



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
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Name: ATENIA LORENZO, ELISIO

A 038-467-916

Date of this notice: 8/19/2019

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:
Liebowitz, Ellen C
Baird, Michael P.
Malphrus, Garry D.**

Aug 19 2019

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RL

Falls Church, Virginia 22041

File: A038-467-916 – San Diego, CA

Date:

AUG 19 2019

In re: Elisio ATENIA LORENZO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Benjamin F. Aiken, Esquire

ON BEHALF OF DHS: Thomas J. Watt
Assistant Chief Counsel

APPLICATION: Termination of proceedings

This matter is before us pursuant to a January 17, 2019, order of the United States Court of Appeals for the Ninth Circuit granting the respondent's petition for review and remanding the record to the Board to consider the respondent's removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii). *See Lorenzo v. Whitaker*, 752 F. App'x 482 (9th Cir. 2019).¹ On remand, the respondent, a native and citizen of the Philippines and lawful permanent resident, moves to terminate proceedings. The Department of Homeland Security (DHS) requests a remand of the proceedings. The motion to terminate proceedings will be granted.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

We assume the parties' familiarity with the full procedural and factual history in this case. The respondent was convicted on October 18, 2013, of possession and transportation of a controlled substance, to wit: methamphetamine in violation of sections 11378 and 11379(a) of the California Health and Safety Code (Exh. 2). He was charged with removability under sections 237(a)(2)(A)(iii) and 237(a)(2)(B)(i) of the Act (aggravated felony defined as illicit trafficking in a controlled substance, and controlled substance violation, respectively). The respondent filed a motion to terminate before the Immigration Judge, arguing that the DHS could not meet its burden to prove that he is removable as charged (Exh. 5). The respondent's main argument was that the California definition of methamphetamine was overbroad as it included geometric and optical isomers, and the federal definition of methamphetamine only included optical isomers.

¹ The Ninth Circuit originally issued a decision in this case that was published, *see Lorenzo v. Sessions*, 902 F.3d 930 (9th Cir. 2018), but the court later withdrew that decision, *see Lorenzo v. Whitaker*, 913 F.3d 930 (9th Cir. 2019), and concurrently issued its unpublished decision and remand, *see Lorenzo v. Whitaker*, 752 F. App'x at 482.

At an October 1, 2014, hearing, the Immigration Judge denied the respondent's motion to terminate proceedings and sustained the charge of removability under section 237(a)(2)(A)(iii) of the Act (Tr. at 98-103). In a written decision issued the same day, the Immigration Judge sustained the charge of removability under section 237(a)(2)(B)(i) of the Act. On February 18, 2015, the Board affirmed the denial of the respondent's motion to terminate proceedings based on the charge of removability under section 237(a)(2)(B)(i) of the Act.

On review, the Ninth Circuit concluded that based on the record before it, the government had not established that the respondent's methamphetamine conviction qualified as a controlled substance offense under section 237(a)(2)(B)(i) of the Act; specifically, it found that the California definition of isomers was facially overbroad, and the element of methamphetamine was not divisible. *Lorenzo v. Whitaker*, 752 F. App'x at 485-86. The court recognized that the government, in a petition for rehearing, had raised a new argument that geometric isomers of methamphetamine did not actually exist, but the court declined to address that argument because it had not been timely raised. *Id.* at 485. The court pointed out, however, that the government was not precluded from presenting its new argument or new evidence in another case.² *Id.* The court remanded for further consideration of the aggravated felony removal charge, and pointed out that insofar as the Board addressed this charge on remand, "it should consider whether [the government's] theory suffers from the same flaw as the government's theory of removability under [section 237(a)(2)(B)(i) of the Act]." *Id.* at 486.

Based on the Ninth Circuit's decision and the record before the Immigration Judge, we conclude that DHS did not establish the respondent's removability under section 237(a)(2)(A)(iii) of the Act, as the aggravated felony charge turns on the same definitional issue and evidence that the Ninth Circuit addressed in the context of the controlled substance charge. Moreover, based on the Ninth Circuit's decision, we are not persuaded by the DHS's general request for a remand. In this regard, we point out that DHS has not addressed the particular findings made by the court in this case, or the fact that the Immigration Judge considered the parties' arguments regarding the breadth of the California definition of methamphetamine during three hearings, and made related factual findings (Tr. at 98-102). Accordingly, the following orders will be entered.

ORDER: The motion to terminate proceedings is granted.

FURTHER ORDER: The proceedings are terminated.


FOR THE BOARD

² The court noted that it "does not conclude that geometric isomers of methamphetamine exist; it concludes only that the record in this case does not show that they do *not* exist." *Lorenzo v. Whitaker*, 752 F. App'x at n.2 (emphasis in original).