CAPITAL AREA IMMIGRANTS' RIGHTS (CAIR) COALITION
IMMIGRATION CONSEQUENCES OF COMMON VIRGINIA OFFENSES
SECTION IV – CONTROLLED SUBSTANCE OFFENSES

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY? [1]	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[2]	COMMENTS AND PRACTICE TIPS
Manufacture, sell, give, distribute or possess w/intent to	18.2-248[3]	Yes	Yes[4]	Yes, a crime related to a controlled	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a *not guilty* plea and do not admit facts sufficient to warrant a finding of

[1] An offense under Va. Code §§ 18.2-248 – 18.2-265.5 is likely to be charged as an aggravated felony under 8 U.S.C. § 1101(a)(43) (B) (illicit trafficking in a controlled substance) and a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). An immigration attorney may argue that these offenses are overbroad since these statutes criminalize controlled substances that are not listed in the federal drug schedules in 21 U.S.C. § 802 (e.g, salvinorina, MDAI, mexedrone, and other substances are included in the Virginia drug schedules but not in the federal drug schedules). *See Mellouli v. Lynch,* 135 S. Ct. 1980 (2015); *Descamps v. United States*, 133 S. Ct. 2276 (2013); *Bah v. Barr*, 950 F.3d 203 (4th Cir. 2020) ("It is undisputed that Virginia's Schedules I and II penalize the possession of some substances not illegal under federal law. Thus, the Virginia statute under which Bah was convicted is overbroad and can render him removable only if the statute is divisible."). A divisibility finding allows the Immigration Judge to look at the record of conviction to determine the identity of the substance and then assess whether the defendant's conviction involved a federally controlled substance. *See* Practice Advisory for Defending Immigrants Facing Controlled Substance Charges at https://www.caircoalition.org/sites/default/files/blog/2015/07/CSA-Practice-Advisory-Final-20150720.pdf.; *See also Bah v. Barr*, 950 F.3d 203 (4th Cir. 2020) (holding that the identity of the controlled substance is an element of the crime in Section 18.2-250(A)(a)); *Cucalon v. Barr*, 958 F.3d 245, 253 (4th Cir. 2020) (concluding that section 18.2-248 is divisible by substance); *Matter of Dingus*, 28 I&N Dec. 529, 538 (BIA 2022) (echoing that the identity of the substance distributed is an element of section 18.2-248 and that the statute is divisible on that basis).

[2] Other grounds of deportability or inadmissibility include, but are not limited to, controlled substance offense, prostitution offense, commercialized vice offense, firearm offense, crimes of domestic violence, crimes of stalking, and crimes against children.

[3] VA Code §18.2-248 is categorically overbroad because the Virginia statute includes in its controlled substance schedules at least one substance not listed on the Federal schedules. *Matter of Dingus*, 28 I&N Dec. 529, 538 (BIA 2022). The identity of the substance distributed is an element of § 18.2-248 and the statute is divisible on that basis. *Id.,* see also *Cucalon v. Barr*, 958 F.3d 245, 253 (4th Cir. 2020) (concluding that § 18.2-248 is divisible by substance). In *Cypress v. Commonwealth*, 699 S.E.2d 206, 213–14 (Va. 2010), the State Supreme Court held that the identity of the controlled substance is an element of section 18.2-248 and the State is required to prove the specific substance distributed beyond a reasonable doubt. Furthermore, 18.2-248 could be considered as Per Se Particularly Serious Crime if sentenced to the aggregate sentence of at least 5 years.8 U.S.C. § 1231(b)(3)(B). *See Hernandez-Nolasco v. Lynch*, 807 F.3d 95, 98 (4th Cir. 2015).

[4] Section 18.2-248 (D) has been found definitively to be an aggravated felony, *Cucalon v. Barr*, 958 F.3d 245 (4th Cir. 2020).

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY? [1]	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[2]	COMMENTS AND PRACTICE TIPS
manufacture, sell, give, distribute controlled subst. or imitation controlled substance				substance, 8 U.S.C. § 1227(a)(2)(B)[5]	guilt to avoid determination that 251 plea will be considered a "conviction".[6] Keep reference to particular controlled substance(s) out of record of conviction.[7] However, if the controlled substance that serves as the basis for conviction is *not* in

[5] *Supra* fn 1.

[6] While entering a plea of not guilty and not admitting facts sufficient for a finding of guilt is still highly encouraged, it is important to understand that a *Crespo* plea may not guarantee a non-conviction for immigration purposes. According to the Fourth Circuit in *Crespo v. Holder*, 631 F. 3d 130, 134 (2011) "neither a judge nor a jury found [Crespo] guilty after a trial and he did not plead guilty or no contest or admit to any facts, let alone facts sufficient to warrant a finding of guilt…" The statement leaves room for a possibility that, *despite a Crespo plea*, if a trial took place where the judge deferred a finding of guilt but found facts that would have justified a finding of a guilt, a deferred disposition covered by VA Code 19.2-303.2 would still be considered a conviction as defined under INA 101(a)(48)(A). *See Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), rev'd on other grounds, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006) (Convictions vacated because of post-conviction events, such as rehabilitation or immigration hardships or reasons unrelated to the merits of the underlying criminal proceedings, remain a conviction for immigration purposes.).

[7] For immigration purposes, the "record of conviction" includes the statutory definition of the offense, the charging document, the written plea agreement, the transcript of the plea colloquy and any explicit factual finding by the trial judge to which the defendant consented. *See Shepard v. United States*, 544 U.S. 13 (2005). Immigration practitioners argue that the lab report or certificate should *not* be included in this record. For more practice tips regarding immigration consequences of Virginia drug offenses, see CAIR Coalition practice advisory on this issue at https://www.caircoalition.org/sites/default/files/blog/2015/07/CSA-Practice-Advisory-Final-20150720.pdf.

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					the federal drug schedules, emphasize that fact in the record.
Transporting controlled substances into the Comm.	18.2-248.01[8]	Yes[9]	Yes[10]	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)[11]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a *not guilty* plea and do not admit facts sufficient to warrant a finding of guilt to avoid determination that 251 plea will be considered a "conviction."[12]

[8] Since the penalty for this crime is minimum of 5 years, and it is an aggravated felony, it is probably a Per Se Particularly Serious Crime. *See* 8 U.S.C. § 1231(b)(3)(B) (withholding of removal); s*ee also* U.S.C. § 1158(b)(2)(B)(i)0 (asylum).

[9] BIA has recognized that transporting controlled substance can constitute a CIMT. For example, *In re Khourn*, the BIA concluded that distribution of cocaine, in violation of 21 U.S.C. § 841(a), is a CIMT. *In re Khourn*, 21 I. & N. Dec. 1041, 1046-47 (BIA 1997). Also *In re Acosta*, 27 I. & N. Dec. 420, 422-24 (BIA 2018) (concluding attempted criminal sale of a controlled substance under New York law constitutes a CIMT); *In re Gonzalez Romo*, 26 I. & N. Dec. 743, 745-46 (BIA 2016) (concluding solicitation to possess marijuana for sale under Arizona law constitutes a CIMT).In *Daye v. U.S. Attorney General,* the Eleventh Circuit analyzed the VA statute and applied a categorical approach, holding that it constitutes a CIMT. 38 F.4th 1355, 1360 (11th Cir. 2022).

[10] *Supra* fn 1.

[11] *Supra* fn 1.

[12] *Supra* fn 6.

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					Keep reference to particular controlled substance(s) out of record of conviction.[13] However, if controlled substance that serves as the basis for conviction is *not* in the federal drug schedules, emphasize that fact in the record. Seek alternative plea to 18.2-248.1(a)(1), 18.2-248.1(b), 18.2-250 or 18.2-250.1 to decrease likelihood that conviction will be deemed an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) (*note:* although none of these are likely to be entirely without immigration consequences).

[13] *Supra* fn 7.

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Sale, gift, distribution or possession with intent to sell, give or distribute marijuana	18.2-248.1(a)(1)	Yes	Probably Not[14]	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)[15]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a *not guilty* plea and do not admit facts sufficient to warrant a finding of guilt to avoid determination that
	18.2-248.1(a)(2)	Yes	Possibly, under 8 U.S.C. § 1101(a)(43).[18]	Yes, a crime relating to a controlled substance.	

[14] There is a strong argument that a conviction under Va. Code §§ 18.2-248.1(a)(1, 2) or conviction involving marijuana under Va. Code § 18.2-255(A)(i) is not an aggravated felony. The Supreme Court held in *Moncrieffe v. Holder* that if "a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the conviction is not for an aggravated felony under the INA." 133 S.Ct. 1678, 1693-94 (2013). Under Va. Code § 18.2-248.1(a)(1) and (2), a person can be convicted for distributing a small amount of marijuana without remuneration. Virginia courts have affirmed convictions under Code § 18.2-248.1(a)(2) where the defendant only possessed small amounts of marijuana, *see Brown v. Commonwealth*, 609 S.E.2d 301, 302 (Va. Ct. App. 2010) (14.74 grams/0.52 ounces); *Lewis v. Commonwealth*, No. 2355-93-4, 1995 WL 40283, at *1 (Va. Ct. App. Jan. 31, 1995) (23.93 grams/0.844 ounces); *Arnold v. Commonwealth*, 356 S.E.2d 847, 851–52 (Va. Ct. App. 1987) (28.34 grams/1 ounce), and where the defendant received no renumeration. *See, e.g.*, *Ervin v. Commonwealth*, 704 S.E.2d 135, 137–38, 148–49 (Va. Ct. App. 2011); *Pierce v. Commonwealth*, 652 S.E.2d 785, 787–88 (Va. Ct. App. 2007). Therefore, under *Moncrieffe* a conviction under Va. Code § 18.2-248.1(a)(1) or (2) is probably not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). However, a conviction under Va. Code § 18.2-248.1(a)(3) is more likely to be considered an aggravated felony as by statute it does not involve a small amount of marijuana.

[15] In *Cespedes v. Holder*, 542 F. App'x 227, 229 (4th Cir. 2013) (unpublished), the Fourth Circuit agreed with the Board of Immigration Appeals that a conviction under Va. Code § 18.2-248.1 was a crime relating to a controlled substance and could not fall within the exception to the controlled substance grounds of deportability at 8 USC § 1227(a)(2)(B)(i) for a single offense involving mere possession of 30 grams or less of marijuana. The Third Circuit in an unpublished opinion has analyzed 18.2-248.1 statute and held that this statute is indeed divisible, and after applying a modified categorical approach, it determined that 18.2-248.1(3) qualifies as an aggravated felony. *Davis v. Attorney General of U.S.*, 563 Fed.Appx. 151, 152 (3rd Cir. 2014).

[18] *Supra* fn 14.

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	18.2-248.1(a)(3)		Yes	Yes, a crime relating to a controlled substance.	251 plea will be considered a "conviction."[16] Keep reference to particular controlled substance(s) and/or remuneration out of record of conviction.[17] (Alternatively, make it clear that there was no intent to profit, if applicable). However, if controlled substance that serves as the basis for conviction is *not* in the federal drug schedules, emphasize that fact in the record. Include affirmative statement of small amount of marijuana or an intent to give/distribute marijuana as an accommodation without an
	18.2-248.1(b)	Yes	Possibly, under 8 U.S.C. § 1101(a)(43).[19]	Yes, a crime relating to a controlled substance.	
	18.2-248.1(c)	Yes	Yes.[20]	Yes, a crime relating to a controlled substance.	

[16] *Supra* fn 6.
[17] *Supra* fn 7.
[19] *Supra* fn 14.
[20] *Supra* fn 14.

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					intent to profit if applicable; if not, keep record vague. Plead to 18.2-248.1(a)(1) or 18.2-248.1(b) to have strongest argument that offense is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) (*Note*: such a plea *would still have* immigration consequences under the controlled substances and CIMT grounds of deportability/inadmissibility).
Advertisement of imitation controlled substances	18.2-248.4	Probably	Possibly, under 8 U.S.C. § 1101(a)(43)[21]	Possibly a crime relating to a controlled substance,	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a *not guilty* plea and do not admit facts

[21] An offense under Va. Code § 18.2-248.4 could be charged as an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) (illicit trafficking in a controlled substance) and/or a controlled substance offense under 8 U.S.C. § 1227(a)(2)(B). 21 U.S.C. § 843(c) makes it unlawful to place an advertisement to receive, buy, or sell, and Schedule I substance in any publication and a "counterfeit" substance offense constitutes a drug trafficking offense if the "counterfeit" substance is itself a "controlled substance." *U.S. v. Sampson*, 140 F.3d 585 (4th Cir. 1998). However, an immigration attorney could argue that Va. Code § 18.2-248.4 is not a categorical match to 21 U.S.C. § 843(c) in at least two ways: (i) Va. Code § 18.2-248.4 criminalizes the distribution of the publication containing the advertisement

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				8 U.S.C. § 1227(a)(2)(B).	sufficient to warrant a finding of guilt to avoid determination that 251 plea will be considered a "conviction."[22]
Illegal stimulants and steroids	18.2-248.5(A)	Yes	Yes	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a *not guilty* plea and do not admit facts sufficient to warrant a finding of guilt to avoid determination that 251 plea will be considered a "conviction."[23] Seek alternative plea to simple possession under 18.2-250 to avoid aggravated felony conviction (*Note*: such a plea *would still have*

rather than placement of the advertisement in the publication; and (ii) the definition of imitation controlled substance is overbroad, including not only counterfeit controlled substances but also non-controlled substances packaged to resemble or claimed to be controlled substances. *See* Va. Code §§ 18.2-247, 18.2-248.4. However, there are no binding decisions on these points.

[22] *Supra* fn 6.

[23] *Supra* fn 6

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					immigration consequences under the controlled substances grounds of deportability/inadmissibility).
	18.2-248.5(B)	Probably	No[24]	Possibly[25]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a *not guilty* plea and do not admit facts sufficient to warrant a finding of guilt to avoid determination that 251 plea will be considered a "conviction."[26] Specify this provision and note caffeine and/or ephedrine sulfate in the record of conviction.[27]

[24] Caffeine and ephedrine sulfate are not federally controlled substances, *see* 21 U.S.C. § 812, so an offense under Va. Code § 18.2-248.5(B) is not an aggravated felony under 8 U.S.C. § 1101(a)(43) (B) (illicit trafficking in a controlled substance) and/or a controlled substance offense under 8 U.S.C. § 1227(a)(2)(B)).
[25] *But see supra* fn 1.
[26] *Supra* fn 4.
[27] *Supra* fn 7.

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Possession of controlled substances	18.2-250	Probably[28]	No (unless the controlled substance is flunitrazepam or offense is explicitly prosecuted as a	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B).[30]	Seek sentencing under 18.2-251 first-time offender diversion program; to avoid a "conviction" for immigration purposes ensure that client enters *not guilty* plea and does not admit or stipulate to facts

[28] A crime involving moral turpitude (CIMT) "requires two essential elements: a culpable mental state and reprehensible conduct." *Guevara-Solorzano v. Sessions*, 891 F.3d 125, 135 (4th Cir. 2018) (citing *Sotnikau v. Lynch*, 846 F.3d 731, 735–36 (4th Cir. 2017)). Many simple possession offenses do not constitute CIMTs because they contain no *mens rea* element. *Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1968). However, this statute contains the elements of "knowingly" or "intentionally" possessing a controlled substance and therefore has the requisite culpable mental state to be a CIMT. *See Guevara-Solorzano*, 891 F.3d at 135 (citing *Sotnikau*, 846 F.3d at 736). The 4th Circuit and BIA have both held that "participation in illicit drug trafficking is a crime involving moral turpitude.'" *Guevara-Solorzano*, 891 F.3d at 135 (quoting *Matter of Gonzalez Romo*, 26 I&N Dec. 743, 746 (BIA 2016) and *Matter of Khourn*, 21 I&N Dec. 1041, 1044 (BIA 1997)). However, these holdings all analyze statutes criminalizing possession of a controlled substances with intent to sell/distribute rather than mere possession. Whether mere possession without intent to sell/distribute constitutes the reprehensible conduct necessary to be CIMT appears to remain an open question. *See Portaluppi v. Shell*, 869 F.2d 245, 246 (4th Cir. 1989) (declining to decide whether simple possession of a narcotic is a CIMT); *Matter of Y-*, 2 I&N Dec. 600, 601 (BIA 1946) (declining to decide whether mere possession without sale would be a CIMT).

[30] *Supra* fn 1. The Fourth Circuit analyzed 18.2-250 in *Bah v. Barr*, 950 F.3d 203, 211 (4th Cir. 2020) and held that the statute is divisible, and under modofiied categorical approach, "ethylone is a controlled substance under both Virginia and federal law, [and] there is a categorical match between the comparable elements. Accordingly, Bah's conviction qualifies as a "violation of ... any law or regulation of a State ... relating to a controlled substance (as defined in [federal law])," 8 U.S.C.§1227(a)(2)(B)(i).

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			recidivist offense)[29]		sufficient to warrant a finding of guilt.[31] Keep reference to recidivism, previous controlled substance related convictions, and the particular controlled substance(s) (especially flunitrazepam) out of record of conviction.[32] However, if controlled substance that serves as

[29] A Virginia controlled substance offense is an aggravated felony if it entails illicit trafficking in a federally controlled substance and/or is a drug trafficking crime under 18 U.S.C. § 924(c), i.e. a felony punishable under 21 U.S.C. §§ 801–865. Possession under Va. Code §§ 18.2-250, 18.2-250.1 does not entail illicit trafficking in a federally controlled substance since it does not have an element of "trafficking," i.e. unlawful trading or dealing of any controlled substance. *See Lopez v. Gonzales*, 549 U.S. 47 (2006); *Matter of Croce Lopiccolo*, No. AXX XX2 839, 2007 WL 1192350, at *1 (BIA Mar. 7, 2007) (citing *Matter of Davis*, 20 I&N 536, 541 (BIA 1992)). Possession under Va. Code §§ 18.2-250, 18.2-250.1 is not a drug trafficking crime unless it is recidivist possession or the drug in possession is flunitrazepam. S*ee Lopez*, 549 U.S. at 55 n. 6; 21 U.S.C § 844(a); Recidivist possession requires a finding in the record of conviction that a criminal penalty is being assessed as a result of recidivism and the defendant has been given an opportunity to contest that recidivism determination. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2586–87 (2010).

[31] *See supra* ft 6; Additionally please note that a conviction for immigration purposes requires (1) the imposition of some form of punishment, penalty, or restraint on liberty and (2) a guilty verdict by a judge/jury, a guilty plea, a nolo contendere plea, or the *admission of sufficient facts by the immigrant to warrant a finding of guilt*. 28 U.S.C. § 1101(a)(48) (emphasis added). Additionally, some offenses do not even require a conviction or the imposition of punishment to trigger immigration consequences. *See* 28 U.S.C. § 1182 (Admission of committing acts that constitute a CIMT or a federal controlled substance offense is a grounds of inadmissibility). See CAIR Coalition Practice Advisory, "Avoiding or Withdrawing a 'Conviction' for Immigration Purposes," for more information on the ways in which a first offender disposition can be structured to avoid a "conviction" for immigration purposes: https://www.caircoalition.org/sites/default/files/blog/2016/04/4.28.16-PA-Avoiding-or-Withdrawing-Conviction.pdf .

[32] *Supra* fn 7.

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					the basis for conviction is *not* in the federal drug schedules, emphasize that fact in the record.

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Possession of marijuana (first offense) (legacy, this offense was repealed July 1, 2021)	18.2-250.1[33]	Probably.[34]	No	Possibly a crime relating to a controlled substance, depending upon the defendant's	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a *not guilty* plea and do not admit facts sufficient to warrant a finding of guilt to avoid determination that 251 plea will be considered a "conviction." Create affirmative record that amount of marijuana involved was *30 grams or less* to avoid controlled substance grounds of deportability for a noncitizen lawfully admitted into the United States. If this is impossible, do not emphasize amount in record. July 1, 2020, the offense of simple possession of marijuana was

[33] Effective July 1, 2021, Va. Code § 18.2-250.1 was repealed.
[34] *Supra* fn 28, 14.

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				immigration status, [35] and, where a conviction occurred on or after July 1, 2021, an immigration judge decides that a conviction under 18.2-250.1 constitutes a conviction for immigration purposes.	amended from a class I misdemeanor to a "civil offense" for which any person in violation would be "subject to a civil penalty of no more than $25." Va. Code S 1 8.2-250.1. However, this offense may still be a "conviction" for immigration purposes under 21 U.S.C. S 8 1 2 through INA unless it meets the relevant exceptions for 30 grams, or a petty offense exception.

[35] Removal proceedings apply one of two categories for removal grounds depending upon whether the noncitizen was lawfully admitted into the United States. If the noncitizen was lawfully admitted into the United States, deportability grounds apply. Possession of marijuana is a controlled substance deportability ground 8 U.S.C. § 1227(a)(2)(B), but there is an exception for a single offense of possessing *30 grams or less* of marijuana for one's own use. If the noncitizen was never

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Possession of marijuana (second or subsequent offense)	18.2-250.1 This statute has been repealed.	Probably[36]	Probably, under 8 U.S.C. § 1101 (a)(43)(B)[37]	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)	Keep any previous record for simple possession out of record of conviction to avoid possible determination that offense is an aggravated felony based on recidivism.[38] A practitioner may explore post-conviction relief in light of the statute being repealed in 2021.
Possession and distribution of flunitrazepam	18.2-251.2	Yes.[39]	Yes, under 8 U.S.C. §1101 (a)(43)(B)[40]	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a *not guilty* plea and do not admit facts sufficient to warrant a finding of

lawfully admitted into the United States, inadmissibility grounds apply. Possession of marijuana is a controlled substance inadmissibility ground under U.S.C. § 1182(a)(2)(A) and there are no exceptions.

[36] *Supra* fn 28.
[37] *Supra* fn 29.
[38] *Supra* fn 1.
[39] *Supra* fn 28.
[40] *Supra* fn 29.

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					guilt to avoid determination that 251 plea will be considered a "conviction."[41] Seek alternate plea to 18.2-250 (preferred) or 18.2-248 and eliminate any reference to flunitrazepam in the record of conviction[42] to reduce the chance the offense is deemed an aggravated felony. (*note:* such a plea *would still have* immigration consequences under the controlled substances ground of deportability).
Manufacture, sell, give, distribute or possess w/intent to	18.2-251.3	Yes	Yes	Yes	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a *not guilty* plea and do not admit facts sufficient to warrant a finding of

[41] *Supra* fn 6.
[42] *Supra* fn 7.

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distribute gamma-butyrolactone or 1, 4-butanediol for human consumption					guilt to avoid determination that 251 plea will be considered a "conviction."[43]
Defeating drug and alcohol screening tests	18.2-251.4(2)	Probably	No	Possibly a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a *not guilty* plea and do not admit facts sufficient to warrant a finding of guilt to avoid determination that 251 plea will be considered a "conviction."[44]

[43] *Supra* fn 6 .
[44] *Supra* fn 6.

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Distribution of certain drugs to persons under 18	18.2-255(A)(i)	Yes	Yes under 8 U.S.C. § 1101(a)(43)(B)	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B).[45]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a *not guilty* plea and do not admit facts sufficient to warrant a finding of guilt to avoid determination that 251 plea will be considered a "conviction."[46] Keep reference to particular controlled substance(s) distributed out of record of conviction. [47]
	18.2-255(A)(ii)	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(B) [48]	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B).[49]	
	18.2-255(B)	Yes	Possibly, under 8 U.S.C. §	Possibly, a crime relating to a	

[45] *Supra* fn 1.
[46] *Supra* fn 6.
[47] *Supra* fn 7.
[48] A Virginia controlled substance offense is an aggravated felony if it entails illicit trafficking in a federally controlled substance and/or is a drug trafficking crime under 18 U.S.C. § 924(c), i.e. a felony punishable under 21 U.S.C. §§ 801–865. 21. U.S.C. § 861 makes employing, hiring, using, persuading, inducing, enticing, or coercing a person under eighteen years of age to violate 21 U.S.C. §§ 801–971, which includes the distribution of controlled substances. An immigration practitioner could argue that Va. Code § 18.2-255(A)(ii) is broader than 21 U.S.C. § 861 since (1) causing a minor to assist in controlled substance distribution is not limited to employing, hiring, using, persuading, inducing, enticing, or coercing the minor to do so; and the Virginia controlled substance schedules are broader than their federal counterparts. *See supra* fn 1.
[49] *Supra* fn 1.

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			1101(a)(43)(B) [50]	controlled substance, 8 U.S.C. § 1227(a)(2)(B)ii, [51]	If conviction under (B), make clear in record that the imitation substance was not itself a "controlled substance" under the federal controlled substances act.
Distribution, sale or advertisement of	18.2-255.1	Probably[52]	Possibly, under 8 U.S.C. §	Possibly a crime relating to a controlled substance,	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a *not guilty* plea and do not admit

[50] An offense under Va. Code §§ 18.2-255(B) could be charged as an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) (illicit trafficking in a controlled substance) and/or a controlled substance offense under 8 U.S.C. § 1227(a)(2)(B) since a "counterfeit" substance offense constitutes a drug trafficking offense if the "counterfeit" substance is itself a "controlled substance." *U.S. v. Sampson*, 140 F.3d 585 (4th Cir. 1998). However, an immigration attorney could argue that Va. Code §§ 18.2-255(B)is not a categorical match to a federal controlled substance offense since the definition of imitation controlled substance is overbroad, including not only counterfeit controlled substances but also non-controlled substances packaged to resemble or claimed to be controlled substances. *See* Va. Code §§ 18.2-247, 18.2-248.4. However, there are no binding decision on this point

[51] *Supra* fn 1.

[52] A crime involving moral turpitude (CIMT) "requires two essential elements: a culpable mental state and reprehensible conduct." *See Guevara-Solorzano v. Sessions*, 891 F.3d 125, 135 (4th Cir. 2018) The knowledge element of Va. Code § 18.2-255.1 gives the offense the requisite culpable mental state to be a CIMT. The act of selling, distributing, or displaying controlled substance advertisements to a minor under Va. Code § 18.2-255.1 could be found to be the "participation in illicit drug trafficking" that both the BIA and the Fourth Circuit have held to be a CIMT. *See Guevara-Solorzano,* 891 F.3d 135 (quoting *Matter of Gonzalez Romo*, 26 I&N Dec. 743, 746 (BIA 2016) and *Matter of Khourn*, 21 I&N Dec. 1041, 1044 (BIA 1997)). A similar argument may be made for placing a drug paraphernalia advertisement in a publication under Va. Code § 18.2-256.5 An immigration attorney practitioner could argue otherwise by emphasizing that the statutes that informed the sweeping language of the BIA and Fourth Circuit all entailed the sale or distribute of a controlled substance rather than advertisements and that the acts in Va. Code §§ 18.2-255.1 or 265.5 are at least one step removed from this. However, there is no precedent on either point.

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paraphernalia to minor			1101(a)(43)(B) [53]	8 U.S.C. § 1227(a)(2)(B).[54]	sufficient facts to warrant a finding of guilt to avoid determination that 251 plea will be considered a "conviction."[55] Keep reference to particular controlled substance(s) out of record of conviction[56] If applicable, create record that printed material contained only small mention of paraphernalia

[53] A Virginia controlled substance offense is an aggravated felony if it entails illicit trafficking in a federally controlled substance and/or is a drug trafficking crime under 18 U.S.C. § 924(c), i.e. a felony punishable under 21 U.S.C. §§ 801–865. An immigration practitioner has a strong argument that Va. Code §§ 18.2-255.1, 265.5 do not entail illicit trafficking in a federally controlled substance because they not have as an element the unlawful trading or dealing of any controlled substance, the "common sense" definition of drug trafficking. *See Lopez v. Gonzales*, 549 U.S. 47 (2006). However, as 21 U.S.C. § 863(a) punishes the sale or offering for sale of drug paraphernalia as a felony offense, it may be argued that Va. Code §§ 18.2-255.1 or 265.5 is a drug trafficking crime. An immigration practitioner, however, may argue that Va. Code 18.2-255.1 and 265.5 are overbroad because they criminalize the distribution, sale, and display of printed material that advertises drug paraphernalia, thereby including some acts – such as the distribution of this material without offering its advertised contents for sale – that 21 U.S.C. § 863(a) does not criminalize.
[54] *Supra* fn 1.
[55] *Supra* fn 6.
[56] *Supra* fn 7.

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					among other items/issues unrelated to controlled substances.
Sale of drugs near certain properties	18.2-255.2	Yes	Possibly, under 8 U.S.C. § 1101(a)(43)(B) [57].	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B). [58]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a *not guilty* plea and do not admit sufficient facts to warrant a finding of guilt to avoid determination that

[57] While Va. Code § 18.2-255.2 would likely be charged as an aggravated felony, an immigration practitioner has several arguments otherwise. Virginia controlled substance offense is an aggravated felony if it entails illicit trafficking in a federally controlled substance and/or is a drug trafficking crime under 18 U.S.C. § 924(c), i.e. a felony punishable under 21 U.S.C. §§ 801–865. Va. Code § 18.2-255.2 does not categorically entail illicit trafficking in a federally controlled substance since it encompasses possession with the intent to distribute, an act that is not a commercial dealing. *See Lopez v. Gonzales*, 549 U.S. 47, 53–54 (2006). Similarly, Va. Code § 18.2-255.2 does not categorically entail a drug trafficking crime since it encompasses acts that the Controlled Substances Act does not punish with more than one year's imprisonment. *See Moncrieffe v. Holder*, 569 U.S. 184, 188 (2013). Such acts include possessing a small amount of marijuana in the following locations with intent to distribute for no renumeration: on a school bus; at a school bus stop, a child day care center, a public library, a state facility (as defined in Va. Code § 37.2-100) or a publicly owned/operated recreation/community center; or within a 1000 ft of a child day care center, a bus stop, or a state facility. *See id*. at 194–95. *Compare* Va. Code § 18.2-255.2 (listing a school bus, a school bus stop, a child day care center, a public library, a state facility, and a publicly owned/operated recreation/community center as locations on which or near which the manufacture, sale, distribution or possession with intent to sell, give or distribute any controlled substance, imitation controlled substance, or marijuana is unlawful) *with* 21 U.S.C. § 860 (not listing the aforementioned places as locations on which or near which the manufacture, distribution or possession with intent to sell, give or distribute any controlled substance is unlawful). An immigration practitioner may also argue that § 18.2-255.2 is categorically broader than federal controlled substance offenses since the Va. controlled substance schedules and definition of an imitation controlled substance encompass substances that are not federal controlled substances. *See supra* fn. 4.

[58] *Supra* fn. 1.

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					251 plea will be considered a "conviction." [59] Keep reference to particular controlled substance(s) out of record of conviction,[60] unless the substance is not a federally controlled substance or was a small amount of marijuana possessed with intent to distribute for no renumeration on a location falling outside the ambit of 21 U.S.C. § 860. Plead instead to 18.2-248.1(a)(1) or 18.2-248.1(b) to have strongest argument that offense is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) (*Note*: such a plea *would still have* immigration consequences under the controlled

[59] *Supra* fn 6.
[60] *Supra* fn 7.

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					substances and CIMT grounds of deportability/inadmissibility).
Keeping drug house	18.2-258	Probably[61]	Possibly, under 8 U.S.C. §1101(a)(43)(B)[62]	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)[63]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a *not guilty* plea and do not admit sufficient facts to warrant a finding of guilt to avoid determination that 251 plea will be considered a "conviction."[64]

[61] Please note that under *Belcher v. Commonweal*th, S.E.2d 2022 WL 4472825 (September 27, 2022), Class 1 misdemeanor in VA is not equivalent to "1 year." As such, those sentenced to Class 1 misdemeanor under this statute could avail themselves of the "petty offense" exception under 212(a)(2)(A)(ii)(II).

[62] An immigration practitioner would have a strong argument that this offense cannot constitute a "drug trafficking aggravated felony" because it does not match the "common sense" definition of drug trafficking, as described by the Supreme Court in *Lopez v. Gonzales*, 549 U.S. 47 (2006). However, the federal definition of "drug trafficking crime" is set forth in 8 U.S.C. § 924(c)(2) and includes the federal statute for "Maintaining drug-involved premises" under 21 U.S.C. § 856. That statute makes it a felony to knowingly operate a place for the purpose of "manufacturing, distributing, or using any controlled substance," and "managing or controlling" the property while "knowingly and intentionally" making it available for the "unlawful[] manufacturing, storing, distributing, or using a controlled substance." An immigration practitioner could argue that Va. Code § 18.2-258 is overbroad and therefore cannot constitute a drug trafficking aggravated felony because it appears to criminalize at least some conduct that is not prohibited by the federal statute, such as an owner having knowledge that his property is "frequented by persons under the influence of illegally obtained controlled substances."

[63] *Supra* fn 1.

[64] *Supra* fn 6.

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					Keep reference to particular controlled substance(s) out of record of conviction,[65] unless the substance is not a federally controlled substance. To avoid aggravated felony, reference in the record any conduct not criminalized in 21 U.S.C. § 856.[66]
Obtaining drugs by fraud, deceit, or forgery	18.2-258.1(A)	Yes	Probably, under 8 U.S.C. § 1101(a)(43)(B) [67]	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B). [69]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a *not guilty* plea and do not admit

[65] *Supra* fn 7.
[66] *Supra* fn 6.
[67] "Acquiring or obtaining possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge" is a drug trafficking crime, *see* 18 U.S.C. § 924(c); 21 U.S.C. §§ 843(a)(3), making it an aggravated felony. An immigration practitioner could argue that Va. Code § 18.258.1(A) is broader than 21 U.S.C. § 843(a)(3) because the Va. controlled substance schedule is broader than its federal counterpart, *see supra* at note ii. An immigration practitioner could also argue that Va. Code § 18.258.1(A) broader than 21 U.S.C. §§ 843(a)(3) as it includes acts not expressly listed in 21 U.S.C. §§ 843(a)(3), such as embezzlement, forgery/alteration of a prescription or of any written order, concealment of a material fact, or use of a false name or the giving of a false address. However, the terms fraud, deception, and forgery could be read to encompass these acts.
[69] *Supra* fn 1.

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			Possibly, under 8 U.S.C. § 1101(a)(43)(R) if the sentence imposed is at least one year[68] Yes, under 8 U.S.C. § 1101(a)(43)(M) if the loss to the victim exceeds $10,000		sufficient facts to warrant a finding of guilt to avoid determination that 251 plea will be considered a "conviction."[70] Keep reference to particular controlled substance(s) out of record of conviction,[71] unless the offense is *not* in the federal drug schedules or relates to possession of 30 grams or less of marijuana for personal use and is client's first drug offense, which is an exception to 8 U.S.C. § 1227(a)(2)(B).

[68] Some of the conduct criminalized by Va. Code § 18.2-258.1(A) may be considered an aggravated felony under 8 U.S.C. § 1101(a)(43)(R), an "offense relating to […] forgery" if the sentence imposed is more than one year. Such conduct includes "obtain[ing] any drug or procur[ing] or attempt[ing] to procure the administration of any controlled substance or marijuana […] by the forgery or alteration of a prescription or of any written order" in Va. Code § 18.2-258.1(A)(ii). While an immigration practitioner could argue Va. Code § 18.2-258.1(A) is overbroad because it criminalizes conduct outside of the ambit of 8 U.S.C. § 1101(a)(43)(R), an immigration judge will probably find Va. Code § 18.2-258.1(A) divisible, allowing the judge to look at the record of conviction to determine which of the offenses expressed in (i-iv) was committed.
[70] *Supra* fn 6
[71] *Supra* fn 7.

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					Keep the sentence to less than a year and/or reference to forgery out of the record of conviction[72] to avoid an aggravated felony under 1101(a)(43)(G) Make clear in record of conviction that loss to the victim was less than $10,000 to avoid fraud aggravated felony ground; otherwise, do not emphasize amount of loss in record. To avoid an aggravated felony, consider alternative plea to 18.2-95 grand larceny or 18.2-96 petit
	18.2-258.1(B)	Yes	Probably, under 8 U.S.C. § 1101(a)(43)(B) [73] Probably, under (M) if the loss to	Yes, a crime relating to a controlled	

[72] *Supra* fn. 7.

[73] Because the sufficient act is embezzlement, which includes "wrongfully and fraudulently use, dispose of, conceal or embezzle any money, bill, note, check, order, draft, bond, receipt, bill of lading or any other personal property, tangible or intangible, which he shall have received for another or for his employer, principal or bailor, or by virtue of his office, trust, or employment, or which shall have been entrusted or delivered to him by another or by any court, corporation or company.. Proof of embezzlement shall be sufficient to sustain the charge of larceny." Consider analysis and case development under *Matter of Onesta Reyes* 28 I&N Dec. 52 (A.G. 2020). *Omargharib v. Holder*, No. 13-2229 (4th Cir. 2014)

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			the victim exceeds $10,000	substance, 8 U.S.C. § 1227(a)(2)(B).[74]	larceny with sentence under one year (but note that this will not avoid the CIMT grounds of removability)
	18.2-258.1(C)	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(B) Probably, under (M) if the loss to the victim exceeds $10,000	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B).[75] Probably, 8 U.S.C. 1182(a)(2)(C) if reason to believe drug trafficking[76]	

[74] *Supra* fn. 1.
[75] *Supra* fn 1.
[76] Unlike those removability grounds that require a conviction, all that is needed to trigger 8 U.S.C. 1182(a)(2)(C) is reasonable, substantial, and probative evidence that a person has knowingly engaged in drug trafficking. *See Matter of Rico*, 16 I&N Dec. 181, 185-86 (BIA 1977); *Alarcon-Serano v. INS,* 220 F.3d 1116, 1119 (9th Cir. 2000*). See also Castano v. INS*, 956 F.2d 236, 238 (11th Cir. 1992) (governments knowledge or reasonable belief that an individual has trafficked in drugs

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY? [1]	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[2]	COMMENTS AND PRACTICE TIPS
	18.2-258.1(D)	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(B) or (U) Yes, under (M) if the loss to the victim exceeds $10,000	Possibly, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B).[77]	
	18.2-258.1(E)	Yes	Yes, under 1101(a)(43)(R) if the sentence imposed is at least one year	Possibly, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B).	

must be based on credible evidence).Drug trafficking has been defined as some sort of commercial dealing, (*see Lopez v. Gonzales*, 549 US 47, 127 S.Ct. 625, 166 L. Ed. 2d 462, (2006)) and the unlawful trading or dealing of any controlled substance. See *Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992). Evidence such as police reports, testimony from police, admissions by noncitizens, delinquency adjudications, adult convictions, and any other evidence of sale or possession with intent to distribute have all been held to supply reason to believe. See *Matter of Favela*, 16 I&N Dec. 753. 756 (BIA 1979); *Matter of Rico,* supra (reason to believe found based on testimony of Border Patrol agents that respondent frequently drove a car in which 162 pounds of marijuana was found).

[77] *Supra* fn 1.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY? [1]	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[2]	COMMENTS AND PRACTICE TIPS
	18.2-258.1(F)	Yes	Yes, under 1101(a)(43)(R) if the sentence imposed is at least one year	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B).[78]	
Possession of controlled paraphernalia	54.1-3466	Possibly[79]	No	Probably, not a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)[80]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a *not guilty* plea and do not admit sufficient facts to warrant a finding of guilt to avoid determination that 251 plea will be considered a "conviction."[81]

[78] *Supra* fn. 1.
[79] A crime involving moral turpitude (CIMT) "requires two essential elements: a culpable mental state and reprehensible conduct." *Guevara-Solorzano v. Sessions*, 891 F.3d 125, 135 (4th Cir. 2018) (citing *Sotnikau v. Lynch*, 846 F.3d 731, 735–36 (4th Cir. 2017)). Va Code § 54.1-3466 appears to be a strict liability statute on its face and so appears to lack the requisite culpable mental state to be a CIMT. *See Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1968) (holding that simple possession offenses do not constitute CIMTs because they contain no *mens rea* element).
[80] *Supra* fn 1; *Mellouli v. Lynch,* 135 S. Ct. 1980 (2015) (A record of conviction for possession of paraphernalia that fails to identify the federally controlled substance does not trigger removal under the immigration statute.); Please note that in *Syblis v. Attorney General of U.S.,* the Third Circuit found that Va.Code Ann. § 54 .1–3466 is sufficiently connected to controlled substances so as to be "related to" controlled substances for purposes of § 1182(a)(2)(A)(i)(II)" 763 F.3d 348 (3rd Cir. 2014).
[81] *Supra* fn 6.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY? [1]	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[2]	COMMENTS AND PRACTICE TIPS
					If possession of paraphernalia relates to a single instance of possession for one's own use of less than 30 grams of marijuana, emphasize that fact in record to preserve argument that the controlled substances ground of deportability is inapplicable. *See Matter of Davey*, 26 I. & N. Dec. 37 (BIA 2012). Otherwise, do not specify in the record the type of drug associated with the possession of paraphernalia or the type of paraphernalia.[82]

[82] *Supra* fn 7.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY? [1]	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[2]	COMMENTS AND PRACTICE TIPS
Sale, etc., of drug paraphernalia	18.2-265.3(A)	Probably	Possibly, under 8 U.S.C. § 1101(a)(43)(B) [83]	Possibly, a crime relating to a controlled substance,	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a not guilty plea and do not admit sufficient facts to warrant a finding of guilt to avoid determination that

[83] Va. Code § 18.2-265.3(A) is likely to be charged as an aggravated felony. However, an immigration practitioner may argue that it is overbroad because it criminalizes acts, such as the possession of drug paraphernalia with intent to sell it, that 21 U.S.C. § 863, its federal counterpart, does not. *Compare* Va. Code § 18.2-258.1 (criminalizing the possession of drug paraphernalia with the intent to sell it) *with* 21 U.S.C. § 863 (criminalizing the sale of drug paraphernalia, but not its possession with intent for sale). Virginia courts have affirmed convictions under Va. Code § 18.2-265.3 for possessing drug paraphernalia with intent to sell it. *See Servis v. Commonwealth*, 371 S.E.2d 156 (Va. Ct. App. 1988). *See also supra* fn 1. *Mellouli v. Lynch,* 135 S. Ct. 1980 (2015) (A record of conviction for possession of paraphernalia that fails to identify the federally controlled substance does not trigger removal under the immigration statute.).

**This chart only analyzes whether convictions may fall within the primary categories of removability set forth in the Immigration and Nationality Act. Defenders should remember that it is also important to analyze whether a conviction leads to other immigration consequences, such as ineligibility for certain forms of relief from removal, Temporary Protected Status, naturalization, or Deferred Action for Childhood Arrivals. Please review the Cover Memorandum and relevant Practice Advisories on our website.*

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY? [1]	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[2]	COMMENTS AND PRACTICE TIPS
				8 U.S.C. § 1227(a)(2)(B)[84]	251 plea will be considered a "conviction."[85] Plead to 18.2-265.3(C) and keep reference to remuneration out of record of conviction[86] to demonstrate that conviction should not be considered an aggravated felony because it is inconsistent with 21 U.S.C. § 863(a), which makes sale of drug paraphernalia a drug trafficking offense under federal law. Keep reference to particular controlled substance(s) related to paraphernalia out of record of conviction. (*See* fn. 7)
	18.2-265.3(B)	Probably	Probably, under 8 U.S.C. §	Probably, a crime relating to a	

[84] *Supra* fn 1; *Mellouli v. Lynch,* 135 S. Ct. 1980 (2015) .
[85] *Supra* fn 6.
[86] *Supra* fn 7.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY? [1]	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[2]	COMMENTS AND PRACTICE TIPS
			1101(a)(43)(B).[87]	controlled substance, 8 U.S.C. § 1227(a)(2)(B)[88]	
	18.2-265.3(C)	Probably	Possibly, under 8 U.S.C. § 1101(a)(43)(B), if record of conviction does not show any evidence of sale of controlled substances or attempted sale (e.g. element of remuneration)	Probably, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B).[89]	

[87] *Supra* fn 1.
[88] *Supra* fn 1.
[89] *Supra* fn 1.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY? [1]	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[2]	COMMENTS AND PRACTICE TIPS
Advertisement of drug paraphernalia	18.2-265.5	Probably[90]	Possibly, under 8 U.S.C. § 1101(a)(43)(B).	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B).[91]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program. Enter a not guilty plea and do not admit sufficient facts to warrant a finding of guilt to avoid determination that 251 plea will be considered a "conviction."[92] Plead to 18.2-265.3(C) and keep reference to remuneration out of record of conviction to demonstrate that conviction should not be considered an aggravated felony because it is inconsistent with 21 U.S.C. § 863(a), which makes sale of drug paraphernalia a

[90] *Supra* fn 28. Please note that under *Belcher v. Commonwealt*h, S.E.2d 2022 WL 4472825 (September 27, 2022), Class 1 misdemeanor in VA is not equivalent to "1 year." As such, those sentenced to Class 1 misdemeanor under this statute could avail themselves of the "petty offense" exception under 212(a)(2)(A)(ii)(II)
[91] *Supra* fn 1.
[92] *Supra* fn 6.

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY? [1]	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[2]	COMMENTS AND PRACTICE TIPS
					drug trafficking offense under federal law. Keep reference to particular controlled substance(s) related to paraphernalia out of record of conviction.

**This chart only analyzes whether convictions may fall within the primary categories of removability set forth in the Immigration and Nationality Act. Defenders should remember that it is also important to analyze whether a conviction leads to other immigration consequences, such as ineligibility for certain forms of relief from removal, Temporary Protected Status, naturalization, or Deferred Action for Childhood Arrivals. Please review the Cover Memorandum and relevant Practice Advisories on our website.*

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY? [1]	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[2]	COMMENTS AND PRACTICE TIPS
Possession, etc., of marijuana and marijuana products by persons 21 years of age or older lawful; penalties.	4.1-1100 (A) Permissive Statute	Permissive Statute			New statute as of July 1, 2021, with more additions to come in January 2024. If possible, keep the charge under 4.1-1100(B) rather than other sub-sections., and if possible, keep any admissions of guilt out of record.
	4.1-1100 (B)	Probably[93]	Probably[94]	Probably, as related to a controlled substance offense, if considered a conviction.[95]	
	4.1-1100 (C)	Probably	Possibly	Probably, as related to a controlled substance offense, if considered a conviction.[96]	

[93] *See supra* fn 28. The minimum amount required is less than 30 grams so should not trigger aggravated felony conviction. An advocate can argue it is not a conviction for immigration purpose as this subsection imposes a civil, payable by pre-paid fine, that is not considered fine under definition of "penalty," required to meet element of conviction for immigration purposes. Further, arguably the adjudication does not meet the element of conviction requiring order from judge as a clerk administered assessment. Further, the penalty is pre-set schedule so the judge makes no decision on where the penalty falls.
[94] *See supra* fn 93.

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[95] Note that how the state defines a crime under its laws may be useful but is not dispositive in immigration convictions. The focus is on whether sufficient constitutional procedural safeguards (i.e., proof beyond reasonable doubt, right to confront one's accuser, speedy and public trial, notice of the accusations, compulsory process for obtaining witnesses in one's favor, and double jeopardy) were employed and whether the judgment exposes the accused to criminal penalties. *Matter of K.S. Wong*. 28 I&N Dec. 518, 525 (BIA 2022). See also *Matter of German Santos*, 28 I&N Dec. 552 (BIA 2022) which states that a drug possession conviction relating to a substance that is controlled under Federal law is still a controlled substance violation under the federal Immigration and Nationality Act.

[96] Supra fn 95.

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