NOT FOR PUBLICATION

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

MATTER OF:

(b)(6), A (b)(6)

Respondent

FILED
Mar 17, 2022

ON BEHALF OF RESPONDENT: Siana J. McLean, Esquire

ON BEHALF OF DHS: Sydney V. Probst, Assistant Chief Counsel

IN REMOVAL PROCEEDINGS
On Motion from a Decision of the Board of Immigration Appeals

Before: O'Connor, Appellate Immigration Judge; de Cardona, Temporary Appellate Immigration Judge; Liebmann, Temporary Appellate Immigration Judge[1]

Opinion by Temporary Appellate Immigration Judge de Cardona

DE CARDONA, Temporary Appellate Immigration Judge

This matter was last before us on May 6, 2021, when we dismissed the respondent's appeal from the December 7, 2020, Immigration Judge's decision denying the respondent's application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The respondent now moves the Board to reopen and terminate proceedings. The Department of Homeland Security ("DHS") opposes the motion. We will grant the respondent's motion to reopen and terminate proceedings.

On December 7, 2020, an Immigration Judge denied the respondent's application for cancellation of removal for certain lawful permanent residents as a matter of discretion. On October 2, 2020, before the respondent's merits hearing, the Immigration Judge denied the respondent's motion to terminate, which argued that he was not removable as charged for having been convicted of a law relating to a controlled substance under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i). The respondent's former counsel appealed the denial of his cancellation of removal application, but did not appeal the denial of his motion to terminate. We affirmed the denial of his cancellation of removal application on May 6, 2021, as noted above.

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

The respondent timely moved to reopen proceedings on June 24, 2021, seeking reopening based on ineffective assistance of counsel and termination of proceedings because he is not removable as charged (Respondent's Mot. at 5-24). We will grant his motion.[2]

We first turn to the respondent's motion to reopen based on ineffective assistance of counsel. A respondent's claim of ineffective assistance of counsel must be supported by (1) an affidavit from the respondent setting forth in detail the agreement that was entered into with counsel regarding the litigation matters the attorney was retained to address, (2) documentary evidence that the counsel in question was informed of the allegations leveled against him and given an opportunity to respond, and (3) proof that a complaint has been filed with appropriate disciplinary authorities with respect to the alleged ineffective assistance (and if this is not filed, why it was not). *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988).

The respondent complied with *Lozada*'s requirements and discussed the prejudice caused to him by his former counsel's failure to contest the denial of his motion to terminate (Respondent's Mot. at 5-7, Tabs C-F). *See Debeatham v. Holder*, 602 F.3d 481, 484-85 (2d Cir. 2010) (a respondent must comply with the procedural requirements set forth in *Lozada* in order to support an ineffective assistance of counsel claim). Moreover, the former counsel's ineffectiveness is "clear on the face of the record" because he did not appeal the denial of the respondent's motion to terminate proceedings based on the colorable claim that the respondent is not removable as charged. *Yang v. Gonzales*, 478 F.3d 133, 143 (2d Cir. 2007); *see Matter of Melgar*, 28 I&N Dec. 169, 171 (BIA 2020) (a respondent seeking to reopen based on ineffective assistance of counsel must show a reasonable probablility that, except for the counsel's error, he would have prevailed on his claim). Thus, we will grant the respondent's motion to reopen based on ineffective assistance of counsel.

Next, we turn to the respondent's motion to terminate. He is a native and citizen of the Dominican Republic who was lawfully admitted to the United States in April 2006 and adjusted his status to that of a lawful permanent resident on April 18, 2007 (Exh. 1). In (b)(6), 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 primary issue in the respondent's motion is whether this conviction renders the respondent removable as charged under 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 [21 U.S.C. § 802])." Upon our de novo review, we conclude that it does not. 8 C.F.R. § 1003.1(d)(3)(ii).

To determine whether a 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 conduct in committing the offense. *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 at least one

[2] The respondent requested a stay of removal pending these proceedings, which we denied on July 2, 2021.

"narcotic drug" that is not a "controlled substance" as defined in the Controlled Substances Act ("CSA").[3] *Mellouli v. Lynch*, 575 U.S. 798, 813 (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].'") (second alteration in original).

Specifically, the respondent asserted in his motion before the Immigration Judge, among other things, that section 220.18(1) regulates more opium derivatives than the CSA (Exh. 4 at 17-22). As such, he maintains that section 220.18(1) is facially overbroad and, therefore, DHS cannot demonstrate by clear and convincing evidence that his conviction involved or was related to a "controlled substance" as defined by the CSA (Respondent's Mot. at 7-18). He also argues that he need not satisfy the "realistic probability" test in light of *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018), because section 220.18(a) is facially overbroad (Respondent's Mot. at 18-23).

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. PENAL LAW § 220.00(7). When the respondent was convicted in (b)(6) 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). 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 (b)(6), which also included all derivatives of opium unless expressly excepted, excluded nine opium derivatives from control: "apomorphine, thebaine-derived butorphanol, dextrorphan, nalbuphine, nalmefene, naloxegol, naloxone, naltrexone, and naldemedine." 21 C.F.R. § 1308.12(b)(1) (2019). Hence, in (b)(6), 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.

Contrary to the Immigration Judge's conclusion (Oct. 2020 IJ at 2),[4] naloxegol and naldemedine have not been 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); *see also* N.Y. PUB. HEALTH LAW § 3307(3). This is because naloxegol and naldemedine are not "chemical preparations and mixtures listed in [21 C.F.R. § 1308.24]." *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 80.3(a)(3).

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

[3] 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 (b)(6)

[4] The Immigration Judge did not discuss thebaine-derived butorphanol.

"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).[5]

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 also not exempted from State control under section 80.3(a)(3) of New York's Health Department regulations. Moreover, research has not revealed a 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 (b)(6).

Despite this asymmetry between the New York and federal schedules, the Immigration Judge concluded 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 (Oct. 2020 IJ at 3-4). This argument aligns with our own view of the realistic probability test as forth in *Matter of Navarro Guadarrama*, 27 I&N Dec. 560, 562-68 (BIA 2019), and *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 at 63 (concluding that a respondent 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") (internal citations omitted).[6] This determination

[5] 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).

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

is further supported by *United States v. Fernandez-Taveras*, 511 F.Supp.3d 367, 372-74 (E.D. N.Y. 2021), which determined that section 220.18(1) is categorically overbroad because the New York statute applies to cocaine isomers to which the CSA does not.

As section 220.18(1) is categorically overbroad under controlling circuit law, the respondent's September 2019 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. 2020) (*quoting People v. Martin*, 545 N.Y.S.2d 287, 288 (N.Y. App. Div. 1989)), *leave to appeal denied*, 35 N.Y.3d 1067 (N.Y. 2020).[7] 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). *People v. Kalabakas*, 124 N.Y.S.3d at 454; *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).[8]

Relying on several of the same cases discussed above, the Second Circuit has concluded in published opinions 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) (determining that section 220.31 is both overbroad and indivisible); *Harbin v. Sessions*, 860 F.3d at 67; *see also United States v. 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 (b)(6) conviction for violating section 220.18(1). Thus, we also will grant the respondent's motion to terminate without prejudice.[9]

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[7] *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.

[8] *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), but in smaller quantities.

[9] No other removal charge has been filed against the respondent, and 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).

Accordingly, the following order will be issued.[10]

ORDER: The respondent's motion to reopen based on ineffective assistance of counsel is granted.

FURTHER ORDER: The order of removal is vacated, and the removal proceedings are terminated without prejudice.

[10] In light of our decision, we find it unnecessary to address any of the respondent's remaining appellate arguments. *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)).