U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: FLORES-DURAN, ALEJANDRO **A 076-743-649**

Date of this notice: 10/30/2019

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:
Baird, Michael P.

Userteam: Docket

File: A076-743-649 – Aurora, CO Date: OCT 30 2019

In re: Alejandro DURAN-FLORES a.k.a. Alejandro Flores-Duran

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Salvador Ongaro, Esquire

ON BEHALF OF DHS: Christine L. Longo
Assistant Chief Counsel

APPLICATION: Adjustment of status

This case was last before us on April 22, 2019, when we remanded at the request of the Department of Homeland Security (DHS), for the Immigration Judge to consider the effect of a change in law in the first instance on his October 24, 2018, written decision granting the respondent's adjustment of status application under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a). On June 3, 2019, the Immigration Judge issued a new decision, again denying the DHS's motion to pretermit, and again granting the respondent's application for adjustment of status. The DHS has appealed and the respondent is opposed. The appeal will be dismissed and the record will be remanded for security and background checks.

In his 2018 decision, the Immigration Judge found that the respondent's December 31, 2014, conviction under Ariz. Rev. Stat. § 13-3407, for solicitation to possess a controlled substance, to wit: methamphetamine, was overbroad compared to the Controlled Substances Act (CSA), such that the conviction was not a controlled substance offense and the respondent was statutorily eligible for adjustment of status (IJ 2018 at 9-11; Exh. 11). The Immigration Judge also found that the respondent merited this relief as a matter of discretion (IJ 2018 at 12-16). The DHS has not, at any time, challenged the discretionary finding, nor any of the other findings beyond the controlled substance issue. We consider the opportunity to raise these other issues to have been waived, and we discern no reason to consider them. *See Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (stating that an agency is not required to make findings on issues which are unnecessary to the result reached) (internal citation omitted); *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012).

In 2018, the Immigration Judge relied upon a published case, *Lorenzo v. Sessions*, 902 F.3d 930 (9th Cir. 2018), which was subsequently withdrawn and replaced with an unpublished case. *See Lorenzo v. Whitaker*, 752 F. App'x 482 (9th Cir. 2019). The new case held that the California definition of methamphetamine was overbroad and not divisible, such that it was not a controlled substance offense under the CSA. *Id.*

Shortly after the Immigration Judge issued his 2019 decision, we noted our disagreement with *Lorenzo v. Whitaker*, in the context of a case arising out of the Eleventh Circuit. *See Matter of Navarro Guadarrama*, 27 I&N Dec. 560, 565-66 (BIA 2019). *Matter of Navarro Guadarrama*, held that an alien convicted of violating a state law regarding a controlled substance must establish a realistic probability that prosecution for an overbroad controlled substance would occur. We stated we would apply this holding "in any circuit that does not have binding legal authority requiring a contrary interpretation." *Id.* at 567.

In the present case, the Immigration Judge found that, applying the categorical approach, the Arizona statute criminalizing methamphetamine as a controlled substance was overbroad on its face (IJ 2019 at 3-9). Moreover, in *United States v. Titties*, 852 F.3d 1257, 1274-75 (10th Cir. 2017), a case that is controlling in this circuit, the court held that the realistic probability test does not apply when the statute is overbroad by its plain language. Because there is controlling circuit law contrary to *Navarro Guadarrama*, we agree with the Immigration Judge.

At the time of the respondent's conviction, the Arizona statute stated that a "dangerous drug" was defined as:

> Any material, compound, mixture or preparation that contains any quantity of the following substances and their salts, isomers, whether optical, positional or geometric, and salts of isomers having a potential for abuse associated with a stimulant effect on the central nervous system: [...] Methamphetamine.

Ariz. Rev. Stat. § 13-3401(6)(c)(xxxviii).

By contrast, the CSA at the time of conviction stated that,

> The term "isomer" means the optical isomer, except as used in schedule I(c) and schedule II(a)(4). As used in schedule I(c), the term "isomer" means any optical, positional, or geometric isomer. As used in schedule II(a)(4), the term "isomer" means any optical or geometric isomer.

21 U.S.C. § 802(14). Notably, methamphetamine does not appear on schedule I or II(a), but is instead listed on schedule II(c) and schedule III. 21 U.S.C. § 812.

Thus, while the Arizona statute specifies "optical, positional or geometric" isomers of methamphetamine may be criminalized, the CSA specifically limits methamphetamine isomers to the "optical" isomer.

The DHS continues to argue that only optical isomers exist for methamphetamine; the other isomers do not exist (IJ 2019 at 9-12). In support of this they submitted to the Immigration Judge a statement from a psychiatry professor (IJ 2019 at 10).[1] No direct evidence was submitted (IJ 2019 at 9). Contrary to the DHS's argument (DHS's Br. at 5-7), the Immigration Judge did consider this evidence but found that it did not explain why the plain language of the Arizona statute differed from the language of the CSA (IJ 2019 at 11). The Immigration Judge noted that other Arizona substances had specified only limited types of isomers, yet the section covering methamphetamine listed multiple isomers (IJ 2019 at 8-9). Similarly, the CSA listed limited isomers for methamphetamine, yet listed more expansive types of isomers for other controlled substances (IJ 2019 at 5-6). Under *Titties*, the statutory language is plainly overbroad, such that the realistic probability test does not apply. Thus, because the statutory language is overbroad, and *Titties* is controlling, the Immigration Judge's conclusion is legally appropriate, and the respondent's conviction, under the categorical approach, and on this factual record cannot be said to be a controlled substance offense.

Accordingly, the following orders will be issued.

ORDER: The DHS appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

[1] The Immigration Judge noted this submission was not new or previously unavailable evidence and the DHS did not make a motion for its late acceptance (IJ 2019 at 9-10). However, the Immigration Judge considered the evidence on the merits (IJ 2019 at 11).