**U.S. Department of Justice**

Executive Office for Immigration Review

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**Name: G[redacted], J[redacted] G[redacted]** **A [redacted]**

**Date of this Notice: 1/25/2021**

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:
MONSKY, MEGAN
FOOTE
Greer, Anne J.
Pepper, S. Kathleen

Userteam: Docket

File: A[redacted] – Napanoch, NY

Date: JAN 25 2021

In re: J[redacted] G[redacted] G[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Christine Danielle McClellan, Esquire

ON BEHALF OF DHS: Daniel W. Kelly
Assistant Chief Counsel

APPLICATION: Termination of removal proceedings

The respondent appeals from an Immigration Judge's July 21, 2020, decision ordering him removed from the United States to his native Haiti. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained.

In January 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 (hereafter "section 220.18(1)"), which prohibits the possession of four ounces or more of any "narcotic drug." The issue on appeal—which we review de novo pursuant to 8 C.F.R. § 1003.1(d)(3)(ii) (2020)—is whether that conviction renders the respondent removable under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i), as an alien convicted of a violation of State law "relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."

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 agree with the respondent 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").[1] *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 mean "any controlled substance listed in schedule I(b), I(c), II(b) or II(c) other than methadone." N.Y. PUB. HEALTH LAW § 220.00(7).

[1] 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 January 2018.

A[redacted]

When the respondent was convicted in January 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 January 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 January 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 DHS acknowledges that New York has not expressly added naloxegol and naldemedine to its list of excluded opium derivatives.[2] Nevertheless, the DHS argues that those substances have been implicitly excluded from control pursuant to a State Health Department regulation, under which "chemical preparations and mixtures listed in [21 C.F.R. § 1308.24]" are automatically removed from New York's schedules. N.Y. COMP. CODES R. & REGS. tit. 10, § 80.3(a)(3) (2018); *see also* N.Y. PUB. HEALTH LAW § 3307(3) (McKinney 2018). The argument is unpersuasive, however, because naloxegol and naldemedine are not "chemical preparations and mixtures listed in [21 C.F.R. § 1308.24]."

Under the CSA, the Attorney General (acting through the Drug Enforcement Agency ("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), 1208.24. That is the avenue for removal referenced in section 80.3(a)(3) of New York's Health Department regulations.

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 stated that the substances were being "decontrolled" under 21 U.S.C. § 811(a)(2), as opposed to "exempted" under 21 U.S.C. § 811(g)(3). *See* 57 Fed. Reg. 31,126 (July 6, 1992) (thebaine-derived butorphanol); 80 Fed. Reg. 3,468 (Jan. 23, 2015) (naloxegol); 82 Fed. Reg. 45,436 (Sept. 29, 2017) (naldemedine).[3]

In sum, because thebaine-derived butorphanol, naloxegol, and naldemedine were not "exempted" from federal control under 21 U.S.C. § 811(g)(3) and 21 C.F.R. § 1308.24, they are

[2] The DHS's brief does not discuss thebaine-derived butorphanol.

[3] 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).

also not exempted from State control under section 80.3(a)(3) of New York's Health Department regulations. Moreover, the DHS has not identified any New York statute or rule that automatically removes a drug from the State schedules when it is removed from the federal schedules pursuant to 21 U.S.C. § 811(a)(2). Accordingly, it follows that thebaine-derived butorphanol, naloxegol, and naldemedine were "narcotic drugs" under New York law in January 2018.

Despite this asymmetry between the New York and federal schedules, the DHS argues that section 220.18(1) remains a categorical match to section 237(a)(2)(B)(i) of the Act because there is no "realistic probability" that New York would actually prosecute anyone for possessing a substance not included in the federal schedules. This argument aligns with our own view of 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 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).[4]

As section 220.18(1) is categorically overbroad under controlling circuit law,[5] the respondent's January 2018 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). Section 220.18(1) is divisible in this sense only if the identity of the particular "narcotic drug" a defendant possesses is 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 which the jury need not agree in order to find a defendant guilty. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (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.) (quoting *People v. Martin*, 545 N.Y.S.2d 287, 288 (N.Y. App. Div. 1989)), *leave to appeal denied*, 152 N.E.3d 1209 (N.Y. 2020).[6] Thus, someone who is arrested for possessing multiple narcotic drugs on the

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

[5] Because section 220.18(1) is overbroad based on its application to thebaine-derived butorphanol, naloxegol, and naldemedine, we find it unnecessary to address the respondent's argument that it is also overbroad by virtue of its application to certain "isomers" that are not federally controlled.

[6] *Kalabakas* involved 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.

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); *People v. Maldonado*, 706 N.Y.S.2d 876, 877 (N.Y. App. Div. 2000).[7]

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. *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.

In view of the foregoing, we conclude that the Immigration Judge erred when he found the respondent removable under section 237(a)(2)(B)(i) of the Act on the basis of his January 2018 conviction for violating section 220.18(1). 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.

Anne J. Green

FOR THE BOARD

[7] *Miller* and *Maldonado* involved convictions 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).

[8] No other removal charge has been filed against the respondent, and the DHS has not moved to remand the record for the purpose of lodging any additional or substituted charges or allegations, as authorized by 8 C.F.R. §§ 1003.30 and 1240.10(e).