



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

**Murguia, Andres
Lichter Immigration
1601 Vine St.
Denver, CO 80206**

**DHS/ICE Office of Chief Counsel - AUR
12445 East Caley Avenue
Centennial, CO 80111-5663**

Name: B [REDACTED], J [REDACTED]

A [REDACTED]-131

Date of this notice: 3/10/2020

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.
O'Connor, Blair
Greer, Anne J.

User team: Docket

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RC

Falls Church, Virginia 22041

File: A [REDACTED]-131 – Aurora, CO

Date:

MAR 10 2020

In re: J [REDACTED] B [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Andres Murguia, Esquire

ON BEHALF OF DHS: Joshua I. Marrone
Assistant Chief Counsel

APPLICATION: Cancellation of removal section 240A(a) of the Act; remand

The Department of Homeland Security (“DHS”) appeals from an Immigration Judge’s August 1, 2019, decision granting the respondent’s application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a) (2018), in the exercise of discretion.¹ The respondent, a native and citizen of the Philippines and lawful permanent resident of the United States, opposes the appeal and filed a motion to remand. The DHS opposes the motion. The respondent’s motion will be granted and the record will be remanded for further proceedings.

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) (2019). We review *de novo* all other issues, including issues of law, judgment, or discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

It is undisputed that in December 2017, the respondent was convicted in the District Court of Delta County, Colorado, for unlawful possession of a controlled substance, in violation of Colo. Rev. Stat. § 18-18-403.5(2)(a) (Exh. 1). Based on this conviction, the respondent conceded that he was removable as charged pursuant to section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), as an alien convicted of a violation of state law relating to a controlled substance, to wit: methamphetamine (IJ at 1-2; Tr. at 7-8; Exh. 1). In his motion to remand, the respondent argues that he should be allowed to rescind his concession in light of a change in law that occurred after his pleadings, and the case should be remanded to the Immigration Judge to reassess his removability (Respondent’s Br. and Motion at 1-2). Specifically, he asserts that a recent case issued by the United States Court of Appeals for the Tenth Circuit, in whose jurisdiction this case arises, *Arellano v. Barr*, 784 F. App’x 609 (10th Cir. 2019), constitutes a change in law in how the categorical approach is applied to criminal statutes involving drugs (Respondent’s Br. and Motion at 1-2, 5-11).

¹ There is no dispute that the respondent is eligible for cancellation of removal (IJ at 3; DHS’s Br. at 3 n.1).

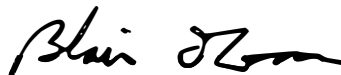
Although we acknowledge that *Arellano v. Barr* is a non-precedential decision and it addresses a different law than the statute at issue for the respondent's conviction (DHS's Opp. to Remand at 1-2), the case does call into question the respondent's removability notwithstanding his concession. We also point out that in our recent decision in *Matter of Navarro Guadarrama*, 27 I&N Dec. 560 (BIA 2019), we held that the realistic probability test applies to categorical determinations of controlled substance offenses, such that if a state controlled substances law contains a substance that does not appear on the list of federally controlled substances, it is the alien's burden to demonstrate that the state actually prosecutes individuals for conduct involving that substance. Therefore, we will remand the record to the Immigration Judge to reconsider the question of the respondent's removability in light of these decisions in the first instance. See *Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002) (noting that the Board has limited fact-finding authority).

On remand, the parties should have the opportunity to update the record, and to make any additional legal and factual arguments as may apply to this case. The Board expresses no opinion regarding the ultimate outcome of these proceedings. In light of this remand, we decline to reach the question of whether the Immigration Judge erred in concluding that the respondent warrants cancellation of removal in the exercise of discretion at this time.

Accordingly, the following orders shall be issued.

ORDER: The respondent's motion to remand is granted.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD