U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: RAMIREZ, ARIZMENDY

A 097-243-468

Date of this notice: 6/18/2018

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:
Mullane, Hugh G.
Malphrus, Garry D.
Hunsucker, Keith E.

Userteam: Docket

File: A097 243 468 – Napanoch, NY Date: JUN 18 2018

In re: Arizmendy RAMIREZ a.k.a. Arizmendy Ramirezinirio a.k.a. Arismendy Ramirez Inirio

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Nicholas J. Phillips, Esquire

ON BEHALF OF DHS: Adam Perl
Assistant Chief Counsel

APPLICATION: Termination

The respondent, a native and citizen of the Dominican Republic and lawful permanent resident, appeals an Immigration Judge's decision dated December 21, 2017, which found that the respondent was removable as charged, and denied the respondent's motion to terminate. The Department of Homeland Security (the "DHS") has filed a response brief. The appeal will be sustained, the Immigration Judge's decision will be vacated, and the removal proceedings will be terminated.

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).

On October 11, 2016, the respondent was convicted of money laundering in the first degree under NYPL § 470.20(1) with a sentence of one to three years incarceration imposed (Exh. 3). Based on the conviction, the DHS issued a Notice to Appear that charged the respondent with being removable pursuant to sections 101(a)(43)(D) and 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(D), 1227(a)(2)(A)(iii) as an alien convicted of an aggravated felony related to money laundering. An offense is an aggravated felony money laundering offense if it is an "offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000." Section 101(a)(43)(D) of the Act.

We disagree with the Immigration Judge's determination that a strict categorical match was not required between NYPL § 470.20(1) and 18 U.S.C. § 1956 because Congress chose to use "described in" rather than other words, such as "defined in," to describe what constituted an aggravated felony for money laundering pursuant to section 101(a)(43)(D) of the Act (Tr. at 13; DHS's Br. at 8).

Even if the Immigration Judge is correct that the words "described in" are broader than the words "defined in," the categorical approach is still applicable. *See Gertsenshteyn v. U.S. Dep't of Justice*, 544 F.3d 137 (2d Cir. 2008) (categorical approach unequivocally applies to section

101(a)(43)(K)(ii) of the Act, which defines "an offense that ... is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage"); *Matter of Bautista*, 25 I&N Dec. 616 (BIA 2011) (categorical approach used to determine if respondent's State offense of attempted arson is a crime "described in" the aggravated felony provision at section 101(a)(43)(E)(i) of the Act)).

The Immigration Judge notes that the final paragraph of section 101(a)(43) lends support to the idea that Congress' intent was to write section 101(a)(43)(D) of the Act in a broader manner than section 101(a)(43)(B) of the Act inasmuch as it reads, "the term [aggravated felony] applies to an offense described in this paragraph, whether in violation of Federal or State law" (IJ at 2; DHS's Br. at 6). However, as noted, the Second Circuit, as well as the Board apply the categorical approach to provisions of the Act which rely on the phrase "described in."

One of the elements in NYPL § 470.20(1) is that the accused know that the property involved in one or more financial transactions represents the proceeds of the criminal sale "of a controlled substance." 18 U.S.C. § 1956, defines three separate crimes, each of which refers to the proceeds of "specified unlawful activity," which is defined at 18 U.S.C. § 1956(c)(7). The phrase "specified unlawful activity" includes "with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving ...the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for purposes of the Controlled Substances Act)." 18 U.S.C. § 1956(c)(7)(B)(i). Since the federal generic definition for money laundering incorporates the federal definition of "controlled substance" under the Controlled Substances Act, and the New York money laundering statute relies upon New York's "controlled substance" definition, it follows that the respondent's conviction under NYPL § 470.20(1) is categorically broader than section 101(a)(43)(D) of the Act (Respondent's Br. at 10).

This is so because *Harbin v. Sessions*, 860 F.3d 58, 68 (2d Cir. 2017) held that the New York state controlled substance provision (NYPL § 220.31) was not divisible with respect to the type of controlled substance. *Harbin v. Sessions*, 860 F.3d at 68 ("the statute does not create separate crimes – it creates separate means of committing the same crime."). In short, we conclude that this issue is also controlled by *Harbin* – notwithstanding the obvious similarities between the New York state money laundering provision and the Federal money laundering provision. Because we are bound by *Harbin*, we must apply it.

In light of the foregoing, we conclude that the DHS has not proven by clear and convincing evidence that the respondent is removable from the United States under section 237(a)(2)(A)(iii) of the Act. Accordingly, we will vacate the Immigration Judge's decision and terminate the removal proceedings.

ORDER: The appeal is sustained, the Immigration Judge's decision is vacated, and the removal proceedings are terminated.

FOR THE BOARD