UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
ELIZABETH, NEW JERSEY

File No.: A200-	:	
In the Matter of	:	**In Removal Proceedings**
Davidson T.	:	
Respondent	:	

CHARGES:	INA § 212(a)(6)(A)(i)	Alien present without being admitted or paroled
	INA § 212(a)(2)(A)(i)(II)	Controlled substance offense

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

I. Facts and Procedural History

On July 11, 2016, the Department of Homeland Security ("DHS") issued Davidson T. ..... ("Respondent") a Notice to Appear ("NTA") alleging that:

1. Respondent is not a citizen or national of the United States;
2. Respondent is a native and citizen of Haiti;
3. Respondent arrived in the United States at an unknown place, on an unknown date; and
4. Respondent was not then admitted or paroled after inspection by an Immigration Officer.

Exhibit ("Exh") 1. The NTA also charged Respondent as removable pursuant to INA § 212(a)(6)(A)(i)[1], as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

[1] INA § 212(a)(6)(A)(i) states: "An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."

On July 28, 2016, Respondent appeared with counsel, Simone Bertollini, Esq., before Immigration Judge ("IJ") Mirlande Tadal in Elizabeth, New Jersey. The court reset the case to a later date.

On August 11, 2016, Respondent appeared with counsel before IJ Tadal. DHS filed Form I-261, Additional Charges of Inadmissibility/Deportability, charging Respondent with the following factual allegations in addition to those set forth in the NTA:

> 5. Respondent was, on June 14, 2002, convicted in the Superior Court of New Jersey, Essex County, of conspiracy to possess marijuana and conspiracy to possess marijuana with intent to distribute, in violation of New Jersey Statute section 2C:5-2.

Exh. 1A. The I-261 also charged Respondent as removable pursuant to section 212(a)(2)(A)(i)(II)[2] of the INA, as an alien who has been convicted of a violation of law relating to a controlled substance. Respondent, through counsel, admitted factual allegations 1 through 4 as listed on the NTA, and also conceded the charge of removability pursuant to INA § 212(a)(6)(A)(i). Respondent did not address the factual allegation and inadmissibility charge contained in the I-261. The court reset the case to a later date.

On August 29, 2016, Respondent, through counsel, submitted a motion requesting dismissal of DHS' additional charge of inadmissibility as listed on Form I-261. *See* Resp't Motion to Dismiss DHS' Additional Charge of Inadmissibility received Aug. 29, 2016.

On September 15, 2016, Respondent appeared with counsel before IJ Tadal. DHS filed an untimely[3] response to Respondent's Aug. 29, 2016 motion. *See* DHS' Response Motion in Support of Additionaly [Sic] Charge of Inadmissibility, received Sep. 15, 2016. The matter is now before the court.[4]

II. Legal Standard and Analysis

In the case of a respondent charged as being present in the United States without being admitted or paroled, the Government must first establish the alienage of the respondent. If the Government establishes foreign birth, a presumption of alienage arises. *See Matter of Hines*, 24 I&N Dec. 544, 546 (BIA 2008) *modified on other grounds by Matter of Cross*, 26 I&N Dec. 485 (BIA 2015). Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be

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[2] INA § 212(a)(2)(A)(i)(II) states: "Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a violation of (or a conspiracy or attempt to violate) 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)), is inadmissible.

[3] As per Form DX issued by the court on August 29, 2016, DHS was granted until September 9, 2016 to reply to Respondent's motion. DHS filed its response six days late, on September 15, 2016.

[4] As Respondent previously conceded removability under INA § 212(a)(6)(A)(i), this decision will only address the remaining disputed charge pursuant to INA § 212(a)(2)(A)(i)(II).

admitted to the United States and is not inadmissible as charged. INA § 240(c)(2); 8 C.F.R. § 1240.8(c).

The INA defines "conviction" as "a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." INA § 101(a)(48)(A). The INA and governing regulations provide that the following types of documents may be used as evidence of a criminal conviction: an official record of judgment and conviction, an official record of plea, verdict, and sentence, a docket entry from court records that indicates the existence of the conviction, official minutes of court proceedings or a transcript of a court hearing which takes notice of the existence of the conviction, an abstract of a record of conviction prepared by the court in which the conviction was entered or by the state official associated with the state's repository of criminal justice records, any document prepared by or under the direction of the court in which the conviction was entered that indicates the existence of the conviction, any document or record attesting to the conviction that is maintained by an official of a state or federal penal institution which is the basis for the institution's authority to assume custody over the individual named in the record. INA § 240(c)(3)(B) and 8 C.F.R. § 1003.41(a). Further, 8 C.F.R. § 1003.41(d) provides that "other evidence that reasonably indicates the existence of a criminal conviction" may be admitted to prove a conviction. *See Matter of Velasquez*, 25 I&N Dec. 680, 686 (BIA 2012) (discussing electronic records and authentication of records).

A. Respondent's conviction is not an offense "relating to a controlled substance" under INA § 212(a)(2)(A)(i)(II)

In the instant case, DHS charged, and Respondent admitted, that he is not a citizen or national of the United States. Exh. 1. Thus, Respondent bears the burden of proving that he is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged, i.e. that he has not been convicted of a violation of law "relating to a controlled substance" under INA § 212(a)(2)(A)(i)(II). *See* INA § 240(c)(2); 8 C.F.R. § 1240.8(c). DHS submitted a judgment of conviction indicating that Respondent was convicted of "Conspiracy to Violate Narcotics Laws" in violation of N.J. STAT. ANN. § 2C:5-2, which, at the time of Respondent's conviction, provided, in pertinent part:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Based on this conviction, DHS charged Respondent as an alien "convicted of, or who admits having committed acts which constitute the essential elements of . . . a violation (or a conspiracy or attempt to violate) 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 Substance Act (21 U.S.C. 802)." INA § 212(a)(2)(A)(i)(II). The phrase "relating to" is not defined in the INA. Previously, the Board of Immigration Appeals ("BIA") construed the term broadly, and found "relating to" to have a broad ordinary meaning, such as "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *See Matter of Espinoza*, 25 I&N Dec. 118, 120 (BIA 2009). Accordingly, the BIA found that one could be found inadmissible under INA § 212(a)(2)(A)(i)(II) for convictions that involved possession of drug paraphernalia, but no actual controlled substance.

However, the Supreme Court was critical of *Matter of Epinoza* and its reasoning in *Mellouli v. Lynch*, 135 S. Ct. 1980, 1988-91 (2015). While *Mellouli* dealt with the removability charge relating to a controlled substance rather than the inadmissibility charge, the language in the two provisions is nearly identical. *See* INA §§ 212(a)(2)(A)(i)(II); 237(a)(2)(B)(i). *Mellouli* rejected the BIA's broad interpretation of "relating to" as stated in *Matter of Espinoza*, stating that construction of § 1227(a)(2)(B)(i) must be faithful to the text, which limits the meaning of "controlled substance" for removal purposes to the substances controlled under § 802. *Id.* The Court stated: "we therefore reject the argument that *any* drug offense renders an alien removable, without regard to the appearance of the drug on a § 802 schedule. Instead, to trigger removal under § 1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug "defined in [§ 802]."

Here, Respondent's final conviction is described in the judgment of conviction as "Conspiracy to Violate Narcotics Laws." Exh 2, p. 8. However, the statute under which Respondent was convicted, § 2C:5-2, criminalizes conspiracy alone, with no indication of the underlying offense which was the object of the conspiracy. Although it is true that a jury must find beyond a reasonable doubt the specific underlying substantive offense of the conspiracy, here, there is nothing in the record of conviction to indicate the specific substantive offense that formed the basis of the conspiracy. *See* N.J. Jury Instructions, N.J.S.A. 2C:5-2 (revised April 12, 2010). "Narcotics Laws" is a vague term that could refer to any number of New Jersey statutes, including one which criminalizes the mere possession of drug paraphernalia, which the Supreme Court has held is categorically not an offense relating to a controlled substance. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1984 (2015)(holding that a Kansas conviction for using drug paraphernalia to store or conceal a controlled substance is not a conviction of a law "relating to a controlled substance" under INA § 237(a)(2)(B)(i)).

In addition, although DHS argues that the conviction relates to a controlled substance because count 1 of the indictment charges Respondent with conspiracy to "Possess a Controlled Dangerous Substance and Possess With Intent to Distribute a Controlled Dangerous Substance, to wit: Marijuana," the court cannot rely on the original charges to conclude that Respondent was convicted of violating a law "relating to a controlled substance". *See* INA § 101(a)(48)(A); *Acosta v. Ashcroft*, 341 F.3d 218, 222 (3d Cir. 2003). The INA defines "conviction" as "a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." INA § § 101(a)(48)(A). Here, Respondent was found guilty of violating N.J. STAT.

ANN. § 2C:5-2 and received punishment in the form two years probation, which renders the judgment a "conviction" for purposes of the INA. *See* Exh. 2, p. 8. *See also* INA § 101(a)(48)(A). Respondent was not convicted of any specific crime which forms the substantive basis of the conspiracy conviction. *See* Exh. 2, p. 1. Therefore, the court cannot use the evidence of the original charge to determine which portion of the statute Respondent was convicted. *See Acosta*, 341 F.3d at 222.

In addition, the court notes that Respondent's conviction does not constitute an admission for purposes of INA § 212(a)(2)(A)(i)(II). In *Matter of K*, 7 I&N Dec. 594, 598 (BIA 1957), the BIA adopted a 3-part test for the acceptance of an admission as a ground of inadmissibility: (1) the admitted conduct must constitute the essential elements of the crime; (2) the applicant must have been provided with a definition and the essential elements of the offense prior to his admission; and (3) the admission must be voluntary. The applicant must also admit all facts constituting the crime. *Matter of E-N-*, 7 I&N Dec. 153 (1956). Here, Respondent was convicted of N.J. STAT. ANN. § 2C:5-2, and never admitted to having committed conduct which constitutes the essential elements of an offense relating to a controlled substance. As such, the court finds that Respondent's conviction under N.J. STAT. ANN. § 2C:5-2 is categorically not an offense relating to a controlled substance under INA § 212(a)(2)(A)(i)(II).

III. CONCLUSION

Respondent's conviction under N.J. STAT. ANN. § 2C:5-2 does not constitute a violation of law relating to a controlled substance. Respondent is therefore not properly charged with inadmissibility under INA § 212(a)(2)(A)(i)(II). Accordingly, the following orders shall be entered:

ORDERS

IT IS ORDERED that the removability charge as listed on Form I-261 – INA § 212(a)(2)(A)(i)(II) – is **NOT SUSTAINED.**

IT IS FURTHER ORDERED that Respondent appear at the next scheduled Master Calendar, where he will be afforded the opportunity to seek relief from removal.

Date 10/3/16

Mirlande Tadal
Immigration Judge

Both parties have the right to appeal the court's decision. The Notice to Appeal is due at the BIA within thirty (30) days of the mailing of this decision.