U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: T[redacted] A[redacted], A[redacted] A[redacted]

Date of this Notice: 2/26/2021

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:

Pepper, S. Kathleen
O'Connor, Blair
MONSKY, MEGAN
FOOTE

Userteam: Docket

File: [redacted] – Fishkill, NY

Date: FEB 26 2021

In re: A[redacted] D. T[redacted] A[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mary Slattery, Esquire

APPLICATION: Termination of removal proceedings

The respondent appeals from the Immigration Judge's August 5, 2020, decision[1] ordering his removal from the United States to the Dominican Republic.[2] The Department of Homeland Security (DHS) has not responded to the appeal. The appeal will be sustained.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a native and citizen of the Dominican Republic. On February 5, 2018, the respondent was convicted of criminal possession of a controlled substance in the second degree in violation of section 220.18(1) of the New York Penal Law (hereinafter "section 220.18(1)"), which prohibits the possession of four ounces or more of any "narcotic drug," and criminal sale of a controlled substance in the second degree in violation of section 220.41(1) of the New York Penal Law (hereinafter "section 220.41(1)"), which prohibits the sale of a narcotic drug of one-half ounce or more (IJ at 2; Tr. at 27; Exhs. 3, 5, and 7). The respondent was also convicted of criminal possession of a weapon in the second degree in violation of section 265.03 of the New York Penal Law (IJ at 2; Tr. at 27; Exhs. 3 and 7).[3]

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[1] The Immigration Judge's decision incorporates by reference the Immigration Judge's October 30, 2019, decision, which denied the respondent's motion to terminate proceedings (IJ at 2; Exh. 11; *see also* Tr. at 25-31).

[2] The respondent's motion to accept the oversized brief is granted. *See* BIA Practice Manual section 3.3(c)(3).

[3] For this offense, the DHS charged the respondent with removability pursuant to section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C), as an alien convicted of a firearms offense (Exh. 1). However, the Immigration Judge did not sustain this charge of removability (IJ at 2-3). The DHS did not file an appeal of this determination; therefore, the Immigration Judge's decision regarding this charge of removability is administratively final. 8 C.F.R. § 1003.39.

[redacted]

The issue on appeal is whether the respondent's convictions under sections 220.18(1) and 220.41(1) of the New York Penal Law render him removable pursuant to (1) section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien who has been convicted of an aggravated felony offense relating to trafficking in a controlled substance as defined under section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B); or (2) section 237(a)(2)(B)(i) of the Act as an alien convicted of a violation of State law "relating to a controlled substance (as defined in section 802 of Title 21)."

To determine whether the respondent is removable under section 237(a)(2)(B)(i) of the Act, we employ the categorical approach, which requires us to focus on the elements of the offense of conviction rather than the respondent's offense conduct. *Matter of P-B-B-*, 28 I&N Dec. 43, 45 (BIA 2020). Applying that approach, we conclude that section 220.18(1) is categorically overbroad because it prohibits the possession of several "narcotic drugs" that are not "controlled substances" as defined in the Controlled Substances Act ("CSA") (IJ at 2).[4] *Mellouli v. Lynch*, 575 U.S. 798, 135 S. Ct. 1980, 1991 (2015) (holding that, "to trigger removal under [section [237(a)(2)(B)(i)], the Government must connect an element of the alien's conviction to a drug 'defined in [§ 802]'").

New York law defines the term "narcotic drug" to include "any controlled substance listed in schedule I(b), I(c), II(b) or II(c) other than methadone." N.Y. PENAL CODE § 220.00(7). When the respondent was convicted in February of 2018, New York's schedule II(b)(1) covered any derivative of opium "[u]nless specifically excepted or unless listed in another schedule." N.Y. PUB. HEALTH LAW § 3306, sched. II(b)(1) (McKinney 2018). Then (as today), New York law excepted *six* opium derivatives from control—"apomorphine, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone." *Id.* By contrast, the federal drug schedules in effect in February 2018—which also included all derivatives of opium unless expressly excepted—excluded *nine* opium derivatives from control—"apomorphine, thebaine-derived butorphanol, dextrorphan, nalbuphine, naldemedine, nalmefene, naloxegol, naloxone, and naltrexone." 21 C.F.R. § 1308.12(b)(1) (2018). Hence, in February 2018, the term "narcotic drug" used in section 220.18(1) included three opium derivatives (thebaine-derived butorphanol, naloxegol, and naldemedine) that were not then federally controlled substances.

The Immigration Judge acknowledged that New York has not expressly added naloxegol and naldemedine to its list of excluded opium derivatives (Exh. 11; Tr. at 28).[5] Thus, as naloxegol, naldemedine, and thebaine-derived butorphanol, are specifically excluded from federal control under the CSA, but not under New York law, there is a categorical mismatch.

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[4] Though we use the present tense for ease of reference, the respondent's removability depends on the law in effect at the time of his conviction. *Doe v. Sessions*, 886 F.3d 203, 208 (2d Cir. 2018). Thus, the categorical approach requires us to compare the New York and federal drug schedules as they existed in February of 2018.

[5] The Immigration Judge does not discuss thebaine-derived butorphanol, but noted that although "geometric isomers 3 methylfentanyl" was previously excepted from New York's list of narcotic drugs, the Drug Enforcement Agency ("DEA") has now placed all fentanyl-related substances in the list of federally-controlled substances (Exh. 11; Tr. at 28).

Under the CSA, the Attorney General, acting through the DEA, can exclude from control certain drugs that would otherwise qualify as "controlled substances." One avenue for doing so, authorized by 21 U.S.C. § 811(g)(3)(B), is to exempt a substance that "does not present any potential for abuse" and that is "intended for laboratory, industrial, educational, or special research purposes and not for general administration to a human being or other animal." 21 C.F.R. §§ 1308.23(a), 1308.24. However, the CSA also allows the DEA "by rule" to simply "remove any drug or other substance from the schedules if ... the drug or other substance does not meet the requirements for inclusion in any schedule." 21 U.S.C. § 811(a)(2). When the DEA removed thebaine-derived butorphanol, naloxegol, and naldemedine from the federal schedules, it did so in rules which unequivocally stated that the substances were being "decontrolled" under 21 U.S.C. § 811(a)(2), not merely "exempted" under 21 U.S.C. § 811(g)(3). *See* 57 Fed. Reg. 31,126 (July , 1992) (thebaine-derived butorphanol); 80 Fed. Reg. 3,468 (Jan. 23, 2015) (naloxegol); 82 Fed. Reg. 45,436 (Sept. 29, 2017) (naldemedine).[6]

Accordingly, it follows that thebaine-derived butorphanol, naloxegol, and naldemedine were "narcotic drugs" under New York law at the time of the respondent's conviction. Despite this asymmetry between the New York and federal schedules, the Immigration Judge found that the respondent's narcotic drug offenses remain a match with the federal statute for removability purposes because there is no "realistic probability" that New York would actually prosecute anyone for possessing a substance not included in the federal schedules (Exh. 11; Tr. at 28-29). We sympathize with this argument, which aligns with our own view regarding the realistic probability test. *Matter of Navarro Guadarrama*, 27 I&N Dec. 560, 562-68 (BIA 2019); *Matter of Ferreira*, 26 I&N Dec. 415, 421 (BIA 2014). However, the argument is foreclosed by controlling circuit law, under which the inclusion of a *single* non-federally controlled substance in New York's drug schedules has been deemed sufficient, without more, to defeat a categorical match to federal laws incorporating the same federal "controlled substance" definition at issue here. *United States v. Townsend*, 897 F.3d 66, 74 (2d Cir. 2018); *Harbin v. Sessions*, 860 F.3d 58, 68 (2d Cir. 2017); *see also Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) (holding that an alien need not identify actual prosecutions for "'conduct that falls outside the generic definition of a crime ... when the statutory language itself, rather than the application of legal imagination to that language, creates the realistic probability that a state would apply the statute to conduct beyond the generic definition'") (citations omitted).[7]

As section 220.18(1) is categorically overbroad under controlling circuit law, the respondent's conviction cannot support his removal unless section 220.18(1) is "divisible" with respect to the identity of the particular "narcotic drug" a defendant possesses. *Matter of Chairez*, 26 I&N Dec. 819, 819–20 (BIA 2016). The relevant state statutes are divisible only if the identity of the particular "narcotic drug" a defendant possesses or sells are an "element" of the offense that must be proved to a unanimous jury beyond a reasonable doubt, as opposed to a mere "brute fact" about

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[6] When the DEA exempts a substance from control pursuant to 21 U.S.C. § 811(g)(3) and 21 C.F.R. §§ 1308.23-1308.24, it says so explicitly in the relevant rule. *See, e.g.,* 83 Fed. Reg. 62,347 (Dec. 3, 2018); 78 Fed. Reg. 4,446 (Jan. 22, 2013); 57 Fed. Reg. 5,818 (Feb. 18, 1992).

[7] We discern no basis for distinguishing *Harbin* and *Hylton* on their facts.

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which the jury need not agree in order to find a defendant guilty. *Mathis v. United States*, 136 S. Ct. 2243, 2248-49 (2016).

New York case law indicates that section 220.18(1), like other drug possession statutes, "'does not distinguish between the types of narcotics possessed, but treats all drugs classified as narcotics interchangeably.'" *People v. Kalabakas*, 124 N.Y.S.3d 448, 454 (N.Y. App. Div. 2020) (internal citation omitted) (involving a conviction under section 220.21(1) of the New York Penal Law, which prohibits possession of the same "narcotic drugs" as section 220.18(1), but in larger quantities), *leave to appeal denied*, 152 N.E.3d 1209 (N.Y. 2020). Thus, someone who is arrested for possessing multiple narcotic drugs on the same occasion can only be prosecuted for a single violation of section 220.18(1). *Id.*; *People v. Miller*, 789 N.Y.S.2d 423 (N.Y. App. Div. 2005) (involving a conviction under section 220.16(1) of the New York Penal Law, which prohibits possession for sale of the same "narcotic drugs" as section 220.18(1)); *People v. Maldonado*, 706 N.Y.S.2d 876, 877 (N.Y. App. Div. 2000) (same).

Similarly, a conviction under section 220.41 requires as an element of the offense the sale of a specified weight of narcotic drug, *People v. Flores*, 602 N.Y.S.2d 167 (N.Y. App. Div.1993), *aff'd*, 84 N.Y.2d 957 (N.Y. 1994), but does not distinguish between the types of narcotic drugs sold for purposes of section 220.41. Thus, like section 220.18(1) discussed above, section 220.41(1) is categorically overbroad compared to the federal statute.

In addition, relying on several of the same cases discussed above, the Second Circuit has concluded in a published opinion that section 220.31 of the New York Penal Law—which prohibits the sale of any "controlled substance"—is indivisible as to the identity of the particular drug the defendant sold. *United States v. Thompson*, 961 F.3d 545, 552 (2d Cir. 2020) (finding section 220.31 both overbroad and indivisible); *Harbin*, 860 F.3d at 67; *see also Townsend*, 897 F.3d at 70 n.2. We have no grounds for reaching a different conclusion here.

We next address whether the respondent's offense constitutes an aggravated felony. An offense is a "drug trafficking crime" as defined in section 18 U .S.C. § 924(c) if it is punishable as a felony under the CSA. *See Lopez v. Gonzales*, 549 U.S. 47, 60 (2006) (holding that a state drug offense only equates to a felony under the CSA, if it proscribes conduct punishable as a felony under the CSA). However, even if the respondent's offense under section 220.41 itself was analogous to a federal offense under the CSA, we cannot find that the respondent's conviction under section 220.41 constitutes an aggravated felony. As discussed above, a "narcotic drug" under New York law is not analogous to the controlled substances set forth under the CSA because schedule II of the state statute includes controlled substances not listed under the federal statute so an offense under the state statute may involve a controlled substance not listed on the federal schedule. Therefore, we conclude that the respondent's 2018 conviction for sale of a narcotic drug does not qualify as an aggravated felony relating to drug trafficking.

In view of the foregoing, we conclude that the Immigration Judge erred when he found the respondent removable under sections 237(a)(2)(A)(iii) and 237(a)(2)(B)(i) of the Act on the basis of his February 2018 convictions for violating sections 220.18(1) and 220.41 of the New York

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Penal Law. The respondent's appeal will therefore be sustained, the order of removal will be vacated, and the removal proceedings will be terminated.[8]

ORDER: The respondent's appeal is sustained, the order of removal is vacated, and the removal proceedings are terminated.

FOR THE BOARD

[8] In light of our decision, we find it unnecessary to address any of the remaining issues raised by the respondent on appeal. *See Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (stating that, as a general rule, courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach) (citing *INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976)).

File: [redacted] - Fishkill, NY

Date: FEB 26 2021

In re: A[redacted]. T[redacted] A[redacted]

CONCURRING OPINION: Blair O'Connor

I concur with the result because precedent requires me to. I write separately to emphasize the absurdity of this outcome. It is beyond dispute from a factual standpoint that the controlled substance the respondent was convicted of possessing and selling was cocaine. We know this because cocaine is the narcotic drug identified in the criminal complaint (Exh. 4), and because cocaine is the controlled substance identified in the factual allegations that the respondent admitted to on the Notice to Appear (Tr. at 10-11, 23-25; Exh. 1). But because of the ridiculous limitations the categorical approach imposes on immigration adjudicators making criminal law determinations, we must close our eyes as to what actually happened and "instead proceed with eyes shut" as to what could have happened, even though we know it did not. *United States v. Chapman*, 866 F.3d 129, 138 (Jordan, J., concurring). In the process, the respondent "escapes the consequences that Congress intended for [his] conduct." *United States v. Valdivia-Flores*, 876 F.3d 1201, 1211 (O'Scannlain, J., specially concurring).

Indeed, it would seem that no New York drug conviction can any longer support a finding of removability because of the possibility, however remote, that New York may prosecute a defendant for violating some arcane controlled substance the vast majority of the world has never even heard of. While I find the need to write concurring opinions such as this beyond frustrating, I continue to do so in hopes that one day someone in Congress will open their eyes to this mess and take action to fix it. *See United States v. Fish*, 758 F.3d 1, 17-18 (1st Cir. 2014) (collecting cases that call on Congress to "'rescue the federal courts from the mire into which [application of the categorical approach] have pushed [them]'") (quoting *Chambers v. United States*, 555 U.S. 122, 131-32) (Alito, J., concurring)); *Mathis v. United States*, 136 S. Ct. at 2258 (Kennedy, J., concurring) (noting the "continued congressional inaction in the face of a system that each year proves more unworkable").