U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Lee, Alan
Alan Lee Attorney at Law
408 8th Avenue, Suite 5A
New York NY 10001

DHS/ICE Office of Chief Counsel - NYC
26 Federal Plaza, 11th Floor
New York NY 10278

Name:

A 079-683-165

Date of this Notice: 8/1/2022

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:
Hunsucker, Keith

Userteam: Docket

NOT FOR PUBLICATION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF:

, A079-683-165

Respondent

FILED
Aug 01, 2022

ON BEHALF OF RESPONDENT: Alan Lee, Esquire

IN REMOVAL PROCEEDINGS
On Certification from a Decision of the Immigration Court, New York, NY

Before: Hunsucker, Appellate Immigration Judge

HUNSUCKER, Appellate Immigration Judge

This case was last before the Board on December 9, 2019, when we rejected the respondent's interlocutory appeal of the Immigration Judge's October 4, 2019, denial of the respondent's motion to terminate proceedings. On February 21, 2020, the Immigration Judge issued a new decision terminating proceedings and certifying the decision to the Board. Neither party submitted a brief to the Board. Pursuant to its authority, the Board will accept this case on certification. 8 C.F.R. §§ 1003.1(c), 1003.7. The decision of the Immigration Judge is affirmed.

We recite the undisputed procedural history for clarity. The respondent, a native and citizen of China, entered the United States in 2003, was granted asylum in 2005, and adjusted his status to that of a lawful permanent resident in 2006. In 2012, he was convicted under section 18.2-94 of the Annotated Code of Virginia, for possession of burglarious tools (*See* IJ at 2). In 2013 he was placed in removal proceedings and charged as removable for his conviction for a crime involving moral turpitude ("CIMT") under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I).

On October 4, 2019, the Immigration Judge denied the respondent's motion to terminate. After the respondent filed another motion to terminate based on changed case law, specifically in light of *Matthews v. Barr*, 927 F.3d 606 (2d Cir. 2019), the Immigration Judge issued a new decision on February 21, 2020, and granted the respondent's motion to terminate without prejudice. She certified that decision to the Board and we consider the legal issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The determinative legal issue in this case is whether, in order to establish that he is not removable, the respondent must show that someone was *actually prosecuted* under this facially overbroad State statute for the type of conduct which is not an immigration crime under the Federal definition.

We conclude the respondent was not required to make this showing, as the statute was facially overbroad and this case is under the jurisdiction of the United States Court of Appeals for the Second Circuit.

The Board has held that, when assessing whether a criminal conviction is for a CIMT, the categorical approach applies. *See Matter of Vucetic*, 28 I&N Dec. 276, 277 (BIA 2021). The categorical approach is an inquiry into whether the crime that a noncitizen committed "categorically matches" an offense which would make the noncitizen removable or inadmissible. *Id.* This approach requires us to focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction. *See Matter of Ortega-Lopez*, 27 I&N Dec. 382, 384-85 (BIA 2018).

In cases where there is a categorical mismatch between the State statute and Federal "generic" definition, such that the State definition is broader and covers more conduct than the Federal definition, the Board has held that the realistic probability test should be employed. *See Matter of Morgan*, 28 I&N Dec. 508, 510 (BIA 2022); *Matter of Aguilar-Barajas*, 28 I&N Dec. 354, 356, 365 n.2 (BIA 2021). The purpose of the realistic probability test is to assess whether a statute of conviction would *actually* be applied to punish conduct outside of the generic Federal definition of an immigration crime, rather than speculating about a "theoretical possibility" that the State would apply its statute to conduct falling outside of the generic definition. *See Moncrieff v. Holder*, 569 U.S. 184, 191, 206 (2013) (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

The Board has interpreted the Supreme Court's requirement that a noncitizen furnish evidence which "demonstrate[s] that the State actually prosecutes the relevant offense" as ubiquitous in every realistic probability inquiry—regardless of whether a statute is facially overbroad. *See Matter of Navarro Guadarrama*, 27 I&N Dec. 560, 566-67 (BIA 2019) ("[T]here must be a realistic probability of a State applying a statute beyond the Federal definition for the State law to fail the categorical inquiry, and [] whether such a probability exists depends on if the State actually prosecutes the offense in a manner broader than the Federal law." (quotations and citation omitted)).

However, the Board has acknowledged that this application may not apply in circuit courts with contrary law. *Id.* ("This approach to the realistic probability test should be applied in any circuit that does not have binding legal authority requiring a contrary interpretation."). In some circuits, when the State statute is overbroad on its face compared to the Federal definition, the inquiry ends, and the realistic probability test need not be employed. *See, e.g., Said v. U.S. Att'y Gen.*, 28 F.4th 1328, 1332 (11th Cir. 2022) ("Thus, a litigant can use facially overbroad statutory text to meet the burden of showing the realistic probability that the state law covers more conduct than the federal.").

This case is governed by the law of the Second Circuit. The Second Circuit has interpreted the realistic probability test as being inapplicable if a state statute is facially overbroad. *See Jack v. Barr*, 966 F.3d 95, 98 (2d Cir. 2020) ("[W]e held that the realistic probability test applies only to statutes of indeterminate scope and has no role to play in the categorical analysis when the state statute of conviction on its face reaches beyond the federal definition." (internal formatting, quotations, and citation omitted); *Williams v. Barr*, 960 F.3d 68, 78 (2d Cir. 2020) ("The 'realistic probability' test articulated in *Duenas-Alvarez* has no role to play in the categorical analysis, however, when the state statute of conviction on its face reaches beyond the generic federal definition.").

The Immigration Judge, in her analysis, relied on *Matthews*, 927 F.3d at 618, which extended the Second Circuit's prior holding in *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) ("The realistic probability test is obviated by the wording of the state statute, which on its face extends to conduct beyond the definition of the corresponding federal offense."). We acknowledge that the Board had previously interpreted *Hylton* as a limited holding in *Navarro Guadarrama*, 27 I&N Dec. at 565 n.5 ("We consider the decision in *Hylton* to be limited to the specific issue addressed—whether the alien was convicted of a drug-trafficking aggravated felony."). But, as the Immigration Judge correctly recognized, the Second Circuit has extended its case law to depart from the Board's requirement of prosecution to satisfy the realistic probability test. *See, e.g., Jack*, 966 F.3d at 98; *Williams*, 960 F.3d at 78. Thus, binding Second Circuit precedent controls here and was appropriately applied by the Immigration Judge. Accordingly, the decision of the Immigration Judge will be affirmed.

ORDER: The decision of the Immigration Judge is affirmed.