INTRODUCTION

Each year, between thirty- and forty-thousand non-citizens are removed from the United States for drug-related criminal convictions. Many of these offenses—roughly two-thirds—are relatively minor, non-violent crimes, including thousands deported for possessing small quantities of federally controlled substances. Drug offenses carry particularly harsh immigration consequences for non-citizens, including mandatory detention, a permanent bar to reentry, and ineligibility for many forms of immigration relief.

Following a June 1, 2015, decision by the United States Supreme Court, *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), new arguments are available to protect at least some of those non-citizens facing removal following drug-related convictions. This practice advisory discusses the implications of the *Mellouli* decision for immigrants charged with Controlled Substance Offenses under Minnesota law.

Specifically, this advisory offers practice pointers for both criminal defense and immigration attorneys representing non-citizen clients. After giving a brief overview of *Mellouli v. Lynch* and its key holdings, and discussing the litigation that has been generated in its wake, this guide will look at the implication of this decision on various Minnesota drug offenses and discuss ways defense and immigration attorneys may be able to protect clients from deportation consequences. The appendix provides additional resources for immigration practitioners to challenge charges of removability.

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1 This practice advisory was written by University of Minnesota Law School students Nicholas Anderson ('16), Ami Hutchinson ('17), and Kelley Keefer ('17) under the supervision of Katherine Evans, counsel for Moones Mellouli and Teaching Fellow at the University of Minnesota’s Center for New Americans. With special thanks to the National Immigration Project and Immigrant Defense Project’s June 8, 2015 *Mellouli* Practice Advisory.

2 *Secure Communities and ICE Deportation: A Failed Program?* at Table 2, TRAC IMMIGRATION (Apr. 8, 2014), http://trac.syr.edu/immigration/reports/349/.


4 *See* Immigration Consequences of Drug Offenses, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (2012), https://www.nacdl.org/uploadedFiles/Content/Legal_Education/Live_CLE/Live_CLE/03_Drug_Offenses_Handout.pdf.

5 This practice advisory is not a substitute for client-specific immigration consultations, which remain necessary for minimizing the immigration consequences of criminal arrests and convictions based on the facts of an individual client’s case. Individuals convicted of controlled substance offenses in Minnesota should also consult an immigration attorney before leaving and returning to the United States.
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Mellouli v. Lynch

In Mellouli, the Supreme Court reaffirmed the strict categorical approach for determining removability for immigration purposes. Specifically, the majority opinion held that Mellouli, who was convicted of a Kansas drug paraphernalia offense, was not deportable for a conviction “relating to” a controlled substance where the government failed to show that the conviction was tied to a substance found in the federal schedules.

Factual Background

Moones Mellouli, a citizen of Tunisia and lawful permanent resident of the United States, was arrested in Kansas in 2010 for driving under the influence and driving with a suspended license. A post-arrest search in a Kansas detention facility yielded four orange pills hidden in Mellouli’s sock. The Court stated that Mellouli acknowledged that the pills were Adderall—a federally controlled substance under both federal and Kansas law—and a criminal complaint was filed charging Mellouli with trafficking contraband in jail, a felony under Kan. Stat. Ann. § 21–5915(b).

By virtue of what the court referred to as a “safe harbor” guilty plea, this initial charge was abandoned by the state. Instead, Mellouli pleaded guilty to the lesser charge of possessing drug paraphernalia to “store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.” Kan. Stat. Ann. § 21-5709(b)(2). The paraphernalia was the sock in which the pills had been found. The amended complaint did not, however, identify the substance contained in the sock.

In 2012, months after successfully completing probation, Mellouli was arrested by Immigration and Customs Enforcement, who charged him as removable under 8 U.S.C. § 1227(a)(2)(B)(i). Section 1227(a)(2)(B)(i) authorizes the removal of:

Any alien who at any time after admission has been convicted of a violation of (or conspiracy or attempt to violate) any law or regulation of the State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable.

Based on this language an Immigration Judge ordered Mellouli deported; the Board of Immigration Appeals (BIA) affirmed and Mellouli was deported in 2012 while he fought the order in federal court.

In its decision, the BIA relied on Matter of Martinez Espinoza, 25 I. & N. Dec. 118 (2009), in which it concluded that paraphernalia relates to “the drug trade in general” so that all drug paraphernalia convictions relate to federally controlled substances regardless of the actual substance involved in a particular conviction. The Immigration Judge in Mellouli used Martinez Espinoza to reason that Mellouli’s conviction for possession of drug paraphernalia involved the drug trade in

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8 The Supreme Court used the term in the context of a plea negotiated for the purpose of avoiding immigration consequences. It should be noted though that the Mellouli is still relatively new and so pleas to controlled substances offenses, even for paraphernalia, still trigger DHS enforcement in Minnesota and can affect other relief (see n.6), and are thus not fully “safe”, even if they might ultimately not trigger removability.
general and therefore implicated § 1227(a)(2)(B)(i). The Eighth Circuit denied Mellouli’s petition for review, and the Supreme Court granted certiorari.

Holding and Key Rulings by the U.S. Supreme Court

The Supreme Court disagreed with the Board of Immigration Appeals’ reliance on Matter of Martinez Espinoza. Writing for the majority, Justice Ginsberg reiterated that the strict categorical approach “has a long pedigree in our Nation’s immigration law.” Mellouli, 135 S.Ct. at 1986 (quoting Moncrieffe v. Holder, 569 U.S. 1678, at 1685 (2013)). She explained that “[b]y focusing on the legal question of what a conviction necessarily established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law.” Id. at 1987.

Under the strict categorical approach, Congress predicated deportation on “convictions, not conduct,” and the Court must therefore look only to the statutory definition of the offense of conviction, not the actual conduct of the non-citizen. In doing so, the Court must “presume that the conviction rested upon nothing more than the least of the acts criminalized’ under the statute.” Id. at 1986 (quoting Moncrieffe v. Holder, 569 U.S. 1678, at 1684–1684). Looking to the Kansas schedules of controlled substances, the Court identified at least nine substances that were not defined in § 802 at the time of Mellouli’s conviction. Mellouli’s conviction, therefore, was not necessarily tied to federally controlled substances because “it required no proof by the prosecutor that Mellouli used his sock to conceal a substance listed under § 802, as opposed to a substance controlled only under Kansas law.” Id. And so the Kansas offense was not a categorical match with the federal removal ground.

The Court also compared the BIA’s disparate treatment of different types of drug offenses. Relying in part on Matter of Paulus, 11 I. & N. Dec. 274 (1965)—which states “[w]here the record of conviction is silent as to the narcotic involved, an alien’s conviction . . . does not constitute a ground of deportability under section 241(a)(11) . . . since the conviction could have involved a substance which though a narcotic under California law is not a narcotic drug within the meaning of the immigration laws”—Justice Ginsberg concluded that the BIA and Eighth Circuit’s attempts to distinguish between drug possession and distribution offenses from offenses involving the drug trade in general created “the anomalous result that minor paraphernalia possession offenses are treated more harshly than drug possession and distribution offenses.” Mellouli, 135 S.Ct. at 1989.

The Supreme Court also rejected the Eighth Circuit’s reasoning “that a state paraphernalia possession conviction categorically relates to a federally controlled substance so long as there is ‘nearly a complete overlap’ between the drugs controlled under state and federal law.” Id. (quoting Mellouli v. Holder, 719 F.3d 995, at 1000 (8th Cir. 2013)). The Supreme Court explained that this reasoning had no limit or source in the statute and returned again to the categorical approach, holding that to trigger removal under the statute, “the Government must connect an element of the alien’s conviction to a drug ‘defined in § 802.’” Id. at 1991 (emphasis added).

Post-Mellouli Settlement Agreement

In the wake of the Mellouli decision, the Eighth Circuit vacated its prior decision and remanded the case to the BIA. The Eighth Circuit, however, issued a new decision accompanying its remand, opining that the BIA may look beyond the elements of the Kansas statute and consider specific underlying facts, such as the identification of Adderall in the dismissed complaint and Mellouli’s alleged admission, to determine whether an “alien’s drug-paraphernalia conviction involved a federally controlled substance.”
Mellouli challenged this new opinion that would permit facts not required for conviction to be used to prove removability as directly contrary to the Supreme Court’s categorical approach. The government eventually agreed. In a settlement agreement included in the appendix, the Solicitor General agreed that “the circumstance-specific rationale for removal discussed by the Eighth Circuit in the statement accompanying its remand order is not a valid basis for establishing removability under § 1227(a)(2)(B)(i) of the INA.” Instead, the government must use the categorical approach to establish that an individual has been convicted of a violation relating to a federally controlled substance. If the categorical approach is successful, the BIA may only consider circumstance-specific evidence for the narrow purpose of determining “whether an alien falls within the exception to removability in Section 1227(a)(2)(B)(i) for ‘a single offense involving possession for one’s own use of 30 grams or less of marijuana.’” See Matter of Dominguez-Rodriguez, 26 I. & N. Dec. 408 (B.I.A. 2014).

Take-away point:
Immigration courts may never consider evidence or facts that are not contained in the record of conviction (charging document, plea agreement, plea colloquy, and jury instructions) unless the elements of the conviction necessarily establish a tie to only federally controlled substances and the conviction could be based on possession of 30 grams or less of marijuana.

The strategies available to defense and immigration attorneys vary depending on whether the offense requires only identification of a class or schedule of controlled substances, involves simulated controlled substances, are for drug paraphernalia, or requires identification of a specific controlled substance. This advisory discusses each category of offenses in turn and concludes with practice tips for both criminal defense and immigration attorneys for each type of offense.

The reach of this advisory is limited. It primarily provides advice for protecting lawful permanent residents and undocumented people from the controlled substance grounds of deportability and inadmissibility at 8 U.S.C. § 1227(a)(2)(B)(i) and § 1182(a)(2)(A)(i)(II). It does not address the impact of drug arrests and convictions on eligibility for immigrants seeking Temporary Protected Status or administrative relief under President Obama’s Executive Action programs of DAPA and DACA.

Additionally, clients seeking some form of immigration relief often confront the government’s argument that the immigrant must affirmatively demonstrate that her conviction did not involve a federally controlled substance in this context—relying on the burden of proof on the immigrant to establish eligibility for relief under 8 U.S.C. § 1229a(c)(4)(A). The Supreme Court has indicated that burden of proof should not affect the outcome in Moncrieffe and a companion case to Mellouli that arose in the context of eligibility for relief. Moncrieffe, 133 S. Ct. at 1687 (“Escaping aggravated felony treatment does not mean escaping deportation, though. It means only avoiding mandatory removal. . . . At that point, having been found not to be an aggravated felon, the noncitizen may seek relief . . .”); Madrigal v. Lynch, 135 S. Ct. 2828 (2015) (reversing and remanding case seeking cancellation relief in light of Mellouli). This remains an area of active litigation though and a recent Eighth Circuit decision placed affirmative obligations on the immigrant to demonstrate that he did not have a disqualifying conviction. Andrade-Zamora v. Lynch, ___ F.3d ___, 2016 WL 761197 (8th Cir. 2016). Model briefing and amicus support on why the outcome should not depend on who bears the burden of proof may be available through the University of Minnesota’s Center for New Americans and the Immigrant Defense Project.
Minnesota Offenses that Require Only Identification Certain Schedules of Controlled Substances

Several controlled substances offenses in Minnesota criminalize possession or sale of any substance contained in certain controlled substance schedules,9 rather than referring to a specific substance. Minnesota case law only requires that “that the defendant possessed a substance that is a controlled substance.” See State v. Knoch, 781 N.W.2d 170, 178 (Minn. Ct. App. 2010) (citing State v. Olhausen, 681 N.W.2d 21, 28 (Minn.2004)). Since the statutory element of schedule-based drug offenses is the schedule, not a particular substance, these offenses are much more likely to be “safe” convictions for immigration purposes. Under the strict categorical approach, if the schedule(s) referenced in the statute contained any substance that was not federally controlled at the time of conviction, the statute is not a categorical match and should not trigger immigration consequences. The following Minnesota statutes fall into this category of offenses.

<table>
<thead>
<tr>
<th>MINNESOTA CONTROLLED SUBSTANCE CRIMES SPECIFYING SCHEDULES NOT SUBSTANCES</th>
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<tbody>
<tr>
<td><strong>Third Degree Sale:</strong> Minn. Stat. § 152.023, subd. 1(3), (4)10</td>
</tr>
<tr>
<td>- The crime of third-degree sale criminalizes sales of Schedule I, II, or III drugs, except sales of Schedule I and II narcotic drugs, to individuals under the age of eighteen. Similarly, conspiring with or employing individuals under the age of eighteen to sell Schedule I, II, or III narcotics is a third-degree controlled substance offense.</td>
</tr>
<tr>
<td><strong>Fourth Degree Possession or Sale:</strong> Minn. Stat. § 152.024, subd. 1(1)-(3); subd. 2(2)</td>
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<tr>
<td>- The fourth-degree controlled substance statute covers the remainder of Schedule I, II, and III sales, except sales of marijuana and tetrahydrocannabinols. Likewise, possession of the same substances with intent to sell is a possession crime in the fourth-degree. It is a substance crime in the fourth degree to sell a schedule IV or V substance to someone under the age of eighteen, or to employ or conspire to sell a Schedule IV or V with someone under the age of eighteen.</td>
</tr>
<tr>
<td><strong>Fifth Degree Possession or Sale:</strong> Minn. Stat. § 152.025, subd. 1(b)(2); subd. 2(a)(1), (b)(1)</td>
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<tr>
<td>- A fifth-degree possession conviction requires knowing and unlawful possession of one or more mixtures containing a Schedule I, II, III, or IV controlled substance, aside from possession involving less than 42.5 grams of marijuana. The crime of fifth-degree sale requires knowing and unlawful sale of one or more mixtures of a Schedule IV controlled substance.</td>
</tr>
<tr>
<td><strong>Other Controlled Substance Offenses:</strong> Minn. Stat. §152.027, subd. 1, subd. 2</td>
</tr>
<tr>
<td>- Subdivisions one and two of the “Other Controlled Substances” statute cover the sale and possession of a Schedule V controlled substance.</td>
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9 See Appendix for a link to information regarding Minnesota’s controlled substances by schedule for each year since they were established in 1971.

10 Under *Mellouli*, there may be certain strategies and arguments for third degree sale offenses, which are based on certain schedules, that are not available for third degree possession, which is substance specific. However, a conviction related to distribution raises additional risks. Sale of a controlled substance could trigger inadmissibility under 8 U.S.C. § 1182(a)(2)(C)(i) (reason to believe individual is a drug trafficker) and could be considered an aggravated felony for drug trafficking if the argument that the Minnesota offense is overbroad is not successful.
The following is an application of the strict categorical approach outlined in Mellouli to a charge of fifth-degree possession of a controlled substance. Note that overbreadth of the state schedule is necessary to avoid later immigration consequences.11

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**Application of the Categorical Approach to Schedule-Based Offenses**

**Example:** The fifth-degree possession statute prohibits possession of any “schedule I, II, III, or IV controlled substance, except a small amount of marijuana.” Minn. Stat. § 152.025 subd. 2 (1).

- **Defense Attorneys:** If your client is charged with fifth-degree possession, he may be protected from immigration consequences if the schedules specified in the statute list any substances that are not federally controlled and you create a record of conviction that admits only the element of a “schedule I, II, III or IV controlled substance,” without providing additional facts.

- **Immigration Attorneys:** If your client has been previously convicted of fifth-degree possession, you would need to examine the substances that were controlled under schedules I-IV at the time of conviction, and compare them to substances that were federally controlled at the time of conviction. If the Minnesota schedule is broader than the federal schedule, the conviction should not result in deportation.

Attorneys dealing with any of the controlled substance statutes referencing schedules should follow this example using the schedule(s) listed in the charged offense.

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**Law vs. Practice: Actual Identity of a Specific Substance is not a Required Element of Schedule-Based Controlled Substance Convictions**

It is important to reject arguments that a specific substance, as opposed to the schedule, is an element of these offenses that must be identified. While in practice the substance may be identified to satisfy the state's burden of proof on the “controlled substance” or “possession” elements, no Minnesota case requires substance identification in all circumstances. The only cases discussing the elements of Minnesota controlled substance crimes address: (1) sufficiency of the evidence required to prove that a defendant knowingly possessed a controlled substance; and, (2) the requirement that a jury must unanimously agree on a specific act of possession. Furthermore, the jury instructions for schedule-based offenses make no explicit statement that a substance must be identified.

If a defendant attacks the sufficiency of the evidence offered by the state to prove a defendant possessed a controlled substance, “Minnesota law requires proof of the actual identity of the substance,” and a defendant’s previous incriminating statements expressing his belief about a substance’s identity will not be sufficient. *State v. Vail*, 274 N.W.2d 127, 134 (Minn. 1979); *See also*...

11 Note that a felony conviction will render the individual an enforcement priority even if the felony is not for removable conduct. Jeh Johnson, Secretary of DHS, “Memo: Secure Communities” and “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum,” (Nov. 20, 2014). Thus, a felony resolution for these offenses may still have immigration consequences even if not ultimately rendering the individual removable.
Olhausen, 681 N.W.2d 28 (Minn. 2004); State v. Robinson, 517 N.W.2d 336 (Minn. 1994); State v. Knoch, 781 N.W.2d 170, 178 (Minn. Ct. App. 2010); State v. Kruger, 2012 WL 2077260 (Minn. Ct. App. 2012). This safeguard is designed to prevent convictions based on shaky evidentiary foundation, and does not require a jury to agree on a specific substance in all circumstances. Furthermore, while “knowing” possession is a required element of a drug possession charge, a defendant can be mistaken as to the specific identity of a substance as long as the defendant knows the substance is controlled. See State v. Ali, 775 N.W.2d 914, 919 (Minn. Ct. App. 2009). In other words, a defendant who thought he possessed pseudoephedrine (classified as Schedule V in Minnesota) and actually possessed norpseudoephedrine (a Schedule IV controlled substance) still has actual knowledge of illegal possession because both substances are controlled under Minnesota law. This mistaken identity issue further bolsters the fact that the actual identity of a substance is not a required element of schedule-based controlled substance offenses.

Occasionally, a defendant may be charged with two distinct instances of possession or constructive possession, which also often results in substance identification in practice. In these circumstances, Minnesota case law is clear that a jury must agree unanimously on a specific act of possession, not the substance involved. For example, in State v. Lubovich, 2006 WL 2529610 (Minn. Ct. App. 2006), the court of appeals reversed a conviction on the grounds that a jury did not unanimously agree whether the defendant possessed methamphetamine, psilocybin mushrooms, or both. The two instances of possession in Lubovich were distinct enough that some jurors could have found that the defendant possessed only the mushrooms, while some could have found he possessed only the methamphetamine. Clearly, even with cases like Lubovich, the element requiring jury unanimity (possession of a schedule I, II, III, or IV controlled substance, except a small amount of marijuana) is still distinguishable from the means of committing the element (possession of methamphetamine, mushrooms, or both).

Finally, defense attorneys and Immigration attorneys should be prepared to deal with judges or prosecutors who object to the fact that a specific substance is not an element of schedule-based offenses, particularly in light of the Minnesota Jury Instruction Guides. The jury instructions for these offenses are drafted in a “fill in the blank” format, so the argument would be that they imply that a specific substance should be filled in. When contrasted with the first-degree jury instructions, however, it is clear that these instructions contain no such requirement. To illustrate, the first-degree instructions specify in a footnote that the blank space must be filled in with “the narcotic charged in the complaint” or the “the amphetamine, phencyclidine, or hallucinogen charged in the complaint.” See pages 16-17, infra for further discussion of the jury instructions that necessarily require substance identification. Conversely, the schedule-based offenses simply list the schedules in a footnote, and make no mention of the specific substance the defendant was actually charged with possessing.13

12 The police in Lubovich found methamphetamine in a nearby ditch and in the hand of a passenger in Lubovich’s vehicle, in addition to finding mushrooms under his seat. The prosecutor informed the jury they could find the defendant possessed “psilocybin mushrooms only, methamphetamine only, or a combination of the two.” Likewise, the judge instructed the jury that defendant would be guilty of a crime for knowingly possessing “one or more mixtures containing psilocybin and/or methamphetamine.” Lubovich is unpublished, but it relies on State v. Stempf, 627 N.W.2d 352, 357 (Minn. Ct. App. 2001), which involved a defendant who was charged with fifth-degree possession arising out of two distinct incidents of constructive methamphetamine possession. The court concluded the jury should have been instructed to separately examine each charge and unanimously agree as to one or both instances of possession.

13 For example, the fifth-degree instructions provide:
A Second Layer of Protection: Scrubbing the Record of Conviction

Defense attorneys should, if possible, provide an added layer of protection by omitting mention of a specific substance in the record of conviction. Because the case law and jury instructions for schedule-based offenses do not require the identity of a substance, judges should not prohibit a plea or trial stipulation that substitutes the identity of the substance with, for example, “a controlled substance classified in Schedule I, II, III, or IV, except a small amount or marijuana.”

Practical Application

Minnesota judges have approved general pleas that do not identify a specific substance. In a 2015 case, a defendant in Hennepin County was initially charged with possession involving over 100 grams of marijuana. Because the statutory element is the schedule and not the substance, a state district court judge allowed the defendant to plead to “unlawfully possessing one or more mixtures containing a controlled substance classified in Schedule I, II, III, or IV, except a small amount of marijuana.” The prosecution deferred to the defense attorney on the factual basis, and the defense attorney specified only the language of the fifth-degree possession statute—and not the specific substance involved.

This type of plea is a useful model for defense attorneys with clients charged with schedule-based offenses who are primarily concerned with immigration consequences. In the above example, assume the government later attempts to deport the defendant based on his fifth-degree conviction. Even if an immigration judge determines the fifth-degree possession statute is divisible, the record of conviction will not reflect the underlying facts of the substance involved.

This step—removing the substance name—is important because courts will sometimes apply the “modified categorical approach,” which is meant to be used when a statute enumerates several different offenses (a “divisible” statute). This approach allows immigration judges to examine the “trial record—including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms” to determine whether the non-citizen was convicted of the offense that corresponds with the federal definition. United States v. Pate, 754 F.3d 550, 554 (8th Cir. 2014).

The Supreme Court in Descamps v. United States, 133 S. Ct. 2276, 2288 (2013), clarified that statutes are only meant to be divisible among the elements of the offense that a jury must unanimously find beyond a reasonable doubt, not the means that can be used to satisfy an element. The Eighth Circuit, however, in United States v. Mathis, 786 F.3d 1068 (8th Cir. 2015), confused this approach, or

First, the defendant unlawfully possessed one or more mixtures containing ________ (A Schedule I, II, III or IV controlled substance except a small amount of marijuana).


See also, 10 Minn. Prac., Jury Instr. Guides--Criminal CRIMJIG 20.34 (6th ed.) (fifth-degree sale); 20.42 (6th ed.) (possession of a Schedule V substance); 20.40 (6th ed.) (sale of a Schedule V substance); 20.30 (6th ed.) (fourth-degree conspiracy to sell with a minor); 20.34 (6th ed.) (fourth-degree sale to minor); 20.24 (6th ed.) (fourth-degree sale); 20.18 (6th ed.) (third-degree conspiracy to sell with a minor); 20.16 (6th ed.) (third-degree sale to a minor). Note: the fourth-degree possession with intent to sell does not have a corresponding form jury instruction, but there is no reason to assume the formatting would differ from the above instructions.
at least fell short of recognizing the distinction between means and elements. In Mathis, the list of “occupied structures” in the second-degree Iowa burglary statute at issue, which was separately defined elsewhere in the statute, included structures that would not have qualified under federal burglary. Id. at 1074. The court concluded “whether [the list of occupied structures] amount to alternative elements or merely alternative means to fulfilling an element, the statute is divisible, and we must apply the modified categorical approach.”14 Id. Because the Eighth Circuit has said that a statute that lists alternative means is divisible, immigration courts are currently looking to the record of conviction for more facts, even when those facts are not tied to elements of the offense.

NOTE: The Supreme Court has granted certiorari review in Mathis, so the Court will soon have another opportunity to clear up the confusion surrounding divisibility.

The Potential Impact of Uncertainty on Controlled Substance Offenses

Again using fifth-degree possession as an example, the statute is divisible among sale and possession crimes. See Minn. Stat. § 152.025 (separating by subdivision). The statute is further divisible between the first set of elements: (1) standard possession of a schedule I, II, III, or IV substance except a small amount of marijuana; and the second set of elements: (2) procuring or possessing a controlled substance by fraudulent means in the subsections of the fifth-degree possession subdivision. See id. at subd. 2.

Descamps says divisibility should stop there because these are the only two alternative sets of elements (forms of the offense) necessary to sustain a charge of fifth-degree possession. Given Mathis’ seeming disregard of the means vs. elements distinction, however, it is not certain that immigration courts in the Eighth Circuit will reach this result. The Eighth Circuit has placed significant emphasis on the disjunctive word “or” as the “hallmark of divisibility.” U.S. v. Bankhead, 746 F.3d 323 (8th Cir. 2014). A court may, therefore, decide to further divide fifth-degree possession into individual schedules based on the “I, II, III, or IV” language. Finally, given that the Eighth Circuit has deemed it appropriate to consult outside definitional statutes, an immigration court may go even further to consult the record of conviction and the list of controlled substances in Minn. Stat. § 152.02 to determine the substance an individual actually possessed.

14 The Iowa jury instructions require a jury to determine whether an individual burgled a vehicle or a building, so it is not clear that Mathis completely abandoned the Supreme Court’s divisibility approach. Iowa Crim. Jur. Instr. § 1300.13 (2004). This merely underscores the lack of clarity between means and elements in the Eighth Circuit’s divisibility case law, which the U.S. Supreme Court is poised to resolve.
PRACTICE TIPS

Criminal Defense Attorneys

☐ Seek a pre-trial diversion program under Minn. Stat. 401.065 like “Operation de Novo, Inc.” that does not require a formal admission of facts.
  

☐ Remove mention of a specific substance from the record of conviction, including:
  
  o The charging document;
  o Written plea agreement;
  o Transcript of a plea colloquy; and
  o Explicit factual findings by the judge.

☐ See if the prosecutor will amend the existing complaint to reflect only the statutory language or dismiss the old complaint and issue a new one with the neutral language. In the alternative, amending the existing complaint explicitly on the record may be sufficient if a prosecutor is reluctant to draft a new charging document.

☐ Consider whether raising a defense or evidentiary challenge will result in substance identification (see discussion of this issue on pages 7-8 for an example). If you determine a substance may be identified on the record, carefully weigh the benefits and risks of raising the defense or evidentiary challenge.

☐ It is very likely that defense attorneys will encounter pushback here. It will help to consult with clients to determine if there are any concessions to offer prosecutors, which may include accepting a less favorable sentence. Furthermore, seek to emphasize any potential weaknesses in the evidence to leverage the request.

Immigration Attorneys

☐ Oppose divisibility by substance or schedule for these offenses, arguing that the element the jury is required to find beyond a reasonable doubt is only that the defendant possessed a substance in one of the listed schedules and not marijuana.

☐ At a minimum, try to contain any modified categorical analysis to a determination of the schedule involved (i.e. searching the record of conviction to determine a defendant convicted of fifth-degree possession was actually convicted of possessing a Schedule IV substance, but not going further to determine the specific Schedule IV substance).

☐ For clients with these schedule-based convictions, examine the specific schedule or schedules to see if there are any listed substances that are not federally controlled. Look at the state and federal schedules, as they existed at the time of the conviction, and not at the most current schedules. If there is over-breadth in the state schedule, the offense should not result in immigration consequences.
Simulated Controlled Substances

Minnesota’s offense for the manufacture and distribution of simulated controlled substances does not have as an element a specific controlled substance. Nor do they require a tie to federally controlled substances. As such, a conviction for this offense should not lead to deportation under the categorical approach discussed above.

SIMULATED CONTROLLED SUBSTANCES

Minn. Stat. § 152.097

☐ Minn. Stat. § 152.097 criminalizes the manufacture, sale, transfer, or attempt to sell, transfer or deliver a noncontrolled substance when that substance is (1) expressly represented as a controlled substance; (2) of such a nature or appearance that the recipient will be able to sell, transfer or deliver the substance as a controlled substance; (3) of such a nature that it would lead a reasonable person to believe the substance was a controlled substance.

Minnesota’s jury instructions only explicitly require that the “fake” substance be identified.\textsuperscript{15} The footnotes to the criminal jury instructions note that the substance alleged in the complaint should be identified, however the footnote does not specify whether or not the substance alleged in the complaint need be the controlled substance or the fake substance. The text of the jury instructions simply requires that the non-controlled substance be connected, in a variety of ways, with a controlled substance.

Although there is virtually no case law examining Minn. Stat. § 152.097, the Court in Mellouli stated that a controlled substance crime cannot be the basis for removability where no federally controlled substance is an element of the offense. As there is no explicit requirement for identification of the controlled substance that is being simulated, it is unlikely that the look-alike can be tied to a federally controlled substance. This reasoning stems from the fact that the court should apply the categorical approach. Moreover, as the nation-wide settlement in Mellouli makes clear, an immigration court cannot look to the facts of the case to determine which substance the look-alike substance is meant to represent. Therefore, as no element of the look-alike offense necessarily ties a conviction to a federally controlled substance, per Mellouli, it should not be grounds for removability.

Again, defense attorneys can best protect their clients from immigration consequences by avoiding identification of what substance the non-controlled substance was meant to simulate.

\textsuperscript{15} The relevant portion of the jury instructions provide that the first element of distribution of simulated controlled substances is:

First, the defendant knowingly sold, transferred, or delivered _________. _________ is a non-controlled substance. This means that the sale, transfer, or delivery of the non-controlled substance was intentional on the part of the defendant. It is not a defense that the defendant believed the non-controlled substance to actually be a controlled substance.

10 Minn. Prac., Jury Instr. Guides--Criminal CRIMJIG 20.52 (6th ed.). This portion of the jury instruction also contains a footnote stating “the substance alleged in the complaint.”
In the event that the court decides that the substance must be identified, practitioners should look to Desai v. Mukasey, 520 F.3d 762, 765 (7th Cir. 2008). The court in Desai held that a conviction under state law for a look-alike substance meant to emulate a federally controlled substance is a removable drug offense. Id. at 765. The next step would be to look and see if the substance which the look-alike substance was intending to emulate is on the federal schedule. See Matter of Paulus, 11 I&N Dec. 274 (BIA 1965) and Matter of Fong, 10 I&N Dec. 616 (BIA 1964). If the substance is on a federal schedule, the respondent may be removable; if it is not, the respondent may escape immigration consequences. However, this opinion is limited to the Illinois simulated drug offense as reviewed by the Seventh Circuit before Mellouli. Practitioners could argue that the Mellouli decision requires a federally controlled substance to be involved and precludes removability for offenses involving non-federal substances, such as simulated substances.16

**PRACTICE TIPS**

**Criminal Defense Attorneys**

☐ To the extent possible do not identify the substance being simulated, as it is not an element and not required for conviction.

☐ Stipulate that the fake controlled substance was simulating a “controlled substance” generally without providing additional facts.

**Immigration Attorneys**

☐ If a substance is listed in the criminal record, compare the substance of conviction to the federal schedules. If the substance is not on the federal schedule, the client should not be removable based on a controlled substance violation.

**Drug Paraphernalia Offenses**

Under Mellouli, drug paraphernalia convictions should not be removable offenses if the conviction occurred at a time when the Minnesota list of controlled substances was broader than the list of federally controlled substances17 because like the offense reviewed in Mellouli, it is “immaterial under [Minn. Stat. § 152.092] whether the substance [is] defined in 21 U.S.C. § 802.” Mellouli v. Lynch at 1984. This is especially important where the state does “charge, or seek or prove, that [the accused] possesse[s] a substance on the § 802 schedules.” Id.


17 Drug paraphernalia is defined under Minn. Stat. § 152.01, subd. 18 as:
Just like in the Kansas paraphernalia offense examined in Mellouli, Minnesota’s drug paraphernalia offenses also do not require identity of the specific substance for which the paraphernalia was used and thus do not have an element that ties these convictions to federally controlled substances. 18 Minnesota jury instructions do not require identification of a specific controlled substance because the instructions require only proof that the object is “drug paraphernalia” as that term is statutorily defined and that definition specifies that the item must be used “in conjunction with” controlled substances contained in Minnesota law or the Uniform Controlled Substances Act.19 Therefore, an object used with any Minnesota controlled substance, even if the substance is not federally controlled, becomes drug paraphernalia under Minnesota law.

If Minnesota’s controlled substance definition contains any substance that is not federally regulated at the time of conviction, the paraphernalia in question could have been used for a non-federally-controlled substance. And under Mellouli the conviction should not have immigration consequences.

**Drug paraphernalia.** (a) Except as otherwise provided in paragraph (b), “drug paraphernalia” means all equipment, products, and materials of any kind, except those items used in conjunction with permitted uses of controlled substances under this chapter or the Uniform Controlled Substances Act, which are knowingly or intentionally used primarily in (1) manufacturing a controlled substance, (2) injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, (3) testing the strength, effectiveness, or purity of a controlled substance, or (4) enhancing the effect of a controlled substance.

(b) “Drug paraphernalia” does not include the possession, manufacture, delivery, or sale of hypodermic needles or syringes in accordance with section 151.40, subdivision 2.

19 The relevant elements of a drug paraphernalia violation are:
First, the defendant, knowingly or intentionally (delivered drug paraphernalia) (possessed drug paraphernalia for delivery) or (manufactured drug paraphernalia for delivery).

Second, the defendant knew or believed that the equipment, products, or materials (was) (were) drug paraphernalia.
While in practice a description of the paraphernalia often includes reference to a specific substance, this is not required by the statute’s elements. See, e.g., State v. Knoch, 781 N.W.2d 170, 173 (Minn. Ct. of App. 2010) (describing drug paraphernalia “that included glass methamphetamine and marijuana pipes . . .”); State v. Johnson, 423 N.W.2d 100, 101 (Minn. Ct. of App. 1988) (identifying pipe as a “marijuana pipe”).

**PRACTICE TIPS**

**Criminal Defense Attorneys**

- Do not specify the substance the paraphernalia was used for. Scrub record of conviction of any reference to specific controlled substance(s).
- Stipulate to “Minnesota controlled substance”

**Immigration Attorneys**

- Argue that the minimum conduct is any Minnesota controlled substance, which includes those that are not federally controlled (see Appendix I).
- The paraphernalia offense is not divisible and is overbroad. There is therefore no categorical match, just as in Mellouli.

**Minnesota Controlled Substance Offenses that Require Identification of a Specific Substance**

The Supreme Court’s decision in Mellouli dictates that the substance of conviction must correlate to a federally controlled substance. As a result, when the Minnesota drug crime requires identification of the controlled substance in the complaint, the conviction should make clear whether or not a federally controlled substance is involved. Most versions of first, second, and third degree controlled substance violations specify federally controlled substances and will result in removability. However, noncitizen defendants convicted of “narcotic” or “hallucinogen” based offenses may have a defense to removability.
**MINNESOTA CONTROLLED SUBSTANCE CRIMES REFERENCING SPECIFIC CONTROLLED SUBSTANCES**

**First Degree Sale:** Minn. Stat. § 152.021 Subd. 1

- The crime of First-Degree sale criminalizes sales of (1) ten grams or more of mixtures containing **cocaine, heroin, or methamphetamine**, (2) 50 grams or more of one or more mixtures containing a **narcotic drug other than cocaine, heroin, or methamphetamine**; (3) 50 grams or more of a mixture containing **amphetamine, phencyclidine, or hallucinogen** or 200 or more dosage units; or (4) 50 kilograms or more of a mixture containing **marijuana or Tetrahydrocannabinols** (reduced to 25 grams or more in a school zone, parks zone, public housing zone, or drug treatment facility).

**First Degree Possession:** Minn. Stat. § 152.021 Subd. 2

- The crime of First-Degree possession criminalizes (1) the possession of 25 grams or more of **cocaine, heroin, or methamphetamine**; (2) 500 grams or more containing a **narcotic drug other than cocaine, heroin, or methamphetamine**; (3) mixtures of 500 grams or more containing **amphetamine, phencyclidine, or hallucinogen**; (4) 100 kilograms or more of a mixture containing **marijuana or Tetrahydrocannabinols**.

**Second Degree Sale:** Minn. Stat. § 152.022 Subd. 1

- A controlled substance sales crime in the second degree requires (1) selling mixtures of three grams or more containing **cocaine, heroin, or methamphetamine**; (2) ten grams or more of a mixture containing a **narcotic drug other than cocaine, heroin, or methamphetamine**; (3) 50 or more dosage units totaling ten grams or more of **amphetamine, phencyclidine, or hallucinogen**; (4) 25 kilograms or more of a mixture containing **marijuana or Tetrahydrocannabinols**; or (5) selling any amount of a schedule I or II narcotic drug to someone under 18 or within a school, park, public housing zone, or drug treatment facility.

**Second Degree Possession:** Minn. Stat. 152.022 Subd. 2

- A second-degree possession conviction requires possession of (1) one or more mixtures of a total weight of six grams or more of **cocaine, heroin, or methamphetamine**; (2) 50 grams or more containing a **narcotic drug other than cocaine, heroin, or methamphetamine**; (3) possession of 50 grams or more containing **amphetamine, phencyclidine, or hallucinogen** (or 100 or more dosage units); (4) 50 kilograms or more of **marijuana or tetrahydrocannabinols**.

**Third Degree Possession:** Minn. Stat. § 152.023

- A person is guilty of third degree possession if they possess (1) three grams or more of a mixture containing **cocaine, heroin, or methamphetamine**; (2) ten grams or more of a **narcotic drug other than cocaine, heroin, or methamphetamine**; (3) 50 or more dosage units of a narcotic drug; (4) five or more dosage units of **lysergic acid diethylamide (LSD), 3,4-methylenedioxy amphetamine, or 3,4-methylenedioxymethamphetamine** in a school, park, or public housing zone, or drug treatment facility.

Several Minnesota drug offenses explicitly require the identification of a federally controlled substance: heroin, cocaine, or methamphetamine, whichever is charged in the complaint. Minnesota Criminal Jury Instructions denote that the first element option for Minn. Stat. § 152.021, subd. 1 and §
152.022, subd. 1 and 2, and 152.023 subd. 1 require identification of heroin, cocaine, or a methamphetamine. Additionally, all three of the first element options listed in the jury instructions for Minn. §§ 152.021, subd. 1 and 2, 152.022, sub. 1 and 2, and 152.023, subd. 2, include a footnote explicitly stating that for those versions of the offense that concern hallucinogens or narcotic drugs whichever substance is charged in the complaint must be specified to the jury. This means that a specific substance will be charged in the complaint and is likely an essential element which must be proven beyond a reasonable doubt. As cocaine, heroin, and methamphetamines are federally controlled substances and an element of the offense, immigration practitioners will have little recourse for these convictions.

There may be a small possibility of avoiding removability for versions of these offenses that involve “hallucinogens” or a “narcotic drug.” These terms are separately defined to include a certain, limited list of substances. Minn. Stat. § 152.01, subds. 5a, 10. The jury instructions for the remaining element options of Minn. Stat. §§ 152.021 and 152.022 dictate that the amphetamine, phencyclidine, or hallucinogen charged in the complaint should be identified (see footnote 20). But it is unclear whether or not the category of drug needs to be identified, such as simply stating “hallucinogen,” or whether the particular type of hallucinogen needs to be identified. If only the general category of drug, like “hallucinogen”, is required it is possible that the category contains a non-federally controlled substance, and it would therefore not be a categorical match per Mellouli. The same is true for those provisions that require only a “narcotic drug.”

In 2012, Minnesota did in fact add two opiates “two obscure opiate derivatives (benzylfentanyl and thenylfentanyl) that have not been included in the Federal controlled substance schedules since 1986.” Matter of Ferreira, 26 I&N Dec. 415 (BIA 2014). Because Minnesota’s narcotic definition is broader than the federal one, a noncitizen should not be removable for a narcotic-based conviction, especially if the record of conviction does not identify the specific narcotic drug involved. However, the BIA in Ferreira required a noncitizen to demonstrate a realistic probability that the State in fact prosecutes the non-federally controlled substances to escape removability. The government initially raised the same argument to the Supreme Court in Mellouli. The Court, however, did not address the realistic probability test, declined to determine whether Ferreira was correctly decided, Mellouli, 135 S. Ct. at 1988 n.8., and most importantly cited no evidence from Mellouli as meeting this test, indicating that the Court does not consider it necessary for the immigrant to show actual prosecution to avoid removability.

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20 The elements of a controlled substance crime in the first degree are:

First, the defendant knowingly possessed

1. one or more mixtures of a total weight of twenty five grams or more containing (cocaine) (heroin) (methamphetamine).
2. one or more mixtures of a total weight of five hundred grams or more of __________ Fn.1
3. one or more mixtures of a total weight of five hundred grams or more of __________ Fn. 2
4. one or more mixtures of five hundred or more dosage units of ________________ Fn. 3
5. one or more mixtures of a total weight of one hundred kilograms or more containing marijuana or tetrahydrocannabinols.

Footnote 1: The narcotic charged in the complaint.
Footnote 2: The amphetamine, phencyclidine, or hallucinogen charged in the complaint.
Footnote 3: The amphetamine, phencyclidine, or hallucinogen charged in the complaint.

10 Minn. Prac., Jury Instr. Guides--Criminal CRIMJIG 20.04 (6th ed.). The jury instructions for the other offenses discussed in this section are materially the same, varying simply by weight and specific act performed.
PRACTICE TIPS

Criminal Defense Attorneys

☐ Criminal attorneys should attempt to list only the category of drug, i.e. narcotic or hallucinogen when applicable.

Immigration Attorneys

☐ If only “hallucinogen” or “narcotic” is listed in the record of conviction, immigration attorneys should determine if the Minnesota definition of the category is over broad.

☐ Push back on realistic probability: Mellouli did not turn on examples of the realistic probability of prosecution. Whether this was because a statute’s express terms demonstrate this probability, Mellouli’s citation to State prosecutions for non-federal substances was sufficient, or the Court recognized the unfairness of the requirement is unclear.

Impact of the Mellouli Settlement on Minnesota Marijuana Offenses

The Mellouli settlement should prevent immigration courts from considering circumstance-specific evidence found outside of the record of conviction in all but two types of Minnesota controlled substance convictions: (1) petty misdemeanor possession of less than 42.5 grams of marijuana; and (2) possession of greater than 1.4 grams of marijuana in a motor vehicle. Under Minnesota law, these are the only offenses that could implicate the removability exception for “a single offense involving possession for one’s own use of 30 grams or less of marijuana.”

MINNESOTA CONTROLLED SUBSTANCE CRIMES THAT PERMIT CONSIDERATION OF CIRCUMSTANCE-SPECIFIC EVIDENCE

Possession of Marijuana in a Motor Vehicle: Minn. Stat. § 152.027(3)

☐ Minn. Stat. § 152.027(3) criminalizes the possession of greater than 1.4 grams of marijuana in a motor vehicle.

Possession or Sale of Small Amounts of Marijuana: Minn. Stat. § 152.027(4)

☐ Possession of a small amount of marijuana, defined elsewhere as less than 42.5 grams, is punishable as a petty misdemeanor.

Circumstance-specific evidence should therefore never be considered in first- through fifth-degree controlled substance convictions, as these convictions categorically fail to qualify for the one-time exception to removability. Fifth-degree possession, for example, specifically excludes possession of less than 42.5 grams of marijuana. Minn. Stat. §§ 152.025(1) and (2); see State v. Gallus, 481 N.W.2d 116 (Minn. App. 1992) (“the [fifth degree controlled substance] statute is violated only when a
defendant possesses more than 42.5 grams of marijuana . . . if the legislature did not intend to have a minimum weight requirement, it would have deleted it [from the statute]”). Similarly, since first-through fourth-degree marijuana crimes also only implicate possession or sale of amounts exceeding the 30-gram exception, they will result in removability under the categorical approach.

If an individual has been convicted of marijuana possession under Minn. Stat. §§ 157.027(3) or (4), immigration courts can consider circumstance-specific evidence outside of the record of conviction. This is because the BIA has determined that the language of the marijuana exception in the federal statute invites a circumstance specific inquiry, as opposed to requiring only categorical link to a generic federal crime like the majority of removal statutes. Matter of Dominguez-Rodriguez, 26 I&N Dec. 408, 411 (BIA 2014) Matter of Davey, 26 I&N Dec. 37, 39 (BIA 2012). Accordingly, an individual may be removable if his or her conviction involved an amount between 30 and 42.5 grams. In these situations, DHS bears the “burden of proving by clear and convincing evidence that the respondent’s offense does not fall within the ‘possession for personal use’ exception in section 237(a)(2)(B)(i) of the Act.”

PRACTICE TIPS

Criminal Defense Attorneys

☐ Seek agreements to non-drug related offenses. Prosecutors are more likely to work with defendants here because possession of a small amount of marijuana in Minnesota does not carry a harsh legal sanction.

☐ For clients charged with one of the above-mentioned marijuana offenses, if the weight of the marijuana is less than 30 grams, a conviction should fall within a one-time exception to removability and specific facts reflecting this are helpful to include in the record of conviction or other documents.

☐ If the weight involved is greater than 30 grams, seek to exclude circumstance specific evidence when possible (in the form of police reports or lab tests).

Immigration Attorneys

☐ Emphasize the one-time exception to removability if the weight of marijuana involved in a previous conviction is less than 30 grams.

☐ If the weight of the marijuana is greater than 30 grams, note that the 30-gram limit proposed by the Supreme Court was merely a suggested limit, not a holding. Since the Minnesota petty misdemeanor statute is designed to decriminalize personal use amounts of marijuana, argue that this offense should categorically fit the one-time exception.

☐ Often these defendants appear pro se or, if the charge is a petty misdemeanor, they will not see a judge and simply pay a fine. As a result, there may be arguments available in post-conviction relief proceedings to set aside a prior plea on Fifth Amendment grounds for lack of warning as to the immigration consequences of the conviction.
Final Note for Those Already in Removal Proceedings

Immigration counsel should focus on possible avenues of relief for those already in removal proceedings. If an individual has been convicted of a drug paraphernalia offense not connected to a federally controlled substance, or if they are only charged with removability based on a “related to” offense, a motion to terminate may be available. Some individuals already facing removal may be eligible for relief following the *Mellouli* decision; in such a case counsel may be able to argue that *Mellouli* eliminates the prior bar to relief and reopen the case. If the case is on appeal, immigration counsel is advised to file a motion to remand before the BIA rules on the appeal.21

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21 These options are described more fully in the NIP/IDP June 8, 2015 Practice Advisory, available at https://www.nationalimmigrationproject.org/legalresources/practice_advisories/Mellouli_Advisory_6-8-15.pdf.
Appendix:

- Mellouli Settlement Agreement
  - 2015 IJ decision on remand in Fort Snelling Immigration Court after Mellouli was decided.
  - Specifically notes that the Minnesota list of controlled substances is broader than the federal list.
  - Does not apply realistic probability following Mellouli
  - Extends Mellouli to inadmissibility.

- Spreadsheet of Minnesota's Controlled Substance Schedules from 1971-2015 is available at http://www1.law.umn.edu/newamericans/resources.html

- Spreadsheet of the Federal Controlled Substance Schedules from 1970 – 2015 is available at http://www1.law.umn.edu/newamericans/resources.html
IN THE SUPREME COURT OF THE UNITED STATES

No. 15A137

MOONES MELLOULI, APPLICANT

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

ON STAY OF PROCEEDINGS BEFORE THE BOARD OF IMMIGRATION APPEALS

JOINT MOTION TO VACATE STAY

Pursuant to Rule 21 of the Rules of this Court, the Solicitor General, on behalf of the Attorney General, and Applicant Moones Mellouli respectfully move to vacate the stay of proceedings before the Board of Immigration Appeals (Board or BIA) entered by this Court pending the filing of a petition for a writ of certiorari or a petition for a writ of mandamus and prohibition. We are authorized to represent that applicant joins in this motion.

1. Applicant, a citizen of Tunisia, became a lawful permanent resident of the United States in 2009. 13-1034 J.A. 12. An immigration judge determined in 2010 that applicant was removable from the United States under 8 U.S.C. 1227(a)(2)(B)(i), based on applicant’s conviction for possession
of drug paraphernalia in violation of Kansas law. See 13-1034
appeal, id. at 17-19, and the court of appeals denied a petition
for review, id. at 1-14. The court held that “a conviction for
violating the Kansas paraphernalia statute is, categorically,
related to a controlled substance within the meaning of
[Section] 1227(a)(2)(B)(i),” as necessary to make an alien
removable under that provision, even though Kansas classified as
controlled a small number of substances that were not also
federally controlled. Id. at 11.

This Court granted a petition for a writ of certiorari, 134
S. Ct. 2873, and reversed the Eighth Circuit’s judgment
upholding the removal order, 135 S. Ct. 1980. This Court
rejected the conclusion of the court of appeals that aliens who
violate state drug paraphernalia laws are categorically
removable under Section 1227(a)(2)(B)(i) even if the State at
issue controls some substances that are not also federally

2. Following this Court’s decision, the Eighth Circuit
vacated its prior decision, sua sponte recalled its mandate,
“and remand[ed] to the BIA for further proceedings in light of
the Supreme Court’s decision.” No. 12-3093, 2015 WL 4079087, at
*3. In a statement accompanying that disposition, the court of
appeals recognized that this Court had established that,
contrary to the court of appeals’ holding, “to trigger removal under [Section] 1227(a)(2)(B)(i), the Government must connect an element of the alien’s conviction to a” federally controlled drug. *Id.* at *1* (quoting 135 S. Ct. at 1991). But the court of appeals wrote that, in its view, the Board could consider on remand whether an alien’s removability under Section 1227(a)(2)(B)(i) could be established based on circumstance-specific evidence that an alien’s drug-paraphernalia conviction involved a federally controlled substance. *Id.* at *1* & n.2. *Ibid.* The court noted that the record before the Board contained circumstance-specific evidence that applicant’s conviction involved the federally controlled substance of Adderall, which had been used to establish “that [applicant’s] drug paraphernalia conviction did not fall within the exception” to removability “in § 1227(a)(2)(B)(i) for ‘a single offense involving possession for one’s own use of 30 grams or less of marijuana.’” *Id.* at *2*.

The court did not request or receive supplemental briefing from applicant or the government prior to its disposition on remand from this Court.

3. The court of appeals issued its mandate on the same day it issued its judgment remanding applicant’s case to the Board. See Judgment, No. 12-3093 (July 6, 2015); Mandate, No. 12-3093 (July 6, 2015). Applicant then moved to recall the mandate, on
the ground that it had been issued prematurely.  See Motion to Recall the Mandate, No. 12-3093 (July 31, 2015).  The government filed a motion to hold applicant’s motion to recall the mandate in abeyance.  The government informed the court of appeals that (as explained below) the Department of Homeland Security (DHS) had already sought to dismiss removal proceedings against applicant rather than pursue the circumstance-specific approach discussed by the court of appeals, and further stated that it “ha[d] no intention of initiating further removal proceedings based on [applicant’s] 2010 conviction under Kan. Stat. Ann. 21-5709(b)(2) or any other basis at this time.”  See Motion to Hold in Abeyance Petitioner’s Motion, No. 12-3093 (Aug. 5, 2015).  The court subsequently denied applicant’s motion to recall the mandate, and denied DHS’s motion as moot.  See Order, No. 12-3093 (Aug. 6, 2015).

4. Before the Board, following the court of appeals’ remand described above, DHS moved to dismiss removal proceedings pursuant to 8 C.F.R. 1239.2(c), rather than seeking removal based on the circumstance-specific theory posited by the court of appeals.  DHS Mot. to Dismiss Removal Proceedings Without Prejudice (DHS Mot. to Dismiss) 1.  DHS’s motion stated that, in light of the record in the case, applicant “is restored to his status as a lawful permanent resident and will not be regarded as an applicant for admission under 8 U.S.C. 1101(a)(13) upon
his return to the United States, nor is he subject to further removal proceedings based on his 2010 conviction under Kan. Stat. Ann. 21-5709(b)(2).” Ibid. The regulation DHS invoked in seeking dismissal is a generally applicable regulation that provides for dismissal of proceedings for a variety of reasons, including that an alien “is not deportable or inadmissible under the immigration laws.” 8 C.F.R. 239.2(a)(2); see 8 C.F.R. 1239.2(c). The regulation provides that a dismissal under it shall be without prejudice.

Applicant opposed DHS’s motion, arguing that this Court’s decision in applicant’s case established that it would not be appropriate for DHS to remove applicant based on his drug-paraphernalia conviction and that, as a result, “the proper course is for the Board to terminate these proceedings with prejudice.” Opp. to DHS Mot. to Dismiss Removal Proceedings Without Prejudice 1. Applicant then filed a further motion asking that the Board “eliminate his removal order and terminate [proceedings] with prejudice,” or, in the alternative that the Board hold applicant’s case in abeyance pending the filing of a petition for a writ of certiorari or a petition for a writ of mandamus and prohibition with this Court. Mot. to Terminate With Prejudice and Alternate Mot. to Hold Case in Abeyance 1, 3.

5. On August 10, 2015, applicant filed in this Court an application for a stay of the Board’s proceedings pending the
filing of a petition for a writ of certiorari or a petition for a writ of mandamus and prohibition. On August 21, 2015, this Court granted the application, staying further proceedings before the Board of Immigration Appeals pending “the timely filing of a petition for a writ of certiorari, or of a petition for writ of mandamus and prohibition, and further order of this Court.”

6. Since the Court’s grant of a stay, the parties have agreed on a disposition of applicant’s case. The parties have agreed to jointly move the Board to terminate removal proceedings against applicant through a motion that stipulates that petitioner is not removable based on his Kansas drug-paraphernalia conviction under the immigration laws.

It is the position of the government that the circumstance-specific rationale for removal discussed by the Eighth Circuit in the statement accompanying its remand order is not a valid basis for establishing removability under Section 1227(a)(2)(B)(i) of the INA. Under Section 1227(a)(2)(B)(i), consideration of circumstance-specific evidence would be appropriate in a case involving marijuana and only if DHS has first established using a categorical approach that an alien “has been convicted of a violation of (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 802 of title 21).” At that point, the Board has held that circumstance-specific evidence may be considered in order to determine whether an alien falls within the exception to removability in Section 1227(a)(2)(B)(i) for “a single offense involving possession for one’s own use of 30 grams or less of marijuana.” See In re Dominguez-Rodriguez, 26 I. & N. Dec. 408 (B.I.A. 2014).

The government therefore does not intend to seek the removal of applicant or any other alien on the basis of the theory apparently posited (but not decided) by the court of appeals. The government also agrees with applicant that dismissal of the removal proceedings against applicant will be with prejudice insofar as DHS may not seek applicant’s removal based on applicant’s Kansas drug-paraphernalia conviction.

Because the parties intend to seek the termination of applicant’s immigration proceedings in this manner, the parties request that this Court vacate the stay of Board proceedings that this Court entered, pending the filing of a petition for a writ of certiorari or a petition for a writ of mandamus and prohibition, so that the Board can act upon the parties’ joint motion to dismiss proceedings. Applicant intends to file petitions for certiorari and for mandamus and prohibition, but
will dismiss the petitions if the Board grants the parties’ joint motion.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

OCTOBER 2015
UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
FORT SNELLING, MINNESOTA

File Number: A073-829-129

In the Matter of: Lael MARTINEZ-ESPINOZA,

Respondent.

Charge: INA § 212(a)(6)(A)(i) – an alien present in the United States without being admitted or parole, or who arrived in the United States at any time or place other than as designated by the Attorney General

Applications: Adjustment of Status under INA § 245(a), Waiver under INA § 212(h).

ON BEHALF OF THE RESPONDENT:
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Wilson Law Group
3019 Minnehaha Avenue, Suite 200
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ON BEHALF OF DHS:
Darrin Hetfield, Esq.
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WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Background

Lael Martinez-Espinoza, Respondent, is a 32-year-old male who is a native and citizen of Mexico. (Ex. 1). Respondent entered the United States on or about December 1983 at San Ysidro, CA without inspection. Id. On December 21, 2004, the Department of Homeland Security (DHS) commenced removal proceedings against Respondent with the filing of a Notice to Appear (NTA), charging Respondent with being removable pursuant to the above-captioned charge(s) of the Immigration and Nationality Act ("the Act" or INA). Id. Respondent conceded service of the NTA and admitted the allegations. Id. He conceded the charge, and the Court sustained it. Id. Respondent designated Mexico as the country of removal should such action become necessary. Respondent subsequently filed the above-listed applications for relief. Respondent also requested voluntary departure in the alternative.

On March 20, 2007, the Immigration Judge (IJ) denied Respondent’s applications and ordered Respondent removed to Mexico. The IJ concluded that Respondent was ineligible to adjust because of his conviction under Minn. Stat. § 152.092 for Possession of Drug Paraphernalia, which the IJ concluded made Respondent ineligible under INA § 212(e)(2)(A)(i)(II) (stating that
an alien who has been convicted of violating a law relating to a controlled substance is inadmissible). The IJ also stated that if Respondent were not inadmissible under INA § 212(a)(2)(A)(i)(II), the IJ would have granted Respondent’s application for adjustment and a waiver based on the hardship to Respondent’s family members and other discretionary factors.

Respondent appealed the IJ’s decision and, on November 4, 2009, the Board of Immigration Appeals (BIA) issued a published decision regarding Respondent’s appeal, Matter of Martinez Espinoza, 25 I&N Dec. 118 (BIA 2009). The BIA concluded that Respondent was inadmissible under INA § 212(a)(2)(A)(i)(II) due to his conviction for possessing drug paraphernalia, but such inadmissibility may be waived in appropriate cases under INA § 212(h). Id. The BIA remanded the case to address whether Respondent should be granted a waiver under § 212(h). Id.

On June 1, 2015, the United States Supreme Court overruled the BIA’s decision in Matter of Martinez Espinoza, concluding a conviction for possessing drug paraphernalia was only a removable offense if it could be demonstrated that the paraphernalia related to a federally controlled substance as listed in 21 U.S.C. § 802. Mellouli v. Lynch, 135 S.Ct. 1980 (2015).¹

The Court, therefore, will now address the impact of Mellouli, 135 S.Ct. 1980 on the case at hand, as well as address the BIA’s remand regarding whether Respondent’s potential inadmissibility should be waived using INA § 212(h).

II. Evidence

A. Testimony

Respondent testified regarding his life in the United States and the hardship his family would suffer if he were to be removed to Mexico. Respondent testified that he entered the United States when he was approximately six months old and has not left since. Respondent received his G.E.D. in 2008 or 2009 and has had several jobs, including working for two years as a trained medical aid. Respondent also has certificates for being a Home Health Aid and Certified Nursing Assistant.

Respondent currently lives with his parents, both of whom are U.S. citizens, in Rochester, MN. Respondent testified that his parents both have significant health issues, including that his father has back problems and is limited in his physical activity and his mother has heart disease and vertigo. Respondent testified that sometimes his mother is unable to move, and so he helps his parents with basic household chores such as helping them get things, mowing the lawn, basic repairs, assisting with groceries and dishes, and helping them with their medications. Respondent testified that he has four sisters, but they all live in California and so are unable to help care for his parents beyond emotional support.

Respondent has three children with his partner, Carla. The children, who are all U.S. citizens, are currently 8, 6, and 5 years old. Respondent testified that when he works, he gives his check to

¹ In contrast to the Supreme Court’s interpretation, the BIA in Matter of Martinez Espinoza, 25 I&N Dec. at 118, had held that it was immaterial whether the controlled substance in question was on the federal list or only on the state’s controlled substance list, as possessing drug paraphernalia related to drug trade in general.
Carla for the kids’ expenses, and she gives him back any leftover money. Respondent testified he usually sees the children every day, and that they spend the night with him about four nights per week. Respondent testified that the kids have been suffering while he has been detained, and that his youngest son is beginning to have behavior issues at school.

Respondent testified that he has had numerous contacts with the police, including two recent convictions for domestic assault. Respondent testified that most of his convictions involve alcohol abuse, including several citations for drinking as a minor and driving under the influence. Respondent testified that he had been attending alcoholism support meetings, but that, after a four year period of no new criminal offenses, he stopped going to meetings in 2013 because he thought he had his alcoholism under control. Respondent testified that this led to the domestic assault conviction, as he was drinking during his fight with Carla. Respondent testified that although he slapped Carla one time in 2013, he has otherwise never been physically aggressive with her, and that most of the domestic assault convictions resulted from Carla calling the police during a verbal argument. Respondent testified that he and Carla are still in a relationship. Respondent testified that he intends to resume his alcohol treatment, as well as enter counseling to learn how to deal with stress and anger. Respondent also testified that he would begin healthy habits, such as working out, going back to school, and spending time with his children, as a means of preventing any future contact with the police.

Carla Vasquez, Respondent’s partner, also testified on his behalf. Carla testified that they have been dating for over 13 years and have spent much of that time living together. Carla testified that in 2014 she became depressed and wanted to break up with Respondent and date a man from work, and so she called the police on Respondent repeatedly as a means of breaking up with him. Carla testified that Respondent hit her once in 2013, but that when she called the police three times in 2014 she lied and said that Respondent hit her. Carla testified that she contacted the prosecutor at the time to try to get the charges against Respondent dropped, but that the prosecutor never got back to her. Carla testified that when Respondent is released from detention, they will get back together and that she is currently visiting him about three times per week. Carla also testified that they would seek counseling together once Respondent is released. Carla testified that Respondent is a good father and very involved in parenting. Carla testified that their children have not been doing well since Respondent has been detained, including that their oldest child has become more quiet and withdrawn and is getting into trouble at school and that their middle child cries daily about wanting to see her father. Carla testified that Respondent was very good about getting the kids to open up, and she is worried now that they don’t have anyone to talk to. Carla testified that she works seven days per week at two jobs, and so it has been very difficult to care for the children without Respondent present.

Respondent’s mother, Raquel Martinez, also testified in support of Respondent. Mrs. Martinez is a U.S. citizen. Mrs. Martinez testified that she has several health problems, including insomnia, anxiety, high blood pressure, and that she had a heart attack. Mrs. Martinez testified that Respondent helps her around the house by mowing the lawn, fixing things, and cooking. Mrs. Martinez testified that she has been watching Respondent’s children while Carla works since Respondent is detained, but that it is very difficult since she gets dizzy and has low energy. Mrs. Martinez also testified that it has been hard watching the children suffer, as they really miss their father.
Respondent’s father, Lael Martinez Diaz, also testified in support of Respondent. Mr. Martinez Diaz testified that he has serious back problems that limit his physical activity. Mr. Martinez Diaz testified that he believes Respondent’s criminal issues mostly stem from alcohol, but he thinks Respondent has learned his lesson now through this extended time in detention. Mr. Martinez Diaz testified that he personally was also an alcoholic, but is now sober, and that he will help Respondent stay sober.

B. Documentation

Ex. 2: Record of Deportable/Inadmissible Alien (I-213), marked into evidence July 6, 2005.
Ex. 3: Respondent’s record of proceeding from previous I-485 application and I-130 petition, filed March 17, 2005.
Ex. 4: Respondent’s submission of supporting documentation, including Form G-325A and medical exam results, filed July 6, 2005.
Ex. 5: I-130 petition for Respondent, with approval stamp from April 1999, marked into evidence July 6, 2005.
Ex. 6: Respondent’s Form I-601 Application for Waiver, with supporting documentation including criminal records, letters regarding hardship, and medical records, filed October 5, 2005.
Ex. 7: Respondent’s submission of supporting documentation, including authorization forms to release information and updated Form G-325A, filed December 7, 2005.
Ex. 8: Respondent’s submission of supporting documentation, including letters regarding hardship and support and conviction records for DUI and Possession of Drug Paraphernalia, filed February 14, 2006.
Ex. 9: Respondent’s submission of supporting documentation, including updated Form I-864A, tax and W-2 information, and proof of petitioner’s income and financial assets, filed February 24, 2006.
Ex. 10: Respondent’s submission of supporting documentation, including Form I-601 fee receipt, letter from Respondent’s parole officer, employment verification letter, information about education and termination of food stamp benefits, and sentencing information for Disorderly Conduct arrest, filed May 1, 2006.
Ex. 11: Respondent’s submission of supporting documentation, including letters from Respondent’s parole officer and employer and criminal records relating to Respondent’s arrest for DWI and Possession of Drug Paraphernalia, filed November 3, 2006.
Ex. 12: Respondent’s submission of supporting documentation, including original letter from Respondent’s parole officer and certified copies of criminal relating to Respondent’s arrest for DWI and Possession of Drug Paraphernalia, filed November 14, 2006.
Ex. 13: Respondent’s submission of supporting documentation, including certified copy of complaint from Respondent’s April 22, 2005 arrest, filed December 20, 2006.
Ex. 14: Respondent’s submission of supporting documentation, including Respondent’s legal brief, letter from Respondent’s parole officer, copies of AA attendance slips, employment letter, and information on GED progress, filed February 1, 2007.
Ex. 15: Respondent’s submission of supporting documentation, including updated results from immigration medical exam, filed March 8, 2007.
Ex. 16: IJ Summary Order dated March 20, 2007; Oral Decision; and Transcript
Ex. 17: Appeal to the BIA filed April 12, 2007
Ex. 18: Respondent’s Brief in Support of Appeal, filed October 1, 2007
Ex. 19: Government’s Response Brief, dated October 19, 2007
Ex. 20: BIA Decision dated November 4, 2009
Ex. A: Respondent’s submission of supporting documentation, including updated affidavit of support and updated information for the I-601 waiver, filed November 3, 2010.
Ex. B: Respondent’s submission of supporting documentation, including letters of support and evidence of good moral character, filed February 11, 2011.
Ex. C: Respondent’s submission of supporting documentation, including records related to Respondent’s drug paraphernalia conviction, filed February 9, 2011.
Ex. D: Respondent’s submission of supporting documentation, including records from Owatonna police related to Respondent’s drug paraphernalia conviction, filed April 23, 2012.
Ex. E: Respondent’s submission of supporting documentation, including records related to Respondent’s domestic assault conviction and letters of support, filed March 24, 2014.
Ex. F: Respondent’s submission of supporting documentation, including updated Form I-864 and financial information, filed April 14, 2014.
Ex. I: Respondent’s submission of supporting documentation, including country condition information, filed May 22, 2014.
Ex. J: Respondent’s submission of supporting documentation, including evidence of hardship to qualifying relatives, filed May 27, 2014
Ex. K: Respondent’s submission of supporting documentation, including Respondent’s criminal history chart, filed May 27, 2014.
Ex. L: Respondent’s Form I-693 Medical Examination, filed July 29, 2014.
Ex. M: Respondent’s submission of supporting documentation, including 2014 criminal records, filed May 7, 2015.
Ex. O: Respondent’s submission of supporting documentation, including evidence of hardship to qualifying relatives, filed May 7, 2015.
Ex. P: Respondent’s submission of supporting documentation, including records related to Respondent’s 2014 criminal charges, filed May 7, 2015.
Ex. Q: Order Granting Motion to Continue, issued May 15, 2015.
Ex. R: Respondent’s submission of supporting documentation, including evidence of hardship to qualifying relatives and cancellation of DANCO, filed May 18, 2015.
Ex. S: Respondent’s Motion for Subpoena, filed May 27, 2015.
Ex. U: Respondent’s submission of supporting documentation, including evidence of hardship to qualifying relatives, filed June 4, 2015.

2 Exhibits filed after the BIA’s remand were marked alphabetically, as opposed to numerically.
Ex. V: Respondent’s submission of supporting documentation, including evidence of hardship to qualifying relatives, filed June 5, 2015.
Ex. W: Respondent’s submission of supporting documentation, including evidence of hardship to qualifying relatives and letters from victim in Respondent’s domestic assault conviction, filed June 8, 2015.
Ex. X: DHS’s brief regarding inadmissibility and 212(h) waiver, filed June 7, 2015.
Ex. Y: Respondent’s memorandum in support of relief, filed June 18, 2015.
Ex. Z: Respondent’s submission of supporting documentation, including counseling documents for Respondent, filed June 18, 2015.
Ex. AA: Respondent’s reply to DHS’s brief, filed June 23, 2015.
Ex. BB: DHS’s second brief regarding inadmissibility and 212(h) waiver eligibility, filed June 29, 2015.
Ex. CC: Respondent’s supplemental memorandum of law, filed June 29, 2015.

III. Credibility

It is the applicant’s burden to satisfy the Immigration Judge that his testimony is credible. See Pesave v. Holder, 607 F.3d 523, 526 (8th Cir. 2010). As Respondent’s applications were filed after May 11, 2005, the credibility provisions of the REAL ID Act govern. INA §§ 208(b)(1)(B), 241(b)(3)(C). Consistent with the REAL ID Act, the following factors may be considered in assessing an applicant’s credibility: demeanor, candor, responsiveness, inherent plausibility of the claim, the consistency between oral and written statements, the internal consistency of such statements, the consistency of such statements with evidence of record, and any inaccuracy or falsehood in such statements, whether or not such inaccuracy or falsehood goes to the heart of the applicant’s claim. INA § 208(b)(1)(B)(iii); see also Matter of J-Y-C, 24 I&N Dec. 260, 262-63 (BIA 2007).

The Court finds Respondent and his witnesses credible. Respondent’s testimony was generally consistent with his previous statements and with the statements of the other witnesses. Respondent and his witnesses were candid and responsive and gave accounts that were inherently plausible.

IV. Relief - Adjustment of Status and INA § 212(h) Waiver

Respondent seeks adjustment of status with an INA § 212(h) waiver. The status of an alien who was inspected and admitted or paroled into the United States may be adjusted to that of an alien lawfully admitted for permanent residence if he (1) applies for adjustment; (2) is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and (3) an immigrant visa is immediately available to him at the time his application is filed. INA § 245(a). If eligibility is established, adjustment of status may be granted in the exercise of discretion. Matter of Arai, 13 I&N Dec. 494 (BIA 1970). The alien bears the burden of establishing eligibility for adjustment of status and demonstrating that relief is merited in the exercise of discretion. See Matter of Blas, 15 I&N Dec. 626, 629 (BIA 1974, A.G. 1976).

Respondent has an approved visa petition on his behalf and his priority date is current. (Ex. 5). Respondent’s father, who is a U.S. citizen, filed a petition on his behalf, and the I-130 petition
was approved in April 1999. Id. Respondent filed a Form I-485 application to adjust status based on this approved petition. (Ex. T). In order to adjust status, however, an applicant must establish that he is not inadmissible or, if any grounds of inadmissibility do apply, request a waiver. Respondent argues that he is not inadmissible, but in the alternative, he seeks a waiver under INA § 212(h) for any grounds of inadmissibility that may apply. Therefore, the Court will begin by determining whether Respondent is admissible to the United States as set forth in INA § 212.

A. Inadmissibility under INA § 212(a)(2)(A)(i)(II)

On March 20, 2007, the IJ concluded that Respondent was ineligible to adjust because of his conviction under Minn. Stat. § 152.092 for Possession of Drug Paraphernalia, which the IJ concluded made Respondent inadmissible under INA § 212(a)(2)(A)(i)(II) (stating that an alien who has been convicted of violating a law relating to a controlled substance is inadmissible). This decision, while affirmed by the BIA at the time, has been called into question by recent guidance from the U.S. Supreme Court. Therefore, the Court reviews Respondent’s inadmissibility under INA § 212(a)(2)(A)(i)(II) in light of the Supreme Court’s decision in Mellouli v. Lynch, 135 S.Ct. 1980 (2015).

The Court begins by noting that the language of INA § 212(a)(2)(A)(i)(II) is nearly identical to INA § 237(a)(2)(B), which was the removability ground at issue in Mellouli. Compare INA § 237(a)(2)(B) (stating that an alien who has been convicted of “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 deportable”) with INA § 212(a)(2)(A)(i)(II) (stating that any alien convicted of violating “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”). Although the burden of proof is on Respondent to establish his eligibility for relief, whereas in cases of removability under INA § 237 the burden is on DHS, the categorical approach applies in both settings. Therefore, the Court concludes that the Supreme Court’s analysis in Mellouli, where the Court addressed how to determine if an offense falls under INA § 237(a)(2)(B), is highly relevant to the analysis of whether a conviction falls under INA § 212(a)(2)(A)(i)(II).

In Mellouli, the Supreme Court concluded that a conviction for possessing drug paraphernalia was only a removable offense if it could be demonstrated that the paraphernalia related to a federally controlled substance as listed in 21 U.S.C. § 802. 135 S.Ct. at 1991. In other words, if a state list of controlled substances that formed the basis of the drug paraphernalia conviction included drugs that the federal list of controlled substances does not, it must be demonstrated that the drug in question was on the federal list and not just the state list. In evaluating whether a particular conviction involved a substance on the federal list, the Supreme Court instructed to courts to use the categorical approach, Mellouli, 135 S.Ct. at 1986-87, but did not reach the issue of whether the modified categorical approach was also appropriate. Mellouli, 135 S.Ct. at 1986, n. 4. The Supreme Court has previously discussed the categorical approach and concluded that if the conviction statute is not a categorical match because the conviction statute is broader than the federal offense, the analysis must proceed to divisibility and, if the statute is divisible, to the modified categorical approach. Descamps v. United States, 133 S. Ct. 2276, 2284 (2013). This method of analysis is equally applicable in determining whether a controlled substance offense
matches with INA § 212(a)(2)(A)(i)(II), and so the Court will review whether the conviction statute is a categorical match with INA § 212(a)(2)(A)(i)(II). If it is not, the Court will then analyze if the conviction statute is divisible, proceeding only to the modified categorical approach if the conviction statute is divisible.

The Court notes that the Minnesota list of controlled substances, like the Kansas list in *Melloul*, is broader than the federal list of controlled substances, as defined in 21 U.S.C. § 802. Compare Minn. Stat. § 152.02 with 21 U.S.C. § 802. Thus, Respondent’s conviction statute, Minn. Stat. § 152.092, which prohibits the use or possession of drug paraphernalia, where “drug” is defined by the Minnesota state list of controlled substances, may reach conduct not covered by INA § 212(a)(2)(A)(i)(II).

However, the Court finds that Minn. Stat. § 152.092, including the definition of drug paraphernalia found in Minn. Stat. § 152.01, subd. 18, is divisible as to the specific drug involved. See United States v. Mathis, 786 F.3d 1068, 1074 n.6 (8th Cir. May 12, 2015) (finding a statute divisible whether it sets out alternative elements or merely alternative means, and allowing cross-referencing to definitions of defined terms outside the convicting statute). The Eighth Circuit has approved incorporating statutes that define terms in the convicting statute for purposes of analyzing divisibility. Mathis, 786 F.3d at 1075 n.7. Therefore Respondent’s statute of conviction, Minn. Stat. § 152.092, when all the relevant definitions are incorporated, reads:

It is unlawful for any person knowingly or intentionally to use or to possess [all equipment, products, and materials of any kind, except those items used in conjunction with permitted uses of controlled substances under this chapter or the Uniform Controlled Substances Act, which are knowingly or intentionally used primarily in (1) manufacturing [a drug, substance, or immediate precursor in Schedules I through V of section 152.02], (2) injecting, ingesting, inhaling, or otherwise introducing into the human body [a drug, substance, or immediate precursor in Schedules I through V of section 152.02], (3) testing the strength, effectiveness, or purity of [a drug, substance, or immediate precursor in Schedules I through V of section 152.02], or (4) enhancing the effect of [a drug, substance, or immediate precursor in Schedules I through V of section 152.02]. Any violation of this section is a petty misdemeanor.

Minn. Stat. § 152.092; Minn. Stat. § 152.01, subd. 4 (defining controlled substance); Minn. Stat. § 152.01, subd 18 (defining drug paraphernalia).

Noting that the Eighth Circuit has held that both alternative elements and alternative means render a statute divisible, Mathis, 786 F.3d at 1074 n.6, the Court concludes that “a drug, substance, or immediate precursor in Schedules I through V of section 152.02” is a divisible phrase in the statute, and that the Court may proceed to the modified categorical approach in order to determine what controlled substance is at issue. See *Descamps*, 133 S. Ct. at 2284.

The conviction records in this case do not shed light on what controlled substance Respondent’s conviction relates to. See Ex. 11, Ex. 13. The plea agreement and sentencing documents do not specify a particular substance. The police report notes only that a pipe with a “burnt residue” that
smelled like marijuana was found in Respondent’s possession. (Ex. 13). The Court concludes that although it may be a reasonable inference that the controlled substance at issue was marijuana, an unverified observation in the field by an officer regarding the smell of the pipe is not strong enough evidence to conclude that Respondent’s conviction related to marijuana as the controlled substance. \(^3\) Because the Court cannot determine what controlled substance Respondent’s conviction related to, the conviction is not a match with INA § 212(a)(2)(A)(i)(II) under either the categorical approach or the modified categorical approach.

Therefore, the Court concludes that Respondent is not inadmissible under INA § 212(a)(2)(A)(i)(II) on account of his conviction under Minn. Stat. § 152.092 for possessing drug paraphernalia.

**B. Inadmissibility under INA § 212(a)(2)(A)(i)(I)**

INA § 212(a)(2)(A)(i)(I) states that an alien is inadmissible if he has been convicted of a crime involving moral turpitude (CIMT). This ground of inadmissibility does not apply to an alien who committed only one crime if: (1) the crime was committed when the alien was under 18 years of age and the crime was committed, including a release from any confinement, more than 5 years before the date of application or (2) the maximum penalty possible for the crime did not exceed one year of imprisonment and the actual sentence imposed was not more than 6 months. INA § 212(a)(2)(A)(ii).

A crime involves moral turpitude “if the relevant statute defines the offense in such a manner that it necessarily entails conduct on the part of the offender that is inherently base, vile, or depraved, and contrary to accepted rules of morality and the duties owed between persons or to society in general.” Matter of Kochlani, 24 I&N Dec. 128, 129 (BIA 2007). The BIA has held that “[n]either the seriousness of a criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude.” Id.

The Court’s analysis of whether or not a crime involves moral turpitude previously was guided by Matter of Silva-Trevino, 24 I&N Dec. 687 (AG 2005) vacated by 26 I&N Dec. 550 (AG 2015). However, in light of the fact that the Eighth Circuit had utilized Silva-Trevino only out of Chevron deference to the Board of Immigration Appeals and the fact that Silva-Trevino was recently vacated by the Attorney General, the Court looks to the Eighth Circuit’s methodology apart from its deference to Silva-Trevino. The first step in assessing whether a crime involves moral turpitude is to look to the statutory language of the crime and “examine the statute itself to determine whether the inherent nature of the crime involves moral turpitude.” Chamouny v. Ashcroft, 376 F.3d 810, 811 (8th Cir. 2004); see also Hernandez-Perez v. Holder, 569 F.3d 345, 348 (8th Cir. 2009). “If the statute defines a crime in which moral turpitude necessarily inheres,” because its elements match or are narrower than the generic CIMT definition, the conviction is

\(^3\) The Court also notes that, as the BIA noted in Matter of Martinez Espinoza, 25 I&N Dec. 118 (BIA 2009), if the controlled substance in an offense is less than 30 grams of marijuana, inadmissibility resulting from that offense can be waived under INA § 212(h). Thus, given that the amount in question here was only “burnt residue,” the Court finds that even if it could have been established that the controlled substance was marijuana, thus rendering Respondent inadmissible under INA § 212(a)(2)(A)(i)(II), such inadmissibility could be waived under INA § 212(h). Furthermore, in accordance with the reasoning cited below regarding the INA § 212(h) waiver, the Court would have granted the request for a INA § 212(h) waiver.
categorically a CIMT and the analysis ends. Chanmouny, 376 F.3d at 811; see also Descamps v. United States, 133 S.Ct. 2276, 2281 (2013). Alternatively, if the statute sweeps more broadly than the CIMT definition, so that it encompasses both turpitudinous and non-turpitudinous conduct, and the Court must examine divisibility and, if the statute is divisible, proceed to the modified categorical approach, which involves reviewing the record of conviction. See Chanmouny, 376 F.3d at 812; Descamps, 133 S.Ct. at 2281, 2283.

Although Respondent has numerous convictions, the Court begins by reviewing his two convictions for Domestic Assault. On September 12, 2013, Respondent was convicted of Domestic Assault in violation of Minn. Stat. § 609.2242, subd. 1(2). (Ex. E). On July 25, 2014, Respondent was again convicted of Domestic Assault, see Ex. M, this time sentenced under Minn. Stat. § 609.2242, subd. 2, which contains the same elements of the offense as Minn. Stat. § 609.2242, subd. 1, but includes the additional sentencing element of that the offender must have previously violated Minn. Stat. § 609.2242, subd. 1. Therefore, for purposes of analyzing whether these convictions are CIMTs, the Court will begin by reviewing the language of Minn. Stat. § 609.2242, subd. 1, because if Minn. Stat. § 609.2242, subd. 1, is a CIMT, then Minn. Stat. § 609.2242, subd. 2, will also be a CIMT, as it contains the same language but with an additional element of being a repeat offender.

Minnesota Statutes § 609.2242, subd. 1, provides:

> Whoever does any of the following against a family or household member . . . commits an assault and is guilty of a misdemeanor:
> (1) commits an act with intent to cause fear in another of immediate bodily harm or death; or
> (2) intentionally inflicts or attempts to inflict bodily harm upon another

Simple assault or battery crimes are generally not considered to involve moral turpitude for purposes of the immigration laws. See Matter of Ahortalejo-Guzman, 25 I&N Dec. 465 (BIA 2011); see also Matter of Fualauu, 21 I&N Dec. 475, 477 (BIA 1996); Matter of Short, 20 I&N Dec. 136, 139 (BIA 1989). But this general rule does not apply where an assault or battery involves some aggravating factor that indicates the perpetrator's moral depravity, such as inflicting injury on a person whom society views as deserving of special protection. See Matter of Tran, 21 I&N Dec. 291, 294 (BIA 1996). The Court concludes that Minn. Stat. § 609.2242, subd. 1 categorically constitutes a crime involving moral turpitude because the statute pertains to assault against a family or household member. Family or household members are people that society views as deserving special protection, and an assault against such a person indicates moral depravity that is inherent in the nature of the crime. The Court concludes that such moral turpitude is present in all offenses covered under Minn. Stat. § 609.2242, subd. 1, whether offenses involving acts intended to cause fear of bodily harm as described in subdivision 1(1) or acts that involve the actual or attempted infliction of bodily harm as described in subdivision 1(2), as such offenses "necessarily entail[] conduct on the part of the offender that is inherently base, vile, or depraved, and contrary to accepted rules of morality and the duties owed between persons or to society in general" when inflicted on a family or household member. See Matter of Kochlani, 24 I&N Dec. at 129.
Therefore, the Court concludes that Minn. Stat. § 609.2242, subd. 1 categorically constitutes a CIMT. As such, offenses under Minn. Stat. § 609.2242, subd. 2, which involve a repeat violation subdivision 1, also is categorically a CIMT, as the moral turpitude inherent in the crime is only increased by the fact that it has been perpetrated before.

Because Respondent has two convictions for CIMTs, one from September 12, 2013 for violating Minn. Stat. § 609.2242, subd. 1, and one from July 25, 2014 for violating Minn. Stat. § 609.2242, subd. 2, he is not eligible for the petty offense exception. See INA § 212(a)(2)(A)(ii) (stating that the exception only applies to aliens who have committed as single crime). Therefore, because Respondent has a conviction for a CIMT, he is inadmissible under INA § 212(a)(2)(A)(i)(I).

C. Waiver of Inadmissibility under INA § 212(h)

Because Respondent has been found to be inadmissible, the Court now reviews whether his inadmissibility grounds should be waived. Respondent has been found to be inadmissible under INA § 212(a)(2)(A)(i)(I) for his two Domestic Assault convictions. However, noting that Respondent has several other convictions that may also render him inadmissible under INA § 212(a)(2)(A)(i)(I) or other provisions of INA § 212, the Court will analyze Respondent’s waiver request in light of his entire criminal history with the effect that, if the Court elects to grant the waiver, the Court intends the waiver to be used for all inadmissibility grounds that may be implicated by the convictions that have been established in the record.4

In order to overcome his inadmissibility and qualify for adjustment of status, Respondent has applied for a waiver under Section 212(h) of the Act. (Ex. T). Section 212(h) can be used to waive various criminal grounds of inadmissibility upon a showing of hardship to a qualifying relative, as it provides that the Attorney General may, in his discretion, waive the application of subparagraph 212(a)(2)(A)(I) (crimes involving moral turpitude), 212(a)(2)(B) (multiple criminal convictions), 212(a)(2)(D) (prostitution and commercial vice), 212(a)(2)(E) (certain aliens who have asserted immunity from prosecution), and 212(a)(2)(A)(i)(II) (an offense of simple possession of 30 grams or less of marijuana).

If the offense occurred within the last fifteen years, the alien must demonstrate that his removal from the United States would result in extreme hardship to his United States citizen or lawful resident parent, spouse, son, or daughter. INA § 212(h)(1)(B). In evaluating extreme hardship to a qualifying relative, the factors to be considered include, but are not limited to: whether the qualifying relative has family ties to this country; the extent of the qualifying relative’s family ties outside the United States; conditions in the country of removal; financial impact of departure from this country; and significant health conditions, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. Matter of

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4 In particular, the Court notes that in addition to several juvenile adjudications and the convictions regarding domestic assault and possession of drug paraphernalia already analyzed here, Respondent has a conviction for violating a restraining order, two convictions for minor consumption of alcohol, three convictions for driving under the influence, two convictions for disorderly conduct, a conviction for obstructing legal process, a conviction for indecent conduct, a conviction for driving after cancellation, and a conviction for violating a no contact order. See Ex. T (criminal history chart); Ex. 6; Ex. 8; Ex. 10-13; Ex. D; Ex. E; Ex. M; Ex. N, Ex. P.

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Cervantes-Gonzalez, 22 I&N Dec. 560, 566 (BIA 1999); see also INS v. Jong Ha Wang, 450 U.S. 139 (1981). The BIA has stated that in order for the qualifier “extreme” to have meaning, hardship that involves only common results of removal, such as separation or financial difficulties, is insufficient to warrant approval of waiver request unless combined with much more extreme impacts. Matter of Ngai, 19 I&N Dec. 245, 246-47 (BIA 1984).

Furthermore, the applicant must demonstrates that he merits a grant of discretion under the waiver and establish that he meets the terms, conditions, and procedures of the regulations promulgated by the Attorney General. INA § 212(h)(2). Under 8 C.F.R. § 1212.7(d), the Attorney General will not favorably exercise discretion in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which the alien clearly demonstrates that a denial of the waiver would result in exceptional and extremely unusual hardship. Waldron v. Holder, 688 F.3d 354, 360 (8th Cir. 2012) (following the exception and extremely unusual hardship standard where alien has committed a violent or dangerous crime); Matter of Jean, 23 I&N Dec. 373, 383 (BIA 2002). Moreover, depending on the gravity of the alien’s underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under INA 212(h)(2). 8 C.F.R. § 1212.7(d); Matter of Jean, 23 I&N Dec. at 383.

As a preliminary matter, the Court does not believe Respondent’s case involves any violent or dangerous crimes. Although Respondent has numerous convictions, they primarily involve alcohol-related offenses and incidents involving Carla. As Carla and Respondent have both testified that many of these charges were fabricated and that, apart from Respondent slapping Carla one time in 2013, he has never been physically aggressive with her, the Court concludes that Respondent’s convictions were not for violent or dangerous crimes. See Ex. V (letters from Carla to prosecutor, retracting her statements).

The Court concludes that Respondent has demonstrated that his removal from the United States would result in extreme hardship to his parents and children, all of whom are U.S. citizens. Respondent’s parents and children all have extensive ties in the United States, and little to no ties in Mexico. The Court also notes that Mexico currently has significant problems with cartels, gangs, general crime, and so the country conditions weigh in favor of finding extreme hardship. Respondent is the primary caretaker for his parents, both of whom have significant health problems that limit their mobility and ability to take care of the household. See also Ex. W; Ex. U; Ex. R; Ex. P (medical records for Respondent’s parents). Respondent’s parents testified that Respondent helps them by getting things for them, helping them take their medication, fixing things around the house, doing yardwork, and other cooking and cleaning duties. The Court notes that as Respondent’s siblings live in California, Respondent’s parents do not have any other immediate relatives that they could turn to for assistance if Respondent were removed from the United States. The Court does not believe it is feasible for Respondent’s parents to relocate with him to Mexico, especially given their health conditions and the disparity in the level of medical care typical in Mexico versus the United States. The Court also concludes that Respondent’s children will suffer extreme hardship if Respondent is removed from the United States. Respondent’s children have already begun showing signs of emotional distress, including behavior problems at school that began after Respondent was detained. See Ex. V. Carla, who works every day at two nearly full-time jobs, works significantly more than the average.
American, and thus Respondent’s absence from childcare is felt more prominently in this situation than in a normal case of family separation. The children are currently being cared for by the grandparents, but their grandmother testified that she struggles to care for them due to her health issues. Thus, the Court concludes that Respondent’s children would suffer extreme hardship if he were removed from the United States, rising above the financial or separation issues found in the ordinary case.

The Court also concludes that Respondent merits a waiver in the exercise of discretion. The Court acknowledges that this is a close case, as Respondent has numerous small convictions over the past several years. However, the Court is persuaded by Carla’s testimony that many of these convictions were not as serious as the charges make them appear, and Respondent has outlined a plan towards avoiding new offenses that includes counseling, substance abuse treatment, and healthy lifestyle choices. See also Ex. Z (counseling appointments scheduled for Respondent). The Court notes that Respondent has expressed remorse for his actions and recognizes that his behavior from this point on must be above reproach, otherwise he risks removal. The Court believes Respondent warrants this final chance as a matter of discretion, due to the length of his time in the United States, his strong family connections, and his expressed desire to avoid future legal trouble for the sake of his children.

Therefore, the Court will grant Respondent’s request for a waiver under INA § 212(h), waiving his inadmissibility under INA § 212(a)(2)(A)(i)(I) and any other inadmissibility grounds that might result from his convictions. Because the Court is granting the waiver and Respondent is otherwise eligible for adjustment, and because the Court finds that Respondent warrants adjustment of status in the exercise of discretion, the Court will grant Respondent’s request to adjust status under INA § 245(a).

Accordingly, the following order will be entered:

ORDER

IT IS HEREBY ORDERED that Respondent’s application for adjustment of status under INA § 245(a), including request for a waiver under INA § 212(h), be GRANTED.

Kristin W. Olmanson
Immigration Judge