



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
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Name: HO, PUI SUN

A 044-190-476

Date of this notice: 4/9/2019

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

Sincerely,

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John
Adkins-Blanch, Charles K.
Kelly, Edward F.

User team: Docket

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Falls Church, Virginia 22041

File: A044-190-476 – Tacoma, WA

Date: APR - 9 2019

In re: Pui Sun HO a.k.a. Ian S. Ho a.k.a. Sun Ho Pui a.k.a. Ho Pui Sun

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Luis Cortes Romero, Esquire

APPLICATION: Reopening; termination

The respondent has appealed from the Immigration Judge's September 10, 2018, decision that denied his motion to reopen and terminate the removal proceedings. The motion will be sua sponte granted and the proceedings terminated. *See* 8 C.F.R. § 1003.2(a).

We review an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under a clearly erroneous standard, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(i), (ii).

As summarized in the Immigration Judge's decision, the respondent was convicted on January 7, 2009, for delivery of cocaine in violation of Oregon Revised Statute section 475.880. The respondent's status as a lawful permanent resident was terminated and he was ordered removed from the United States on October 1, 2013, as an alien convicted of an aggravated felony drug trafficking crime. *See* sections 101(a)(43)(B) and 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(B) and 1227(a)(2)(A)(iii).

The respondent filed a motion to reopen and terminate the proceedings on August 15, 2018, arguing that his drug offense no longer qualifies as an aggravated felony pursuant to the decision of the United States Court of Appeals for the Ninth Circuit in *Sandoval v. Sessions*, 866 F.3d 986 (9th Cir. 2017) (holding that alien's conviction for delivery of heroin was not an aggravated felony because the underlying Oregon statute that defines "delivery," O.R.S. § 475.005, includes mere solicitation and is indivisible). The Immigration Judge did not address the respondent's arguments, however. He examined the record of conviction to determine that the respondent's conviction involved a sentencing enhancement for a commercial drug transaction. Specifically, he found that the respondent was convicted of delivery "for consideration." The Immigration Judge concluded that because the offense involved a commercial element, it qualifies as an aggravated felony drug trafficking crime. Therefore, the respondent's motion was denied.

In order to qualify as an aggravated felony under section 101(a)(43)(B) of the Act, a state offense must be a felony that is either an "illicit trafficking" offense or a "drug trafficking crime." *Id.* at 989. An illicit trafficking offense must include some element of commercial dealing. *See Lopez v. United States*, 549 U.S. 47, 53 (2006).

The statute of conviction in this case, O.R.S. § 475.880, does not include a commercial element. The Immigration Judge determined that the respondent's crime involved a trafficking element only after he examined conviction documents under a modified categorical analysis to find that the respondent's delivery of heroin was performed "for consideration" (IJ at 3). However, inasmuch as the Ninth Circuit has found that Oregon's drug delivery statute is indivisible, the Immigration Judge was precluded from applying the modified categorical approach to determine whether the respondent's crime satisfied the "illicit trafficking" prong of section 101(a)(43)(B) of the Act. *See Sandoval v. Sessions*, 866 F.3d. at 993-94. The Ninth Circuit similarly found that the statute's indivisibility prohibited a modified categorical analysis to determine whether the conduct underlying a conviction would qualify as "drug trafficking" crime under section 101(a)(43)(B). *Id.* Accordingly, we conclude that the respondent's cocaine delivery offense does not qualify as an aggravated felony for immigration purposes.

The respondent's conviction for delivery of cocaine is the only basis of removability with which he has been charged (IJ at 1; Exh. 1).¹ Considering that the respondent no longer appears to be removable, we will sua sponte reopen and terminate the proceedings without prejudice.

ORDER: The motion to reopen is sua sponte granted and the proceedings are terminated without prejudice.



FOR THE BOARD

¹ The Immigration Judge did not address the untimely filing of the respondent's motion. *See* 8 C.F.R. § 1003.23(b) (requiring motions to reopen to be filed within 90 days of the entry of an administrative order).