U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: ESCOBAR, CRISTIAN

A 096-629-697

Date of this notice: 5/7/2019

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:
Donovan, Teresa L.
Wendtland, Linda S.
Rosen, Scott

Userteam: Docket

File: A096-629-697 – San Francisco, CA Date: MAY - 7 2019

In re: Cristian ESCOBAR a.k.a. Cristian Ernesto Valencia Escobar

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Elias Z. Shamieh, Esquire

APPLICATION: Termination; cancellation of removal; voluntary departure

The respondent, a native and citizen of El Salvador, appeals from the Immigration Judge's decision dated January 29, 2018, finding him removable and pretermitting his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The Immigration Judge also denied the respondent's request for voluntary departure in lieu of removal pursuant to section 240B(b) of the Act, 8 U.S.C. § 1229c(b). The Department of Homeland Security (DHS) has not responded to the appeal. The appeal will be dismissed in part. The record will be remanded.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

This case was last before us on December 15, 2016, when we remanded the record for the Immigration Judge to determine whether the respondent had been convicted for an aggravated felony after the respondent presented evidence that the conviction underlying his charge of removability had been amended because of a constitutional violation. On remand, the respondent maintained that his conviction under Cal. Health & Safety Code § 11352(a), pursuant to an amended felony information and change of plea agreement, was not for an aggravated felony, and he sought relief in the form of cancellation of removal under section 240A(a) of the Act (IJ at 1-3; Tr. at 41, July 27, 2017). The Immigration Judge pretermitted the respondent's application for cancellation of removal after finding that the respondent's record of conviction was inconclusive and determining that the respondent had not met his burden of proof to demonstrate his eligibility for cancellation of removal based on the inconclusive record (IJ at 2-3).[1] The respondent now appeals.

[1] The respondent also requested that the Immigration Judge re-litigate his applications for asylum and withholding of removal, as well as his request for protection under the Convention Against Torture, all of which were previously denied (IJ at 1-2). Sections 208, 241(b)(3) of the Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. § 1208.16-.18. The Immigration Judge declined to do so (IJ at 3).

On appeal, the respondent requests termination of his removal proceedings pursuant to *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), in which the Supreme Court held that "[a] putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear' under" section 239(a) of the Act, 8 U.S.C. § 1229(a), "and does not trigger the stop-time rule" for purposes of cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b). *Id.* at 2108, 2113-14. The respondent argues that under *Pereira v. Sessions*, jurisdiction over these proceedings never vested with the Immigration Judge, despite the filing of the notice to appear in Immigration Court, because his notice to appear lacked the specific time and date for his removal proceeding (Respondent's Br. at 11-12; Exh. 1).

We are not persuaded by this argument. A notice to appear that does not specify the time and place of an alien's removal proceeding vests an Immigration Judge with jurisdiction over the removal proceeding and meets the requirements of section 239(a) of the Act, so long as a notice of hearing specifying this information is later sent to the alien. *See Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018). Since the respondent received a notice of hearing and subsequently appeared in court on the date and at the time specified by the notice of hearing, the Immigration Judge had jurisdiction over the removal proceeding (*see* Notice of Hearing dated September 22, 2015; Tr. at 1-4, Oct. 20, 2015). *Id.* The respondent, who has been represented by counsel throughout these proceedings, attended his removal hearings and received a full opportunity to present his case. Therefore, termination of the respondent's removal proceedings on this basis is not warranted.

Additionally, we find unavailing the respondent's argument that his conviction under Cal. Health & Safety Code § 11352(a) does not render him removable (Respondent's Br. at 2, 4-5). After we remanded the record to the Immigration Judge, the DHS charged the respondent as removable pursuant to section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), for having been "convicted of a violation of . . . any law or regulation of a State . . . relating to a controlled substance (as defined in section 802 of title 21)" (IJ at 2; Exh. R1). The respondent's offense of conviction, Cal. Health & Safety Code § 11352(a), "is a state law relating to a controlled substance." *Mielewczyk v. Holder*, 575 F.3d 992, 998-99 (9th Cir. 2009).

Although controlled substances, as defined under California law, are not a categorical match to the controlled substances defined in 21 U.S.C. § 802, the respondent's offense of conviction is divisible with regard to the identity of the controlled substance underlying the conviction because the identity of the controlled substance is an element of the offense. *United States v. Martinez-Lopez*, 864 F.3d 1034, 1041 (9th Cir. 2017). Given that Cal. Health & Safety Code § 11352(a) is divisible, we apply the modified categorical approach to determine that the respondent's offense involved cocaine, which is a controlled substance as defined in 21 U.S.C. § 802 (IJ at 2; Exh. R2 at Tab A; Exh. R8 at Tab A). *United States v. Martinez-Lopez*, 864 F.3d at 1041; *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) (explaining that the modified categorical approach may be employed to determine the elements of an offense when the offense is divisible). Therefore, the Immigration Judge properly found that the respondent was removable pursuant to section 237(a)(2)(B)(i) of the Act for having been convicted of violating a law of a state relating to a controlled substance defined in 21 U.S.C. § 802 (IJ at 2). As such, termination of the respondent's proceedings is not warranted (Exh. R1). *United States v. Martinez-Lopez*, 864 F.3d at 1041; *Mielewczyk v. Holder*, 575 F.3d at 999.

We agree with the respondent that he is not precluded from establishing his eligibility for cancellation of removal pursuant to section 240A(a)(3) of the Act by virtue of having been convicted under Cal. Health & Safety Code § 11352(a) (IJ at 2-3; Respondent's Br. at 7-8). The respondent's offense of conviction provides:

> [E]very person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in [the cross-referenced statutory provisions] . . . unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, four, or five years.

Cal. Health & Safety Code § 11352(a).

The United States Court of Appeals for the Ninth Circuit has held that Cal. Health & Safety Code § 11352(a) is divisible, not only with respect to the identity of the controlled substance at issue, but also with respect to the actus reus. *See United States v. Martinez-Lopez*, 864 F.3d at 1041-43 (noting that "section 11352 creat[es] . . . separate crimes based on alternative actus rei elements, and does not merely describe alternative ways of satisfying a single [actus reus] element") (citing *Mathis v. United States*, 136 S. Ct. at 2249) (internal quotations omitted) (alteration in original). Thus, we may examine documents from the record of conviction to determine "what crime, with what elements [the respondent] was convicted of." *Mathis v. United States*, 136 S. Ct. at 2249; *see also Shepard v. United States*, 544 U.S. 13, 26 (2005) (setting forth which records are permissible for courts to examine in determining the elements of an offense of conviction, including, inter alia, charging documents and plea agreements).

Here, the record contains an amended felony information and a change of plea agreement, and when read together, these documents establish that the respondent pleaded guilty to "offer[ing] to transport, import into the State of California, sell, furnish, administer, and give away, a controlled substance, to wit, Cocaine" under Cal. Health & Safety Code § 11352(a) (Exh. R2 at Tab A; Exh. R8 at Tab A). *Mathis v. United States*, 136 S. Ct. at 2249; *Shepard v. United States*, 544 U.S. at 26. Therefore, we disagree with the Immigration Judge's determination that the respondent's record of conviction is inconclusive as the elements of his offense are contained within the amended felony information, and the change of plea agreement makes clear that the respondent pleaded to the allegations contained within the amended felony information (IJ at 2-3; Exh. R2 at Tab A; Exh. R8 at Tab A).

Moreover, we agree with the respondent that the actus reus element of his offense of conviction was "offer," which makes the offense for which he was convicted a solicitation offense (Exh. R2 at Tab A; Exh. R8 at Tab A; Respondent's Br. at 7-8). *See Young v. Holder*, 697 F.3d 796, 983 (9th Cir. 2012) (en banc) (noting that Cal. Health & Safety Code § 11352(a) "criminalizes the mere solicitation of, or offer to sell, a controlled substance"), *abrogated in part by Moncrieffe v. Holder*, 569 U.S. 184 (2013); *see also United States v. Rivera-Sanchez*, 247 F.3d 905, 908-09 (9th Cir. 2001) (noting that a statute criminalizes solicitation when it "prohibits 'offers' to transport, import,

sell, furnish, or give away" a drug because the "offense is complete when an offer is made with the requisite intent; neither the delivery of the drug, an exchange of money, nor a direct, unequivocal act toward a sale are necessary elements of the offense") (internal citation omitted), *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n.4 (2002).

Because solicitation offenses are not punishable under the Controlled Substances Act (CSA) (21 U.S.C. § 801 et seq.), the respondent's offense of conviction does not constitute an illicit trafficking in a controlled substance aggravated felony. *See* section 101(a)(43)(B) of the Act; *see also Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999) (The CSA "neither mentions solicitation nor contains any broad catch-all provision that could even arguably be read to cover solicitation"); 21 U.S.C. § 846 (criminalizing the inchoate offenses of "attempt" or "conspiracy" to commit any offense described in the CSA, but omitting the inchoate offense of solicitation to commit any offense described in the CSA from the criminalized conduct).

Given that the respondent has not been convicted for an aggravated felony, we will remand the record for the Immigration Judge to re-assess the respondent's eligibility for relief from removal, including further development of the record as necessary, and for evaluation of whether the respondent merits relief from removal as a matter of discretion. Section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d); *see also Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998) (establishing that the respondent bears the burden to demonstrate that he warrants relief as a matter of discretion). On remand, both parties should have an opportunity to present evidence and argument in support of their respective positions for consideration by the Immigration Judge. Given our disposition, we find it unnecessary to reach the respondent's remaining appellate arguments. We express no opinion as to the merit of the respondent's claims.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is dismissed with respect to the issues of jurisdiction and removability.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion, and for the entry of a new decision.

Terry L. Garvin

FOR THE BOARD