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Name: ORTEGA, IANKEL

A 041-595-509

Date of this notice: 12/1/2017

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:
Liebowitz, Ellen C
Malphrus, Garry D.
Mullane, Hugh G.

Userteam: Docket

File: A041 595 509 – New York, NY

Date: DEC - 1 2017

In re: Iankel ORTEGA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Paige P. Austin, Esquire

ON BEHALF OF DHS: Kamephis Perez
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals the Immigration Judge's decision dated January 5, 2016, terminating removal proceedings. The respondent has filed a brief in opposition to the DHS's appeal. The appeal will be dismissed.

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) (2017). We review questions of law, discretion, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a native and citizen of the Dominican Republic, and lawful permanent resident, who pled guilty on June 22, 2010, and June 27, 2011, to criminal possession of a controlled substance in the seventh degree in violation of New York Penal Law section 220.03 (IJ at 1; Exhs. 1, 2-Tabs B and C).

We agree with the Immigration Judge's ultimate determination that the respondent's convictions are not controlled substance related offenses under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i), and that the respondent is not removable as charged.

During the pendency of the respondent's appeal, the United States Court of Appeals for the Second Circuit issued a decision which controls the respondent's case. *See Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017). In *Harbin*, the court held that fifth-degree criminal sale of a "controlled substance" under section 220.31 of the New York Penal Law is overbroad and indivisible when compared to the aggravated felony definition. *See Harbin v. Sessions*, 860 F.3d at 58. In particular, it held that NYPL § 220.31 criminalizes a controlled substance, human chorionic gonadotropin, which is not criminalized under the Federal Controlled Substance Act ("CSA") schedule, and thus NYPL § 220.31 was not a categorical match to the removability ground. *See Harbin v. Sessions*, 860 F.3d at 68. The Second Circuit further held that NYPL § 220.31 "defines a single crime and is therefore an 'indivisible' statute." *See Harbin v. Sessions*, 860 F.3d at 61.

Although the DHS asserts that we should not recognize *Harbin v. Sessions*, we are bound by the Second Circuit's decision as it is the law of the controlling Federal Circuit (DHS Reply to Supplemental Br. at 2-7; Respondent's Supplemental Br. at 2-5). *See Matter of Salazar*, 23 I&N Dec. 223, 235 (BIA 2002). We agree with the respondent that because NYPL §§ 220.31 and 220.03 define "controlled substance" with reference to the same statute, *Harbin v. Sessions* controls the respondent's case (Respondent's Supplemental Br. at 3). NYPL § 220.03 is not a categorical match to section 237(a)(2)(B)(i) of the Act because the New York statute defining controlled substance is overbroad when compared to the definition of controlled substance as defined in the CSA. *See Harbin v. Sessions*, 860 F.3d at 68. NYPL § 220.03 also defines a single crime and is an indivisible statute regarding the substance involved. *See Harbin v. Sessions*, 860 F.3d at 64-68. Because the respondent's offense is not divisible by controlled substance, we cannot apply the modified categorical approach in this instance. *See generally Descamps v. United States*, 133 S. Ct. 2276 (2013).

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

Ellen Priebowitz
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
201 VARICK STREET
NEW YORK, NEW YORK

File No.: A 041-595-509

In the Matter of:	:	
ORTEGA, Iankel	:	**IN REMOVAL PROCEEDINGS**
The Respondent.	:	

CHARGES: INA § 237(a)(2)(B)(i) Controlled Substance Conviction

APPLICATIONS: 8 C.F.R. § 1239.2(c) Motion to Terminate Proceedings

ON BEHALF OF RESPONDENT
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ON BEHALF OF DHS
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DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Iankel Ortega (Respondent) is a native and citizen of the Dominican Republic. (Exs. 1; 2, Tab A). He was admitted to the United States (U.S.) on or about February 6, 1998 in New York, NY as a lawful permanent resident (LPR). (Ex. 1). On June 22, 2010, in the Criminal Court of the City of New York, County of New York, he pled guilty to Criminal Possession of a Controlled Substance in the Seventh Degree (CPCS-7), in violation of New York Penal Law (NYPL) § 220.03. (Exs. 1.1; 2, Tab B). On June 27, 2011, in the Criminal Court of the City of New York, County of New York, he pled guilty to CPCS-7, in violation of NYPL § 220.03. (Exs. 1.1; 2, Tab C).

On October 7, 2015, the Department of Homeland Security (DHS or Department) served Respondent with a Notice to Appear (NTA), alleging that he is removable pursuant to INA § 237(a)(2)(B)(i) for having been convicted of a controlled substance offense. (Ex. 1). On October 21, 2015, DHS filed an I-261 amending allegations four and five of the NTA and adding

allegations six and seven. (Ex. 1.1). Respondent, through his counsel, admitted to allegations one through three in the NTA, admitted allegations four and six in the I-261, denied allegations five and seven in the I-261, and denied the charge of removability. Respondent's Hearing (Resp. Hrng.), (Oct. 21, 2015). The Court did not designate a country for removal at this time. *See* INA § 241(b)(2)(D). Respondent requested time to brief the issue of removability before the Court made its decision, which was granted. *Id.*

On October 28, 2015, Respondent submitted a motion to terminate proceedings arguing that DHS could not show by clear and convincing evidence that his two misdemeanor convictions were categorically controlled substance offenses involving a federally scheduled drug. *See* Respondent's Motion to Terminate (Resp. Mt.) at 1. Additionally, he argued that NYPL § 220.03 is not divisible, which requires a categorical approach, but if in the alternative the Court found the statute was divisible, the unconverted criminal court complaints that were submitted by DHS do not form part of the conviction record. *Id.* On November 5, 2015, DHS submitted its opposition to Respondent's motion to terminate proceedings. *See* DHS's Opposition Brief (DHS's Brief). On December 10, 2015, at a Master Calendar Hearing, both parties argued the issue of removability, and the Court decided to withhold its decision regarding the disputed factual allegations and the charge of removability.

This decision addresses the issue of Respondent's removability pursuant to INA § 237(a)(2)(B)(i). The Court finds that DHS has not met its burden to establish his removability by clear and convincing evidence. Therefore, Respondent's motion to terminate the present proceedings will be granted.

II. EXHIBITS

Ex. 1: NTA, served October 7, 2015
Ex. 1.1: I-261, served October 21, 2015
Ex. 2: DHS submission of evidence regarding Respondent's convictions, Tabs A-D

III. LEGAL STANDARDS & ANALYSIS

a. Motion to Terminate

DHS bears the burden of establishing by clear and convincing evidence that an alien who has been admitted to the U.S. is removable as charged. *See* INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a). Respondent has been charged with removability pursuant to INA § 237(a)(2)(B)(i) for having been convicted of a controlled substance offense. (Exs. 1; 1.1). In order to support this charge, DHS cites to his two convictions for CPCS-7, in violation of NYPL § 220.03. *See* (Ex. 2, Tabs B and C).

i. Crimes relating to a Controlled Substance

To sustain the charge of removability under INA § 237(a)(2)(B)(i), DHS must establish by clear and convincing evidence that Respondent was convicted of a crime relating to a controlled substance, as defined in § 102 of the Controlled Substances Act (CSA) (21 U.S.C. §

802). INA § 237(a)(2)(B). A controlled substance is any substance that appears in Schedules I-V under 21 U.S.C. § 812. *See* 21 U.S.C. § 802(6).

1. *Categorical Approach*

Respondent pled guilty twice to CPCS-7 under NYPL § 220.03. *See* (Ex. 2, Tabs B and C). Under NYPL § 220.03, a criminal defendant is guilty of CPCS-7, a class A misdemeanor, when "he or she knowingly and unlawfully possesses a controlled substance." Initially, under the categorical approach, Respondent's statute of conviction appears to be a match to his removability ground because they both contain the term "controlled substance." He, however, argues that there is no categorical match despite this similarity in terms. He notes that, in the New York statute and the removability charge, the term "controlled substance" refers to the New York and federal schedules of controlled substances, respectively. *See* Resp. Mt. at 8-9. Furthermore, the New York and federal schedules of controlled substances do not match because "chorionic gonadotropic" is a controlled substance listed on the New York schedule, but it is not listed on the federal schedule in the CSA. *Id.*; NYPL § 220.00; New York Public Health Law (NYPHL) § 3306, Schedule III(g); 21 U.S.C. § 802 (6) (defining "controlled substance" as "a drug . . . included in schedule I, II, III, IV, or V"); 21 U.S.C. § 812(c) (Schedules I-V). As a result of this difference in the schedules, NYPL § 220.03 defines "controlled substance" more broadly than 21 U.S.C. § 802.

Before the Court concludes that Respondent's statute of conviction is not a categorical match to the removability ground, there must first be a "realistic probability" that New York State prosecutes criminal defendants for the possession or sale of "chorionic gonadotropic." *See Matter of Ferreira*, 26 I&N Dec. 415, 420-21 (2014) (remanding for application of the realistic probability test where a State statute covered a controlled substance not included in the Federal controlled substance schedules, and noting that the "'realistic probability test' is part of the initial inquiry that an Immigration Judge must undertake when applying the categorical approach"). The Court is aware that *Mellouli v. Lynch* suggests that a mismatch between State and federal controlled substance schedules causes the categorical approach to fail. 135 S.Ct. 1980, 1987-88 (2015). However, the Supreme Court stated in *Mellouli* that it was not deciding whether the BIA applied that categorical approach correctly in *Matter of Ferreira*. 135 S. Ct. at fn. 8 ("The Government acknowledges that *Ferreira* 'assumed the applicability of [the *Paulus*] framework.' Brief for Respondent 49. Whether *Ferreira* applied that framework correctly is not a matter this case calls upon us to decide."). Accordingly, *Ferreira* is still binding precedent because the Supreme Court purposefully left *Ferreira* untouched in *Mellouli*. Therefore, the Court will analyze Respondent's conviction and apply the realistic probability standard as outlined in *Ferreira*.

Here, Respondent submitted indictments for the sale of "chorionic gonadotropin" against Claire Godfrey from February 13, 2007; grand jury indictments from January 25, 2007 against Dr. Robert Carlson, Glen Stephanos, and George Stephanos and certificates of dispositions from those cases; and indictments Naomi Loomis, Robert "Stan" Loomis, Kenneth Loomis, Kirk Calvert, and Tony Palladino from June 16, 2010. *See* Resp. Mt. (Tabs A-C, at 29-190). These submissions demonstrate a realistic probability that New York State prosecutes criminal

defendants for possessing or selling "chorionic gonadotropin." Therefore, the realistic probability test under *Ferreira* has been met, and the categorical approach analysis fails.

2. *Divisibility*

Once the categorical approach analysis fails, the Court must next assess whether the statute of conviction is divisible, lending itself to a modified categorical approach analysis. As previously discussed, in the Second Circuit, the Court must conduct a divisibility analysis under *Descamps v. United States*, 133 S. Ct. 2276, 2281-83 (2013). *See Flores v. Holder*, 779 F.3d 159 (2d Cir. 2015). A statute is divisible, so as to warrant a modified categorical analysis, only if: (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction; and (2) at least one (but not all) of those listed offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard. *Descamps* at 2281-83; see *Matter of Chairez-Castrejon (I)*, 26 I&N Dec. 349, 353 (BIA 2014) (rejecting *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012) "to the extent that it is inconsistent with [the Board's] understanding of the Supreme Court's approach to divisibility in *Descamps*"). More importantly, the modified categorical approach does not apply merely because the elements of a crime can sometimes be proved by reference to *conduct* that fits the generic standard; under *Descamps*, such crimes are merely "overbroad," not divisible. *Descamps* at 2281-83; *United States v. Beardsley*, 691 F.3d 252, 268-69 (2d Cir. 2012). Thus, the modified categorical approach may *only* be used when a Respondent has been convicted under a divisible statute. *Descamps* at 2281.

NYPL § 220.03 satisfies the first divisibility requirement. The New York statute references a "controlled substance" which could be any substance on the New York schedule. *See* NYPHL § 3306. Under *Descamps*, the "elements" of an offense require jury unanimity, while the "means" of committing an offense do not.[1] 133 S. Ct. at 2288-90. Here, the specific controlled substance possessed by a criminal defendant is an element of NYPL § 220.03, and not a means of committing the offense, because it requires jury unanimity. *People v. Kalin*, 12 N.Y.3d 225, 229 (2009) (including "controlled substance" as an element of NYPL § 220.03).

Model jury instructions for NYPL § 220.03 make clear that the controlled substance involved is an element of the offense, which must be specified and proven beyond a reasonable doubt. *See* Criminal Jury Instructions 2d (New York) ("CIJ2d") § 220.03, *available at* http://www.nycourts.gov/judges/cji/2-PenalLaw/220/art220hp.shtml. Specifically, the instructions require that the criminal defendant must have possessed a *specific controlled substance* and did so *knowingly* and *unlawfully*. *Id.* Therefore, NYPL § 220.03 satisfies the first divisibility requirement because the statute defines a single offense by reference to disjunctive sets of "elements" (i.e. "controlled substance"), more than one combination of which could support a conviction. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

[1] In *Matter of Chairez and Sama*, 26 I&N Dec. 686 (A.G. 2015), the Attorney General is reviewing *Descamps's* definition of "element" as a fact about the crime that a jury must find "unanimously and beyond a reasonable doubt." *Chairez and Sama*, 26 I&N at 686 ("Does Descamps require that a criminal statute be treated as 'divisible' for purposes of the modified categorical approach only if, under applicable law, jurors must be unanimous as to the version of the offense committed?"); *see Descamps*, 133 S. Ct. at 2288-90. During the pendency of the Attorney General's review, the Board's decisions, or portions thereof, that address that specific question only shall not be regarded as precedential or binding by Immigration Judges or the Board.

NYPL § 220.03 also satisfies the second divisibility requirement. Under the second requirement, at least one (but not all) of the combinations of disjunctive elements (i.e. "controlled substance") is a categorical match to the relevant generic standard, the CSA. For example, cocaine is a substance on both the New York and federal controlled substances schedules. 21 U.S.C § 812(c); NYPHL § 3306. However, "chorionic gonadotropin" is on the New York schedule, but not the federal schedule. *Id.* Therefore, some combinations of the disjunctive sets of elements trigger removability while others do not.

For the reasons discussed, NYPL § 220.03 is divisible and requires a modified categorical approach analysis. The Court will examine the record of conviction to determine whether Respondent's conviction necessarily involved, as an element of the offense, a controlled substance under the CSA. *Moncrieffe* at 1684; *see also Coronado v. Holder*, 759 F.3d 977, 983 (9th Cir. 2014)[2] (finding that a California State conviction for possession of controlled substances required a modified categorical approach analysis because one substance was scheduled under California law but not federal law).

3. *Modified Categorical Approach*

The "modified categorical approach" allows a court to look beyond the statute, to the record of conviction, for the limited purpose of determining whether the alien's *conviction*, not the alien's *conduct*, falls under the part of the statute that would render the alien removable. *See Descamps*, 133 S. Ct. 2276; *Dickson v. Ashcroft*, 346 F.3d 44, 48-49 (2d Cir. 2003) (citing *Kuhali v. Reno*, 266 F.3d 93, 106-07 (2d Cir. 2001)); *Matter of Vargas-Sarmiento*, 23 I&N Dec. 651, 654 (BIA 2004), petition for review denied by *Vargas-Sarmiento v. U.S. Dep't of Justice*, 448 F.3d 159, 162 (2d Cir. 2006). Because the modified categorical approach is a means to implement the categorical approach, it is an elements-based inquiry, not a facts-based search. *Moncrieffe v. Holder* at1684-85 (under the categorical approach, "we examine what the state conviction necessarily involved, not the facts underlying the case"); *see Descamps* at 2292-93.

Under the modified categorical approach, examination of "extra-statutory materials," such as the record of conviction, is permitted to elucidate the relevant elements comprising the conviction. *Descamps* at 2283-85; *Moncrieffe* at 1684; *Shepard v. United States*, 544 U.S. 13, 20 (2005); *Taylor v. United States*, 495 U.S. 575, 602 (1990); *Dickson*, 346 F.3d at 52. The record of conviction includes "those documents enumerated in the regulations to be admissible evidence in proving a criminal conviction in any proceeding before an Immigration Judge." *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 325-26 (BIA 1996); *see also* INA § 240(c)(3)(B)(i)-(vii). Additionally, the record of conviction includes "the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or 'some comparable judicial record' of the factual basis for the plea." *Id.*; *see also Descamps* at 2284 (citing *Shepard*, 544 U.S. at 26; *Taylor*, 495 U.S. at 602); *Moncrieffe* at 1684 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009)); *Dickson*, 346 F.3d at 52. A police report, however, is not part of the record of conviction. *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 465 (BIA 2011). Here, the Court is particularly concerned with discovering what specific controlled

[2] While the *Coronado* decision is not binding, this Court finds that it is instructive in light of the highly analogous circumstances under which the decision was rendered.

substance Respondent pled guilty to possessing as part of his plea agreements on June 22, 2010 and June 27, 2011.

When analyzing a conviction sustained after a jury trial, the court's inquiry is limited to documents establishing the facts necessary to satisfy the statutory elements of a conviction. *Descamps* at 2283-85; *Moncrieffe* at 1684. In other words, the court cannot "look beyond the elements to the evidence or, otherwise said, to explore whether a person convicted of one crime could also have been convicted of another, more serious offense." *Descamps* at 2292. For example, the court can rely on an "indictment or information and jury instructions" to show what the defendant was charged with and what "the jury necessarily had to find" to sustain a conviction. *Taylor*, 495 U.S. at 602. By contrast, where a defendant pleads guilty, the court can examine "the plea agreement, plea colloquy or 'some comparable judicial record' of the factual basis for the plea." *Moncrieffe* at 1685 (citing *Nijhawan*, 557 U.S. at 35 (citing *Shepard*, 544 U.S. at 26)). Allegations in a charging document, by themselves, however, cannot establish the conduct to which Respondent "actually and necessarily pleaded." *See Akinsade v. Holder*, 678 F.3d 138, 144 (2d Cir. 2012) (citing *Wala v. Mukasey*, 511 F.3d 102, 108 (2d Cir. 2007)).

In New York, there are several types of accusatory instruments in a misdemeanor case, including, *inter alia*, an information and a misdemeanor complaint. Both an information and a misdemeanor complaint are verified written accusations, charging the defendant with at least one offense which is not a felony. *See* New York Criminal Procedure Law (NYCPL) § 100.10(1), (4). Nonetheless, a criminal complaint may not be part of the record of conviction because a criminal complaint is not always the charging document. *See Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 467 (BIA 2010); *see also Thomas v. Att'y Gen. of U.S.*, 625 F.3d 134, 145 (3d Cir. 2010). In New York, a criminal defendant has the right to be prosecuted by an information, a document with higher evidentiary standards than a complaint. *See* NYCPL §§ 100.10(1), (4), 170.65(1). Thus, a criminal complaint becomes a "charging document" only if it has been converted into an information. NYCPL § 170.65(1) (a misdemeanor complaint is converted into an information when it is supplemented by a "supporting deposition" and other documents that "taken together satisfy the requirements for a valid information"). Alternatively, a complaint can constitute a charging document if the defendant has expressly waived the right to be prosecuted by an information. NYCPL § 170.65(3); *see also* NYPCL § 100.10(4). Criminal courts may not assume or infer a waiver of this right. *People v. Weinberg*, 315 N.E.2d 434, 435 (N.Y. 1974); *People v. Kalin*, 12 N.Y.3d at 228-29.While not binding on this court, the Third Circuit has concluded that it was unclear whether a police officer's written statement constituted "the relevant charging documents under New York law" because a "misdemeanor complaint 'must...be replaced by an information' unless the defendant 'waive[s] prosecution by information and consent[s] to be prosecuted upon the misdemeanor complaint.'" *Thomas*, 625 F.3d at 145 (quoting NYCPL §§ 170.65(1), (3)) (alterations in original).

Here, DHS alleges that the records of conviction for both the June 22, 2010 and June 27, 2011 convictions consist of a certificate of disposition (certificate), a misdemeanor complaint, court docket sheets, and an FBI Rap Sheet. (Ex. 2, Tabs B, C, and D). Neither certificate nor the Rap Sheet lists what drug, if any, Respondent pled guilty to possessing for either conviction. Both misdemeanor complaints, however, indicate that he possessed "Alprazolam" (Xanax), a Schedule IV drug under the CSA and the NYPL. 21 U.S.C § 812(c); NYPHL § 3306 (Schedule

IV(c)). Based on the documents provided by DHS, the Court finds that DHS failed to meet its burden that either of the misdemeanor complaints should be included as part of the records of conviction.

First, both of the certificates only list the statute of the crime to which Respondent pled, NYPL § 220.03, and does not indicate anywhere what specific controlled substance he allegedly pled guilty to possessing under the statute. (Ex. 2, Tab C at 5); *see Dulal-Whiteway v. U.S. Dep't of Homeland Sec.*, 501 F.3d 116, 131 (2d Cir. 2007) *abrogated on different grounds by Nijhawan v. Holder*, 557 U.S. 29, 129 S. Ct. 2294, 174 L. Ed. 2d 22 (2009) ("For convictions following a plea, the BIA may rely only upon facts to which a defendant actually and necessarily pleaded in order to establish the elements of the offense, as indicated by a charging document, written plea agreement, or plea colloquy transcript."); *Akinsade*, 678 F.3d at 144; *James v. Mukasey*, 522 F.3d 250, 258 (2d Cir. 2008); *Wala*, 511 F.3d at 108. To prove that a Respondent has committed a crime involving a controlled substance, DHS must show that the record of conviction lists a controlled substance that is found on the CSA, which it cannot do here with either of the certificates alone.

Second, DHS submitted a misdemeanor complaint for each of the two convictions that are not within the record of conviction. The first misdemeanor complaint corresponds to initial arrest charges made on February 25, 2010 for Criminal Sale of a Controlled Substance in the Third Degree in violation of NYPL § 220.39(1), which states that "Deponent is informed by Under Cover 206, that...informant asked defendant for sticks (Xanax/Alprazolam/Schedule IV) and defendant stated in sum and substance that each pill was $5." (Ex. 2, Tab B). DHS argues that this complaint, as it was later amended on April 29, 2010 to reflect that the charge was reduced to CPCS-7 (NYPL § 220.03), should be admissible to the Court. *See* DHS's Brief at 5. Respondent's counsel argues that it is neither a reliable document as to what Respondent pled to nor has it been proven to be a valid charging document or even an information under the New York Criminal Procedure Law (NYCPL). Resp. Mt. at 27-28; *see also* Resp. Hrng., (Dec. 10, 2015).

The second misdemeanor complaint corresponds to initial arrest charges made on November 13, 2010 for Criminal Sale of a Controlled Substance in the Fifth Degree (NYPL § 220.31), Criminal Sale of a Controlled Substance in the Fourth Degree (NYPL § 220.34), and Criminal Possession of a Controlled Substance in the Fifth Degree (NYPL § 220.06(1)), which states that "Deponent...searched defendant's person and recovered,..., 4 rectangular white pills, bearing the imprint '372 2' and a prescription bottle." The complaint further states that the Deponent with "his professional training as a police officer in the identification of drugs...observation of the packaging which is characteristic of this type of drug, and consultation of the drugs.com website, which indicates that white rectangular pills, bearing the imprint "372 2" are Alprazolam (Xanax), a controlled substance." (Ex. 2, Tab C). The same arguments for and against the inclusion of the first misdemeanor complaint into the record of conviction were made with respect to the second misdemeanor complaint, namely that it was later amended on June 27, 2011 to reflect that the charge was reduced to CPCS-7 (NYPL § 220.03), but that it again was not shown to have been converted into an information or that it is a valid charging document as presented. The Court agrees with Respondent for both misdemeanor complaints.

The Court cannot rely on the misdemeanor complaints, as provided, as part of the records of conviction to which it can look to during the modified categorical analysis. DHS failed to provide any supporting evidence indicating that Respondent waived his right to prosecution by information under NYPCL §170.65(3) or that the complaints were converted into informations under the requirements of NYCPL § 170.65(1) for either conviction. *See* (Ex. 2, Tabs B and C); *see also* Resp. Mt. at 23-27; Resp. Hrng., (Dec. 10, 2015). Without such evidence, a misdemeanor complaint cannot be considered a valid charging document under New York law and thereby cannot be included as part of the record of conviction. *See* NYCPL §§ 100.10(4), 170.65(1), 170.65(3); *Moncrieffe* at 1684-85.

Since the misdemeanor complaint cannot be included as part of the record of conviction and no other evidence was submitted such as a plea colloquy or some other comparable judicial record to establish the facts of the plea agreement, the Court finds that DHS has failed to demonstrate that the record of conviction evidences which controlled substance Respondent "actually and necessarily pleaded" to possessing. *See Dulal-Whiteway*, 501 F.3d at 131*Akinsade* at 144 (quoting *Wala* at 108); *Moncrieffe* at 1685. As previously discussed, the *specific* controlled substance is an element of the offense under NYPL § 220.03 and is outcome determinative of whether his conviction categorically matches his removability charge under INA § 237(a)(2)(B)(i). Therefore, with the limited information contained in the record of conviction, the modified categorical approach can go no further, and the Court cannot find that Respondent's conviction is a categorical match to his removability charge under INA § 237(a)(2)(B)(i). DHS has not met its burden of proof, and the charge of removability is not sustained.

Accordingly, after a careful review of the record, the following Orders will be entered:

ORDERS

IT IS HEREBY ORDERED that Respondent's motion to terminate proceedings be **GRANTED.**

JAN 5, 2016
Date

Gabriel C. Videla
Immigration Judge