



**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals  
Office of the Clerk*

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York, PA 17402**

**Name: WILKINS, LINTON WAYNE**

**A 203-305-377**

**Date of this notice: 11/8/2018**

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:  
Greer, Anne J.

Userteam: Docket

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*WJ*

Falls Church, Virginia 22041

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File: A203-305-377 – York, PA

Date: **NOV - 8 2018**

In re: Linton Wayne WILKINS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Daniel B. Conklin, Esquire

APPLICATION: Cancellation of removal

In a final administrative order dated November 14, 2017, this Board dismissed the respondent's appeal from an Immigration Judge's May 31, 2017, decision denying his application for cancellation of removal for certain permanent residents. Section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The respondent thereafter sought judicial review of the Board's decision before the United States Court of Appeals for the Third Circuit, which has now remanded the matter to us for further consideration. *See Wilkins v. Sessions*, No. 17-3552 (3d Cir., June 11, 2018) (unpublished). Upon further consideration, we will remand the record to the Immigration Judge for further proceedings.

In 2015, the respondent was convicted of possession of marijuana with intent to manufacture or deliver, a felony violation of 35 PA. CONS. STAT. § 780-113(a)(30) ("section 780-113(a)(30)") for which he was sentenced to an indeterminate term of imprisonment of 1 1/2 to 23 months (Exh. 1, allegation 4; Exh. 2, tab C; Tr. at 14). The respondent does not dispute that he is removable from the United States as an alien convicted of a violation of State law relating to a federally controlled substance. *See* section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i).

In our prior decision, we concluded the statute was categorically overbroad vis-à-vis the "drug trafficking crime" definition because the minimum conduct that had a realistic probability of being prosecuted under section 780-113(a)(30) was possession of "a small amount" of marijuana that the defendant intends to "deliver" for no remuneration, but such conduct is not punishable by more than one year imprisonment under the Controlled Substances Act. *See* 21 U.S.C. §§ 841(b)(4), 844; *Commonwealth v. Pagan*, 461 A.2d 321 (Pa. Super. 1983). We thus employed the modified categorical approach, relying upon 35 PA. CONS. STAT. § 7508(a)(1) ("section 7508"), which established mandatory minimums based upon the quantity of marijuana.

However, Pennsylvania state courts have held that 35 PA. CONS. STAT. § 7508 is unconstitutional. *Commonwealth v. DiMatteo*, 177 A.3d 182, 186-87 (Pa. 2018); *see also Commonwealth v. Mosley*, 114 A.3d 1072, 1088-91 (Pa. Super. Ct. 2015); *Commonwealth v. Fennell*, 105 A.3d 13, 18-19 (Pa. Super. Ct. 2014). Without section 7508, the respondent's statute is categorically overbroad and indivisible as to the quantity involved. Accordingly, the respondent's conviction cannot be considered an aggravated felony. *Matter of Chairez*, 26 I&N Dec. 819, 825 & n.7 (BIA 2016).

Therefore, the record is remanded to the Immigration Judge to consider the respondent's eligibility for cancellation of removal and for the entry of a new decision. Upon remand, the parties may present additional evidence, both testimonial and documentary, with respect to the relevant issues in this case.

  
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FOR THE BOARD