U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: OLIVIO, MARGOT

A12-191-595

Date of this notice: 11/8/2007

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:
COLE, PATRICIA A.
Grant, Christopher M.
PAULEY, ROGER

File: A12 191 595 - San Francisco, CA

Date: NOV - 8 2007

In re: MARGOT OLIVIO a.k.a. Margo Olivio Lacy

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Barbara S. Soukup, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

Lodged: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation (withdrawn)

APPLICATION: Termination of proceedings

The respondent appeals from an Immigration Judge's August 2, 2007, decision. In that decision the Immigration Judge found, *inter alia*, the respondent, a native and citizen of Germany and a lawful permanent resident of the United States, removable as an alien convicted of an aggravated felony on the basis of her June 19, 2004, conviction in California for the offense of controlled substance possession for sale in violation of CAL. HEALTH & SAFETY CODE § 11378.[1] The Immigration Judge concluded that this offense qualified as an aggravated felony under section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B); to wit, a "drug trafficking crime." The appeal will be sustained, and the removal proceedings will be terminated.

The respondent argues on appeal that, as the record of conviction is limited to the abstract of judgment and the criminal information, pursuant to *Snellenberger v. Gonzales*, 493 F.3d 1015 (9th Cir. 2007) and *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007), her conviction cannot form the basis for finding her removable. She asserts that, as the California definition of "controlled substance" does not map perfectly with the definition of "controlled substance" in the Federal

[1] This provision states that every person who possesses for sale any controlled substance which is (1) classified in Schedule III, IV, or V and which is not a narcotic drug, except subdivision (g) of Section 11056, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20), (21), (22), and (23) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d), (e), or (f), except paragraph (3) of subdivision (e) and subparagraphs (A) and (B) of paragraph (2) of subdivision (f), of Section 11055, shall be punished by imprisonment in the state prison.

Controlled Substances Act, under the categorical approach, the Department of Homeland Security (DHS) cannot prove that her conviction qualifies as a drug trafficking crime. Moreover, she further argues that, as the abstract of judgment may not be employed under the "modified" categorical approach, the DHS is again unable to meet its burden of proof.

In *Ruiz-Vidal, supra,* at 1077-78, the court held that in proving removability based on a conviction for possession of a controlled substance, the DHS must show that the underlying conviction was for possession of a substance that is unauthorized under both state law and the Controlled Substances Act. Similarly, this case concerns an offense involving possession of a controlled substance, albeit for sale. As the California definition of "controlled substance" does not map perfectly with the definition of "controlled substance" in the Federal Controlled Substances Act (CSA), by applying a "categorical" approach, that is, looking only to the statutory definition of the offense, we may not conclude that the respondent's California conviction for possession of a controlled substance for sale represented a drug trafficking crime, as defined under the CSA.

When it is unclear from the statutory definition of the offense as to whether an offense constitutes a removable offense, the United States Court of Appeals for the Ninth Circuit, the jurisdiction in which this matter arises, provides that a "modified" categorical approach is to be applied, under which we may look beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction, including the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings. *See Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004). The present record contains an abstract of judgment of conviction and a charging document, but does not include jury instructions or any documents relating to the respondent's plea. However, in the Ninth Circuit, when applying the "modified" categorical approach, the abstract of judgment is not part of the record of conviction. *See United States v. Snellenberger*, 493 F.3d 1020 at fn. 5 (observing that neither abstracts of judgment nor minute orders may be considered under the modified categorical approach defined in *Shepard v. United States*, 544 U.S. 13, 26 (2005)).

Under the particular circumstances of this case, we conclude that Ninth Circuit law precludes us from finding that the respondent has been convicted of an offense which constitutes a "drug trafficking crime." The respondent pled guilty to violating CAL. HEALTH & SAFETY CODE § 11378, a statute which criminalizes the possession of controlled substances for sale. However, our examination of the "record of conviction" is limited to the criminal information and precludes us from finding that she pled guilty to possession for sale of a controlled substance listed under the CSA. As the Ninth Circuit has observed, in determining whether a conviction may serve as a predicate offense for removal, charging papers alone are never sufficient. *See Ruiz-Vidal v. Gonzales*, 473 F.3d at 1078-79. In sum, the documents permissible under Ninth Circuit precedent were not produced by the DHS in the instant case. The record of conviction is insufficient to show that the criminal conviction was for a drug trafficking crime. Accordingly, we find that the DHS has not shown, by clear and convincing evidence, that the respondent's conviction was for an aggravated felony. As the respondent is not removable for having been convicted of an aggravated felony, the appeal will be sustained, the Immigration Judge's decision will be vacated, and the proceedings will be terminated.

The following orders shall be issued.

ORDER: The appeal is sustained.

FURTHER ORDER: The Immigration Judge's August 2, 2007, decision is vacated.

FURTHER ORDER: The removal proceedings are terminated.

FOR THE BOARD