[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-13313
Non-Argument Calendar

Agency No. A047-038-733

DEVON IGNACIOUS PORTER,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(April 12, 2018)

Before WILSON, ANDERSON, and HULL, Circuit Judges.

PER CURIAM:

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Devon Ignacious Porter, proceeding *pro se*, seeks review of the Board of Immigration Appeals' ("BIA") final order affirming the Immigration Judge's ("IJ") denial of cancellation of removal. The BIA held that Porter did not meet his burden of showing that he was eligible for cancellation of removal because he did not establish that his Florida conviction for trafficking in methamphetamine under Fla. Stat. § 893.135(1)(f) was not an aggravated felony. The BIA reasoned that the statute of conviction was divisible, with some of the alternative elements being aggravated felonies and some not, but that Porter's conviction record was inconclusive as to which elements formed the basis of his conviction. Thus, Porter did not meet the burden, which was his, to prove his conviction was not for an aggravated felony. Porter challenges that conclusion, arguing that the documents evidencing his conviction show he only possessed methamphetamine, so he was not convicted of an aggravated felony, and therefore, he is eligible for cancellation of removal. He also argues that he should not have been removed as an aggravated felon, because the government failed to meet its burden to establish his removability. He contends that if a criminal statute is divisible for purposes of a deportation ground and the record of conviction is sufficiently vague, the government cannot meet its burden and the individual is not deportable.

We review the BIA's decision as the final judgment, except that we review any portion of the IJ's decision that the BIA expressly adopted. *Rivas v. U.S. Att'y*

Gen., 765 F.3d 1324, 1328 (11th Cir. 2014), *cert. denied*, *Rivas v. Holder*, 135 S. Ct. 1414 (2015). We review legal issues *de novo*. *Id.*; *Sairath v. Dyer*, 154 F.3d 1280, 1281-82 (11th Cir. 1998). We review *de novo* whether a prior conviction qualifies as an aggravated felony. *Accardo v. U.S. Att'y Gen.*, 634 F.3d 1333, 1335 (11th Cir. 2011). Additionally, we are required to give liberal construction to the pleadings of *pro se* litigants. *Albra v. Advan, Inc.*, 490 F.3d 826, 829 (11th Cir. 2007).

The Immigration and Nationality Act ("INA") permits permanent residents who otherwise would be removable to apply for cancellation of removal, provided that, *inter alia*, they have "not been convicted of any aggravated felony." INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3). The alien bears the burden of proving that he is statutorily eligible for the relief sought. INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A). "If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." 8 C.F.R. § 1240.8(d).

The INA specifically defines an "aggravated felony" to include "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of Title 18)." INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). That statute, in turn, defines a "drug trafficking crime" as "any

felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*).” 18 U.S.C. § 924(c)(2). This Court has recently held that Florida Statute section 893.135(1)(c) is neither divisible nor a categorical match to a federal crime in the Controlled Substance Act. *Cintron v. U.S Att'y Gen.*, __ F.3d __, 2018 WL 947533 (11th Cir. Feb. 20, 2018).

Subsection (f) of section 893.135(1) at issue in this case is substantially identical to the subsection examined in *Cintron*.[1] *See Ulloa Francisco v. U.S. Att'y Gen.*, __ F.3d __, 2018 WL 1249998 (11th Cir. Mar. 12, 2018) (comparing subsection (b) to subsection (c) and concluding that they were substantially identical such that *Cintron* controlled). Therefore, we determine that Porter's conviction under Fla. Stat. § 893.135(1)(f) could not be an aggravated felony and

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[1] Compare subsection (f):

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 14 grams or more of amphetamine, as described in s. 893.03(2)(c) 2., or methamphetamine, as described in s. 893.03(2)(c) 4., or of any mixture containing amphetamine or methamphetamine, or phenylacetone, phenylacetic acid, pseudoephedrine, or ephedrine in conjunction with other chemicals and equipment utilized in the manufacture of amphetamine or methamphetamine, commits a felony of the first degree, which felony shall be known as “trafficking in amphetamine,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

with subsection (c):

> A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, ... or 4 grams or more of any mixture containing any such substance, but less than 30 kilograms of such substance or mixture, commits a felony of the first degree, which felony shall be known as “trafficking in illegal drugs,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. § 893.135(1)(c), (f).

Porter has satisfied the third requirement for eligibility for cancellation of removal, i.e. that he has not been convicted of an aggravated felony. INA § 240A(a)(3); 8 U.S.C. § 1229b(a)(3). The decision of the BIA is vacated and we remand for further proceedings.

VACATED AND REMANDED