



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
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Name: HILLOCKS, DEXTER ANTHONY

A 047-365-390

Date of this notice: 9/16/2020

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:
Goodwin, Deborah K.
Baird, Michael P.
Wilson, Earle B.

Userteam: Docket

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Falls Church, Virginia 22041

File: A047-365-390 – York, PA

Date: **SEP 1 6 2020**

In re: Dexter Anthony HILLOCKS

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: M. Patrick Yingling, Esquire

ON BEHALF OF DHS: Jon D. Staples
Assistant Chief Counsel

APPLICATION: Termination

On August 12, 2019, the United States Court of Appeals for the Third Circuit remanded this case to the Board. The respondent has filed a motion to terminate. The motion will be granted and proceedings will be terminated.

In 2015, the respondent, a native and citizen of Trinidad and Tobago and lawful permanent resident of the United States, was served with a Notice to Appear charging that he was removable from the United States under section 237(a)(2)(B)(i) of the Immigration and Nationality Act (“Act”), 8 U.S.C. § 1227(a)(2)(B)(i), based on a conviction of any law relating to a controlled substance, and under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), based on a conviction for an aggravated felony.

On March 4, 2016, an Immigration Judge found the respondent removable under section 237(a)(2)(B)(i) of the Act, based on his 2002 conviction for possession of marijuana in violation of section 780-113(a)(16) of Title 35 of the Pennsylvania Consolidated Statutes. The Immigration Judge also found the respondent removable under section 237(a)(2)(A)(iii) of the Act based on his 2015 conviction for criminal use of a communication facility in violation of section 7512(A) of Title 18 of the Pennsylvania Consolidated Statutes. The respondent appealed that decision to this Board. On July 15, 2016, we remanded the record to the Immigration Judge for further proceedings and analysis regarding the respondent’s removability.

On December 8, 2016, a different Immigration Judge found that the respondent’s conviction for criminal use of a communication facility rendered him removable under section 237(a)(2)(B)(i) of the Act, a controlled substance conviction, and section 237(a)(2)(A)(iii) of the Act, an aggravated felony.¹ The respondent appealed the Immigration Judge’s decision to this Board. On June 7, 2017, we dismissed the respondent’s appeal. The respondent then filed a petition for review with the Third Circuit.

On August 12, 2019, the Third Circuit found that this Board incorrectly applied the modified categorical approach when we determined the respondent’s conviction for criminal use of a

¹ The Immigration Judge did not analyze whether the respondent’s 2002 conviction rendered him removable under the section 237(a)(2)(B)(i) of the Act.

communication facility in violation of section 7512(A) of Title 18 of the Pennsylvania Consolidated Statutes was an aggravated felony and a crime involving a controlled substance. See *Hillocks v. Att’y Gen. United States*, 934 F.3d 332 (3d Cir. 2019). The Third Circuit found that the convicting statute was overbroad and indivisible. Applying the categorical approach, the Third Circuit held that the respondent’s conviction under section 7512(A) of Title 18 of the Pennsylvania Consolidated Statutes was not an aggravated felony and that the statute did not relate to a controlled substance. Therefore, the Third Circuit reversed the Board’s determination that the respondent’s conviction under section 7512(A) of Title 18 of the Pennsylvania Consolidated Statutes rendered him removable under section 237(a)(2)(B)(i) of the Act, a controlled substance conviction, and section 237(a)(2)(A)(iii) of the Act, an aggravated felony. The Third Circuit vacated the respondent’s removal order and remanded the record to this Board for further proceedings consistent with its order.

Upon remand, the respondent filed a motion to terminate removal proceedings. The respondent correctly asserts that the Third Circuit found that his conviction under section 7512(A) of Title 18 of the Pennsylvania Consolidated Statutes was not an aggravated felony and that the statute does not relate to a controlled substance and cannot serve as a basis for removal (Respondent’s motion to terminate at 3). The respondent also contends that he has no other removable offenses (Respondent’s motion to terminate at 3-4).

The Department of Homeland Security (DHS) opposes the respondent’s motion to terminate. The DHS asserts that the record should be remanded to the Immigration Judge to determine whether the respondent’s 2002 conviction for possession of a controlled substance in violation of section 780-113(a)(16) of Title 35 of the Pennsylvania Consolidated Statutes is a removable offense under section 237(a)(2)(B)(i) of the Act. The DHS contends that the respondent’s 2002 conviction is a removable offense. The DHS points out that the respondent was not convicted under 780-113(a)(31) of Title 35 of the Pennsylvania Consolidated Statutes which prohibits the possession of a small amount of marijuana for personal use (DHS’s opposition to the respondent’s motion to terminate at 4).

The respondent filed a response to the DHS’s opposition to his motion to terminate. The respondent argues that his convicting statute, on its face, does not require that a specific amount of a controlled substance be possessed in order for the crime to be committed (Respondent’s reply Br. at 3). Therefore, the respondent contends that someone could be convicted under section 780-113(a)(16) of Title 35 of the Pennsylvania Consolidated Statutes for possessing less than 30 grams of marijuana (Respondent’s Reply Br. at 3). The respondent contends that under the Third Circuit’s decision in his case, the categorical approach must be used to determine whether his conviction is a removable offense under section 237(a)(2)(B)(i) of the Act. The respondent asserts that since the categorical approach requires that the state conviction rest upon the least of the acts criminalized by the statute, his 2002 conviction is not a removable offense under section 237(a)(2)(B)(i) of the Act.

During the pendency of the appeal, this Board requested supplementary briefing on the issue of whether the respondent’s 2002 conviction renders him removable under section 237(a)(2)(B)(i) of the Act. In particular, this Board asked the parties to address whether section 780-113(a)(16) of Title 35 of the Pennsylvania Consolidated Statutes is divisible. Both parties have filed supplementary briefs in response to our request.

The respondent argues that his convicting statute is not divisible, and, therefore, the modified categorical approach does not apply. Accordingly, the respondent contends that he is not removable as charged and requests that we terminate proceedings. The DHS argues that the convicting statute is divisible and that application of the modified categorical approach is appropriate in this case. Furthermore, the DHS contends that when the modified categorical approach is applied, the conviction documents reveal that marijuana was the controlled substance at issue. Therefore, the DHS contends that the respondent's conviction is a controlled substance violation, which renders him removable under the Act.

In its August 12, 2019, decision the Third Circuit recognized that its precedent at the time of its decision did not apply the categorical approach to determine whether a state statute relates to a controlled substance. *Hillocks v. Att'y Gen. United States*, 934 F.3d at 344-45. However, in light of the Supreme Court's decision in *Mellouli v. Lynch*, 575 U.S. 798 (2015), the Third Circuit found that the categorical approach must be applied "to the question of whether a particular state offense relates to a controlled substance." *Id.* at 345. Under the categorical approach, "we presume that the state conviction 'rested upon the least of the acts' criminalized by the statute, and then we determine whether that conduct would fall within the federal definition of the crime." *Id.* at 338. The Third Court found that "[t]he modified approach only applies when (1) the statute of conviction has alternative elements, and (2) 'at least one' of the alternative divisible categories would, by its elements, be a match with a generic federal crime." *Id.* at 339. "The modified categorical approach allows adjudicators to look into a limited set of documents to see which of the alternatives served as a basis for the individual's conviction." *Id.* at 338.

At the time of the respondent's 2002 conviction, section 780-113(a)(16) of Title 35 of the Pennsylvania Consolidated Statutes prohibited the following: "[k]nowingly or intentionally possessing a controlled or counterfeit substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, unless the substance was obtained directly from, or pursuant to, a valid prescription order or order of a practitioner, or except as otherwise authorized by this act."

The respondent was charged with removability pursuant to section 237(a)(2)(B)(i) of the Act, which provides as follows: "An alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), other than a single offense involving possession for one's own use of thirty grams or less of marijuana, is deportable." Therefore, the generic federal crime at issue in this case is "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of thirty grams or less of marijuana."

Applying the categorical approach, the respondent's statute of conviction does not have the "least of act" necessary to sustain a controlled substance violation under section 237(a)(2)(B)(i) of the Act, because an individual can be convicted of possessing substances under the state statute of conviction that are not controlled substances as defined in section 102 of the Controlled Substances Act. The Third Circuit found in the respondent's case that the Pennsylvania controlled substance list incorporates several drugs that are not on the federal list and, therefore, it is not a categorical match to the federal crime. *Hillocks v. Att'y Gen. United States*, 934 F.3d at 340-41. Furthermore, we agree with the respondent that counterfeit substances under Pennsylvania law, as defined by section 780-102 of Title 35 of the Pennsylvania Consolidated Statutes, include substances that are

not controlled substances under federal law (Respondent's Supplementary Br. at 6-7).² Therefore, section 780-113(a)(16) of Title 35 of the Pennsylvania Consolidated Statutes is not a categorical match to a federal controlled substance violation.³

Furthermore, even if we were to consider that the type of substance, controlled or counterfeit, is an alternative element required for a conviction under section 780-113(a)(16) of Title 35 of the Pennsylvania Consolidated Statutes, as set forth above, both counterfeit and controlled substances under Pennsylvania law are too broad and do not necessarily involve a controlled substance as defined in section 102 of the Controlled Substances Act. Therefore, the modified categorical approach cannot be applied to this case. *See Hillocks v. Att'y Gen. United States*, 934 F.3d at 339 (holding that the "[t]he modified approach only applies when (1) the statute of conviction has alternative elements, and (2) 'at least one' of the alternative divisible categories would, by its elements, be a match with a generic federal crime").

We are not persuaded by the DHS's arguments that the statute of conviction in this case is divisible. The DHS relies, in part, on an unpublished decision in *Espinoza v. Att'y Gen.*, 742 F.App'x 666 (3d Cir. 2018), which was issued prior to the Third Circuit's decision in *Hillocks v. Att'y Gen. United States*. In *Espinoza v. Att'y Gen.*, 742 F.App'x at 668 n.2, the court observed that the alien in that case "focuse[d] his argument almost entirely on whether the subsection of the Schedule referenced in section 780-113(a)(16) of Title 35 of the Pennsylvania Consolidated Statutes is divisible." The court, therefore, focused its analysis on the divisibility of section 780-104(1)(vii), synthetic cannabinoids of Schedule 1 of the Pennsylvania Controlled Substances Act. *Espinoza v. Att'y Gen.*, 742 F.App'x at 668, n.2. The Third Circuit did not decide whether section 780-113(a)(16) of Title 35 of the Pennsylvania Consolidated Statutes was divisible.

Based on the foregoing, we conclude that the respondent's 2002 conviction pursuant to section 780-113(a)(16) of Title 35 of the Pennsylvania Consolidated Statutes does not render him removable under section 237(a)(2)(B)(i) of the Act based on a conviction of "a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana." Therefore, the respondent's motion to terminate removal proceedings is granted and the DHS's request for remand to the Immigration Judge is denied.

Accordingly, the following orders will be entered.

ORDER: The Board's June 7, 2017, decision is vacated.

² Pursuant to section 780-102 of Title 35 of the Pennsylvania Consolidated Statutes, a counterfeit substance is defined as "a controlled substance, other drug, device or cosmetic which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed such substance and which thereby is falsely purported or represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser."

³ The DHS does not argue that the statute of conviction in this case is a categorical match to a federal crime.

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FURTHER ORDER: The respondent's motion to terminate is granted and removal proceedings are terminated.



FOR THE BOARD

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