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Key Immigration Consequences of Common New York Offenses:

## Practice Note

June 27, 2017

**This Practice Note updates the following NYPL chart references:**

- 220.03 (Criminal possession of a controlled substance in the seventh degree);
- 220.06(1) (Criminal possession of a controlled substance in the fifth degree, first subsection);
- 220.31 (Criminal sale of a controlled substance in the fifth degree);
- 220.34(7)&(8) (Criminal sale of a controlled substance in the fourth degree, seventh and eighth subsections);
- 220.45 (Criminally possessing a hypodermic instrument); and
- 220.65 (Criminal sale of a prescription for a controlled substance or of a controlled substance by a practitioner or pharmacist) [Not now in NY Chart]

On June 21, the United States Court of Appeals for the Second Circuit issued a precedent decision that affects the aggravated felony and controlled substance determinations for at least the six New York offenses listed above. **These New York controlled substance offenses, or the referenced subsections of these offenses, will probably no longer be categorically deemed a drug trafficking aggravated felony (AF) or controlled substance offense (CSO) in later removal or other immigration proceedings under the jurisdiction of the Second Circuit.** See *Harbin v. Sessions*, No. 14-1433 (2d Cir. June 21, 2017). **However, practitioners should consider that the law remains uncertain for clients whose later immigration proceedings take place outside states in the Second Circuit, as well as the other caveats listed at the end of this Practice Note.**

Mr. Harbin was convicted in 1991 of New York criminal sale of a controlled substance in the fifth degree under NYPL Section 220.31 (“A person is guilty of criminal sale of a controlled substance in the fifth degree when he knowingly or unlawfully sells a controlled substance”). New York defines “controlled substance” to include any substance listed in the five schedules of Section 3306 of the New York Public Health Law other than marihuana. See N.Y. Pub. Health Law Section 3306. Since 1990, these New York schedules have included chorionic gonadotropin (hCG), see NY Schedule III(g), which is a substance not listed in the federal schedules at 21 U.S.C. Section 802 that are referenced in the INA for defining “controlled substance” under both the aggravated felony “illicit trafficking in a controlled substance” ground at INA Section 101(a)(43)(B) and the general controlled substance offense removal grounds at INA Section 212(a)(2)(A)(i)(II) and INA Section 237(a)(2)(B).



Specifically at issue in Mr. Harbin’s case was whether his NYPL Section 220.31 sale offense is a drug trafficking aggravated felony barring cancellation of removal and asylum. In a unanimous panel opinion written by Judge Pooler, the Second Circuit held, based on the New York statutory text and New York court case law, that NYPL Section 220.31 is indivisible as to the identity of the controlled substance, i.e., identity of the specific substance need not be established as an element of the crime. Slip op. 11-22.

The Second Circuit then concluded that, because the NYPL Section 220.31 offense can punish conduct that is not criminal under the federal Controlled Substances Act, i.e., sale of hCG, it is not an aggravated felony under the categorical approach. Slip op. 22-23. The Second Circuit stated:

To be a drug-trafficking aggravated felony under the INA based on “the categorical approach, a state drug offense must . . . ‘necessarily’ proscribe conduct that is an offense under the CSA.” *Moncrieffe*, 133 S. Ct. at 1685. In this case, however, N.Y. Pub. Health Law § 3306, which supplies the drug schedules that permit conviction under NYPL § 220.31, includes chorionic gonadotropin as a controlled substance. Chorionic gonadotropin is not a controlled substance under the CSA. Compare N.Y. Pub. Health Law § 3306 with 21 U.S.C. § 802. Because NYPL § 220.31 can punish conduct that is not criminal under the CSA, it is not an aggravated felony.

Slip op. 22-23. The Second Circuit did not require any “realistic probability” showing by Mr. Harbin of actual New York convictions for sale of hCG.

The Second Circuit’s holding should apply to AF and CSO determinations for the other New York Penal Law Section 220 offenses listed at the beginning of this Practice Note as these are additional New York offenses that use the general “controlled substance” term as defined in Section 3306 of the New York Public Health Law, and it would appear that these offenses would also be deemed indivisible as to the identity of the controlled substance under the Second Circuit’s reasoning. However, the Second Circuit’s decision does not apply to other New York Section 220 offenses, or subsections of New York Section 220 offenses, where the statutory elements reference specific substances that are listed on the federal schedules, e.g. cocaine, or categories of substances, e.g., New York “narcotic drugs,” all of which are listed on the federal schedules.

#### **CAVEATS:**

- As mentioned above, the *Harbin* decision is only binding on immigration judges and adjudicators in states governed by Second Circuit law (New York, Connecticut or Vermont), and will not be binding on judges/adjudicators if the client is later placed in removal proceedings outside of these states.



- DHS lawyers have argued, and may continue to argue, that an immigrant has to show actual New York convictions involving hCG in order to show that there is a categorical mismatch between what substances are covered under NY and federal law. To date, practitioners have identified NY prosecutions, but not actual convictions, involving hCG.
- DHS lawyers may argue that removal grounds that are not based on conviction, such as a controlled substance inadmissibility charge that is based on admission of an offense or on reason to believe the person is a drug trafficker, may be supported by a guilty plea or other conviction records indicating a substance that is on the federal schedules.
- DHS lawyers may argue that conviction under the NYPL “sale” provisions listed above are deportable and inadmissible crimes involving moral turpitude under INA Sections 212(a)(2)(A)(i)(I) and 237(a)(2)(A)(i). *See Matter of Khourn*, 21 I. & N. Dec. 1041 (BIA 1997).