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

Fontes, Martin Cayetano
Fontes|Figueroa Law Group, APC
2677 N Main St., Ste. 820
Santa Ana, CA 92705

DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: H[redacted]-C[redacted], J[redacted] A... **A[redacted]-212**

Date of this notice: 7/15/2019

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:
Wendtland, Linda S.
Cole, Patricia A.
Greer, Anne J.

Userteam: Docket

File: A[redacted]-212 – Los Angeles, CA Date: JUL 15 2019

In re: J[redacted] A[redacted] H[redacted]-C[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Martin C. Fontes, Esquire

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Mexico, appeals an Immigration Judge's October 25, 2017, decision denying his application for cancellation of removal[1] under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The appeal will be sustained and the record will be remanded.

We review an Immigration Judge's factual determinations, including credibility determinations, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i). The Board uses a de novo standard of review for questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges. *See* 8 C.F.R. § 1003.1(d)(3)(ii). The respondent, as an applicant for relief under the Act, bears the burden of establishing that he is eligible for, and deserving of, all relief sought. 8 C.F.R. § 1240.8(d); section 240(c)(4) of the Act.

This matter was previously before the Board on September 27, 2011, January 20, 2012, and December 9, 2016. At issue in those decisions was the respondent's eligibility for cancellation of removal in light of his 2003 conviction under section 11357(b) of the California Health and Safety Code and his ongoing efforts to have that conviction vacated (IJ at 2-3). Pursuant to an order from the United States Court of Appeals for the Ninth Circuit and the vacatur of the respondent's 2003 conviction, this Board and the Immigration Judge reconsidered our prior determinations that this conviction rendered the respondent ineligible for cancellation of removal. As a result, in her October 25, 2017, decision, the Immigration Judge considered the respondent's eligibility for cancellation of removal in light of his 2004 conviction for possession of a controlled substance without a prescription arising under section 4060 of the California Business and Professions Code ("CBPC").

We also note that the respondent has other convictions in addition to the controlled substance violations described above. In 2004 he was convicted of petty theft under section 484 and 488 of the California Penal Code (IJ at 3). In 2011, the respondent was convicted of joyriding in violation of section 10851(a) of the California Vehicle Code and of driving under the influence of alcohol in violation of sections 23152(a)-(b) of the Vehicle Code (*Id.*). In 2015, the respondent pled guilty to driving on a suspended license in violation of section 14601.2(a) of the Vehicle Code (*Id.*).

[1] Although the respondent asserted below that he is eligible for adjustment of status, he did not file an application for this relief (IJ at 1-2, 3), and he does not pursue this form of relief on appeal.

Turning to the respondent's eligibility for cancellation of removal, we reiterate that it is his burden to establish by a preponderance of the evidence that none of his convictions poses a statutory bar to relief. *Villavicencio-Rojas v. Lynch*, 811 F.3d 1216, 1218 (9th Cir. 2016). The Immigration Judge found that the respondent did not prove that his 2004 conviction under section 4060 of the CBPC was not a controlled substance violation rendering him ineligible for cancellation of removal (IJ at 4-8).

According to the Supreme Court, the requirements of the Act's controlled substance removability grounds are "satisfied when the elements that make up the state crime of conviction relate to a *federally* controlled substance." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1990 (2015) (emphasis added). Thus, a conviction for violating a state statute relating to controlled substances supports a finding of inadmissibility under section 212(a)(2)(A)(i)(II) only if an "element" of the statute is connected to a substance listed in the Federal controlled substance schedules. *Id.* at 1991.

Section 4060 of the CBPC prohibits the possession of a controlled substance (as that term is defined under California law) without a prescription. *See* section 4060 of the CBPC;[2] *People v. Kennedy*, 91 Cal. App. 4th 288 (Cal. Dist. Ct. App. 2001). California's definition of a "controlled substance" includes some substances that are not federally "controlled substances." *See Coronado v. Holder*, 759 F.3d 977, 983 (9th Cir. 2014) (noting that California drug schedules include drugs that are not included on the Federal schedules); *see, e.g.*, Cal. Health & Safety Code § 11055 (defining "controlled substance" to include khat). Thus, the respondent's conviction cannot render him inadmissible under section 212(a)(2)(A)(i)(II) of the Act unless section 4060 is "divisible," so as to permit consideration of the conviction record under the "modified categorical" approach.

In removal proceedings, we evaluate the divisibility of criminal statutes by employing the standards set forth in *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *Descamps v. United States*, 570 U.S. 254 (2013). *See Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016). Under *Mathis*, the divisibility of a statute depends on whether the statutory alternatives are discrete "elements" as opposed to "means" of committing an offense. *Mathis v. United States*, 136 S. Ct. at 2256. Thus, the divisibility of CBPC section 4060 depends upon whether the identity of the *particular* "controlled substance" involved is an "element" of the offense—i.e., a fact that must be proven to the jury, unanimously and beyond a reasonable doubt, in order to convict—or merely a "brute fact" about which the jury can disagree while still rendering a guilty verdict.

Although the Immigration Judge determined that section 4060 of the CBPC is divisible, the opinion lacks citation to any California state case law reflecting that a particular controlled substance is an element of the offense, and likewise we have found no such authority. *Cf. Almanza-Arenas v. Lynch*, 815 F.3d 469, 479 (9th Cir. 2016). The fact that different sections of California's Health and Safety Code have been found to be divisible because, e.g., the particular controlled substance is an element of an offense under a given section of the Health and Safety Code does

[2] This section provides in relevant part that a "person shall not possess any controlled substance, except that furnished to a person upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor . . . ."

not provide support for a conclusion that section 4060 of the CBPC is divisible.[3] Rather, the relevant question is whether the identity of a particular controlled substance is an element of a violation of section 4060 of the CBPC.

On that question, California law does not clearly indicate that the identity of a particular controlled substance is an element of a violation of section 4060, as no variation in penalty applies to possession of different substances and neither the Immigration Judge nor we could locate jury instructions requiring that the particular controlled substance involved in a section 4060 offense be found unanimously by the trier of fact (IJ at 7, n.2). *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Moreover, the reference in a court decision to a particular controlled substance is not dispositive to the legal inquiry into whether the underlying statute itself is divisible, unless it is based on jury findings or the like.[4] *See Mathis v. United States*, 136 S. Ct. at 2248; *Taylor v. United States*, 495 U.S. 575, 602 (1990); *Almanza-Arenas v. Lynch*, 815 F.3d at 479 (discussing indictments that charge a defendant in the alternative).

The key question of whether or not section 4060 is divisible is potentially answerable by consulting the record of conviction, at which we may "peek . . . for 'the sole and limited purpose" of determining whether the identity of the drug is an element of the offense defined by section 4060 of the CBPC. *See Mathis*, 136 S. Ct. at 2256; *see also* 8 C.F.R. § 1003.1(d)(3)(iv) (2018) (empowering the Board to take administrative notice of the contents of official documents). In this case, however, we are unable to conduct this analysis in the first instance, because the record contains no indictment, plea agreement or judgment of conviction, nor factual findings by the Immigration Judge as to these records (IJ at 7).

Although we acknowledge the Immigration Judge's reasoning that an inconclusive record of conviction will not carry an alien's burden to establish that he has not been convicted of a disqualifying offense for purposes of establishing cancellation of removal eligibility,[5] we do not see that reasoning as precluding a finding that the statute of conviction is overbroad and indivisible. That is because we would consult the record of conviction here only to find an answer as to the legal question of the nature of the offense under section 4060 of the CBPC. The lack of information as to the divisibility of the statute is distinguished from an alien's lack of proof, under a modified categorical analysis, that his conviction under a divisible statute did not involve a federally controlled substance. *Rendon v. Holder*, 763 F.3d 1077, 1084 n.6 (9th Cir. 2014) (noting that where statute is indivisible, there would never be support for finding that state statute is a match for generic crime).

Since the record contains no conviction documents at which we might peek, and the requisite factual findings as to these conviction records are not part of the issues presented for our review on appeal, on remand the respondent should proffer the relevant conviction records for the

[3] *See* IJ at 5 (citing cases finding, inter alia, sections 11352, 11379, 11550(a), 11378, and 11377(a) of the California Health and safety Code to be divisible).

[4] *See* IJ at 7 (citing cases).

[5] *See* IJ at 6-7 (*citing Marinelarena v. Sessions*, 869 F.3d 780 (9th Cir. 2017), *reh'g en banc granted*, 886 F.3d 737 (9th Cir. 2018)).

Immigration Judge to proceed with her analysis of the question whether the respondent's 2004 conviction under the CBPC renders him ineligible for cancellation of removal.

We note that the respondent argues that we should remand this record to the Immigration Judge so that proceedings can be terminated in light of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). In that case, the Supreme Court examined a Notice to Appear ("NTA") that "fail[ed] to designate the specific time or place of the noncitizen's removal proceedings" and found that it did not qualify as a "notice to appear under [section 239(a) of the Act]" for purposes of cancellation of removal. *See* Respondent's Br. at 10-14. The respondent argues that under *Pereira v. Sessions*, jurisdiction over these proceedings never vested with the Immigration Judge (despite the filing of the NTA with the court), because the NTA did not designate the specific time and date of the initial removal hearing (Respondent's Br. at 10-13).

The respondent's arguments in support of termination are foreclosed by *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018). In that case, we held that an NTA that does not specify the time and place of an alien's initial hearing vests an Immigration Judge with jurisdiction over removal proceedings so long as a notice of hearing specifying this information is later sent to the alien. *See id.* at 447; *accord Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019). In this case, a notice of hearing was later sent to the respondent, and he appeared at subsequent hearings in these removal proceedings. Because (as in *Bermudez-Cota*) the respondent received proper notice of the time and place of his removal proceedings when he received the notice of hearing, the NTA's omission of the time and place of the initial removal hearing was not a jurisdictional defect, and, therefore, termination is unwarranted.

In light of the foregoing, we will remand this record for further proceedings on the respondent's eligibility for cancellation of removal. In addition to the additional analysis required as to the respondent's section 4060 conviction, the respondent has several convictions that may bar him from the relief of cancellation of removal. Accordingly, the Immigration Judge should conduct further proceedings as to the respondent's eligibility for relief. Regardless of whether the respondent is found eligible for cancellation of removal, on remand the Immigration Judge should also render factual findings (if necessary, in the alternative) as to the relevant issues involved in an application for discretionary relief, and then balance those factors to determine whether a grant of such relief to this respondent would be proper.

Therefore the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded for further proceedings consistent with this order.

Linda J. Wendtland
FOR THE BOARD