U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: A[redacted], A[redacted] A[redacted]

A [redacted]-727

Date of this notice: 1/4/2019

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:
Kendall Clark, Molly
Adkins-Blanch, Charles K.
Kelly, Edward F.

Userteam: Docket

File: A[redacted]-727 – Fort Snelling, MN Date: JAN – 4 2019

In re: A[redacted] A[redacted] A[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Matthew A. Streff, Esquire

ON BEHALF OF DHS: Luke R. Nelson
Assistant Chief Counsel

APPLICATION: Withholding of removal

The parties have appealed the Immigration Judge's July 17, 2018, decision finding the respondent removable as charged and granting his application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3). The respondent contests the Immigration Judge's determination that he has been convicted of an aggravated felony that limits the forms of relief available to him. The Department of Homeland Security (DHS) argues that the Immigration Judge erred in concluding that the respondent is eligible for withholding of removal. The respondent's appeal will be sustained in part and the record will be remanded as set forth below.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was convicted in 2015 of a Third Degree Minnesota Controlled Substance Crime (IJ at 1). The respondent does not contest that he is removable under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), as the result of this controlled substance offense. However, he contests the determination that his offense constitutes an aggravated felony as defined in section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B) (illicit trafficking in a controlled substance), that supports the charge that he is removable under section 237(a)(2)(A)(iii) of the Act.

With respect to the controlled substance charge of removability, we are persuaded by the respondent's appellate argument that he has not been convicted of an aggravated felony. This is because the least culpable act penalized by the statute of conviction does not appear to fall within the definition of an aggravated felony. *See Garcia-Urbano v. Sessions*, 890 F.3d 726, 728 (8th Cir. 2018) (describing the application of the "categorical approach"). The respondent was convicted of violating Minn. Stat. § 152.023, subd. 1(1) (IJ at 1; Ex. 1). While the statute proscribes the "sale" of a mixture containing a narcotic drug, the respondent emphasizes that the term "sale" is broadly defined under Minn. Stat. § 152.01, subd. 15a. *See* Respondent's Br. at 9-10. Under this subdivision, a sale is defined to include an offer to sell or give away a narcotic substance. Additionally, an offer of sale need not be accompanied by actual possession of the

substance with the intent to deliver it. *See* Minn. Stat. § 152.01, subd. 15a(2)-(3) (defining separate "sale" offenses to include either an offer to provide the substance *or* the actual possession of a substance with the intent to provide it to another).

We are persuaded by the respondent's argument that an offer to give away a prohibited substance without proof of either possession of the substance or the requisite intent to affect delivery does not fall within the federal definition of illicit trafficking in a controlled substance. *See United States v. Savage*, 542 F.3d 959, 965 (2d Cir. 2008) (citing *United States v. Price*, 516 F.3d 285, 288-89 (5th Cir. 2008)); *see also United States v. Maldonado*, 864 F.3d 893, 899 (8th Cir. 2017). Further, the statute of conviction does not appear to be divisible and amenable to application of the modified categorical approach since the jury instructions for the offense incorporate the same broad definition of a "sale" set forth in Minn. Stat. § 152.01, subd. 15a. *See* Controlled Substance Crime in the Third Degree—Sale—Elements, *Minnesota Jury Instruction Guides, Criminal* (CRIMJIG 20.16) (Vol. 10A, Minnesota Practice, 6th Ed.). Because the least of the acts penalized by the statute of conviction does not appear to constitute a controlled substance trafficking offense, we conclude that the respondent's conviction does not support the charge that he has been convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act.

Turning to relief, the DHS has appealed the Immigration Judge's grant of withholding of removal. The DHS first argues that the Immigration Judge erred in concluding that the respondent's conviction does not constitute a particularly serious crime that bars him from withholding of removal. *See* DHS Br. at 9-16. The DHS further argues that the Immigration Judge erred in finding that the respondent faces a probability of persecution in Somalia such that he is eligible for withholding of removal. *See* DHS Br. at 16-20. The DHS's appeal of these issues will be dismissed.

We will dismiss the DHS's appeal of the Immigration Judge's determination that the respondent's offense does not constitute a particularly serious crime that bars him from withholding of removal (IJ at 6-8). *See Matter of Y-L-*, 23 I&N Dec. 270 (A.G. 2002); *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). The Immigration Judge credited the respondent's testimony that his role in the controlled substance offense involved aiding and abetting the sale of a small amount of cocaine by driving the car in which the transaction took place (IJ at 7). The Immigration Judge further found that the amount of money involved was small and that there were no aggravating factors such as violence, the involvement of organized crime, or the involvement of a juvenile (IJ at 7). We conclude that the factual findings that underlie the Immigration Judge's analysis are not clearly erroneous. *See Garcia-Mata v. Sessions* , 893 F.3d 1107, 1110 (8th Cir. 2018). Based on these findings, we are not persuaded that the Immigration Judge erred as a matter of law in concluding that the respondent's offense did not constitute a particularly serious crime. *See Matter of Y-L-*; *Matter of Frentescu*.

We affirm the Immigration Judge's determination that the respondent demonstrated that he faces a probability of persecution in Somalia such that he is eligible for withholding of removal under section 241(b)(3) of the Act. The Immigration Judge found that the respondent's mother was killed when he was a child and present in the family home, and that this constituted past persecution on account of their Galgale tribal identity (IJ at 2, 8-9). Because the respondent demonstrated past persecution, there is a presumption that the respondent faces a threat to his life

or freedom on this same basis in the future. *See* 8 C.F.R. § 1208.16(b)(1). The Immigration Judge found that the DHS did not establish that there has been a fundamental change in circumstances such that this presumption has been rebutted (IJ at 9). The Immigration Judge's conclusion reflects a thorough examination of the evidence in the record (IJ at 4-5). The DHS argues that the Immigration Judge erred in relying on "generic" information contained in the Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, Country Reports on Human Rights Practices for 2017 – Somalia (Ex. 7, Tab D). *See* DHS Br. at 18. However, State Department country reports are a reliable source of information on country conditions. *See Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 213 (BIA 2010) ("State Department reports on country conditions . . . are highly probative evidence and are usually the best source of information on conditions in foreign nations."), *cited with approval by Lopez-Cortaza v. Sessions* , 739 F. App'x 855, 862 (8th Cir. 2018). Thus, we will not disturb the Immigration Judge's decision that the respondent established eligibility for withholding of removal.

The respondent argues that he is eligible for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a), because he has not been convicted of an aggravated felony. *See* Respondent's Br. at 2-3. However, cancellation of removal is a one-time form of relief. *See* section 240A(c)(6) of the Act. The administrative record reflects that the respondent was previously granted cancellation of removal under this section of the Act (*see* Ex. 2 at 3). The respondent is therefore ineligible to seek this form of relief for a second time.

We will remand the record for the Immigration Judge to consider the respondent's eligibility for asylum. As previously discussed, we find that the respondent's conviction does not categorically constitute an aggravated felony as defined in section 101(a)(43)(B) of the Act. The respondent is thus not subject to the statutory bar contained at sections 208(b)(2)(A)(ii), (B)(i) of the Act. We have not reversed the Immigration Judge's determination that the offense does not constitute a particularly serious crime under applicable precedent. However, even in the absence of statutory bars, asylum is a discretionary form of relief. *See generally Matter of A-H-*, 23 I&N Dec. 774, 783 (A.G. 2005). We will remand the record for consideration of whether a favorable exercise of discretion is warranted in this case. We express no opinion as to that determination. Any decision on the respondent's eligibility for relief from removal remains subject to completion of the required background and security investigations. *See* 8 C.F.R. § 1003.1(d)(6).

ORDER: The respondent's appeal is sustained as to the charge that he has been convicted of an aggravated felony that renders him removable under section 237(a)(2)(A)(iii) of the Act.

FURTHER ORDER: The DHS's appeal of the determination that the respondent demonstrated eligibility for withholding of removal under section 241(b)(3) of the Act is dismissed.

FURTHER ORDER: The record is remanded for consideration of whether asylum is warranted in the exercise of discretion.

Molly Dwyer Clark
FOR THE BOARD