U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: B[redacted]-B[redacted], V[redacted] M[redacted]... **A [redacted]723**

Date of this notice: 3/27/2015

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:
Greer, Anne J.
Pauley, Roger
Guendelsberger, John

TranC
Userteam: Docket

File: [redacted] 723 – Atlanta, GA Date: MAR 27 2015

In re: V[redacted] B[redacted]-B[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ben Winograd, Esquire[1]

ON BEHALF OF DHS: Gene P. Hamilton
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (illicit trafficking offense)

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (attempt or conspiracy offense)

Lodged: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Cancellation of removal

The Department of Homeland Security (DHS) appeals from the decision of the Immigration Judge, dated March 5, 2014, finding the respondent removable on the lodged charge, and granting the respondent's application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), in the exercise of discretion (I.J. at 4-7).[2] The respondent, a native and citizen of Venezuela, opposes the appeal, which will be dismissed. The record will be remanded to permit DHS to conduct the necessary background and security checks.

The Immigration Judge held that DHS carried its burden of proof to show that the respondent was removable under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), but that it had not done so with respect to the charges under section 237(a)(2)(A)(iii) of the Act (I.J. at 1-4).

[1] We acknowledge and appreciate the pro bono representation of counsel before us in this case.

[2] The Immigration Judge also denied the respondent's applications for asylum, withholding of removal, and protection under the Convention Against Torture, which we need not address given our disposition of the case (I.J. at 7-8).

The Immigration Judge granted cancellation of removal, concluding the respondent was statutorily eligible for such relief, and that a grant was warranted in discretion (I.J. at 4-7).

On appeal, DHS argues that it established the respondent's removability under section 237(a)(2)(A)(iii) of the Act by clear and convincing evidence, asserting the respondent's conviction was for an aggravated felony as defined by section 101(a)(43)(B) or (U) of the Act, 8 U.S.C. §§ 1101(a)(43)(B), (U), and that the respondent is therefore statutorily ineligible for cancellation of removal (DHS Br. at 9-22). In the alternative, DHS argues the Immigration Judge should have denied cancellation of removal in the exercise of discretion (DHS Br. 22-27). DHS also argues the Immigration Judge erred in denying its motion to reconsider in which it asserted the "stop-time" rule at section 240A(d) of the Act rendered the respondent ineligible for cancellation of removal (DHS Br. at 27-37).[3]

In opposition, the respondent asserts the Immigration Judge's decision to grant cancellation of removal should be sustained. He argues the Immigration Judge correctly held that he was not convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act, asserting his conviction was not categorically for an aggravated felony, and that DHS did not show the statute is divisible. He further asserts that, even applying the modified categorical approach, the record of conviction does not establish the conviction was for an aggravated felony (Resp't Br. at 9-20). The respondent also argues the Immigration Judge correctly determined he merits a favorable exercise of discretion (Resp't Br. at 20-26).

On review, we agree with the Immigration Judge that DHS did not show that the respondent's 2011 conviction for trafficking in cocaine in violation of N.C. GEN. STAT. § 90-95(h)(3) was categorically for an aggravated felony as defined in section 101(a)(43)(B) or (U) of the Act, because the statute only requires that an individual possess cocaine, and that DHS did not show that the modified categorical approach was applicable to this determination, because the statute is overbroad rather than divisible (I.J. at 2-4).

With respect to the categorical approach, DHS asserts that the aggravated felony of "illicit trafficking in a controlled substance" defined in section 101(a)(43)(B) of the Act includes other subsets of crimes in addition to "drug trafficking crimes," and, citing *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992), that the Board has stated that other crimes fall within the "illicit trafficking" definition if they are a felony under state law, involve "unlawful trading and dealing," and involve a federally controlled substance (DHS Br. at 9-22). DHS argues that all

[3] In its appeal brief, DHS asserts that it simultaneously filed two Notices of Appeal, one pertaining to an appeal from the Immigration Judge's March 5, 2014, merits decision, and one pertaining to the Immigration Judge's March 18, 2014, motion decision, but that the Board only issued one briefing schedule (DHS Br. at 1, 8). Upon review, however, we find the record does not reflect that an appeal was filed from the March 18, 2014, motion decision. Accordingly, we agree with the respondent that the March 18, 2014, denial of the DHS' motion for reconsideration is not properly before us because the DHS has not separately appealed from that decision (Resp't Br. at 26-27). *See Matter of G-A-*, 23 I&N Dec. 366, 367 n.1 (BIA 2002).

conduct that can be prosecuted under N.C. GEN. STAT. § 90-95(h)(3) satisfies all three requirements, including the requirement that the offense involve "unlawful trading and dealing," because the "statutory scheme infers an intent to traffic from the large quantity of cocaine" (DHS Br. at 14-15).

We agree with the Immigration Judge and the respondent that the statute of conviction is not categorically an aggravated felony. As the Immigration Judge held and as the respondent argues, N.C. GEN. STAT. § 90-95(h)(3) criminalizes simple possession of 28 grams or more of cocaine, which does not involve the element of illicit trafficking, and which is not a felony under the Controlled Substances Act (I.J. at 2-4; Resp't Br. at 9-11). As the respondent asserts, the relevant inquiry is not whether the statute "infers an intent to traffic" (DHS Br. at 14-15), but what the conviction necessarily entails. The United States Court of Appeals for the Fourth Circuit has held that not all violations of this statute involve such an "intent to distribute." *See United States v. Brandon*, 247 F.3d 186, 195 (4th Cir. 2001) ("[I]t cannot fairly be said that an intent to distribute is inherent in all violations of N.C. GEN. STAT. § 90–95(h)."). Moreover, DHS conceded below that the offense was not categorically an aggravated felony (Tr. at 17-18). Finally, as the respondent asserts, simple possession is a misdemeanor and not a felony under the Controlled Substances Act. *See Lopez v. Gonzales*, 549 U.S. 47, 60 (2006).

With respect to the modified categorical approach, DHS argues that, even if not all conduct covered under the statute satisfies *Matter of Davis*, the statute "is clearly divisible because it is drafted in the alternative" (DHS Br. at 15 n.9). DHS asserts that the modified categorical approach shows the respondent's offense involved at least 400 grams of cocaine, which "evinces an intent to distribute" under state law, notwithstanding *United States v. Brandon*, *supra* (DHS Br. at 16-19). Further, DHS argues the offense constitutes a "drug trafficking crime" as defined in 18 U.S.C. § 924(c) because the offense would have been penalized under the distribution rather than the simple possession provisions of the Controlled Substances Act, although the state statute does not have a mens rea element (DHS Br. at 20-22).

We also agree with the Immigration Judge and the respondent that the statute of conviction is overbroad and indivisible. As the respondent asserts, DHS did not produce authority establishing that the statute contains alternative elements upon which a jury must unanimously agree in order to convict, rather than alternative means of committing the offense (Resp't Br. at 11-12). *See Descamps v. United States*, 133 S.Ct. 2276 (2013); *Matter of Chairez* (*Chairez I*), 26 I&N Dec. 349 (BIA 2014).[4] Further, to the extent DHS argues the amount of cocaine at issue

[4] The Board recently issued a new decision in *Matter of Chairez* (*Chairez II*), 26 I&N Dec. 478 (BIA 2015), in which we observed that, because Immigration Judges must follow the law of the circuit court of appeals in whose jurisdiction they sit in evaluating issues of divisibility, the interpretation of *Descamps v. United States*, 133 S.Ct. 2276 (2013), reflected in *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014), applies only insofar as there is no controlling authority to the contrary in the relevant circuit. In *United States v. Estrella*, the Eleventh Circuit agreed with the Board's jury unanimity approach. 758 F.3d 1239, 1245-46 (11th Cir. 2014) ("[I]f the statutory scheme is not such that it would typically require the jury to agree to convict on the (continued...)

"evinces an intent to distribute," we observe that such an inference would not satisfy the requirement that a jury unanimously "agree to convict on the basis of one alternative as opposed to the other." *See United States v. Estrella*, 758 F.3d 1239, 1245-46 (11th Cir. 2014). Accordingly, we agree with the Immigration Judge that the 2011 conviction did not render the respondent removable under section 237(a)(2)(A)(iii) of the Act or ineligible for cancellation of removal under section 240A(b)(1)(C) of the Act.

We are also not persuaded by DHS's appellate contention that the Immigration Judge should have denied the respondent's application for cancellation of removal under section 240A(a) of the Act in the exercise of discretion (DHS Br. 22-27). DHS argues the Immigration Judge did not properly balance the relevant factors, asserting that the Immigration Judge should have required additional corroboration, should have found that the respondent's conviction was for a "serious crime," and should not have found that the respondent demonstrated rehabilitation.

In exercising discretion, an Immigration Judge, upon review of the record as a whole, "must balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his (or her) behalf to determine whether the granting of...relief appears in the best interest of this country." *Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998) (holding that the general standards developed in *Matter of Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978), for the exercise of discretion under section 212(c) of the Act, 8 U.S.C. § 1182(c), are applicable to the exercise of discretion under section 240A(a) of the Act)).

Favorable considerations include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the respondent and his family if removal occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character. *Id.* Adverse factors include the nature and underlying circumstances of the grounds of removal that are at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. *Id.*

The Immigration Judge weighed the respondent's criminal history against his positive equities and decided to grant cancellation of removal (I.J. at 4-7). The Immigration Judge found that the respondent's credible testimony demonstrated that his positive equities include the respondent's family ties (i.e., he lives with his mother, a United States citizen), his lengthy residence in the United States (i.e., he has been a lawful permanent resident for over 14 years), hardship his removal would cause his family (i.e., his mother who has had a kidney transplant

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(...continued)
basis of one alternative as opposed to the other, then the statute is not divisible in the sense required to justify invocation of the modified categorical approach.").

and is unable to work), his positive work history and filing of income taxes, that he performs community service and attends a church on a regular basis, and that he does not have any family members in his home country of Venezuela.

We have no wish to minimize the seriousness of the respondent's criminal record. It includes convictions for obtaining property by false pretenses and for possessing cocaine. The respondent was sentenced to 44 to 62 months' imprisonment for the drug conviction. We agree, however, with the Immigration Judge's assessment that the respondent's serious criminal history is offset by his strong equities and rehabilitation, since he has taken responsibility for the offense and provided assistance to the government.[5]

We find this is a close case, but in balancing the respondent's adverse factors against his positive equities, we conclude that one final chance to remain with his family is warranted in this case. *See Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1988); *see also* section 240A(c)(6) of the Act (providing that cancellation of removal can only be granted once). The DHS's appeal will be dismissed, and the record will be remanded to allow DHS to perform the necessary background investigation. The following orders shall be issued.

ORDER: The DHS's appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents and would deny cancellation of removal in the exercise of discretion in light of the respondent's serious criminal record.

[5] We are not persuaded by DHS's assertion that *Matter of Y-L-, A-G-, & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002), informs the instant analysis, especially given that we agree with the Immigration Judge that the conviction was not an illicit trafficking aggravated felony and, moreover, that the respondent's eligibility for withholding of removal is not at issue.