



**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals  
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5107 Leesburg Pike, Suite 2000  
Falls Church, Virginia 22041

**Bergmann, Benjamin David  
Parrish Kruidenier Law Firm  
2910 Grand Avenue  
Des Moines, IA 50312**

**DHS/ICE Office of Chief Counsel - OMA  
1717 Avenue H, Room 174  
Omaha, NE 68110**

**Name: M [REDACTED] H [REDACTED], J [REDACTED]**

**A [REDACTED] 997**

**Date of this notice: 3/14/2018**

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:  
Cole, Patricia A.  
Greer, Anne J.  
Crossett, John P.

User team: Docket

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Falls Church, Virginia 22041

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File: [REDACTED] 997 – Omaha, NE

Date: **MAR 14 2018**

In re: J [REDACTED] M [REDACTED] H [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Benjamin D. Bergmann, Esquire

ON BEHALF OF DHS: Joshua Sleper  
Assistant Chief Counsel

APPLICATION: Removability; cancellation of removal pursuant to section 240A(a) of the Act

The respondent, a native and citizen of Mexico, appeals the Immigration Judge's September 26, 2017, decision finding him removable and denying his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The Department of Homeland Security ("DHS") opposes the appeal. The respondent's appeal will be sustained, the Immigration Judge's decision vacated, and the record remanded.

The record reflects that, on October 5, 2016, the respondent was convicted of possession with intent to deliver a controlled substance, cocaine, in violation of Iowa Code Ann. § 124.401(1)(c)(2)(b) (IJ at 2; Exhs. 1, 2). The Judge determined that the respondent's conviction constituted an aggravated felony as defined in section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B), an offense relating to the illicit trafficking in a controlled substance, that rendered him removable pursuant to section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (IJ at 2; IJ at 5-6, Sept. 21, 2017). The Immigration Judge therefore denied the respondent's application for cancellation of removal (IJ at 2-3). See section 240A(a)(3) of the Act (stating that an applicant who has been convicted of an aggravated felony is not eligible for cancellation of removal). The Judge also concluded that the offense constituted a controlled substance violation that rendered the respondent removable pursuant to section 237(a)(2)(B)(i) of the Act (IJ at 2; IJ at 4-5, Sept. 21, 2017). The respondent challenges the Immigration Judge's conclusion on appeal.

At the outset, we do not agree with the Immigration Judge's determination that the respondent's violation of Iowa Code Ann. § 124.401(1)(c)(2)(b) constitutes an aggravated felony pursuant to section 101(a)(43)(B) of the Act (IJ at 5-6, Sept. 21, 2017). This provision defines an aggravated felony as "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in [18 U.S.C. section 924(c)])." We have determined that the "illicit trafficking" clause of this aggravated felony definition is distinct from the "drug trafficking crime" clause. *Matter of Sanchez-Cornejo*, 25 I&N Dec. 273, 274 (BIA 2010). A state drug offense qualifies as a drug trafficking crime under 18 U.S.C. § 924(c) if the offense would have been punishable as a felony under the Controlled Substances Act ("CSA"). *Id.* at 275. The term "illicit trafficking," in turn, includes "any state, federal, or qualified foreign felony conviction involving the unlawful trading or dealing" in a

controlled substance as defined by Federal law. *Matter of L-G-H-*, 26 I&N Dec. 365, 368 (BIA 2014).

The respondent's statute of conviction states the following:

1. It is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance.

c. Violation of this subsection with respect to the following controlled substances, counterfeit substances, simulated controlled substances, or imitation controlled substances is a class "C" felony, and . . . shall be punished by a fine of not less than one thousand dollars nor more than fifty thousand dollars:

(2) One hundred grams or less of any of the following:

(b) Cocaine, its salts, optical and geometric isomers, or salts of isomers.

We do not agree that the respondent's violation of Iowa Code Ann. § 124.401(1)(c)(2)(b) qualifies as a "drug trafficking crime" (IJ at 5-6, Sept. 21, 2017). To make this determination, we first employ a "categorical approach" to determine whether the state offense is comparable to an offense that is punishable under the CSA. *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). The Iowa statute penalizes the act of manufacturing, delivering, or possessing with the intent to manufacture or deliver, "a controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance." While it is unlawful to "create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance" under 21 U.S.C. § 841(a)(2), the delivery of a simulated controlled substance is not an offense that is punishable under the CSA. *United States v. Brown*, 598 F.3d 1013, 1016 (8th Cir. 2010) ("While . . . the CSA penalizes offenses involving counterfeit substances . . . never has Congress regulated simulated or look-alike controlled substances"). Iowa Code Ann. § 124.401(1)(c)(2)(b) thus does not define a categorical "drug trafficking crime."

We next consider whether Iowa Code Ann. § 124.401(1)(c)(2)(b) is divisible as to the phrase, "controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance," such that we can employ the modified categorical approach. *See Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). A divisible statute "lists multiple elements disjunctively," rather than merely enumerating "various factual means of committing a single element." *Id.* In making this determination, we look first to authoritative sources of state law. *Id.* at 2256. Here, the Iowa Court of Appeals has stated that Iowa Code Ann. § 124.401(1)(c) is violated "regardless of whether the substance . . . is a controlled substance, a counterfeit substance, or a simulated controlled substance." *State v. Meyer*, 705 N.W.2d 676, 678 (Iowa Ct. App. 2005). As such, in *State v. Leiss*, 788 N.W.2d 397 (Iowa Ct. App. 2010) (Table), the defendant was convicted of violating the statute for possessing a simulated controlled substance.

In addition, we look to the "the statute on its face" to resolve the issue. *Mathis v. United States*, 136 S. Ct. at 2256. Notably, none of the substances listed under subsection (c) of the Iowa statute are specifically described as counterfeit, simulated, or imitation controlled substances. A plain

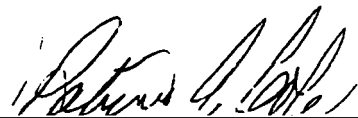
reading of the subsection thus indicates that the descriptive phrase applies to each of the substances listed, such that a person could be convicted under Iowa Code Ann. § 124.401(1)(c)(2)(b) for possessing counterfeit, simulated, or imitation cocaine. In addition, “the penalties indicated in section 124.401(1)(c) are identical regardless of the authenticity of the substance.” *State v. Meyer*, 705 N.W.2d at 678; *see also Mathis v. United States*, 136 S. Ct. at 2256 (stating that “if statutory alternatives carry different punishments . . . they must be elements”). Therefore, based on our plain reading of the statute and our review of relevant state law, we conclude that the Iowa statute is not divisible as to whether the controlled substance involved was authentic, counterfeit, simulated, or imitation.

Similarly, we conclude that Iowa Code Ann. § 124.401(1)(c)(2)(b) does not constitute an aggravated felony under the “illicit trafficking” clause of section 101(a)(43)(B) of the Act. Given that the statute is not divisible as the authenticity of the controlled substance, it could involve authentic, counterfeit, simulated, or imitation cocaine. It thus does not necessarily involve a controlled substance as defined by Federal law. *See* 21 U.S.C. § 812; *Cf. Matter of L-G-H-*, 26 I&N Dec. at 368 (stating that the alien was convicted of cocaine, a federally controlled substance).

Based on the foregoing, we conclude that Iowa Code Ann. § 124.401(1)(c)(2)(b) is overbroad and indivisible when compared to section 101(a)(43)(B) of the Act. We therefore reverse the portion of the Immigration Judge’s decision concluding that the respondent was convicted of an aggravated felony that renders him removable pursuant to section 237(a)(2)(A)(iii) of the Act and bars his eligibility for cancellation of removal pursuant to section 240A(a) of the Act.

We also do not agree with the Immigration Judge’s conclusion that Iowa Code Ann. § 124.401(1)(c)(2)(b) defines a controlled substance violation that renders the respondent removable pursuant to section 237(a)(2)(B)(i) of the Act (IJ at 2; IJ at 4-5, Sept. 21, 2017). Pursuant to section 237(a)(2)(B)(i) of the Act, “an alien who . . . has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))” is removable. Drug possession and distribution convictions trigger removal only if they necessarily involve a federally controlled substance. *Mellouli v. Lynch*, 135 S.Ct. 1980, 1989 (2015). As discussed, a person can be convicted for violating Iowa Code Ann. § 124.401(1)(c)(2)(b) for possessing simulated or imitation cocaine, neither of which are federally controlled substances. Accordingly, the following order will be entered.

ORDER: The respondent’s appeal is sustained, the Immigration Judge’s decision, dated September 26, 2017, is vacated and the record is remanded for further proceedings consistent with this decision.



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
UNITED STATES IMMIGRATION COURT  
OMAHA, NEBRASKA

File: [REDACTED] 997

September 26, 2017

In the Matter of

J [REDACTED] M [REDACTED] H [REDACTED] )  
 ) IN REMOVAL PROCEEDINGS  
 )  
RESPONDENT )

CHARGES: 237(a)(2)(B)(i)-controlled substances offense  
INA 237(a)(2)(A)(iii) of the INA-aggravated felony for illicit trafficking  
and a controlled substances

APPLICATIONS: Cancellation of removal under INA section 240Aa

ON BEHALF OF RESPONDENT: Benjamin Bergmann  
Parish Kruideneir Law Firm  
2910 Grand Avenue Des Moines, Iowa 50312

ON BEHALF OF DHS: Ana Speas Bees  
Assistant Chief Counsel  
Department of Homeland Security  
1717 Avenue H  
Omaha, Nebraska 68110

ORAL DECISION OF THE IMMIGRATION JUDGE

I. Background

The respondent is a native and citizen of Mexico who entered the e-  
~~According to the~~ United States at an unknown place at an unknown date, but became a

lawful permanent resident on May 15, 2003 under section 245 of the Act. see Exhibit 1.

On October 5, 2016 the respondent was convicted in the Iowa ~~D~~istrict ~~c~~Court of in Eldora Muscatine County, Iowa for the offense of possession with intent to deliver an uncontrolled substance, cocaine, in violation of Iowa code 124.401(1)(C)(2)(B) for which an indeterminate sentence of ~~ed~~ incarceration of not to exceed 10 years on each count was imposed on November 18, 2016. On that same day in the same court the respondent was convicted of three counts of Iowa Drug Tax Stamp Act, in violation of Iowa code section 453B.12 for which an indeterminate ~~determines sentence of~~ incarceration not to exceed 5 years on each count was imposed on November 18, 2016. On July 20, 2017 the Department of Homeland Security (~~opened~~ "DHS" or "Department") commenced rule proceedings by serving the respondent a Notice to Appear ~~(—"NTA")~~ charging him ~~e-with-being~~ removability under the above caption section of the Immigration Nationality Act ("INA" or Act.) See Exhibit 1.}

The respondent admitted allegations 1 through 6, but opposed removability under both sections.

## II. Removability

The court incorporates by reference Exhibit 3. Exhibit 3 dated September 21, 2017 is the court's finding that respondent is removable as charged. The court believes this demonstrates respondent's removability.

## III. Applications for Relief

The respondent is requesting Cancellation of Removal for ~~search in~~ permanent residents ~~ee~~ under INA section 240(a)(A). ~~8Aa~~. In Exhibit 3, the court found respondent was ineligible for this form of relief and incorporates the analysis from that decision to this relief decision. ~~application.~~ For these reasons, the court found that the respondent was ineligible for this form of relief.

IV. Orders.

~~It is hereby ordered that respondent's application. Strike that.~~ It is hereby ordered that respondent is removable under INA section 237(a)(2)(B)(i). It is ordered that respondent's application for Cancellation of Removal for certain permanent residents ~~ce~~ is denied. It is ~~hereby greatly~~ ordered that the respondent be removed to the country of Mexico upon the charges contained in the Notice to Appear.

The respondent is advised of his right of appeal:

You have the right to appeal to the Board of Immigration Appeals. To appeal you must file a Notice of Appeal to the Board of Immigration Appeals within 30 days from the publication date of this decision. If the final date for filing falls on a Saturday, Sunday, or a legal Holiday the time for appeal shall be extended to the next business day. If the time expires and no appeals has been filed the decision of this court becomes final. Your Notice of Appeal attached documents and filing fee for a fee waiver or request must be mailed to: Board of ~~Order of~~ Immigration Appeals Office at the Clerk, 5107 Leesburg Pike suite 2000 Falls Church, Virginia 20530.

So, ordered this 26th date of September 2017.

**Please see the next page for electronic**

**signature**

MATTHEW E. MORRISSEY  
Immigration Judge