UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
26 FEDERAL PLAZA
NEW YORK, NEW YORK

File No: [redacted] Date: September 20, 2013

In the Matter of:	
[redacted] **NUNEZ**	**IN REMOVAL PROCEEDINGS**
Respondent	

CHARGES: INA § 237(a)(2)(B)(i) Controlled Substance Offense

APPLICATIONS: Motion to Terminate

ON BEHALF OF RESPONDENT
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ON BEHALF OF DHS
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DECISION AND ORDERS OF THE IMMIGRATION JUDGE

In this removal proceeding, the United States Department of Homeland Security (DHS) charges [redacted] Nunez (Respondent) with removability under Immigration and Nationality Act (INA) § 237(a)(2)(B)(i) based upon Respondent's conviction for criminal possession of a controlled substance in the seventh degree in violation of New York Penal Law (NYPL) § 220.03. Respondent contested the charges. Because DHS failed to prove by clear and convincing evidence that Respondent was convicted of a deportable offense, the Court terminates this proceeding.

I. Procedural History

Respondent is a thirty-six-year-old native and citizen of the Dominican Republic. [Exh. 1]. He entered the United States as a lawful permanent resident on November 27, 1992. Id. On August 12, 2000, Respondent pleaded guilty to criminal possession of a controlled substance in the seventh degree in violation of NYPL § 220.03. DHS Submission. [Exh. 2, Tab C].

DHS served Respondent with a Notice to Appear (NTA), charging him with removability under INA § 237(a)(2)(B)(i) (Controlled Substance Offense). In support of the charges, DHS

submitted Respondent's RAP sheet, Respondent's immigrant visa and alien registration, a certificate of disposition, a misdemeanor complaint and the sentence and commitment. Id. at Tabs A-D.

On February 11, 2013, the Court ruled that DHS had not sustained the charge of removability based upon the contents of the record at that time. The Court adjourned the case, however, so that DHS could supplement the record of conviction. On June 13, 2013, DHS informed the Court that it would not supplement the record of conviction or lodge any additional charges.

II. Evidence

Exh. 1: Notice to Appear (served 5/8/12)
Exh. 2: DHS Submission of March 12, 2012
Tab A: Respondent's RAP sheet
Tab B: Immigrant Visa and Alien Registration
Tab C: Certificates of Disposition & Sentence and Commitment
Tab D: Certificates of Disposition
Exh. 3: DHS Letter to the Court dated March 13, 2012[1]

III. Removability

DHS bears the burden of establishing by clear and convincing evidence that Respondent is deportable as charged. See INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a). Thus, to sustain this charge DHS must establish by clear and convincing evidence that Respondent was convicted of a crime "relating to a controlled substance[,] as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802))." INA § 237(a)(2)(B).

A. Categorical Approach

To make this determination, the Court must first employ the "categorical approach" to analyze whether the "'minimum conduct necessary to sustain a conviction'" under NYPL §§ 110-130.40 would involve a minor. Gertsenshteyn v. Mukasey, 544 F.3d 137, 143 (2d Cir. 2008) (quoting Dalton v. Ashcroft, 257 F.3d 200, 204 (2d Cir. 2001); see also Martinez v. Mukasey, 551 F.3d 113, 119 (2d Cir. 2008); Dickson v. Ashcroft, 346 F.3d 44, 48 (2d Cir. 2003). The categorical approach requires the existence of "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct" that would constitute a removable offense. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 184 (2007).

Here, Respondent was convicted of violating NYPL § 220.03, which provides that "[a] person is guilty of criminal possession of a controlled substance in the seventh degree when he or she knowingly and unlawfully possesses a controlled substance." In New York, "Chorionic gonadotropin" is a controlled substance. New York Public Health Law (NYPHL) § 3306, Schedule III(g). By contrast, under the Controlled Substances Act (CSA), "Chorionic

[1] Exhibits 2 and 3 have not yet been marked into evidence. The Court hereby admits them into the record.

gonadotropin" is not a controlled substance. See 21 U.S.C. § 802 (6) (defining "controlled substance" as "a drug…included in schedule I, II, III, IV, or V"); 21 U.S.C. § 812 (Schedules I-V). Thus, the NYPL § 220.03 is broader than 21 U.S.C. § 802. Thus, the minimum conduct required for a conviction under NYPL § 220.03 includes conduct that would not constitute a removable offense under INA § 237(a)(2)(B)(i). Moreover, because the legislature in New York expressly chose to include "Chorionic gonadotropin" as a controlled substance, there is "a realistic probability, not a theoretical possibility," that New York would apply its statute to conduct that would not constitute a removable offense. Cf. Duenas-Alvarez, 549 U.S. at 184; see Cabantac v. Holder, --- F.3d ----, 2013 WL 4046052 (finding that a California offense is categorically broader than its federal counterpart because it defines "controlled substance" more broadly than the CSA).

Criminal possession of a controlled substance in the 7th degree, however, is divisible because it "contain[s] an element …that c[an] be satisfied either by removable or non-removable conduct." Matter of Lanferman, 25 I&N Dec. 721, 727 (2012). Thus, the Court must use the modified categorical approach. Id.

B. Modified Categorical Approach

The "modified categorical approach" allows a court to look beyond the statute, to the record of conviction, for the limited purpose of determining whether the alien's *conviction*, not the alien's *conduct*, falls under the part of the statute that would render the alien removable. See Dickson, 346 F.3d at 48-49 (citing Kuhali, 266 F.3d at 106-07); Matter of Vargas-Sarmiento, 23 I&N Dec. 651, 654 (BIA 2004), petition for review denied by Vargas-Sarmiento v. U.S. Dep't of Justice, 448 F.3d 159, 162 (2d Cir. 2006).[2]

1. Record of Conviction

Under the modified categorical approach, the court's inquiry is limited to the "record of

[2] Descamps v. United States involves the application of the modified categorical approach. No. 11-9540, 570 U.S. ___(2013). In Descamps the Supreme Court made it clear that a federal sentencing judge may not apply the modified categorical approach and look to the underlying court record when the statute of conviction has a single set of indivisible elements. The Court also explained that the modified categorical approach is a tool to help adjudicators implement the categorical approach, rather than an exception to the categorical approach itself. The Court also made it clear that an adjudicator applying the modified categorical approach may only examine the record of conviction to determine the statutory offense or section the person was convicted of, not to determine the facts or conduct that led to the conviction. NYPL § 220.03 is a statue that has a single set of indivisible elements. Therefore, if this court were to apply the Descamps approach, it would not be able to utilize the modified categorical approach in the instant case. Rather, it would be limited to determining removablity under the categorical approach discussed above. However, it is unclear whether Descamps applies to immigration cases. In Descamps, the Supreme Court adopted a definition of "divisibility" for purposes of the ACCA that is in direct conflict with the Board's definition for purposes of the INA. See Matter of Lanferman, 25 I&N Dec. at 721. Descamps may not abrogate Lanferman because the Supreme Court adopted its approach to divisibility based upon factors such as the text and history of the ACCA, Sixth Amendment considerations and the practical difficulties of alternative approaches. While some of these factors may be relevant to the immigration context, others may be absent or significantly different in the immigration context. For these reasons, after Descamps, it remains unclear if the federal courts will define divisibility for immigration purposes in the same way they have in the criminal context.

conviction." Dickson v. Ashcroft, 346 F.3d 44, 52 (2d Cir. 2003); see also Shepard v. U.S., 544 U.S. 13, 20 (2005); Taylor v. U.S., 495 U.S. 575, 602 (1990). The record of conviction includes "those documents enumerated in the regulations to be admissible evidence in proving a criminal conviction in any proceeding before an Immigration Judge." Matter of Madrigal-Calvo, 21 I&N Dec. 323, 326 (BIA 1996); see also INA § 240(c)(3)(B)(i)-(vii). Additionally, the record of conviction includes "the charge, indictment, plea, judgment or verdict, sentence, and transcript from court proceedings." Id.; see also Dickson, 346 F.3d at 52; Shepard, 544 U.S. at 26. A police report is not part of the record of conviction. Matter of Ahortalejo-Guzman, 25 I&N Dec. 465, 465 (BIA 2011).

In New York, a criminal defendant has the right to be prosecuted by an "information," a document with higher evidentiary standards than a complaint. See New York Criminal Procedure Law ("NYCPL") §§ 100.10(1), (4), 170.65(1). A criminal complaint becomes a "charging document" only if it has been converted into an information. NYCPL § 170.65(1) (a misdemeanor complaint is converted into an information when it is supplemented by a "supporting deposition" and other documents that "taken together satisfy the requirements for a valid information"). Alternatively, a complaint can constitute a charging document if the defendant has expressly waived the right to be prosecuted by an information. NYCPL § 170.65(3). Criminal courts may not assume or infer a waiver of this right. People v. Weinberg, 315 N.E.2d 434, 435 (N.Y. 1974); People v. Kalin, 906 N.E. 2d 381, 382 (N.Y. 2009). While not binding on this Court, the Third Circuit has concluded that it was unclear whether a police officer's written statement constituted "the relevant charging documents under New York law" because a "misdemeanor complaint 'must…be replaced by an information' unless the defendant 'waive[s] prosecution by information and consent[s] to be prosecuted upon the misdemeanor complaint.'" Thomas v. Attorney General of U.S., 625 F.3d 134, 145 (3d Cir. 2010) (quoting NYCPL §§ 170.65(1), (3)) (alterations in original).

Here, the only indication that the Respondent was convicted for possessing "a controlled substance," as defined by 21 U.S.C. § 802, is the misdemeanor complaint, which is a statement by a police officer accusing the Respondent of possessing heroine. [Exh. 2, Tab C, at 3]. However, the record does not contain any evidence indicating that the misdemeanor complaint was converted to an information by additional documents satisfying "the requirements for a valid information" or that the Respondent waived his prosecution by information. See NYCPL §§ 170.65(1), (3). Thus, it is unclear whether the misdemeanor complaint is the charging document. Accordingly, it is not part of the record of conviction and cannot be used to establish that the Respondent possessed a controlled substance, as defined by 21 U.S.C. § 802. Ahortalejo-Guzman, 25 I&N at 465.

2. Sufficiency of the "Charging Document"

Even if the misdemeanor complaint were the charging document, it does not establish what substance the Respondent was convicted of possessing. When analyzing a conviction sustained after a jury trial, the court's inquiry is limited to documents establishing the facts "that the jury necessarily had to find" to sustain a conviction. Taylor, 495 U.S. at 602. For example, the court can rely on an "indictment or information and jury instructions" to show what the defendant was charged with and what "the jury necessarily had to find" to sustain a conviction.

Id. By contrast, where a defendant pleads guilty, the closest analogs are "the statement of factual basis for the charge…shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." Shepard, 544 U.S. at 20.

The Second Circuit has applied the principles in Taylor and Shepard in several cases involving convictions from guilty pleas. For example, the Court has held that, "[f]or convictions following a plea, the BIA may rely only upon facts to which a defendant actually and necessarily pleaded in order to establish the elements of the offense, as indicated by a charging document, written plea agreement, or plea colloquy transcript." Dulal-Whiteway v. U.S. Dept. of Homeland Sec. 501 F.3d 116, 131 (2d Cir. 2007), abrogated on other grounds by Nijhawan v. Holder, 557 U.S. 29 (2009); see also Akinsade v. Holder, 678 F.3d 138, 144 (2d Cir. 2012); James v. Mukasey, 522 F.3d 250, 258 (2008); Wala v. Mukasey, 511 F.3d 102, 108 (2d Cir. 2007).

Similarly, in dicta, the Court has stated:

> "In this case, the IJ and BIA relied upon a factual allegation in the charging instrument—that James had sexual intercourse with a sixteen-year-old when he was twenty-two—to conclude that James was convicted of sexual abuse of a minor. But this factual allegation was not 'actually and necessarily pleaded' to in order to establish the elements of endangering the welfare of a child. Dulal-Whiteway, 501 F.3d at 131. New York Penal Law section 260.10 does not require engagement in sexual intercourse, see People v. Chase, 186 Misc.2d 487, 720 N.Y.S.2d 707, 708 (2d Dep't 2000), and James did not so plead; he admitted to having had 'sexual contact with a minor.'"

James, 522 F.3d at 257-58. Likewise, the Court has vacated a removal order because the respondent "did not admit to, was not charged with, and was not required to plead to" conduct that would render him removable. Wala, 511 F.3d at 109.

The Board treated the charging document similarly in Lanferman, where the critical inquiry was the presence of a gun. In that case, the Board held that the charging document, which alleged that Respondent used a gun, combined with the plea colloquy, which indicated that Respondent admitted to using a gun, were sufficient to establish removability. Lanferman, 22 I&N Dec. at 72-73.

Here, DHS submitted the misdemeanor complaint. The misdemeanor complaint alone, however, only establishes what substance the Respondent was accused of possessing, not the substance the Respondent was convicted of possessing. Moreover, DHS refused to submit "a transcript of plea colloquy, [a] written plea agreement presented to the court, or [] a record of comparable findings of fact adopted by the defendant upon entering the plea," Shepard, 544 U.S. at 20. These documents would have established the conduct to which the Respondent "actually and necessarily pleaded." Dulal-Whiteway 501 F.3d at 131. Therefore, the record of conviction

does not establish what substance the Respondent was convicted of possessing. Id.

C. Conclusion

In sum, DHS failed to establish removability by clear and convincing evidence. Respondent's conviction under NYPL § 220.03 is categorically broader than INA § 237(a)(2)(B) because "Chorionic gonadotropin" is a controlled substance under New York, but not under the CSA. Further, the record of conviction does not indicate the substance that Respondent was convicted of possessing. DHS failed to establish that the misdemeanor complaint is part of the record of conviction because it is unclear whether it was charging document in Respondent's criminal case. Even if the misdemeanor complaint were the charging document, it does not establish what substance Respondent "actually and necessarily pleaded" guilty to possessing. Dulal-Whiteway 501 F.3d at 131; see also Akinsade, 678 F.3d at 144; James, 522 F.3d at 258; Wala, 511 F.3d at 108.

Accordingly, the following order will be entered:

ORDER

IT IS HEREBY ORDERED that the proceeding be terminated with prejudice.

Alice Segal
Immigration Judge

Dated: 9/20/13