U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: C[redacted], S[redacted] L[redacted]

A [redacted]-605

Date of this Notice: 9/23/2021

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:
Noferi, Mark

Userteam: Docket

NOT FOR PUBLICATION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF:

S[redacted] L[redacted] C[redacted], A[redacted]-605

Respondent

FILED
Sep 23, 2021

ON BEHALF OF RESPONDENT: Rohmah A. Javed, Esquire

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

IN REMOVAL PROCEEDINGS
On Appeal from a Decision of the Immigration Court, Fishkill, NY

Before: Noferi; Temporary Appellate Immigration Judge[1]

Opinion by Temporary Appellate Immigration Judge Noferi

NOFERI, Temporary Appellate Immigration Judge

The Department of Homeland Security (DHS) appeals from the Immigration Judge's April 8, 2021, decision terminating these proceedings. The respondent has filed a motion for summary affirmance in opposition. The appeal will be dismissed.

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

The respondent is a native and citizen of Jamaica, and a lawful permanent resident of the United States (IJ at 1; Exhs. 1, 3). On June 7, 2018, the respondent was convicted of conspiracy in the second degree in violation of section 105.15 of the New York Penal Law (NYPL) and criminal sale of a controlled substance in the second degree in violation of section 220.41(1) of the NYPL (IJ at 1; Exhs. 1, 2, 4). As a result, the DHS charged the respondent as removable pursuant to section 237(a)(2)(B)(i) of the Immigration and Nationality Act as an alien convicted of a violation of State law "relating to a controlled substance (as defined in section 802 of Title 21)" and 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 by sections 101(a)(43)(B) and (U) of the Act, 8 U.S.C. § 1101(a)(43)(B) and (U) (Exh. 1). In applying the categorical approach, the Immigration Judge found that New York's definition of

[1] Temporary Appellate Immigration Judges sit pursuant to appointment by the Attorney General. *See* 8 C.F.R. § 1003.1(a)(4).

"narcotic drug" was broader than the federal definition, making it a categorical mismatch, and thus terminated proceedings because the respondent's conviction under section 220.41(1) of the NYPL could no longer serve as the basis of his removal under section 237(a)(2)(B)(i) or section 237(a)(2)(A)(iii), as defined by section 101(a)(43)(B) (IJ at 2-3). Moreover, the Immigration Judge determined that inasmuch as the respondent's conviction for sale of narcotic drugs does not serve as a basis for his removal under section 237(a)(2)(B)(i) or section 237(a)(2)(A)(iii), the respondent's conspiracy conviction cannot serve as a basis for his removal under section 237(a)(2)(A)(iii) as the conspiracy conviction was premised upon the respondent's conspiracy to violate section 220.41(1) of the NYPL (IJ at 3-4). This appeal followed.

On appeal, the DHS argues that the Immigration Judge erred when he terminated proceedings because he did not consider the factual basis for the respondent's convictions (DHS's Br. at 6-9). The DHS further contends that the Immigration Judge incorrectly concluded that the respondent's convictions do not relate to a controlled substance as defined in the Controlled Substances Act (CSA), 21 U.S.C. § 802 (DHS's Br. at 11-18). Specifically, the DHS contends that the Immigration Judge erred in concluding that the isomers at issue are not brought within the scope of the CSA by the Federal Analogue Act (DHS's Br. at 18-22). Moreover, the DHS argues that the respondent's conviction is categorically a controlled substance offense under section 237(a)(2)(B)(i) of the Act because there is no realistic probability that New York would prosecute possession of an isomer of a narcotic drug (DHS's Br. at 22-26). In the alternative, the DHS argues that the respondent's statute of conviction is divisible, and thus the modified categorical approach applies, under which the respondent remains removable as charged (DHS's Br. at 27-39). For the following reasons, we affirm the decision of the Immigration Judge.

To determine whether the respondent is removable under section 237(a)(2)(B)(i) of the Act or section 237(a)(2)(A)(iii) as defined by sections 101(a)(43)(B) and (U) 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 220.41(1) of the NYPL is categorically overbroad because it prohibits the possession of several "narcotic drugs" that are not "controlled substances" as defined in the federal Controlled Substances Act ("CSA") (IJ at 2-4).[2] *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 [the CSA]'").[3]

[2] We note that although we use the present tense, 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). Therefore, the categorical approach requires us to compare the New York and federal drug schedules as they existed in June of 2018.

[3] To the extent the DHS cites to the recent United States Supreme Court decision, *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021), for the proposition that the Immigration Judge should have considered the factual basis for the respondent's convictions (DHS's Br. at 6), we note that *Pereida* is inapposite as it principally is a case on burdens of proof, and does not call into question the application of the categorical approach. To the limited extent *Pereida* discusses documentary

Section 220.41(1) of NYPL states, in relevant part, "a person is guilty of criminal sale of a controlled substance in the second degree when he knowingly and unlawfully sells one or more preparations, compounds, mixtures or substances containing a narcotic drug and the preparations, compounds, mixtures or substances are of an aggregate weight of one-half ounce or more" (IJ at 3). 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). In June of 2018, when the respondent was convicted of violating section 220.41(1) of the NYPL, 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). The Immigration Judge found, without clear error, that New York's schedule II(b) excepts fewer opium derivatives from control compared to the corresponding federal drug schedule (IJ at 2). *See Matter of M-A-M-Z-*, 28 I&N Dec. 173, 180 (BIA 2020) (reiterating that "an Immigration Judge's factual findings are clearly erroneous only if they are illogical or implausible"). Specifically, New York law excepted six opium derivatives from control: "apomorphine, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone." N.Y. Pub. Health Law § 3306, sched. 11(b)(1) (McKinney 2018). By contrast, the federal drug schedules in effect in June 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). As such, in June 2018, the term "narcotic drug" used in section 220.41(1) of the NYPL included three opium derivatives (thebaine-derived butorphanol, naloxegol, and naldemedine) that were not then federally controlled substances.[4] Therefore, there is a categorical mismatch.

Despite this mismatch, the DHS argues that the respondent's narcotic drug offense remains a match with the federal statute for removability purposes because there is no "realistic probability" that New York would actually prosecute conduct involving an isomer of a narcotic drug that is purportedly not federally controlled (DHS's Br. at 23). The DHS's view aligns with our 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, contrary to the DHS's contentions on appeal, the DHS's argument is foreclosed by controlling circuit law, interpreting the same federal "controlled substance" definition at issue in this case, under which

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evidence, it only contemplates the limited proposition that Immigration Judges may potentially use additional forms of documentary evidence to establish a conviction. *Pereida*, 141 S. Ct. at 761-63, 767. Conversely, in this case, it is undisputed that the respondent was convicted under section 220.41(1) of the NYPL.

[4] While the DHS argues that the Federal Analogue Act (FAA) brings the respondent's section 220.41(1) conviction under the purview of the CSA, the Immigration Judge properly determined that the FAA, at 21 U.S.C. § 813, allows an analogue of a controlled substance, to the extent that it is intended for human consumption, to be treated for purposes of any federal law as a Schedule I controlled substance, but that section 220.41(1) of the NYPL imposes no such requirement (IJ at 2; Feb. 25, 2021, Respondent's Br. on Charges of Removability at 16-20).

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. *See United States v. Townsend*, 897 F.3d 66, 74 (2d Cir. 2018); *see also Harbin v. Sessions*, 860 F.3d 58, 68 (2d Cir. 2017); *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) (holding that a noncitizen 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). As section 220.41(1) is categorically overbroad under controlling circuit law, the respondent's conviction cannot support his removal unless section 220.41(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).

A statute is divisible only if the identity of the particular "narcotic drug" a defendant possesses or sells 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, 2248-49 (2016). 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). However, as the Immigration Judge explained, section 220.41(1) does not distinguish between the *types* of narcotic drugs sold (IJ at 3). Thus, section 220.41(1) is categorically overbroad compared to the federal statute and cannot form the basis of the respondent's removal under section 237(a)(2)(B)(i) of the Act.[5]

We next address whether the respondent's section 220.41 conviction constitutes an aggravated felony under section 237(a)(2)(A)(iii) of the Act, as defined by section 101(a)(43)(B) of the Act. An offense is a "drug trafficking crime" under the Act, as defined in section 18 U.S.C. § 924(c), if it is punishable as a felony under the CSA. *See* section 101(a)(43)(b) of the Act; *see also 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 conclude 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, and thus 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.

[5] In addition, relying on several of the same cases discussed above, the Second Circuit has concluded in a published opinion that similarly structured section 220.31 of the NYPL, 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); *see also Harbin*, 860 F.3d at 67; *Townsend*, 897 F.3d at 70 n.2. We have no grounds for reaching a different conclusion regarding the similar provision at issue here.

Furthermore, we agree with the Immigration Judge that inasmuch as the respondent's conviction for narcotic drug sale under section 220.41(1) does not serve as a basis for his removal under section 237(a)(2)(B)(i) or section 237(a)(2)(A)(iii) of the Act, it follows that the respondent's conviction for conspiracy to violate section 220.41 cannot serve as a basis for his removal (IJ at 3-4). *See Matter of Al Sabsabi*, 28 I&N Dec. 269, 272 (BIA 2021) (discussing longstanding Board precedent that an offense underlying a conspiracy conviction affects the immigration consequences of that conspiracy conviction).

In view of the foregoing, we conclude that the Immigration Judge did not err when he found the respondent was not removable under sections 237(a)(2)(A)(iii) and 237(a)(2)(B)(i) of the Act on the basis of his June 2018 convictions for violating section 220.41 of the NYPL. Nor did the Immigration Judge err in concluding the respondent was not removable for his conviction under section 105.15 of the NYPL.

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.