



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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**DHS/ICE Office of Chief Counsel - EAZ
Eloy Detention Ctr, 1705 E. Hanna Rd
Eloy, AZ 85131**

Name: LOPEZ-TOVAR, BERTHA A

A 071-904-519

Date of this notice: 12/12/2016

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:
Pauley, Roger
Guendelsberger, John
Geller, Joan B

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User team: Docket

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**LOPEZ-TOVAR, BERTHA A.
277216/A071-904-519
ELOY DETENTION CENTER
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Name: LOPEZ-TOVAR, BERTHA A

A 071-904-519

Date of this notice: 12/12/2016

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger
Guendelsberger, John
Geller, Joan B

User team: [illegible]

Falls Church, Virginia 22041

File: A071 904 519 – Eloy, AZ

Date: **DEC 12 2016**

In re: BERTHA A. LOPEZ-TOVAR a.k.a. Bertha Alicia Lopez a.k.a. Bertha Diaz a.k.a. Bertha Alicia Lopez-Tovar

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kathryn E. Staples, Esquire

ON BEHALF OF DHS: Elly Laff
Assistant Chief Counsel

CHARGE:

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

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

APPLICATION: Termination of proceedings

The respondent appeals the Immigration Judge's March 29, 2016, decision finding her removable as charged and denying her applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231(b)(3), and for protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16-18 (2016). The appeal will be sustained, and the proceedings will be terminated.

In her decision, the Immigration Judge found the respondent removable as charged based on her December 14, 2012, conviction for the offense of attempted possession of a dangerous drug for sale in violation of Arizona Revised Statutes sections 13-3407 (I.J. at 12-15; Exh. 4). In particular, the respondent conceded her removability for a controlled substances offense under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i) (I.J. at 12). Further, although not specifically stated, it appears the Immigration Judge utilized *Descamps v. United States*, 133 S.Ct. 2276 (2013), to find the statute divisible, and then applied the modified categorical approach to find the respondent's conviction to be an aggravated felony under sections 101(a)(43)(B) and (U) of the Act rendering her removable under section 237(a)(2)(A)(iii) of the Act (I.J. at 13-14). The Immigration Judge also denied all of the respondent's applications for relief. The respondent has appealed. We find that the respondent's conviction under Arizona Revised Statutes section 13-3407 does not render her removable either for an aggravated felony as defined by section 101(a)(43)(B) of the Act or for a controlled substances offense under section 237(a)(2)(B)(i) of the Act, and the proceedings therefore must be terminated.

In particular, subsequent to the Immigration Judge's decision in this case, the United States Court of Appeals for the Ninth Circuit, where this case arises, held that Arizona Revised Statutes section 13-3408 is not divisible but, rather, is "overbroad" due to Arizona's regulation of two substances not on the Federal Controlled Substance Schedule.¹ See *Vera-Valdevinos v. Lynch*, 649 F.App'x 597 (9th Cir. May 11, 2016). Specifically, the Ninth Circuit found section 13-3408 indivisible because Arizona's jury instructions do not require the jury to make a finding of fact regarding the specific substance at issue. See *id.* at 598 n. 1; see also *Lopez-Valencia v. Lynch*, 798 F.3d 863, 869 (9th Cir. 2015) ("[A] statute is indivisible if the jury may disagree on the fact at issue yet still convict."); Rev. Ariz. Jury Instructions (Criminal), 34.0871 (3d ed.). The Ninth Circuit further found that a violation of section 13-3408 is neither a categorical "controlled substances violation" nor a categorical "drug trafficking aggravated felony" under section 101(a)(43)(B) of the Act and that the modified categorical approach does not apply. See *Vera-Valdevinos v. Lynch*, *supra*, at 598.

It is not disputed that Arizona's definition of "dangerous drug" is categorically broader than the federal definition of "controlled substance" (I.J. at 12). See *Alvarado v. Holder*, 759 F.3d 1121, 1130 (9th Cir. 2014). As with section 13-3408, Arizona's jury instructions for Arizona Revised Statutes section 13-3407 also do not require the jury to make a finding of fact regarding the specific substance at issue. See Rev. Ariz. Jury Instructions (Criminal), 34.072 (3d ed.). Thus, section 13-3407 also appears to be "overbroad" and not amenable to the modified categorical approach. Therefore, the respondent's conviction under section 13-3407 does not render her removable under either section 237(a)(2)(A)(iii) or (B)(i) of the Act.² See *id.*

Finally, we note that the respondent was also convicted for the offense of possession of drug paraphernalia in violation of Arizona Revised Statutes section 13-3415(A) (Exhs. 3, 11A, 11B). The record of conviction reflects that the respondent's conviction related to possession of

¹ The Immigration Judge also noted this in her decision (I.J. at 12).

² Subsequent to *Descamps*, the Supreme Court issued its decision in *Mathis v. United States*, 136 S.Ct. 2243 (2016), wherein it clarified its divisibility analysis in *Descamps*. The Supreme Court's decision in *Mathis* is consistent with the Ninth Circuit's post-*Descamps* decision in *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014), to which the Immigration Judge referred in her decision (I.J. at 13). See *id.* ("[T]he Supreme Court regards elements [of an offense] as those circumstances on which the jury must unanimously agree."). Thus, the Supreme Court's decision in *Mathis* does not affect the divisibility analysis in this instance.

We also note that, prior to the Supreme Court's decisions in *Descamps* and *Mathis*, and its own decision in *Rendon*, the Ninth Circuit held, in an unpublished decision, that section 13-3407(A) of the Arizona Revised Statutes is divisible such that the modified categorical approach can be applied. See *Banda-Montoya v. Holder*, 446 F.App'x 920, 922 (9th Cir. 2011). The Ninth Circuit has not explicitly withdrawn from its decision in *Banda-Montoya*. However, it also did not have the benefit of the Supreme Court's guidance on the issue of divisibility when it made that decision. Given when it was decided and the fact that it is not published precedent, we do not find the decision in *Banda-Montoya* binding.

“baggies and [a] pipe.” However, in order for a conviction for possession of drug paraphernalia to render an alien removable under section 237(a)(2)(B)(i) of the Act, an element of the conviction must be connected to a drug defined in the Controlled Substances Act. *See Mellouli v. Lynch*, 135 S.Ct. 1980 (2015). That is not the case here. Therefore, we also find the respondent’s conviction under section 13-3415(A) does not render her removable from the United States.

Accordingly, the appeal will be sustained, and the proceedings will be terminated.

ORDER: The appeal is sustained, and the proceedings are terminated.



FOR THE BOARD