U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Setz-Kelly, Christopher P.
Gian-Grasso, Tomczak & Hufe P.C.
990 Spring Garden Street
Suite # 304
Philadelphia, PA 19123

DHS/ICE Office of Chief Counsel - DAL
125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: NGUYEN, CONG VAN

A 071-427-810

Date of this notice: 7/9/2020

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:
Wilson, Earle B.
Goodwin, Deborah K.
MONSKY, MEGAN FOOTE

Userteam: Docket

File: A071-427-810 – Dallas, TX

Date: JUL - 9 2020

In re: Cong Van NGUYEN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Christopher P. Setz-Kelly, Esquire

APPLICATION: Reconsideration; termination

The respondent, a native and citizen of Vietnam, appeals from the December 5, 2018, decision of the Immigration Judge, denying his motion to reconsider.[1] The Department of Homeland Security ("DHS") has not responded to the appeal. The appeal will be sustained, the Immigration Judge's decision will be vacated, and the proceedings will be terminated.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo questions of law, discretion, and judgment, and all other issues in appeals from an Immigration Judge's decision. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was convicted on December 17, 2001, of selling a precursor substance, to wit: pseudoephedrine, with knowledge that the buyer would use the substance to manufacture a controlled substance in violation of Oklahoma Statutes ("OKLA. STAT.") section 2-328 (2001) (IJ at 4; Exhs. 1-2). The DHS filed a Notice to Appear ("NTA") on August 26, 2003, and charged the respondent as inadmissible under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II) (Exh. 1). The Immigration Judge sustained the charge of removability in a decision dated October 3, 2003 (Exh. 1).

On April 24, 2018, the respondent filed a motion to reconsider with the Immigration Judge on the basis that he is no longer removable due to a change in the law, namely the Supreme Court's decision in *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015). The Immigration Judge denied the respondent's motion, finding that his motion was untimely and that equitable tolling was not warranted because the respondent did not establish due diligence. The Immigration Judge further found that *Mellouli* does not constitute a fundamental change in law warranting reconsideration of the prior Immigration Judge's decision regarding the respondent's inadmissibility under section 212(a)(2)(A)(i)(II) of the Act (IJ at 2-6). Finally, the Immigration Judge declined to reopen the respondent's proceedings sua sponte (IJ at 6-7).

[1] We acknowledge that the respondent initially attempted to file a motion labeled a motion to reopen with the Houston Immigration Court and was instead directed to file his motion with the Dallas Immigration Court (IJ at 1 n.1). He then filed a motion labeled a motion to reconsider with the Dallas Immigration Court (IJ at 1 n.1). The Immigration Judge stated that he adjudicated both motions as they contained the same arguments and evidence (IJ at 1 n.1).

The respondent does not dispute the untimeliness of his motion, but continues to argue that he warrants equitable tolling of the time limitations on his motion or sua sponte reconsideration and termination in the interests of justice. Specifically, the respondent argues that his 2001 Oklahoma conviction no longer renders him inadmissible under this section because pseudoephedrine is not included within the definition of a controlled substance under 21 U.S.C. § 802 (2001) (Respondent's Br. at 8-11). 8 C.F.R. § 1003.1(d)(3)(ii).

Pursuant to section 212(a)(2)(A)(i)(II) of the Act, a person who has been convicted of a violation of any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, as defined in 21 U.S.C. § 802, is inadmissible. *See Mellouli v. Lynch*, 135 S. Ct. at 1980; *see also Matter of Navarro Guadarrama*, 27 I&N Dec. 560 (BIA 2019), *affirming Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014). Controlled substance is defined as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S.C. § 802(6) (2001).

The respondent does not contest on appeal the Immigration Judge's determination that the statute under which the respondent was convicted, 63 OKLA. STAT. § 2-328, is not a categorical match to the generic definition of a controlled substance, as the respondent's statute of conviction includes additional substances which are not listed within 21 U.S.C. § 802 (IJ at 5). *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *see also Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013); *Descamps v. United States*, 570 U.S. 254, 257 (2013); *Vazquez v. Sessions*, 885 F.3d 862, 870-71 (5th Cir. 2018). Nor does the respondent contest that the statute of conviction is divisible and that the modified categorical approach applies (IJ at 5-6). *Descamps v. United States*, 570 U.S. at 257; *Vazquez v. Sessions*, 885 F.3d at 871-72. Therefore, under the modified categorical approach, the record reveals that the respondent pled nolo contendere to selling a precursor substance, to wit: pseudoephedrine, with knowledge that the buyer will use the substance to manufacture a controlled dangerous substance (IJ at 6; Exh. 2). *See Descamps v. United States*, 570 U.S. at 257; *see also Shepard v. United States.* 544 U.S. 13, 20, 26 (2005).

The Immigration Judge acknowledged that pseudoephedrine is not contained within the five federal drug schedules, but posited that as pseudoephedrine is encompassed within 21 U.S.C. § 802 as a list I chemical, pseudoephedrine thus constitutes an immediate precursor within the definition of a controlled substance (IJ at 6). *See* 21 U.S.C. § 802(34)(K) (2001). However, the presence of pseudoephedrine as a list I chemical is irrelevant to the determination of whether pseudoephedrine constitutes an immediate precursor within meaning of 21 U.S.C. § 802(23) (2001) to trigger removability (Respondent's Br. at 9). *See United States v. Steward*, 16 F.3d 317, 319 n.1 (9th Cir. 1994) (discussing the classification of ephedrine as a controlled substance).

Rather, immediate precursors are included in the regulation under 21 C.F.R. § 1308.12(g)(1) (2001). *See* 21 U.S.C. § 802(23) (defining immediate precursor as a substance "which the Attorney General has found to be and *by regulation designated* as" being integral to the manufacture of a controlled substance) (emphasis added). Pseudoephedrine does not appear as an immediate precursor under the relevant regulation. 21 C.F.R. § 1308.12(g)(1). Therefore, based on the respondent's own conviction, there is a realistic probability that Oklahoma would enforce its law in a manner that would cover substances within its State definition of a "precursor substance" that are not included under Federal law. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007);

see also Vazquez v. Sessions, 885 F.3d at 873; *Matter of Navarro Guadarrama*, 27 I&N Dec. at 562-63.

Thus, upon our de novo review, we find that sua sponte reopening and termination is appropriate given that the respondent's conviction involving pseudoephedrine (a non-federally controlled substance) no longer renders him inadmissible under section 212(a)(2)(A)(i)(II) of the Act. *See Mellouli v. Lynch*, 135 S. Ct. at 1991 ("[T]o trigger removal, . . . the government must connect an element of the alien's conviction to a drug 'defined in [21 U.S.C. § 802].'"). The respondent has not been charged under any other ground of removability, and the proceedings will, thus, be terminated.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained, and the Immigration Judge's December 5, 2018, decision is vacated.

FURTHER ORDER: The removal proceedings are reopened and terminated without prejudice and the record is returned to the Immigration Court without further action.

FOR THE BOARD