U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: BREWSTER, MOSES ADAMS

A 024-023-175

Date of this notice: 6/27/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Pauley, Roger
O'Connor, Blair
Greer, Anne J.

Userteam: Docket

File: A024 023 175 – Tucson, AZ

Date: JUN 27 2017

In re: MOSES ADAMS BREWSTER

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rebecca Eissenova, Esquire

ON BEHALF OF DHS: Faten R. Barakat-Nice
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Removability

The respondent is a native and citizen of Jamaica. This case was last before us on September 25, 2014, when we remanded the record to the Immigration Judge for further proceedings and the entry of a new decision. On September 19, 2016, the Immigration Judge determined that the respondent was removable as charged and pretermitted the respondent's applications for relief. [1] The respondent now appeals from the Immigration Judge's September 19, 2016, decision. The record will be remanded.

On appeal, the respondent argues that the Immigration Judge erred in determining that he is removable as charged. Specifically, the respondent argues that his 1998 conviction for the offense of possession of a controlled substance with intent to distribute within 1,000 feet of school property in violation of sections 2C:35-7 and 2C:35-5a of the New Jersey Statutes Annotated ("NJSA") does not constitute an aggravated felony under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act. The respondent also argues that the Immigration Judge erred in determining that his 1998 conviction renders him removable as an alien who has been convicted of a controlled substance offense as defined by section 237(a)(2)(B)(i).

[1] We note that the Immigration Judge incorporated by reference Exhibit 22, which is a separate September 19, 2016, decision in which the Immigration Judge specifically determined that the respondent was removable as charged.

The Board reviews an Immigration Judge's findings of fact for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review issues of law, discretion, or judgment de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

Initially, we disagree with the Immigration Judge's determination that the respondent is removable under section 237(a)(2)(A)(iii) of the Act, as an alien who has been convicted of an aggravated felony (I.J. at Exh. 22, pp 3-6). We note that the Supreme Court rendered a decision on the question of a statute's divisibility that we have held is fully applicable in immigration proceedings. *See Mathis v. United States*, 136 S. Ct. 2243 (2016); *Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016). Moreover, although this case arises in the United States Court of Appeals for the Ninth Circuit, we nonetheless find persuasive the decision in the United States Court of Appeals for the Third Circuit, which held that NJSA section 2C:35-7 is not an aggravated felony under the categorical approach and is not divisible in any way permitting resort to the modified categorical approach. *Chang-Cruz v. Att'y Gen. of U.S.*, 659 F. App'x 114, 117-18 (3d Cir. Aug. 24, 2016) (unpublished) (citing *Mathis v. United States*, *supra*, at 2254-56). Pursuant to *Mathis* and *Chang-Cruz*, we conclude that the respondent's conviction under NJSA section 2C:35-7 was not for an aggravated felony.

Turning next to the respondent's removability under section 237(a)(2)(B)(i) of the Act, we agree with the Immigration Judge's determination that the respondent's 1998 conviction is a controlled substance offense (I.J. at Exh. 22, pp 6-7). The respondent argues on appeal that NJSA section 2C:35-7 is overbroad because it includes at least one controlled substance that is not included in the federal definition of a controlled substance. However, we agree with the Immigration Judge's determination that the type of controlled substance involved in section 2C:35-7 of NJSA is an element rather than a means of the offense (I.J. at Exh. 22, pg. 6-7 & n.3). *See* NJ J.I. CRIM 2C:35-7. We therefore employ the modified categorical approach to determine whether the respondent's offense constitutes a controlled substance offense. [2] *See Descamps v. United States*, 133 S. Ct. 2276 (2013); *Matter of Chairez*, *supra*. In this regard, the record of conviction reveals that the controlled substance involved in the respondent's offense was marijuana, which is a federally controlled substance (I.J. at Exh. 22, pg. 7; Exh. 3).

Therefore, we will remand the record to permit the respondent to apply for any form of relief that may now be available to him. *See* 8 C.F.R. § 1240.8(d). In this regard, the Immigration Judge should reevaluate the prior conclusion concerning the respondent's eligibility for relief in light of the holding that he has not been convicted of an aggravated felony.

Accordingly, the following order will be entered.

[2] The respondent relies on *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), to support his argument that NJSA section 2C:35-7 does not constitute a controlled substance offense. However, that case is distinguishable because it involved only a categorical analysis of whether the statute constituted a controlled substance offense.

ORDER: The appeal is sustained, in part, the section 237(a)(2)(A)(iii) charge is dismissed, and the record is remanded for further proceedings and the entry of a new decision consistent with this opinion.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
TUCSON, ARIZONA

File: A024-023-175 September 19, 2016

In the Matter of

MOSES ADAMS BREWSTER	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(2)(B)(i), Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act as amended

APPLICATIONS: Cancellation of removal

ON BEHALF OF RESPONDENT: Ms. Rebecca Eisenberg, Esquire

ON BEHALF OF DHS: Ms. Fad Barakat, Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent whose name is Mr. Moses Adams Brewster is a 51-year-old single male native and citizen of Jamaica.

These proceedings were started by filing of a Notice to Appear and the Form I-261 charging the respondent with removability based on the above two charges.

The Department alleged that the respondent is not a citizen or national of the United States, but he is a native and citizen of Jamaica. He was admitted to the United States as a lawful permanent resident November 6th, 1994.

The Department alleged respondent was convicted June 1, 1998, New Jersey Superior Court, Passaic County, for the offense of possession of a controlled dangerous substance, to wit marijuana, with the intent to distribute the same within 1,000 feet of school property. The Department alleged that he was sentenced to serve 364 days in prison.

This case previously was before a prior immigration judge at another immigration court and on December 3rd, 2010, that immigration judge issued an oral decision sustaining both charges and ordering the respondent removed to Jamaica. The respondent filed a timely appeal with the Board of Immigration Appeals. On May 31, 2011, the Board dismissed the respondent's appeal. The respondent then filed an appeal with the United States Court of Appeals for the 9th Circuit. On May 15, 2014, the court of appeals issued an order returning the case to the Board. Subsequently, the Department filed an unopposed motion to remand with the Board. On September 25, 2014, the court granted the Department's motion and remanded the case to the court for further proceedings and the entry of a new decision.

FINDING OF REMOVABILITY

The court has carefully considered all of the exhibits and has issued a written decision covering all of the issues and aspects of the case. See Exhibit 22. Within Exhibit 22, the court carefully considers all of the exhibits, all of the procedural history of this case, and makes a detailed finding of removability, sustaining the two charges of removability. The court will not reiterate the entire Exhibit 22, but ask any appellate reviewing court to please review Exhibit 22. The court finds by clear and convincing evidence that the charges of removability listed are sustained by clear and convincing evidence. The court carefully recites all of the exhibits the court relies on, the applicable case law, the factual findings, and once again, sustains the two charges

of removability pursuant to Exhibit 22.

FORMS OF RELIEF

The respondent, through his attorney of record, has requested the relief of cancellation of removal as an immigrant. The law clearly states that an individual convicted of an aggravated felony is not eligible for that relief; therefore, the court pretermits and denies that form of relief. The court also carefully considers other forms of relief on Page 7 of Exhibit 22 and, based on the aggravated felony conviction, the respondent is statutorily ineligible for asylum, cancellation of removal, as just stated, and post-conclusion voluntary departure.

The respondent, through his attorney of record, has sought no other forms of relief in these proceedings, such as withholding of removal or Convention Against Torture. The respondent's attorney of record simply informed the court that they wish to reserve appeal, state for the record that they wished to apply for cancellation of removal as an immigrant, disagreeing with the court's finding of the aggravated felony. Based on the facts of the case, the respondent is ineligible for any forms of relief in these proceedings. Accordingly, the following order will be entered:

ORDER

It is ordered that the respondent is removed from the United States to Jamaica.

Please see the next page for electronic signature

SEAN H. KEENAN
Immigration Judge

//s//

Immigration Judge SEAN H. KEENAN

keenans on January 6, 2017 at 2:57 PM GMT

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
300 WEST CONGRESS STREET, SUITE 300
TUCSON, ARIZONA 85701

IN THE MATTER OF	)	**IN REMOVAL PROCEEDINGS**
BREWSTER, Moses Adams	)	**FILE NO.:** A024-023-175
Respondent	)	**DATE:** September 19, 2016

CHARGES: Section 237(a)(2)(A)(iii) of the Act, in that, after admission, the respondent was convicted of an aggravated felony as that term is defined in section 101(a)(43)(B) of the Act, a an offense relating to illicit trafficking in a controlled substance, including a drug trafficking crime.

Section 237(a)(2)(B)(i) of the Act, in that, the respondent, after being admitted to the United States, was 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), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

On Behalf of the Respondent:
Matthew H. Green, Esq.
Law Offices of Matthew H. Green
130 W. Cushing Street
Tucson, Arizona 85701

On Behalf of the Department:
Assistant Chief Counsel
Department of Homeland Security
6431 South Country Club Road
Tucson, Arizona 85701

DECISION AND ORDER OF THE IMMIGRATION COURT

I. RELEVANT FACTS

Through its Notice to Appear and I-261, the Department of Homeland Security ("the Department") charges that the respondent is removable under the Immigration and Nationality Act ("INA" or "the Act") for having been convicted of an aggravated felony and a controlled substance offense. [Exs. 1, 2]; *see also* INA §§ 237(a)(2)(A)(iii); 237(a)(2)(B)(i). In support of these charges, the Department alleges the following: [1] the respondent is not a citizen or national of the United States; [2] he is a native and citizen of Jamaica; [3] he was admitted to the United States at New York, New York on or about November 6, 1994, as a lawful permanent resident; [4] on June 1, 1998, he was convicted in New Jersey Superior Court, County of Passaic, for the offense of Possession of a Controlled Dangerous Substance to wit: Marijuana with the intent to Distribute the Same Within 1000 Feet of School Property, in violation of N.J. STAT.

EXHIBIT # 2
SHK
IJ
9/19/16
DATE

ANN. ("N.J.S.A.") §§ 2C:35-5a, 2C:35-7, for which he was sentenced to serve 364 days in prison. [Exs. 1, 2].

The respondent admitted factual allegations one through three, denied allegation four, and contested the charges of removability. On December 3, 2010, Immigration Judge Bruce A. Taylor issued an oral decision sustaining both charges and ordering the respondent removed to Jamaica. [*See* Exs. 10, 11A, 11B, 11C]. The respondent filed a timely appeal with the Board of Immigration Appeals ("the Board"). On May 31, 2011, the Board dismissed the respondent's appeal. [Ex. 14]. The respondent then filed an appeal with the United States Court of Appeals for the Ninth Circuit. On May 15, 2014, the Court of Appeals issued an order returning the case to the Board. Subsequently, the Department filed an unopposed motion to remand with the Board. On September 25, 2014, the Court granted the Department's motion and remanded the case to the Court for further proceedings and the entry of a new decision. [Ex. 15].

The following is a list of documents that have been formally admitted as an exhibit in the Record of Proceeding and considered by the Court in making the present decision: Exhibit 1 is the Notice to Appear; Exhibit 2 is an I-261, Additional Charges of Inadmissibility/Deportability; Exhibit 3 is the Department's exhibits, tabs A-I, including a Form I-213, Record of Deportable/Inadmissible Alien and conviction documents for indictment number 98-03-0327-1; Exhibit 4 is the respondent's motion to terminate and an order granting the motion; Exhibit 5 is the Department's motion to reconsider; Exhibit 6 is the respondent's reply to the motion to reconsider; Exhibit 7 is an order denying the Department's motion; Exhibit 8 is the Department's exhibits, including sub-exhibits A-B; Exhibit 9 is a motion to continue; Exhibit 10 is a transcript of the respondent's prior immigration proceedings; Exhibit 11A is a transcript of Immigration Judge Taylor's December 3, 2010 oral decision; Exhibit 11B is a corrected copy of the transcript of Judge Taylor's December 3, 2010 oral decision; Exhibit 11C is the summary memorandum of Judge Taylor's December 3, 2010 oral decision; Exhibit 12 is the respondent's opening brief on appeal; Exhibit 13 is a change of venue and other procedural documents; Exhibit 14 is the Board's decision dated May 31, 2011; Exhibit 15 is the Board's decision dated September 25; Exhibit 16 is the respondent's exhibits, including sub-exhibits A-B; Exhibit 17 is the respondent's motion to terminate; Exhibit 18 is the Department's opposition to the motion to terminate; Exhibit 19 is the respondent's response brief to the Department's opposition to the motion to terminate; and Exhibit 20 is the respondent's supplementary brief in support of his motion to terminate.

II. PROVING EXISTENCE OF CRIMINAL CONVICTIONS

Pursuant to section 240(c)(3) of the Act, the Department has the burden to prove by clear and convincing evidence that the respondent is removable as charged. Where removability hinges on the existence of criminal convictions, this includes the burden of providing clear and convincing evidence of the fact of conviction. *See* INA § 240(c)(3)(A). To meet this burden, section 240(c)(3)(B) of the Act and 8 C.F.R. § 1003.41 set forth a non-exhaustive list of documents that are admissible as proof of a criminal conviction.

The Department submitted the judgment of conviction, indictment, plea form, and other documents for New Jersey Superior Court, Passaic County indictment number 98-03-0327-1.

[*See* Ex. 3, Tabs B-I]. These documents provide that the respondent pled guilty to and was convicted for the offense of Possession of a Controlled Dangerous Substance to wit: Marijuana with the intent to Distribute the Same Within 1000 Feet of School Property, in violation of N.J.S.A. §§ 2C:35-5a, 2C:35-7. [*Id.*]. He was sentenced to 364 days in prison for this offense. [Ex. 3, Tab B]. Accordingly, the Court finds that the Department has established the respondent's conviction by clear and convincing evidence.

III. REMOVABILITY

To determine whether an alien has been convicted for one of the many "generic" criminal offenses that carry certain immigration-related consequences, the Court must apply the framework laid out in *Taylor v. United States*, 495 U.S. 575, 602 (1990). Generally, the Court employs a categorical-type inquiry that compares the elements of the underlying statute to those of the generic offense at issue. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). This is done by examining the statute of conviction "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141 (2008); *see Descamps v. United States*, 133 S.Ct. 2276, 2283 (2013) ("The key . . . is elements, not facts."). In a narrow set of circumstances, however, the Court is permitted to go "beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction," such as jury instructions and the judgment of conviction, to determine what elements formed the basis of the underlying conviction. *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004). These are known as the "categorical" and "modified categorical" approaches, respectively.[1]

A. Aggravated Felony: Illicit Trafficking in a Controlled Substance

In accordance with section 237(a)(2)(A)(iii) of the Act, the Department argues that the respondent is removable from the United States for having been convicted of an aggravated felony. The term "aggravated felony" means, *inter alia*, "illicit trafficking in a controlled substance . . . , including a drug trafficking crime[.]" INA § 101(a)(43)(B). Pursuant to this definition, there are two potential routes for classifying a state drug-related conviction as an aggravated felony. *Daas v. Holder*, 620 F.3d 1050, 1054 (9th Cir. 2010). First, under the "illicit

[1] There are three possible scenarios that arise when applying this inquiry. First, if the elements of the statute are the same as, or narrower than, those of the generic offense, the offense is said to "categorical[ly]" constitute the generic offense. *Descamps*, 133 S.Ct. at 2281. Second, if the statute has alternative elements, some – but not all – of which encompass the elements of the generic offense, the statute is said to be "divisible" and the Court can examine the underlying record of conviction to determine which elements (generic or non-generic) formed the basis of the conviction. *See id.* at 2279; *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 353 (BIA 2014) ("*Chairez I*") (adopting *Descamps v. United States*, 133 S. Ct. 2276, 2281, 2283 (2013), in the immigration context), vacated in part by *Matter of Chairez-Castrejon*, 26 I&N Dec. 478, 484 (BIA 2015) ("*Chairez II*") (indicating that immigration judges should follow the *Chairez I* approach to divisibility "absent applicable circuit court authority to the contrary"). Third, if "the statute of conviction has an overbroad or missing element . . . , [an alien] convicted under that statute is *never* convicted of the generic crime." *Id.* at 2280 (emphasis added). This is so because the modified categorical approach cannot be employed to ascertain whether the offense was committed in such a way so as to satisfy the "missing element" or otherwise limit the overbroad element to conduct that does, in fact, satisfy the generic crime. *See id.* at 2292-93 (explaining that the modified categorical approach can be used "*only* to determine which alternative element in a divisible statute formed the basis of the [underlying] conviction" (emphasis added)).

trafficking in a controlled substance" prong, the state offense is an aggravated felony "if the crime contains a trafficking element." *Id.* (citing *Lopez-Jacuinde v. Holder*, 600 F.3d 1215, 1217 (9th Cir. 2010)). Additionally, under the "including a drug trafficking crime" prong, a state offense is an aggravated felony if it meets the generic definition of an offense that constitutes a felony under any of the federal drug laws. *Rendon v. Mukasey*, 520 F.3d 967, 974 (9th Cir. 2008); 18 U.S.C. § 924(c)(2).

The respondent was convicted under N.J.S.A. § 2C:35-7, for distributing, dispensing, or possessing with intent to distribute a controlled substance within 1,000 feet of school property. [Ex 3.]. The statute reads in pertinent part:

> Any person who violates subsection a. of N.J.S.A. § 2C:35-5 by distributing, dispensing or possessing with intent to distribute a controlled dangerous substance or controlled substance analog while on any school property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of such school property or a school bus, or while on any school bus, is guilty of a crime of the third degree

N.J.S.A. § 2C:35-7 (1998). In the present case, the Department submitted the judgment of conviction, indictment, plea form, and other documents related to the respondent's conviction. [*See* Ex. 3, Tabs B-I]. The judgment of conviction states that the respondent pled guilty to and was convicted for the offense of Count 3: "Poss CDS w/int Dist. w/in 1000 ft school Prop [sic]," in violation of N.J.S.A. §§ 2C:35-5a and 2C:35-7. [Ex. 3, Tab B]. Additionally, the indictment provides that the respondent "did knowingly or purposely possess a certain controlled dangerous substance, namely marijuana, with intent to distribute same within 1000 feet of school property being used for school purposes." [Ex. 3, Tab C].[2] Taking the language of the indictment in conjunction with the judgement of conviction, the Court finds that the respondent's conviction was necessarily based on distributing, dispensing, or possessing with intent to distribute marijuana within 1,000 of school property.[3] Having established that the record of conviction unequivocally provides the basis for the respondent's conviction, it is necessary to turn to whether the conviction satisfies the respective generic federal definitions.

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[2] Under the modified categorical approach, an Immigration Judge may not consult the charging documents alone but "may consider the charging documents in conjunction with the plea agreement, the transcript of a plea proceeding, or the judgment to determine whether the defendant pled guilty to the elements of the generic crime." *United States v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002) *overruled on other grounds by United States v. Vidal,* 504 F.3d 1072 (9th Cir. 2007) (en banc).

[3] The respondent argues that the mention of "controlled dangerous substances" in section 2C:35-7 refers to a list of alternative *means of commission*, rather than alternative *elements*, and therefore is categorically overbroad and not divisible under the modified categorical approach. *See Descamps*, 133 S.Ct. at 2289. The Court is not persuaded by this reading of the statute, as the relevant jury instructions make clear that jurors are instructed as to the *specific* controlled dangerous substance at issue and must find the defendant guilty under that specific provision. *See* N.J. JURY. INST. CRIM. § 2C:35-7 (Approved Jan. 6, 1992) ("the elements [of the offense] are: (1) S_____ is (*insert appropriate* controlled dangerous substance or controlled substance analog)" (emphasis added)); *see also Descamps*, 133 S.Ct. at 2290 ("divisible statutes enable a sentencing court to conclude that a jury (or judge at a plea hearing) has convicted the defendant of every element of the generic crime. A prosecutor charging a violation of a divisible statute must generally *select the relevant element from its list of alternatives*." (emphasis added)).

As it relates to the first illicit trafficking prong, the statute of conviction must involve "some sort of commercial dealing." *Rendon*, 520 F.3d at 974. That is, the conviction must be based on "activity of a business or merchant nature, thus excluding simple possession or transfer *without consideration*." *Steele v. Blackman*, 236 F.3d 130, 135 (3d Cir. 2001) (emphasis added); *see also Dias v. Holder*, 450 Fed. App'x. 660, 661 (9th Cir. 2011). A conviction under N.J.S.A. § 2C:35-7 does not constitute an aggravated felony under this prong because it does not necessarily involve a commercial dealing. The statute covers three forms of conduct: distribution, dispensation and possession with intent to distribute. "Distribute" is defined as "to deliver other than by administering or dispensing a controlled substance or controlled substance analog." N.J.S.A. § 2C:35-2. "Deliver" is therein defined as the "actual, constructive, or attempted transfer from one person to another of a controlled dangerous substance analog, whether or not there is an agency relationship." N.J.S.A. § 2C:35-2. Nothing in the definition requires any remuneration or exchange of consideration. Indeed, the jury instructions relating to distribution state: "It is not necessary that the drugs be transferred in exchange for payment or promise of payment of money or anything of value." N.J. JURY. INST. CRIM. § 2C:35-5, *citing* N.J.S.A. § 2C:35-2; *New Jersey v. Heitzman*, 209 N.J. Super 617, 621 (App. Div. 1986), *aff'd* 107 N.J. 603 (1987). Because distribution under the New Jersey statute does not demonstrate by its elements that a commercial transaction took place, it logically follows that the lesser offense of possession with intent to distribute similarly does not. Thus, neither distribution nor possession with intent to distribute will constitute, by their elements as defined in the statute, a "commercial transaction." *L-G-H-*, 26 I&N Dec. at 371-2 n.9.

Furthermore, dispensation under the New Jersey statutes similarly does not require the exchange of anything of value. The definition provides that "'[d]ispense' means to deliver a controlled dangerous substance or controlled substance analog to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling or compounding necessary to prepare the substance for that delivery." N.J.S.A. § 2C:35-2. The definition of "deliver" similarly does not require the exchange of value. As such, dispensation does not necessarily involve a commercial transaction because it does not require the exchange of consideration or money.

Therefore, because N.J.S.A. § 2C:35-7 does not require a commercial transaction, the statute of conviction is overbroad. The statute is not divisible, as none of the alternative means of committing the offense render an applicant removable because none require a commercial transaction. *See Descamps*, 133 S. Ct. at 2283. The respondent's conviction is therefore not an aggravated felony under the first prong of section 101(a)(43)(B) of the Act.

Because the respondent's conviction does not qualify under the first prong, the Court will consider whether it nonetheless falls under the second prong. As noted above, this prong requires that the offense meet the generic definition of a crime proscribed by any federal drug law and the offense be one that constitutes a felony under federal law. *See Lopez*, 549 U.S. at 60. Specifically, federal law states that it is unlawful for a person to knowingly and intentionally "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). The respondent's conviction under N.J.S.A. § 2C:35-7 appears to fall within the definition of this crime because, as stated above, the conviction was necessarily based on the respondent distributing, dispensing, or possessing with

intent to distribute marijuana.[4] However, the CSA creates a felony exception for an offense that involves less than five grams of marijuana and treats such offense as a misdemeanor. *See* 8 U.S.C. § 860(a). The respondent correctly argues that the New Jersey statute does not include this exception and an individual could be convicted under N.J.S.A. § 2C:35-7 for possession with intent to distribute or dispense less than five grams of marijuana near or on school property. Consequently, the New Jersey statute appears to be a categorical mismatch.

However, to fail the categorical test, there must exist "a realistic probability, not just a theoretical possibility, that the State would apply its statute to conduct" outside the relevant generic standard. *Moncrieffe*, 133 S. Ct. at 1685; *see Chairez II*, 26 I&N Dec. at 484 (finding no realistic probability that a State statute would be applied in a manner not constituting a removable offense where the respondent identified no decision where anyone had been so prosecuted); *Ferreira*, 26 I&N Dec. at 420-21. The respondent did not provide any evidence showing that the State applies the statute to offenses involving less than five grams of marijuana. *See Matter of Mendoza Osorio*, 26 I&N Dec. 703, 707, 711 (BIA 2016) (finding that respondent did not meet his burden of showing a realistic probability that New York state applied the statute of conviction to conduct outside the definition of child abuse); *Chairez II*, 26 I&N Dec. at 484; *Ferreira*, 26 I&N Dec. at 419. The Court therefore finds that there is not a realistic probability that the State prosecutes individuals under this statute for distributing or dispensing less than five grams of marijuana. Accordingly, even though N.J.S.A. § 2C:35-7 does not have the five-gram felony exception found in the CSA, the New Jersey statute is still a categorical match to the felony standard set out in the CSA. Therefore, the respondent's conviction under N.J.S.A. § 2C:35-7 is categorically an aggravated felony under the second prong of section 101(a)(43)(B) of the Act. Accordingly, the Court will sustain the charge under section 237(a)(2)(A)(iii) of the Act.

B. Offense Relating to Controlled Substances

Section 237(a)(2)(B)(i) of the Act renders an alien removable from the United States if he or she has been convicted of any law or regulation of a State, the United States, or a foreign country "relating to" a controlled substance. To establish removability, the Department must prove that the drug underlying the respondent's state conviction is covered by the federal Controlled Substances Act ("CSA"). *Mellouli v. Lynch*, 135. S. Ct. 1980, 1991-94 (2015); *Madrigal-Barcenas v. Holder*, 797 F.3d 643, 644 (9th Cir. 2015). However, an alien that otherwise falls within this provision is excepted from removability if his or her conviction was for "a single offense involving possession for one's own use of thirty grams or less of marijuana." INA § 237(a)(2)(B)(i). For the reasons that follow, the Court finds that the respondent is removable under this provision.

Here, the respondent clearly falls within the purview of this section. The respondent accurately notes that the New Jersey list of controlled dangerous substances is not an exact match for the federal controlled substances schedule contained within the CSA, as the New Jersey list contains at least one substance that the CSA does not. *Compare* N.J.S.A. § 24:21-5d *with* 21 U.S.C. § 812. As noted above in footnote, however, the New Jersey statute is divisible

[4] Marijuana is a "controlled substance" under federal law. 21 U.S.C. § 812, Schedule I (c)(10); *see also id.* § 802(6).

with respect to the controlled substance involved in the offense. The applicable jury instructions provide that jurors are instructed as to the *specific* controlled dangerous substance at issue. *See* N.J. JURY. INST. CRIM. § 2C:35-7 (Approved Jan. 6, 1992) ("the elements [of the offense] are: (1) S_____ is (*insert appropriate* controlled dangerous substance or controlled substance analog)" (emphasis added)). Therefore, the Court has found that the respondent's conviction under N.J.S.A. § 2C:35-7 was necessarily based on distributing, dispensing, or possessing with intent to distribute marijuana within 1,000 of school property. Marijuana is a "controlled substance" under federal law. 21 U.S.C. § 812, Schedule I (c)(10); *see also id.* § 802(6). Thus, it is clear that the respondent was convicted for violating "a law or regulation of a State . . . relating to a controlled substance." INA § 237(a)(2)(B)(i); *see also Madrigal-Barcenas v. Holder*, 797 F.3d at 644.

Moreover, the respondent does not fall within the exception to removability. *See Matter of Davey*, 26 I&N Dec. 37, 39-40 (BIA 2012). As the Board of Immigration Appeals ("the Board") has explained, this exception only applies to "a specific type of conduct (possession for one's own use) committed on a specific number of occasions (a "single" offense) and involving a specific quantity (30 grams or less) of a specific substance (marijuana)." *Id.* at 39 (explaining that this is a fact-specific inquiry).[5] The factual basis for the respondent's guilty plea provides that his conviction involved five pounds of marijuana. [Ex. 18, Tab A at 14]. The respondent therefore fails to qualify under this exception, as the conduct underlying his conviction did not involve the simple possession of *less than 30 grams* of marijuana. Accordingly, because the respondent cannot rely on this exception to avoid removability, the Court sustains the Department's charge under section 237(a)(2)(B)(i) of the Act.

IV. RELIEF

Having been convicted of an aggravated felony, the respondent is statutorily ineligible for asylum, cancellation of removal, and post-conclusion voluntary departure. *See* INA §§ 208(b)(2)(B)(i), 240A(a)(3), 240B(b)(1)(C).

[5] Certain portions of the Act list "offenses using language that almost certainly does not refer to generic crimes but refers to specific circumstances." *Nijhawan v. Holder*, 557 U.S. 29, 37 (2009). In these situations, to apply a categorical approach would leave the specific circumstances with little, if any, meaningful application. *Id.* Thus, the Court turns to the conviction documents to determine whether this exception applies.

V. CONCLUSION

In light of the aforementioned discussion, the following orders shall be entered:

ORDERS: **IT IS HEREBY ORDERED THAT** the Department's charge of removability under section 237(a)(2)(A)(iii) of the Act is **SUSTAINED.**

IT IS FURTHER ORDERED THAT the Department's charge of removability under section 237(a)(2)(B)(i) of the Act is **SUSTAINED**.

IT IS FURTHER ORDERED THAT any and all applications for cancellation of removal under sections 240A(a) or 240A(b), asylum under section 208, and voluntary departure under section 240B(b) are **PRETERMITTED.**

September 19, 2016
Date

Sean H. Keenan
U.S. Immigration Judge

CERTIFICATE OF SERVICE
SERVICE BY: Mail (M) Personal Service (P)
TO: [ ] DHS [ ] Alien [ ] Alien's Attorney
Date: _____ By: _____ (Court Staff)