MATTER OF DAVIS

In Deportation Proceedings

A-39187077

Decided by Board May 28, 1992

(1) The phrase "any illicit trafficking in any controlled substance," as used to specify a drug-related "aggravated felony" in section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43) (Supp. II 1990), may be commonly defined as any unlawful trading or dealing in any controlled substance.

(2) Any felony drug-related state, federal, or qualified foreign offense described by the words "illicit trafficking in any controlled substance," i.e., any unlawful trading or dealing in any controlled substance, is an aggravated felony without regard to the analysis set forth in *Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990).

(3) In addition, because the phrase "any illicit trafficking in any controlled substance" in section 101(a)(43) of the Act includes any "drug trafficking crime" as defined in 18 U.S.C § 924(c)(2) (1988), an offense involving a controlled substance which is not designated as a felony under the law of the rendering jurisdiction, and/or which does not constitute "illicit trafficking" as commonly defined, might nonetheless be a "drug trafficking crime" (and therefore qualify as "illicit trafficking" and an "aggravated felony") if it is analogous to a felony offense under the statutes enumerated in 18 U.S.C § 924(c)(2) as addressed in *Matter of Barrett, supra. Matter of Barrett, supra*, clarified.

(4) The determination whether a conviction for "any attempt or conspiracy" to commit a drug-related crime constitutes "any illicit trafficking in any controlled substance" within the meaning of section 101(a)(43) of the Act must be based on the drug-related substantive offense underlying the attempt or conspiracy.

CHARGE:

Order: Act of 1952—Sec. 241(a)(4)(B) [8 U.S.C. § 1251(a)(4)(B)]—Convicted of aggravated felony

Sec. 241(a)(11) [8 U.S.C. § 1251(a)(11)]—Convicted of controlled substance violation

ON BEHALF OF RESPONDENT:
Pro se

ON BEHALF OF SERVICE:
George W. Maugans
General Attorney

BY: Milhollan, Chairman; Dunne, Morris, Vacca, and Heilman, Board Members

In a decision dated July 19, 1990, the immigration judge found that

the respondent's state conviction for conspiracy to distribute a controlled substance was not an aggravated felony within the meaning of section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43) (1988), and that the respondent was therefore not deportable as charged under section 241(a)(4)(B) of the Act, 8 U.S.C. § 1251(a)(4)(B) (1988).[1] The immigration judge did, however, find the respondent deportable under section 241(a)(11) of the Act[2] for conviction of a controlled substance violation and ordered him deported to the Dominican Republic. The respondent and the Immigration and Naturalization Service both filed appeals. The respondent's appeal will be summarily dismissed. The Service's appeal will be sustained and the respondent will be ordered deported pursuant to both section 241(a)(11) and section 241(a)(4)(B) of the Act. The requests for oral argument before this Board are denied. 8 C.F.R. § 3.1(e) (1992).

The respondent is a male native and citizen of the Dominican Republic who entered the United States as an immigrant on or about March 21, 1985. On July 19, 1989, the respondent was convicted in the Circuit Court for Montgomery County, Maryland, of conspiracy to distribute a controlled substance (cocaine), a misdemeanor, in violation of the common law of Maryland. The Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien (Form I-221S) charging the respondent with deportability under sections 241(a)(4)(B) and (11) of the Act was issued on September 1, 1989.

The immigration judge's finding of deportability under section 241(a)(11) of the Act has not been challenged by the respondent on appeal. In his Notice of Appeal (Form EOIR-26) the respondent states the following as the reasons for his appeal: "My very resistance Appeal on the Case Mostly is Because, I do have a Wife in the U.S. and I also do have a 3 1/2 months old baby. Those my reasons why to Appeal the Case thank you." These generalized statements contained in the Notice of Appeal fail to meaningfully identify the specific aspects of the immigration judge's order that the respondent considers to be incorrect. *See Toquero v. INS*, 956 F.2d 193 (9th Cir. 1992); *Medrano-Villatoro v. INS*, 866 F.2d 132 (5th Cir. 1989); *Lozada v. INS*, 857 F.2d 10 (1st Cir. 1988); *Martinez-Zelaya v. INS*, 841 F.2d 294 (9th Cir.

[1] This ground of deportation has been revised and redesignated as section 241(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1251(a)(2)(A)(iii) (Supp. II 1990), by section 602(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5080, but that amendment does not apply to deportation proceedings for which notice has been provided to the alien before March 1, 1991. *See* section 602(d) of the Immigration Act of 1990, 104 Stat. at 5082.

[2] Revised and redesignated as section 241(a)(2)(B)(i) of the Act by section 602(a) of the Immigration Act of 1990, 104 Stat. at 5080.

1988); *Bonne-Annee v. INS*, 810 F.2d 1077 (11th Cir. 1987); *Townsend v. United States Dept. of Justice, INS*, 799 F.2d 179 (5th Cir. 1986); *Matter of Lodge*, 19 I&N Dec. 500 (BIA 1987); *Matter of Valencia*, 19 I&N Dec. 354 (BIA 1986); *Matter of Holguin*, 13 I&N Dec. 423 (BIA 1969). The respondent's appeal will be summarily dismissed pursuant to 8 C.F.R. § 3.1(d)(1-a)(i)(A). *See* 57 Fed. Reg. 11,570 (Apr. 6, 1992).

The Service contends in support of its appeal that the immigration judge erred in not also finding the respondent deportable under section 241(a)(4)(B) of the Act as an alien convicted of an aggravated felony. The Service's appeal will be addressed even though the respondent has been found deportable and has not applied for relief because of the additional consequences attendant to a finding of deportability as an aggravated felon, *see, e.g.*, section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B) (Supp. II 1990) (consent to reapply for admission after deportation required for 20 years after deportation in the case of an alien convicted of an aggravated felony), and because of the significant legal questions presented.

The immigration judge's decision finding the respondent deportable under section 241(a)(11), but not under section 241(a)(4)(B), was rendered after the decision of this Board in *Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990), and before the definition of "aggravated felony" was amended by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (effective Nov. 29, 1990).

At the time this Board entered the decision in *Matter of Barrett, supra*, section 101(a)(43) of the Act defined the term "aggravated felony" as follows:

> The term "aggravated felony" means murder, any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, or any attempt or conspiracy to commit any such act, committed within the United States.

In 18 U.S.C. § 924(c)(2) (1988), the term "drug trafficking crime" is defined as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)."

In *Barrett* we concluded that the definition of "drug trafficking crime" in 18 U.S.C. § 924(c)(2), for purposes of determining a drug-related "aggravated felony" under section 101(a)(43) of the Immigration and Nationality Act, encompasses state convictions for crimes analogous to offenses under the three federal statutes enumerated in section 924(c)(2). The comparison or analogy called for in *Barrett*, is a matter of law, not fact. *Matter of Barrett, supra*, at 177-78; *cf. Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975), *rev'g, Matter of Lennon*, 15 I&N

Dec. 9 (BIA 1974); *Matter of McNaughton*, 16 I&N Dec. 569, 572 (BIA 1978), *aff'd*, 612 F.2d 457 (9th Cir. 1980).

In applying *Barrett* in this case, the immigration judge found that the respondent's state conspiracy offense would qualify as an aggravated felony only upon proof that the elements of the state conspiracy provision are analogous to the elements of the conspiracy provision of the Controlled Substances Act (21 U.S.C. § 846). In a detailed comparison between the Maryland common law of conspiracy and 21 U.S.C. § 846, the immigration judge found that while proof of an overt act in furtherance of the conspiracy is required for a conviction under the federal provision as interpreted by the United States Court of Appeals for the Fourth Circuit, no overt act is required under Maryland law. Accordingly, he concluded that the state conviction was not sufficiently analogous to section 846 and was therefore not a "drug trafficking crime" nor, in turn, an "aggravated felony."

On appeal the Service's principal contention is that, pursuant to *Barrett*, the distribution offense underlying the respondent's conspiracy conviction (article 27, section 286(a)(1) of the Maryland Annotated Code), and not the state conspiracy conviction itself, must be compared to a felony provision in the federal statutes listed in 18 U.S.C. § 924(c)(2). The specific federal provision proposed by the Service as the appropriate analogy is 21 U.S.C. § 841(a)(1) (1988). In sum, the Service contends that any state conviction for a conspiracy to commit an underlying drug-related offense is an aggravated felony where the underlying drug-related offense is analogous to a felony provision under the federal statutes listed in 18 U.S.C. § 924(c)(2).

Subsequent to the decision of the immigration judge, the definition of aggravated felony at section 101(a)(43) of the Act was amended and now provides as follows:

> The term "aggravated felony" means murder, *any illicit trafficking in any controlled substance (as defined in section 102 of the Controlled Substances Act)*, including any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, any offense described in section 1956 of title 18, United States Code (relating to laundering of monetary instruments), or any crime of violence (as defined in section 16 of title 18, United States Code, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years, or any attempt or conspiracy to commit any such act. *Such term applies to offenses described in the previous sentence whether in violation of Federal or State law* and also applies to offenses described in the previous sentence in violation of foreign law for which the term of imprisonment was completed within the previous 15 years.

Section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43) (Supp. II 1990) (emphasis added). *See* section 501 of the Immigration Act of 1990, 104 Stat. at 5048, *as corrected by* section 306(a)(1) of the Miscellaneous

and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733, 1751 (enacted Dec. 12, 1991). The amendments to section 101(a)(43) by section 501 of the Immigration Act of 1990 apply to offenses committed on or after November 29, 1990, except that the amendments underlined in the above-quoted statute are effective as if included in the original definition of "aggravated felony" added by section 7342 of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4469, effective November 18, 1988. *See* section 501(b) of the Immigration Act of 1990, 104 Stat. at 5048.

In all cases involving statutory construction, the starting point must be the language employed by Congress, and it is assumed that the legislative purpose is expressed by the ordinary meaning of the words used. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984).

The wording of section 101(a)(43), as amended, specifies that the phrase "any illicit trafficking," as used to define a drug-related "aggravated felony," includes, at a minimum, "any drug trafficking crime" as defined in 18 U.S.C. § 924(c)(2). The amended definition retains its reference to "any attempt or conspiracy to commit any such act." Moreover, the amendment explicitly added that the term "aggravated felony" applies to "offenses described" in the first sentence of section 101(a)(43), "whether in violation of Federal or State law," in effect codifying the holding in *Barrett*,[3] or "in violation of foreign law for which the term of imprisonment was completed within the previous 15 years." Section 101(a)(43) of the Act, *as amended by* section 501 of the Immigration Act of 1990, 104 Stat. at 5048.

The phrase "illicit trafficking," as it relates to controlled substances in section 101(a)(43) of the Immigration and Nationality Act, is not defined in the Controlled Substances Act, the Controlled Substances Import and Export Act, the Maritime Drug Law Enforcement Act, or in section 101 of the Immigration and Nationality Act. Nor is "illicit trafficking" as it refers to firearms and destructive devices in section 101(a)(43) of the Act defined in 18 U.S.C. § 921. The terms "illicit trafficker" and "illicit trafficking" do appear in section 212(a)(23) of

[3] *See* S. Rep. No. 55, 101st Cong., 2d Sess. (1990); 136 Cong. Rec. S17,106, S17,117 (daily ed. Oct. 26, 1990) (the criminal alien amendments included as part of the Immigration Act of 1990 "[e]xtend the definition of aggravated felony to include aliens convicted of like State crimes, codifying a recent ruling of the Immigration Board of Appeals"); 136 Cong. Rec. S17,741 (daily ed. Oct. 27, 1990); *cf.* 136 Cong. Rec. S6603 (daily ed. May 18, 1990); H. Rep. No. 681, 101st Cong., 2d Sess., pt. 1, at 147 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6553.

the Act, 8 U.S.C. § 1182(a)(23) (1988),[4] in reference to controlled substances.

Black's Law Dictionary defines "traffic" as "[c]ommerce; trade; sale or exchange of merchandise, bills, money, and the like. The passing of goods or commodities from one person to another for an equivalent in goods or money." *Black's Law Dictionary*, 1340 (5th ed. 1979). "Trafficking" is in turn defined as: "Trading or dealing in certain goods and commonly used in connection with illegal narcotic sales." *Id.* Essential to the term in this sense is its business or merchant nature, the trading or dealing of goods, although only a minimal degree of involvement may be sufficient under the precedents of this Board to characterize an activity as "trafficking" or a participant as a "trafficker." *See Matter of Roberts*, 20 I&N Dec. 294 (BIA 1990); *Matter of P-*, 5 I&N Dec. 190 (BIA 1953).

"Illicit" is defined as "not permitted or allowed; prohibited; unlawful; as an illicit trade." *Black's Law Dictionary*, *supra*, at 673. Giving effect to this plain meaning, the use of "illicit" in section 101(a)(43) of the Immigration and Nationality Act simply refers to the illegality of the trafficking activity. *Cf. Bassett v. United States INS*, 581 F.2d 1385 (10th Cir. 1978).

Thus, we conclude that a drug-related aggravated felony includes any state, federal, or qualified foreign felony conviction involving the unlawful trading or dealing of any controlled substance as defined in section 102 of the Controlled Substances Act. *Cf. Matter of De La Cruz*, 20 I&N Dec. 346 (BIA 1991). If the offense satisfies this test, no further analysis of the type contemplated in *Barrett* is required. Conversely, we would not conclude, based solely on the common definitions of "traffic" or "trafficking," and considering that the ultimate term in question is "aggravated *felony*," that an offense that is not a felony and/or an offense which lacks a sufficient nexus to the trade or dealing of controlled substances constitutes "illicit trafficking" in a controlled substance within the meaning of section 101(a)(43) of the Act. The offense of simple possession would appear to be one example of a drug-related offense not amounting to the common definition of "illicit trafficking."[5]

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[4]Revised and redesignated as section 212(a)(2)(C) of the Act, by section 601(a) of the Immigration Act of 1990, 104 Stat. at 5067.

[5]This interpretation is consistent with our cases discussing the term "illicit trafficking" as it relates to controlled substances in section 212(a)(23) of the Act. For example, in these cases we have noted an exception to a finding of trafficking where the evidence establishes that the illegal substance was intended for personal use as distinguished from intent "to be used in 'traffick.'" *Matter of Rico*, 16 I&N Dec. 181, 186 (BIA 1977). *Compare Matter of McDonald and Brewster*, 15 I&N Dec. 203 (BIA 1975) (aliens who entered United States in possession of six marihuana cigarettes brought for personal use

However, because Congress has defined "illicit trafficking" in controlled substances as *including* any "drug trafficking crime" as defined in 18 U.S.C. § 924(c)(2), certain drug-related offenses not designated as felonies under the law of the rendering jurisdiction, and/or not obviously constituting "illicit trafficking" as commonly defined, might nonetheless be "drug trafficking crimes" and therefore constitute "illicit trafficking" in controlled substances within the meaning of section 101(a)(43).

A "drug trafficking crime," again, is "any felony punishable under" the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act. 18 U.S.C. § 924(c)(2); *see also Matter of Barrett, supra.* In *Barrett* we found that the definition of "drug trafficking crime" for purposes of determining a drug-related "aggravated felony" included state offenses "analogous" to offenses under the three federal statutes in 18 U.S.C. § 924(c)(2). We conclude that the analysis in *Barrett* is consistent with the 1990 amendment of section 101(a)(43) to include offenses "described" as "drug trafficking crimes," and that the comparison called for in *Barrett* will continue to apply in certain cases in determining "drug trafficking crimes." Moreover, in addition to state and federal offenses, the comparison in *Barrett* may also be appropriate for foreign offenses "for which the term of imprisonment was completed within the previous 15 years." Section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43) (Supp. II 1990).

In applying *Matter of Barrett* in this case, the respondent argued at the hearing that the phrase "any felony punishable" in 18 U.S.C. § 924(c)(2) indicated that only state convictions which were also characterized *under state law* as felonies could be "drug trafficking crimes." Under this analysis identical drug offenses in two different states which are analogous to an offense under the Controlled

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found not to be illicit traffickers) *with Matter of Favela,* 16 I&N Dec. 753 (BIA 1979) (conscious participation in attempt to smuggle marihuana; sufficient quantity of marihuana to infer that applicant was a trafficker); *Matter of R-H-,* 7 I&N Dec. 675 (BIA 1958) (conscious participation in drug trafficking; alien admitted delivering 15-20 dealer-supplied marihuana cigarettes on at least three different occasions to dealer's customers) *and Matter of P-, supra* (alien admitted intent to resell narcotics purchased in Italy and smuggled into United States). Of course, as distinguished from section 212(a)(23) of the Act, in the context of determining drug-related "illicit trafficking" for purposes of finding an "aggravated felony," there will first be a conviction. The Immigration and Nationality Act consistently attaches liability to the alien only for the *conviction* of an aggravated felony. *See, e.g.,* sections 241(a)(4)(B), 242(a)(2) of the Act. It is the elements of the drug conviction, or as noted *infra,* of the underlying offense in the case of an attempt or conspiracy conviction, and not inferences drawn from the surrounding circumstances, which determine whether the conviction is for "illicit trafficking" for purposes of determining a drug-related "aggravated felony."

Substances Act, but are treated by one state as a felony and by the second as a misdemeanor, would result in a finding of "drug trafficking crime" for the offense of the first state and not for the second. We do not find that this result is required by the language of 18 U.S.C. § 924(c)(2) or was intended by Congress in referring to that section. Specifically, we note that the word "felony" in 18 U.S.C. § 924(c)(2), as interpreted in federal criminal law, clearly refers to felony offenses under the three statutes enumerated there. *See, e.g., United States v. Contreras*, 895 F.2d 1241, 1244 (9th Cir. 1990). We therefore clarify our holding in *Matter of Barrett* to specify that for a finding of "drug trafficking crime" the alien's offense must be a felony offense under one of the three statutes listed in 18 U.S.C. § 924(c)(2), or it must be analogous to a felony offense under one of the three statutes in section 924(c)(2). A felony under federal criminal law is any offense where the maximum term of imprisonment authorized exceeds 1 year. 18 U.S.C. § 3559 (1988).

Thus, as noted above, where a state, federal, or qualified foreign conviction is a felony and involves unlawful "trafficking," as commonly defined, in any controlled substance as defined in section 102 of the Controlled Substances Act, a finding of aggravated felony is proper, and no analysis under *Barrett* is required. However, if the offense is not designated as a felony it may nonetheless be "a drug trafficking crime" (and therefore "illicit trafficking" and an "aggravated felony") if it is analogous to an offense punishable under one of the federal acts specified in 18 U.S.C. § 924(c)(2), and the offense to which it is analogous is a "felony" under federal law.

Similarly, certain offenses which do not obviously meet the common definitions of "trafficking" might nonetheless be "drug trafficking crimes" within the meaning of 18 U.S.C. § 924(c)(2) and therefore constitute "illicit trafficking" in controlled substances within the meaning of section 101(a)(43). To return to the example of possession, 21 U.S.C. § 844(a) (Supp. II 1990) indicates that certain possessory offenses are punishable by terms of imprisonment exceeding 1 year and thus are felonies.[6] Consequently, any federal conviction under 21 U.S.C. § 844(a) which is a felony, or pursuant to *Barrett* any federal, state, or specified foreign conviction analogous to such a

[6]For example, a conviction under section 844(a) for unlawful possession of a controlled substance, where the offense is committed after a prior drug conviction, is punishable by a term of imprisonment of up to 2 years. Similarly, a first-time conviction under section 844(a) for the possession of a mixture or substance which contains cocaine base and the amount of the mixture or substance exceeds 5 grams is punishable by imprisonment of not less than 5 years and not more than 20 years. 21 U.S.C. § 844(a) (Supp. II 1990). Because the maximum term of imprisonment authorized for these convictions exceeds 1 year they are felonies. 18 U.S.C. § 3559 (1988).

conviction, is a "drug trafficking crime" under 18 U.S.C. § 924(c)(2), "illicit trafficking" in a controlled substance within the meaning of section 101(a)(43) of the Act, and, therefore, an "aggravated felony."

In this case we have a state conspiracy conviction defined under the state's common law as a misdemeanor. With respect to a conviction for "any attempt or conspiracy" to commit a drug crime, we find that the determination whether the conviction is "any illicit trafficking" within the meaning of section 101(a)(43) must be based on the substantive offense underlying the attempt or conspiracy. The definition of "aggravated felony" in section 101(a)(43) of the Act, as amended, relates generally to aliens convicted of murder, drug trafficking, firearms trafficking, offenses described in 18 U.S.C. § 1956, or any crime of violence as defined in 18 U.S.C. § 16 (except purely political offenses) "*or any attempt or conspiracy to commit any such act*, committed within the United States." Section 101(a)(43) of the Act (emphasis added). We find that "any such act" refers to each of the five general categories of offenses comprising the definition of "aggravated felony." Our decision in *Barrett* focused only on the now-amended second of these categories, that is, the definition of "aggravated felony" based on "any drug trafficking crime" as defined in 18 U.S.C. § 924(c)(2). Resolution of the issue in *Barrett* (whether a state conviction may be a "drug trafficking crime") centered on the phrase "punishable under" in 18 U.S.C. § 924(c)(2). The analogy called for in *Barrett* resulted from the reading of "punishable under" and in no way focused on the independent "any attempt or conspiracy" phrase in section 101(a)(43). The phrase "*any* attempt or conspiracy" is not defined or limited by reference to any federal provision or definition. (Emphasis added). It can clearly arise as either a state or foreign provision (i.e., attempted murder) or a federal provision (i.e., conspiracy to distribute a controlled substance in violation of 21 U.S.C. §§ 846 and 841(a)(1)) within the context of section 101(a)(43) of the Act. The Service correctly reads *Barrett* as requiring a comparison between the elements of the underlying substantive drug offense and a federal drug provision referenced in 18 U.S.C. § 924(c)(2), and not between the state/foreign and the federal attempt or conspiracy provisions.

We note that this is consistent with the way in which attempt and conspiracy offenses have regularly been treated under section 241(a)(4) of the Act,[7] the provision to which the aggravated felony deportation ground was originally added. It is well established concerning crimes involving moral turpitude that "[w]here the underlying, substantive

[7]Revised and redesignated as section 241(a)(2)(A)(i) of the Act, by section 602(a) of the Immigration Act of 1990, 104 Stat. at 5077.

offense is a crime involving moral turpitude ... conspiracy to commit such an offense is also a crime involving moral turpitude." *McNaughton v. INS*, *supra*, at 459; *see also Guarneri v. Kessler*, 98 F.2d 580 (5th Cir.), *cert. denied*, 305 U.S. 648 (1938); *Mercer v. Lence*, 96 F.2d 122 (10th Cir.), *cert. denied*, 305 U.S. 611 (1938); *Matter of Goldeshtein*, 20 I&N Dec. 382 (BIA 1991), *rev'd on other grounds*, 8 F.3d 645 (9th Cir. 1993); *Matter of G-*, 7 I&N Dec. 114, 115 (BIA 1956). Likewise, "[t]here is no distinction for immigration purposes in respect to moral turpitude, between the commission of the substantive crime and the attempt to commit it." *Matter of Awaijane*, 14 I&N Dec. 117, 118-19 (BIA 1972) (citing *United States ex rel. Meyer v. Day*, 54 F.2d 336 (2d Cir. 1931)).

In sum, in cases based on an attempt or conspiracy conviction, where the underlying felony offense involves unlawful trading or dealing in controlled substances, i.e. "illicit trafficking" as commonly defined, no further comparison pursuant to *Barrett* is required for a finding that the conviction is for an aggravated felony. Where the underlying offense is not a felony and/or is not clearly "illicit trafficking" as commonly defined, the conviction may nonetheless still be "illicit trafficking" within the meaning of section 101(a)(43) of the Act if the underlying offense is a "drug trafficking crime" within the meaning of 18 U.S.C. § 924(c)(2), as interpreted in *Barrett*.

In the instant case we have reviewed the record de novo and conclude that the respondent has been convicted of an aggravated felony as defined in section 101(a)(43) of the Act. The respondent was convicted on July 19, 1989, in the Circuit Court for Montgomery County, Maryland, of conspiracy to distribute a controlled substance (cocaine) in violation of the common law of Maryland. His offense involves a controlled substance as defined in section 102 of the Controlled Substances Act. *See* 21 U.S.C. §§ 802(6), 812(c) Schedule II(a)(4) (Supp. II 1990); 21 C.F.R. § 1308.12(b)(4) (1991); *United States v. Amidzich*, 396 F. Supp. 1140 (E.D. Wis. 1975). In conspiracy cases we determine "illicit trafficking" based on the underlying substantive offense. Unlawful distribution of a controlled substance clearly concerns the unlawful trading or dealing of controlled substances. The underlying offense is a felony. *See* Md. Ann. Code art. 27, §§ 286(a)(1), (b), 279 (1991).[8] Accordingly, we conclude that the

[8]The Maryland Annotated Code provides as follows:
Unlawful manufacture, distribution, etc.; counterfeiting, etc.; manufacture, possession, etc., of certain equipment for illegal use; keeping common nuisance.

(a) Except as authorized by this subheading, it is unlawful for any person:

(1) To manufacture, distribute, or dispense, or to possess a controlled dangerous substance in sufficient quantity to reasonably indicate under all

respondent's conviction is for "illicit trafficking" within the meaning of section 101(a)(43) of the Act, and that he is therefore an alien convicted of an "aggravated felony" and deportable as such under section 241(a)(4)(B) of the Act. The Service's appeal with respect to deportability under section 241(a)(4)(B) of the Act is sustained.

ORDER: The respondent's appeal is summarily dismissed pursuant to 8 C.F.R. § 3.1(d)(1-a)(i)(A).

FURTHER ORDER: The appeal of the Immigration and Naturalization Service is sustained.

FURTHER ORDER: The respondent is ordered deported to the Dominican Republic based on both charges contained in the Order to Show Cause.

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circumstances an intent to manufacture, distribute, or dispense, a controlled dangerous substance ....

(b) Any person who violates any of the provisions of subsection (a) of this section with respect to:

(1) A substance classified in Schedules I or II which is a narcotic drug is guilty of a felony and is subject to imprisonment for not more than 20 years, or a fine of not more than $25,000, or both.

Md. Ann. Code art. 27, §§ 286(a)(1), (b) (1991).

Cocaine is included in Schedule II of Maryland's controlled dangerous substance list as follows:

Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts or isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph.

Md. Ann. Code art. 27, § 279(b)a.4. (1991).