No. _____

In the Supreme Court of the United States

PEDRO MADRIGAL-BARCENAS,
Petitioner,

v.

ERIC H. HOLDER, JR. ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JULIAN L. ANDRÉ
Counsel of Record
JON DEAN
PANTEA LILI AHMADI
MCDERMOTT WILL & EMERY LLP
2049 Century Park East
Suite 3800
Los Angeles, CA 90067
(310) 277-4110
JAndre@mwe.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Under the Immigration and Nationality Act (INA), a noncitizen is ineligible for cancellation of removal if he has been convicted of an offense "relating to a controlled substance *(as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802))*." 8 U.S.C. § 1182(a)(2)(A)(i)(II) (emphasis added). The majority of federal courts of appeals that have analyzed this statutory provision have held that the INA does not require that a drug paraphernalia conviction involve a controlled substance that is actually listed in the federal schedules of controlled substances. A twelve-to-two supermajority of the *en banc* Third Circuit, however, held that this interpretation of the INA is "illogical and atextual." *Rojas v. U.S. Att'y Gen'l*, 728 F.3d 203, 211 (3d Cir. 2013). The question presented here, over which there exists a direct and intractable two-to-one (arguably four-to-two) conflict, as the government has acknowledged, is:

Does the plain text of the INA require that a drug paraphernalia conviction involve or relate to a controlled substance that is actually listed in the federal schedules of controlled substances in order to render a noncitizen ineligible for cancellation of removal?

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Petitioner Pedro Madrigal-Barcenas petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is unreported (Pet. App. 1a), but is available at 2013 WL 492440. The administrative decisions of the Immigration Judge (IJ) (Pet. App. 14a) and the Board of Immigration Appeals (BIA) (Pet. App. 4a) are unreported.

JURISDICTION

The Ninth Circuit issued its decision on February 11, 2013. Pet. App. 1a. On July 29, 2013, the Ninth Circuit denied Petitioner's timely petition for panel rehearing and rehearing *en banc*. Pet. App. 32a. On October 22, 2013, Justice Kennedy extended the time to file a petition for a writ of certiorari to and including December 6, 2013. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The relevant portions of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1182, 1227, and 1229b, are reproduced at Pet. App. 33a, 43a-44a. The relevant portions of the Controlled Substances Act (CSA), 21 U.S.C. §§ 802, 812, are reproduced at Pet. App. 45a-46a. The relevant portion of Nevada law, Nevada Revised Statutes § 453.566, is reproduced at Pet. App. 47a.

STATEMENT OF THE CASE

I. Statutory Background

Under the INA, the Attorney General may cancel removal of a noncitizen who is inadmissible or deportable. 8 U.S.C. § 1229b(b). Among other requirements, to be eligible for cancellation of removal, a noncitizen must not have been convicted of a criminal offense identified under 8 U.S.C. § 1182(a)(2) (Section 1182). *See* 8 U.S.C. § 1229b(b)(1)(C). In turn, Section 1182 states:

> any alien convicted of, who admits having committed, or who admits committing acts which constitute the essential elements of . . . a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance *(as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))* . . . is inadmissible.

8 U.S.C. § 1182(a)(2)(A)(i) (emphasis added). 8 U.S.C. § 1227(a)(2)(B)(i) (Section 1227), which addresses deportable aliens, contains language regarding controlled substance offenses that is nearly identical to Section 1182.[1] Most notably, Sections 1182 and 1227

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[1] Section 1227 states:

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance *(as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))*, other than a single offense involving

both contain the identical "as defined" parenthetical referencing the CSA.

The CSA established five lengthy schedules of controlled substances. 21 U.S.C. § 812; *see* 21 C.F.R. §§ 1308.11-1308.15. The CSA defines "controlled substance" to mean a drug or precursor included in those schedules. 21 U.S.C. § 802(6).

Nevada Revised Statute § 453.566, which prohibits the "unlawful use or possession" of drug paraphernalia, states:

> Any person who uses, or possesses with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of this chapter is guilty of a misdemeanor.

Nev. Rev. Stat. § 453.566. Under Nevada law, the Nevada Pharmacy Board creates schedules of controlled substances, which are published in Sections 435.510 through 453.550 of the Nevada Administrative Code. Nev. Rev. Stat. § 453.211; Nev. Admin. Code §§ 453.510-453.550. Nevada's controlled substance schedules include approximately sixteen substances that are not identified in the federal schedules of the

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> possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1227(a)(2)(B)(i) (emphasis added).

CSA. *Compare* Nev. Admin. Code §§ 453.510-453.550 *with* 21 C.F.R. §§ 1308.11-1308.15.

II. Factual and Procedural History

1. Petitioner Pedro Madrigal-Barcenas is a 33-year-old native and citizen of Mexico. Pet. App. 5a. He has lived continuously in the United States for over fifteen years. C.A. Admin. Rec. 317. He supports his four young children—three of whom are U.S. citizens. C.A. Admin. Rec. 319, 324. He also supports his father, a U.S. citizen, and his mother, a legal permanent resident. C.A. Admin. Rec. 316. During the first ten years in which Petitioner lived in the U.S., he did not have any criminal convictions or arrests. C.A. Admin. Rec. 321.

On January 22, 2008, Petitioner was charged with and pleaded guilty to misdemeanor possession of drug paraphernalia in violation of Nevada Revised Statute § 453.566. C.A. Admin. Rec. 345-47. He was ordered to pay a fine and costs totaling $632.00. C.A. Admin. Rec. 345-47. Nowhere in the record of conviction does it state that a specific controlled substance under Nevada law formed the basis of Petitioner's drug paraphernalia charge. C.A. Admin. Rec. 345-47. Instead, the charging document indicates only that Petitioner was charged with possession of a glass pipe with "burnt residue." C.A. Admin. Rec. 345-47.

2. On January 29, 2008, the government initiated removal proceedings against Petitioner. C.A. Admin. Rec. 358-59. Petitioner admitted his removability, but applied for cancellation of removal under Section 1229b on the basis of the hardship his removal would cause his children and parents. C.A. Admin. Rec. 313-40.

The government alleged that Petitioner was ineligible for cancellation of removal because of his misdemeanor drug paraphernalia conviction. C.A. Admin. Rec. 86-96, 345-47.

Petitioner argued that his conviction did not render him ineligible for cancellation of removal. C.A. Admin. Rec. 122-123. In particular, Petitioner argued that, under the plain text of Section 1182, a drug paraphernalia conviction must involve a controlled substance actually prohibited under the CSA. C.A. Admin. Rec. 124. Petitioner noted that any other interpretation of Section 1182 would be illogical and render the "as defined in [the CSA]" parenthetical superfluous. C.A. Admin. Rec. 128. Petitioner further asserted that the Nevada statute is categorically overbroad because Nevada law prohibits the use of drug paraphernalia, such as a pipe, to "introduce into the human body" approximately sixteen substances that are not prohibited under the CSA. C.A. Admin. Rec. 124-125. Finally, Petitioner argued that his conviction could not be narrowed under the modified categorical approach because the record of conviction did not establish that his drug paraphernalia conviction involved a controlled substance contained in the CSA. C.A. Admin. Rec. 125-126.

The IJ rejected Petitioner's arguments and found that he was ineligible for cancellation of removal because of his drug paraphernalia conviction. Pet. App. 24a. The IJ relied primarily on the Ninth Circuit's decision in *Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000), which held that Arizona's drug paraphernalia statute was "clearly a law relating to a controlled substance" even though "the definition of 'drug' as used in

[Arizona's drug paraphernalia statute] does not map perfectly the definition of 'controlled substance' as used in [the] INA." *Id.* at 915. In particular, the IJ held that when dealing with a drug paraphernalia statute "there is not a need that a drug be specified, because [given] the nature of the conviction there is not necessarily any drug that was part of the criminal activity." Pet. App. 21a. The IJ further noted that it "would be futile to require that there be specificity regarding the type of drug involved." Pet. App. 21a. The IJ did not identify any alternative bases for denying Petitioner's application for cancellation of removal. Pet. App. 18a-28a.

3. On June 1, 2009, Petitioner appealed to the BIA. A one-member panel of the BIA affirmed and held that a drug paraphernalia conviction "did not need to be tied to a specific, federally controlled substance." Pet. App. 4a-10a. Again relying on *Luu-Le* and the BIA's 2009 decision in *Matter of Espinoza*, 25 I & N Dec. 118 (B.I.A. 2009), the BIA stated that "[b]oth this Board and the Ninth Circuit have ruled that an offense for possession of drug paraphernalia does not always have to be tied to a specific substance that is included within the federal controlled substance schedules before the offense may qualify as an offense relating to a controlled substance." Pet. App. 7a (citing *Matter of Espinoza*, 25 I & N Dec. 118 and *Luu-Le*, 224 F.3d at 915).

4. On April 18, 2011, Petitioner filed a petition for review with the Ninth Circuit. Petitioner again argued that, under the plain text of Section 1182, a drug paraphernalia conviction does not render a noncitizen ineligible for cancellation of removal unless it involves

a controlled substance that is actually listed in the federal schedules. C.A. Pet. Br. 10. In particular, Petitioner argued that applying the Ninth Circuit's holding in *Luu-Le* to the facts of Petitioner's case would require the court to read out of the statute the explicit reference to the CSA in the "as defined" parenthetical. C.A. Pet. Br. 16. In support of this position, Petitioner urged the Ninth Circuit to follow its more recent decision in *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007), which held that a California conviction for possession of a controlled substance was categorically overbroad because California law prohibits two substances that are not contained in the CSA. C.A. Pet. Br. 16. Petitioner then reiterated that Nevada's drug paraphernalia statute was categorically overbroad because Nevada law prohibits the use of drug paraphernalia in connection with approximately sixteen substances that are not contained in the federal schedules. C.A. Pet. Br. 21-22. Finally, Petitioner argued that his conviction could not be narrowed under the modified categorical approach because the criminal complaint, which only referenced an unknown burnt residue, established that Petitioner was not charged with an offense that related to a controlled substance actually "contained in the federal schedules." C.A. Pet. Br. 34.

In response, the government relied heavily on *Luu-Le* and argued that, under Ninth Circuit law, Petitioner's drug paraphernalia conviction "is a conviction for violating a law 'relating to a controlled substance' as defined in the [INA]." C.A. Resp. Br. 14. In particular, the government argued that, under *Luu-Le*, it does not matter if the state law definition of controlled substances differs from the definition of

controlled substance under the CSA. C.A. Resp. Br. 12-13. It then asserted that, because Nevada's drug paraphernalia statute was "materially identical" to the Arizona statute at issue in *Luu-Le*, that case was controlling. C.A. Resp. Br. 14-15. The government further argued that the Ninth Circuit's holding in *Ruiz-Vidal* was inapplicable because it addressed a conviction for drug possession, rather than a drug paraphernalia conviction. C.A. Resp. Br. 18-19.

The Ninth Circuit agreed with the government. In its February 11, 2013 decision, the Ninth Circuit denied the petition for review and held that Petitioner was ineligible for cancellation of removal. Pet. App. 2a. In particular, the Ninth Circuit held that *Luu-Le* and its progeny "require denial of the petition because Nevada's drug-paraphernalia statute is materially identical to the statutes that we considered there." Pet. App. 2a. The Ninth Circuit never reached Petitioner's argument regarding the modified categorical approach or addressed Petitioner's burden of proof. Pet. App. 1a-3a. The Ninth Circuit subsequently denied Petitioner's timely petition for panel rehearing and rehearing *en banc*. Pet. App. 32a.

5. This Petition followed.

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question of federal law on which the federal courts of appeals are intractably divided. Under the INA, a noncitizen is ineligible for cancellation of removal or is deportable if he or she has been convicted of an offense "relating to a controlled substance *(as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))*."

8 U.S.C. § 1182(a)(2)(A)(i)(II) (emphasis added); *see also* 8 U.S.C. § 1227(a)(2)(B)(i). Although the plain text of Sections 1182 and 1227 unambiguously incorporates the definition of controlled substance that is contained in the CSA, the courts of appeals are divided two-to-one, and arguably four-to-two, on whether a noncitizen's state law drug paraphernalia conviction must involve a controlled substance that is actually prohibited under the CSA.

In the Ninth Circuit, regardless of what drug was actually involved, a drug paraphernalia conviction categorically renders a noncitizen ineligible for cancellation of removal under Section 1182 or deportable under Section 1227. *See Luu-Le*, 224 F.3d at 911; *see also United States v. Oseguera-Madrigal*, 700 F.3d 1196 (9th Cir. 2012); *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009); *Bermudez v. Holder*, 586 F.3d 1167 (9th Cir. 2009) (per curiam). The Eighth Circuit and BIA have expressly adopted the Ninth Circuit's interpretation. *See Mellouli v. Holder*, 719 F.3d 995 (8th Cir. 2013); *Matter of Espinoza*, 25 I & N Dec. 118. The Ninth Circuit, Eighth Circuit, and BIA read out of the statute the explicit reference to the CSA by ignoring the "as defined in [the CSA]" parenthetical. Moreover, while not directly addressing the INA's text, the Fourth and Eleventh Circuits have also found that a drug paraphernalia conviction categorically renders a noncitizen ineligible for cancellation of removal. *See Alvarez-Acosta v. U.S. Att'y Gen'l*, 524 F.3d 1191, 1196 (11th Cir. 2008); *Castillo v. Holder*, C.A. No. 12-1235, 2013 WL 5075590 (4th Cir. Sep. 16, 2013)

The Ninth Circuit's approach, however, directly conflicts with the plain text interpretation of the INA

that was recently adopted by the Third Circuit. In a twelve-to-two *en banc* decision, the Third Circuit held that the INA requires that a state drug paraphernalia conviction must involve a controlled substance that is actually prohibited under the CSA. *Rojas v. U.S. Att'y Gen'l*, 728 F.3d 203, 220 (3d Cir. 2013). Indeed, the Third Circuit found that any other interpretation would be "illogical and atextual." *Id.* at 211. The Third Circuit's interpretation is further supported by the Seventh Circuit's holding in *Desai v. Mukasey*, 520 F.3d 762, 766 (7th Cir. 2008) that a state conviction must relate to a controlled substance that is actually defined in the CSA. This Court should therefore grant certiorari to establish the correct interpretation of the INA on an issue that the government acknowledges is the subject of "inconsistency among the courts of appeals." Att'y Gen'l Resp. to Pet. for Reh'g, *Mellouli v. Holder*, C.A. No. 12-3093 (8th Cir. Oct. 15, 2013).

The Ninth Circuit's holding that Petitioner's drug paraphernalia conviction categorically renders him ineligible for cancellation of removal also conflicts with this Court's decisions in *Moncrieffe v. Holder*, -- U.S. --, 133 S. Ct. 1678 (2013), *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 130 S. Ct. 2577 (2010), *Shepard v. United States*, 544 U.S. 13 (2005), and *Taylor v. United States*, 495 U.S. 575 (1990). Under any faithful application of this Court's categorical approach jurisprudence, the Nevada statute at issue is categorically overbroad because it prohibits a broader scope of conduct than identified in the INA.

Finally, this case is an appropriate vehicle in which to resolve the question presented. Petitioner's case presents a straightforward question of statutory

interpretation, which numerous federal courts of appeals have addressed. Moreover, no significant vehicular challenges to Petitioner's case exist because the Ninth Circuit never reached the modified categorical approach and it did not address Petitioner's burden of proof. This Court confronts no obstacle to vacating and remanding on the singular question presented.

I. The Federal Courts of Appeals Are Intractably Divided Over the Question Presented

A. The Ninth Circuit, Eighth Circuit, and BIA Hold that a Drug Paraphernalia Conviction Does Not Need to Involve a Federally Controlled Substance

The Ninth Circuit, Eighth Circuit, and BIA hold that a state law drug paraphernalia conviction categorically renders an alien ineligible for cancellation of removal (under Section 1182) or deportable (under Section 1227), regardless of whether the conviction related to or involved a controlled substance actually identified in the federal controlled substance schedules. In reaching this conclusion, the Ninth Circuit, Eighth Circuit, and BIA have interpreted the "relating to" language in the INA so broadly as to render the "as defined in Section 102 of the Controlled Substance Act" parenthetical superfluous. This "illogical and atextual" interpretation directly conflicts with the twelve-to-two decision of the Third Circuit in *Rojas*.

1. The Ninth Circuit was the first federal court of appeals to address the immigration consequences of a state drug paraphernalia conviction under the INA. In

Luu-Le, 224 F.3d at 915, the Ninth Circuit analyzed whether Arizona's drug paraphernalia statute, Arizona Revised Statute § 13-3415, was a conviction "relating to a controlled substance" that rendered the petitioner deportable under Section 1227. *Id.* at 915. The Ninth Circuit dismissed the petition for review and held that the petitioner was deportable on the basis of his drug paraphernalia conviction. Most notably, the Ninth Circuit determined that the petitioner was deportable regardless of whether Arizona prohibited a broader range of substances than were prohibited under the CSA. *Id.* at 915. In particular, the Court stated:

> Although the definition of "drug" as used in section 13-3415 does not map perfectly the definition of "controlled substance" as used in INA section 241(a)(2)(B)(i), in our opinion section 13-3415 is clearly a law "relating to" a controlled substance. Section 13-3415 is plainly intended to criminalize behavior involving the production or use of drugs—at least some of which are also covered by the federal schedules of controlled substances as printed in 21 U.S.C. § 812(c) – through focusing on "drug paraphernalia." The statute makes abundantly clear that an object is not drug paraphernalia unless it is in some way linked to drugs.

Id.

The Ninth Circuit has subsequently applied *Luu-Le* to find that other state drug paraphernalia convictions categorically render an alien ineligible for cancellation of removal under Section 1182 or deportable under Section 1227. *See* Pet. App. 2a (holding that a Nevada misdemeanor drug paraphernalia conviction rendered

Petitioner ineligible for cancellation of removal); *Oseguera-Madrigal*, 700 F.3d at 1196 (holding that a Washington drug paraphernalia conviction rendered defendant ineligible for cancellation of removal); *Estrada*, 560 F.3d at 1039 (holding that a California drug paraphernalia conviction was a violation "relating to" controlled substances under Section 1182); *Bermudez*, 586 F.3d at 1167 (per curiam) (holding that petitioner was deportable because of a Hawaii drug paraphernalia conviction).

2. In *Espinoza*, 25 I & N Dec. 118, the BIA adopted the Ninth Circuit's rule. Relying on *Luu-Le*, the BIA held that a drug paraphernalia conviction does not need to be tied to "a specific, federally controlled substance." *Id.* at 121-22. In particular, the BIA noted that the Ninth Circuit's decision in *Luu-Le* supported a broad interpretation of the "relating to" language in Section 1182. The BIA recognized that the INA requires "a correspondence between the Federal and State controlled substance . . . for cases involving possession of particular substances." *Id.* at 121. It, however, refused to apply this requirement to drug paraphernalia convictions because drug paraphernalia convictions relate to the "drug trade in general" rather than to any particular substance. *Id.* at 121.[2]

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[2] For example, in *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007), the Ninth Circuit addressed the immigration consequences of a California conviction for possession of controlled substances. The Ninth Circuit held that "in order to prove removability, the government must show that Ruiz-Vidal's criminal conviction was for possession of a substance that is not only listed under California law, but also contained in the federal schedules." *Id.* at 1077-78. The Ninth Circuit and BIA have, however, repeatedly refused to apply *Ruiz-Vidal*'s holding to drug paraphernalia

3. The Eighth Circuit has followed the approach to drug paraphernalia convictions first expressed by the Ninth Circuit in *Luu-Le* and later adopted by the BIA in *Espinoza*. In *Mellouli*, 719 F.3d at 995, the petitioner was convicted of misdemeanor drug paraphernalia possession under Kansas law. *Id.* at 998. The petitioner argued that he was not removable because the "state court record of conviction does not identify the controlled substance underlying his state paraphernalia conviction, and therefore the [conviction did not relate] to a federal controlled substance" as the INA requires. *Id.* at 996. The Eighth Circuit rejected this argument and "affirmed the BIA's categorical determination that the petitioner's drug paraphernalia conviction was within § 1227(a)(2)(B)(I), without regard to whether the paraphernalia was used in connection with a federally scheduled drug." *Id.* at 1002. The Eighth Circuit also deferred to the BIA's conclusion that a "state court drug paraphernalia conviction 'relates to' a federal controlled substance because it is a crime 'involving other conduct associated with the drug trade in general.'" *Id.* at 1000 (citing *Espinoza*, 25 I & N Dec. at 21). Accordingly, the Eighth Circuit held that a state drug paraphernalia conviction is "categorically, a violation of a law 'relating to a controlled substance.'" *Id.* at 1002.[3]

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convictions or other drug-related offenses. *See* Pet. App. 2a; *Espinoza*, 25 I & N Dec. at 21.

[3] The Third Circuit's *en banc* decision in *Rojas* was published shortly after the Eighth Circuit's decision in *Mellouli*. The petitioner in *Mellouli* relied heavily upon *Rojas* in seeking rehearing *en banc*. Although the government conceded that the Third Circuit's decision in *Rojas* conflicts with the Court's decision

4. Additionally, the Eleventh Circuit and Fourth Circuit have both found that a state drug paraphernalia conviction renders an alien ineligible for cancellation of removal. *See Alvarez-Acosta*, 524 F.3d at 1196 (finding that a Florida drug paraphernalia conviction rendered petitioner ineligible for cancellation of removal); *Castillo*, 2013 WL 5075590, at *1 (citing *Mellouli*, 719 F.3d at 999-1000 and *Alvarez-Acosta*, 524 F.3d at 1196). Although neither the Eleventh Circuit nor the Fourth Circuit specifically addressed the proper interpretation of Sections 1182 and 1227, the *Alvarez-Acosta* and *Castillo* decisions deepen the intractable conflict among the courts of appeals.

B. The Third Circuit Holds that a Drug Paraphernalia Conviction Must Involve a Controlled Substance That Is Actually Defined in the CSA

In *Rojas*, a twelve-to-two supermajority of the *en banc* Third Circuit addressed the "as defined in [the CSA]" parenthetical contained in Sections 1182 and 1227, and expressly rejected the "illogical and atextual" interpretation adopted by the Ninth Circuit, Eighth Circuit, and BIA. 728 F.3d at 209-14. In particular, the Third Circuit addressed whether a drug paraphernalia conviction under Pennsylvania law rendered a noncitizen removable. *Id.* at 205-06. After oral argument before a three-judge panel (but before

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in *Mellouli*, the Eighth Circuit denied the petition for rehearing. Order Den. Pet. Reh'g, *Mellouli v. Holder*, C.A. No. 12-3093 (8th Cir. Oct. 28, 2013). Four judges of the Eighth Circuit, however, voted to grant the petition for rehearing *en banc*. *Id*.

the Court issued its decision), the Third Circuit *sua sponte* ordered that the case be reheard *en banc*. *Id.* at 204. After doing so, the *en banc* Third Circuit held that the text of the INA unambiguously requires that a noncitizen's drug paraphernalia conviction actually involve a federally controlled substance. *Id.* at 205, 220.

In reaching its decision, the Third Circuit relied on basic canons of statutory interpretation and focused on the "commonsense conception" of the INA's terms. *Id.* at 208 (citing *Carachuri-Rosendo*, 560 U.S. 563). The Third Circuit noted that "[r]eading the statute as written, it is clear that the parenthetical '(as defined in [the CSA])' is a restrictive modifier that affects only its immediate antecedent term, 'a controlled substance.'" *Id.* at 209. The Third Circuit further reasoned that the "as defined in [the CSA]" parenthetical therefore "'bridges the state law crimes with federal definitions of what counts as a controlled substance.'" *Id.* at 209 (quoting *Desai*, 520 F.3d at 766). The Third Circuit concluded that ignoring the "as defined in [the CSA]" parenthetical would "violate the cardinal principle that we do not cripple statutes by rendering words therein superfluous." *Id.* at 209-10 (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Accordingly, the Third Circuit held that, under the "statute's most natural reading," the "as defined" parenthetical means that a controlled substance conviction "must involve or relate to a substance 'defined in' federal law." *Id.* at 220.

The Third Circuit also expressly rejected the approach to drug paraphernalia convictions and interpretation of the INA adopted by the Ninth Circuit, Eighth Circuit, and BIA. Most notably, the Third

Circuit "decline[d] to follow" the Eighth Circuit's decision in *Mellouli*. *Id.* at 219 n.18. The Third Circuit also chose to rely on the Ninth Circuit's decision in *Ruiz-Vidal*, which addressed a conviction for drug possession, rather than to adopt the Ninth Circuit's holding in *Luu-Le*.[4] *Id*. at 210, 218 n.17.

The Third Circuit's decision demonstrates the serious flaws in the reasoning advanced by the Eighth Circuit, Ninth Circuit, and BIA. For example, the approach of the Eighth and Ninth Circuits to drug paraphernalia convictions rests largely on the premise that drug paraphernalia convictions should be treated differently than possession convictions because they relate to the "drug trade in general" rather than to a particular substance. The Third Circuit, however, rejected the proposition that a connection to a particular federally controlled substance is only required in cases involving "possessory" offenses. *Id.* at 211. Specifically, the Third Circuit stated that it could not "surmise from the text any support" for this "illogical and atextual interpretation" of the INA. *Id.* Rather, the Third Circuit noted that "common sense indicates that there should be no difference" between a conviction for possession of a particular controlled

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[4] In reaching its decision, the Third Circuit noted that the Ninth Circuit in *Luu-Le* "only addressed whether a drug paraphernalia statute was a law 'relating to' a controlled substance, and did not reach the 'as defined' parenthetical." *Id.* at 218 n.17. Unfortunately for Petitioner, the Third Circuit's limited interpretation of *Luu-Le*'s holding has been repeatedly rejected by the Ninth Circuit and BIA. *See supra* at 12-14. Indeed, Petitioner argued below that the BIA and Ninth Circuit should adopt the same interpretation of *Luu-Le* that the Third Circuit adopted in *Rojas*, but his arguments were rejected. *See* Pet. App. 2a-3a.

substance and the paraphernalia used in connection with that substance. *Id*. Indeed, the Third Circuit stated that it "cannot square the text of the law with a world in which a noncitizen may be deported for using . . . paraphernalia, but not for 'possessing' the drug itself." *Id.* (criticizing *Espinoza*, 25 I & N Dec. at 121).

The Third Circuit's decision in *Rojas* and the basic principles set forth therein simply cannot be reconciled with the holdings of the Ninth Circuit, Eighth Circuit, Eleventh Circuit, and Fourth Circuit. Indeed, the government has conceded that the proper statutory interpretation of the "as defined in [the CSA]" parenthetical contained in the INA and its application to drug paraphernalia convictions is the subject of "inconsistency among the courts of appeals." Att'y Gen'l Resp. to Pet. for Reh'g, *Mellouli v. Holder*, C.A. No. 12-3093 (8th Cir. Oct. 15, 2013).

C. The Seventh Circuit Supports the Third Circuit's Interpretation of the INA

The Third Circuit's twelve-to-two *en banc* decision in *Rojas* is supported by the Seventh Circuit's decision in *Desai,* 520 F.3d 762. Although the Seventh Circuit did not address a drug paraphernalia conviction, *Desai* unequivocally held that, under the plain text of the INA, there must be a connection between the actual conviction and "a controlled substance listed in the federal CSA." *Id.* at 766.[5]

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[5] The Seventh Circuit has also rejected the illogical premise that drug paraphernalia convictions should be treated differently because they relate to the drug trade in general rather than to a particular substance. *See Barraza v. Mukasey*, 519 F.3d 388, 391-92 (7th Cir. 2008) (holding that possession of "a pipe for smoking

In *Desai*, the Seventh Circuit addressed whether an Illinois conviction for distributing a "Look-Alike Substance" that purported to contain, but did not contain, the hallucinogenic drug Psilocybin was a violation of a state law relating to a "federal controlled substance" under Section 1227. *Id.* at 763. The fact that Psilocybin is a controlled substance that is contained in the CSA was critical to the Seventh Circuit's analysis. The Seventh Circuit stated:

> Psilocybin is a controlled substance under the federal CSA. Thus, this is a state law that is related to a federal controlled substance, in the sense that violating it in the way that Desai did—by distributing something that would lead one to believe it contained Psilocybin—brings it into association with a federal controlled substance.

Id. at 765.

Indeed, the Seventh Circuit held that a state conviction must not merely relate to controlled substances generally—it must relate to a controlled substance that is actually defined in the CSA. The Court stated:

> [O]ur task is simply to examine whether the state law is one relating to a *federal controlled substance*. . . . If a state decides to outlaw the distribution of jelly beans, then it would have no

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marijuana is a crime within the scope of § 1182(a)(2)(A)(i)(II) because drug paraphernalia relates to the drug with which it is used").

> effect on one's immigration status to deal jelly beans, because it is not related to a controlled substance listed in the federal CSA.

Id. at 766 (emphasis added).

Under the Eighth and Ninth Circuit's reasoning, however, the Seventh Circuit's jelly bean example from *Desai* would no longer hold true. Rather, if a state decided to outlaw jelly beans, a conviction for possessing paraphernalia used to ingest jelly beans (but not for the possession of the jelly beans themselves) would render a noncitizen ineligible for cancellation of removal or deportable. In addition to being contrary to common sense, such a rule is inconsistent with the plain text of the INA and would render the "as defined in [the CSA]" language superfluous.

D. The Conflict Among the Federal Courts of Appeals Is Intractable

The conflict between the federal courts of appeals is indeed intractable. The Ninth Circuit's holding in *Luu-Le* was expressly adopted by the BIA in *Espinoza*. *Espinoza* was then followed by the Eighth Circuit's decision in *Mellouli*, which deferred to the BIA, and the Fourth Circuit's recent decision in *Castillo*, which adopted *Mellouli*. The *Luu-Le* line of cases has effectively operated as a runaway train for the past decade, and it continues to do so despite the well-reasoned decisions of the Third Circuit and Seventh Circuit to the contrary.

The Ninth Circuit and Eighth Circuit have refused to reconsider their "atextual" interpretations of the INA by denying *en banc* review. *See* Pet. App. 32a; Order Den. Pet. Reh'g, *Mellouli v. Holder*, C.A. No. 12-3093

(8th Cir. Oct. 28, 2013).[6] Moreover, despite the Third Circuit's *en banc* decision in *Rojas*, the BIA has continued to apply *Luu-Le* and *Espinoza* in cases arising outside of the Third Circuit. *See In re Aispuro*, 2013 WL 5872177 (B.I.A. Oct. 21, 2013) (citing *Luu-Le*, 224 F.3d at 916). Accordingly, there is no realistic possibility that this conflict can be resolved absent this Court's intervention.

II. The Ninth Circuit's Approach to Drug Paraphernalia Convictions Conflicts with This Court's Categorical Approach Jurisprudence

To determine the impact of a state conviction on a noncitizen's immigration status, federal courts uniformly apply the categorical approach, which "has

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[6] When ordered to respond to the petition for rehearing *en banc* in *Mellouli*, the government defended the Eighth Circuit's rule by asserting that the Third Circuit's interpretation of the INA is "ungrammatical" because "it is the law or regulation violated, not the violation or the conviction, that must relate to a federally controlled substance." Att'y Gen'l Resp. to Pet. for Reh'g, *Mellouli v. Holder*, C.A. No. 12-3093 (8th Cir. Oct. 15, 2013). The government's argument defies basic canons of statutory interpretation, including the cardinal rule that words in a statute should not be rendered superfluous as well as the rule of the last antecedent. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (quoting *Duncan*, 533 U.S. at 174); *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (noting that under the rule of the last antecedent "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows."). Indeed, here the statutory text is unambiguous.

a long pedigree in our Nation's immigration law." *Moncrieffe*, 133 S. Ct. at 1685. Petitioner's case demonstrates that the Ninth Circuit's approach to drug paraphernalia convictions is fundamentally inconsistent with this Court's categorical approach jurisprudence as set forth in *Moncrieffe*, 133 S. Ct. at 1678, *Carachuri-Rosendo*, 130 S. Ct. at 2577, *Taylor*, 495 U.S. at 575, and *Shepard*, 544 U.S. at 13.

Under the categorical approach, federal courts look to the "statute defining the crime of conviction, rather than to the specific facts underlying the crime." *Kawashima v. Holder*, -- U.S. --, 132 S. Ct. 1166 (2012); *see also Carachuri-Rosendo*, 130 S. Ct. at 2586 (holding that courts must "look to the conviction itself as our starting place, not to what might have or could have been charged"); *Shepard*, 544 U.S. at 24 (holding that courts should determine whether "a prior conviction 'necessarily' involved (and a prior plea necessarily admitted) facts equating to [the relevant federal offense]") (plurality opinion). In the immigration context, courts must therefore examine the statutory definition of the crime to determine whether the state statute of conviction "necessarily" renders a noncitizen removable under the INA. *See, e.g.*, *Moncrieffe*, 133 S. Ct. at 1684-85. In particular, courts "examine what the state conviction necessarily involved" and "must presume that the conviction 'rested upon [nothing] [sic] more than the least of th[e] [sic] acts' criminalized." *Id.* at 1684 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). If the full range of conduct prohibited by the state statute includes conduct that "falls outside" the scope of the INA, the court must conclude that the state statute is not a categorical match. *See id.* at 1685.

Here, it is undisputable that Nevada's drug paraphernalia statute prohibits conduct that "falls outside" the scope of the INA. Petitioner was convicted of possession of drug paraphernalia in violation of Nevada Revised Statute § 453.566, which states:

> Any person who *uses, or possesses with intent to use, drug paraphernalia to* plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, prepare, test, analyze, pack, repack, store, contain, conceal, inject, *ingest, inhale or otherwise introduce into the human body a controlled substance in violation of this chapter* is guilty of a misdemeanor.

Nev. Rev. Stat. § 453.566 (emphasis added). Pursuant to this statute, an individual can be convicted of possessing certain types of drug paraphernalia if there is a connection to a controlled substance defined under Nevada law. *Id.* Thus, possession of a pipe is not a crime unless it was "used or intended to be used" to inhale a controlled substance prohibited under Nevada law. *Id.*; *see also Barraza*, 519 F.3d at 392 ("Owning a pipe for smoking tobacco does not violate any law; it is the relation of a given pipe to its use with a forbidden drug that makes it 'drug paraphernalia.'").

Nevada law prohibits approximately sixteen controlled substances that are not banned under the CSA.[7] Because Nevada law prohibits a larger number

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[7] *Compare* Nev. Admin. Code §§ 453.510-453.550 *with* 21 C.F.R. §§ 1308.11-1308.15. Datura and Ethylamine Analog of Phencyclidine are listed as Schedule I controlled substances. *See* Nev. Admin. Code § 453.510. Hydrogen Iodide Gas,

of controlled substances than the CSA, an individual can be convicted of possessing drug paraphernalia that was not actually used in connection with a federally controlled substance. Accordingly, the full scope of conduct prohibited under Nevada Revised Statute § 453.566 is categorically broader than the conduct prohibited under the INA. The Ninth Circuit's holding to the contrary simply cannot be reconciled with a proper application of the categorical approach.

III. The Question Presented Is of Substantial and Recurring Importance

The question of whether the statutory text of the INA requires that a drug paraphernalia conviction relate to or involve a controlled substance actually defined in the CSA to render a noncitizen ineligible for cancellation of removal is of substantial importance for a number of reasons. As discussed above, the proper statutory interpretation of the "as defined in [the CSA]" parenthetical impacts both Sections 1182 and 1227. The question presented therefore governs not only

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Methandrenone, and Methandrostenolone are listed as schedule II controlled substances. *See* Nev. Admin. Code § 453.520. 17-Methyltestosterone, Quinbolone, Bolandiol, Chlormethandienone, Chorionic Gonadotropin (HGC), Dihydrochlormethyltestosterone, Dihydromesterone, Formyldienolone, and Human Growth Hormone are listed as Schedule III controlled substances. *See* Nev. Admin. Code § 453.530. Lastly, Carisoprodol and Mazindol are listed as Schedule IV substances. *See* Nev. Admin. Code § 453.530. None of these substances were defined as controlled substances in the CSA's schedules in 2008. *See* 21 C.F.R. §§ 1308.11-1308.15.

whether a noncitizen is ineligible for cancellation of removal, but also whether a noncitizen is deportable or inadmissible.

Moreover, the proper interpretation of the "as defined in [the CSA]" parenthetical contained in Sections 1182 and 1227 will not only impact drug paraphernalia offenses. Rather, this Court's interpretation of the "as defined" parenthetical will substantially impact how the BIA and federal courts handle all drug related offenses. *See, e.g.*, *Desai*, 520 F.3d at 766 (addressing a conviction for distributing look-alike substances). The question presented will affect hundreds, if not thousands, of persons each year. For example, in 2011, over 40,000 noncitizens were removed because of a drug-related offense. Department of Homeland Security, *Immigration Enforcement Actions* at 6, *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf. Indeed, the Third Circuit's *sua sponte* decision to grant *en banc* review in *Rojas* further underscores the importance of the question presented.

The consistent application of immigration laws throughout the United States is of paramount importance to our immigration system. The important and recurring question of statutory interpretation presented here will result in disparate treatment of noncitizens throughout the federal courts of appeals absent this Court's intervention.

IV. This Case Is an Appropriate Vehicle for Deciding the Question Presented

This case is an appropriate vehicle in which to decide the question presented for a number of reasons. First, because the Ninth Circuit did not reach the modified categorical approach or address Petitioner's burden of proof, this Court will not need to address these additional issues, which typically arise in cases involving cancellation of removal.[8] *See* Pet. App. 1a-3a. Second, unlike in *Rojas* and *Mellouli*, there are no additional documents in the record suggesting that Petitioner's conviction involved a controlled substance identified in the CSA. *See Rojas*, 728 F.3d at 206 (noting that the paraphernalia consisted of "'loose cigar paper and [a] plastic baggie' with marijuana"); *Mellouli*, 719 F.3d at 998 (noting that petitioner was initially charged with possession of Adderall). Thus, there is no need for this Court to examine whether additional documents in the record are sufficient under *Shepard*.

This case presents a straightforward question of statutory interpretation. At least three, and arguably six, federal courts of appeals have already addressed the question presented. As no significant vehicular

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[8] Although the BIA briefly addressed Petitioner's burden of proof, it held that Petitioner's burden was not met because his drug paraphernalia conviction categorically rendered him ineligible for cancellation of removal. Pet. App. 6a-7a. Indeed, the BIA's analysis of this issue was entirely dependent on its incorrect interpretation of the statutory text of Section 1182. Should this Court grant certiorari and reverse the judgment of the Ninth Circuit, the BIA would certainly have to address this issue anew.

challenges exist in Petitioner's case, there is no reason for this Court to wait to resolve this direct and acknowledged conflict regarding the proper interpretation of the INA's text.

CONCLUSION

For the reasons provided above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JULIAN L. ANDRÉ
Counsel of Record
JON DEAN
PANTEA LILI AHMADI
MCDERMOTT WILL & EMERY LLP
2049 Century Park East, Suite 3800
Los Angeles, CA 90067
(310) 277-4110 (p)
(310) 277-4730 (f)
JAndre@mwe.com

Attorneys for Petitioner

December 6, 2013

APPENDIX

APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-72049
Agency No. A088-914-486

[Filed February 11, 2013]

PEDRO MADRIGAL-BARCENAS, aka Juan Reynosa-Varsenas,

Petitioner,

v.

ERIC H. HOLDER JR., Attorney General,

Respondent.

MEMORANDUM[*]

On Petition for Review of an Order of the Board of Immigration Appeals

Argued and Submitted January 14, 2013
San Francisco, California

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: NOONAN, TASHIMA, and GRABER, Circuit Judges.

Pedro Madrigal-Barcenas petitions for review of the Board of Immigration Appeals' denial of his application for cancellation of removal on account of his conviction for possession of drug paraphernalia in violation of section 453.566 of the Nevada Revised Statutes. Reviewing de novo, Ruiz-Vidal v. Gonzales, 473 F.3d 1072, 1076 n.2 (9th Cir. 2007), we deny the petition.

1. A nonpermanent resident may be eligible for cancellation of removal only if he "has not been convicted of an offense under [8 U.S.C. § 1182(a)(2)]." 8 U.S.C. § 1229b(b)(1)(C). The offenses listed under § 1182(a)(2) include violations of "any law . . . relating to a controlled substance (as defined in section 802 of Title 21)." 8 U.S.C. § 1182(a)(2)(A)(i)(II). A state statute that criminalizes possession of paraphernalia for use with drugs may be a law "relating to a controlled substance" for these purposes. Minh Duc Luu-Le v. INS, 224 F.3d 911, 916 (9th Cir. 2000).

2. The facts of this case are analogous to those in previous decisions regarding other states' drug paraphernalia statutes: United States v. Oseguera-Madrigal, 700 F.3d 1196, 1199–200 (9th Cir. 2012); Bermudez v. Holder, 586 F.3d 1167, 1168–69 (9th Cir. 2009) (per curiam); Estrada v. Holder, 560 F.3d 1039, 1042 (9th Cir. 2009); and Luu-Le, 224 F.3d at 915–16. Those cases require denial of the petition because Nevada's drug-paraphernalia statute is materially identical to the statutes that we considered there.

3. Because the waiver to inadmissibility under § 1182(h) does not affect eligibility for cancellation, In

re Bustamante, 25 I. & N. Dec. 564, 567 (B.I.A. 2011), interpretations of that provision, e.g., In re Espinoza, 25 I. & N. Dec. 118, 123–26 (B.I.A. 2009), and of the "personal use" exception to deportability under § 1227, e.g., In re Davey, 26 I. & N. Dec. 37, 38–41 (B.I.A. 2012), are not relevant here.

PETITION DENIED.

APPENDIX B

BOARD OF IMMIGRATION APPEALS

File: A088 914 486 - Las Vegas

[Filed May 28, 2010]

In re: PEDRO MADRIGAL-BARCENAS a.k.a. Juan Reynosa-Varsenas

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jon Eric Garde, Esquire

ON BEHALF OF DHS: Peter Eitel
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. *5* 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Cancellation of removal

On April 30, 2009, an Immigration Judge found the respondent ineligible for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The respondent has appealed from this decision. The appeal will be dismissed. The respondent's request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e)(7).

I. BACKGROUND

The respondent is a native and citizen of Mexico. On January 22, 2008, the respondent pled guilty to unlawful possession of drug paraphernalia under Nevada Revised Statute § 453.566. The Immigration Judge found that this conviction was for an offense relating to a controlled substance and therefore rendered the respondent ineligible for cancellation of removal under section 240A(b)(1) of the Act. *See* section 240A(b)(1)(C) of the Act (indicating that an alien does not qualify for cancellation of removal if the alien has been convicted of an offense under section 212(a)(2) of the Act); *see also* section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), (indicating that an alien who has been convicted of or who admits having committed acts that constitute the essential elements of a violation of any law relating to a controlled substance is inadmissible).

On appeal, the respondent contends that his conviction does not make him inadmissible under section 212(a)(2)(A)(i)(II) of the Act because neither the statute under which he was convicted nor the conviction record sufficiently proves that the burnt residue found on the glass pipe that he had in his possession was a controlled substance "as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)." *See* section 212(a)(2)(A)(i)(II) of the Act. The respondent maintains that Nevada's schedules of controlled substances include substances that are not included in the federal Controlled Substances Act (CSA). Accordingly, the respondent claims that Nevada Revised Statute § 453.566, the statute under which he was convicted, is divisible. He argues that a conviction

under the statute could relate to a substance that qualifies as a controlled substance under Nevada law but does not qualify as a controlled substance under federal law. And he maintains that it is the Department of Homeland Security's burden to prove that the offense for which he was convicted relates to a controlled substance as defined in federal law. The respondent contends that the DHS has not met this burden in the present case because the conviction records do not indicate what substance was involved in his offense.

In addition, the respondent argues that his case is distinguishable from *Luu-Le* v. *INS,* 224 F.3d 911 (9th Cir. 2000) because that case dealt with a conviction under Arizona law and must be limited to its facts. And the respondent maintains that *Luu-Le* v. *INS, supra,* is inconsistent with other rulings from the United States Court of Appeals for the Ninth Circuit, including *Ruiz-Vidal v. Gonzales,* 473 F.3d 1072 (9th Cir. 2007) and therefore should not be followed. The respondent claims that it "defies reason" to require a substance to be listed in the federal controlled substance schedules in cases involving specific substances and not to require that the substance for which drug paraphernalia was used also be included within the federal schedules. The respondent therefore maintains that the Immigration Judge's decision should be reversed and that his application for adjustment of status should be granted.

II. ANALYSIS

We disagree with the respondent's arguments. Both our precedents and those of the Ninth Circuit, the circuit in which this case arises, establish that the

respondent's conviction for unlawful possession of drug paraphernalia under Nevada law is an offense relating to a controlled substance for the purposes of section 212(a)(2)(A)(i)(II) of the Act and that he is inadmissible on the basis of this offense. *See Matter of Martinez-Espinoza,* 25 I&N Dec. 118 (BIA 2009) (finding that an alien may be rendered inadmissible for a conviction for possession of drug paraphernalia); *see also Estrada* v. *Holder,* 560 F.3d 1039, 1042 (9th Cir. 2009); *Luu-Le* v. *INS, supra* (finding that conviction under Arizona Criminal Code § 13-3415 for possession of drug paraphernalia was an offense relating to a controlled substance).

Both this Board and the Ninth Circuit have ruled that an offense for possession of drug paraphernalia does not always have to be tied to a specific substance that is included within the federal controlled substance schedules before the offense may qualify as an offense relating to a controlled substance. In *Luu-Le* v. *INS, supra,* the Ninth Circuit stated that "[a]lthough the definition of "drug" as used in section 13-3415 [of the Arizona Criminal Code] does not map perfectly the definition of "controlled substance" as used in INA section 241(a)(2)(B)(i), in our opinion section 13-3415 is clearly a law relating to a controlled substance. Section 13-3415 is plainly intended to criminalize behavior involving the production or use of drugs - at least some of which are also covered by the federal schedules of controlled substances as printed in 21 U.S.C. § 812(c) - through focusing on "drug paraphernalia"." *Luu-Le* v.

INS, supra, at 915.[1]

In *Matter of Martinez-Espinoza, supra,* we cited the Ninth Circuit's ruling in *Luu-Le* v. *INS, supra,* and emphasized the distinction between crimes involving the possession or distribution of a particular drug and those involving other conduct associated with the drug trade in general. We explained that the requirement of a correspondence between the federal and state controlled substance schedules for cases involving possession of a particular substance has never been extended to cases involving the drug trade in general. And we found that drug paraphernalia did not need to be tied to a specific, federally controlled substance before a conviction for possession or use of drug paraphernalia could qualify as a conviction for an offense relating to a controlled substance. *See Matter of Martinez-Espinoza, supra,* at 121.

The respondent claims on appeal that this distinction between crimes involving a particular substance and crimes relating to the drug trade in general defies reason, but we disagree. The primary purpose of laws criminalizing things such as the use of drug paraphernalia is to control the use or the production of controlled substances. Accordingly, these laws "relate" to controlled substances for the purposes of section 212(a)(2)(A)(i)(II) of the Act " even if the drug paraphernalia involved in a particular offense could be used to administer or to produce a variety of substances, some of which are not included within the federal schedules of controlled substances. *See Matter*

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[1] Section 241(a)(2)(B)(i) of the Act has been recodified as section 212(a)(2)(A)(i)(II) of the Act.

of Martinez-Espinoza, supra, at 121-22.

Moreover, we do not find that *Luu-Le* v. *INS, supra,* is meaningfully distinguishable from the present case, despite the respondent's arguments. And we do not find that *Luu-Le* v. *INS, supra,* is inconsistent with *Ruiz-Vidal* v. *Gonzales, supra,* and the other cases cited by the respondent. The statute at issue in *Ruiz-Vidal* v. *Gonzales, supra,* criminalized the possession of a controlled substance for sale. The crime therefore related to particular substances rather than to the drug trade in general, and the holding was not directly applicable to *Luu-Le* v. *INS, supra,* a case involving a crime related to the drug trade in general.

Based on the foregoing, we do not find that the statute under which the respondent was convicted is divisible or that the DHS needed to produce additional evidence to establish that the respondent was convicted of an offense defined in section 212(a)(2)(A)(i)(II) of the Act as the respondent claims. Under the governing statute and regulations, the respondent, not the government, bears the burden of proving that the respondent is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act. *See* section 240(c)(4) of the Act, 8 U.S.C.§ 1229a(c)(4); 8 C.F.R. § 1240.8(d) (stating that "if the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply").

The Ninth Circuit has found that, when a statute is divisible and includes offenses that would make an applicant for relief ineligible for relief and offenses that would not, the applicant may satisfy his or her burden

of proof by producing inconclusive records of conviction. *See Sandoval-Lua v. Gonzales,* 499 F.3d 112 1 (9th Cir. 2007). The statute in the present case, however, is not divisible for our purposes. The Ninth Circuit's ruling in *Sandoval-Lua v. Gonzales, supra,* therefore does not apply to the respondent's case. And the evidence offered by the DHS is sufficient to establish that the respondent was convicted of an offense relating to a controlled substance and that the respondent is inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Because the respondent has not offered any evidence to contradict the DHS' evidence and because the respondent bears the ultimate burden of establishing his eligibility for relief, we uphold the Immigration Judge's decision finding the respondent ineligible for adjustment of status under section 245 of the Act, and we dismiss the respondent's appeal.

ORDER: The appeal is dismissed.

/s/
FOR THE BOARD

APPENDIX C

IMMIGRATION COURT
3365 PEPPER LANE, SUITE 200
LA5 VEGAS, NV 89120

Case No.: A088-914-486

[Filed April 30, 2009]

In the Matter of

MADRIGAL-BARCENAS, PEDRO,
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on APRIL 30 2009

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[x] The respondent was ordered removed from the United States to Mexico
~~or in the alternative to~~

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $_____

with an alternate order of removal to

Respondent's application for:
[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn.
[ ] Withholding of removal was ( ) granted ( ) denied ( ) withdrawn.
[ ] A Waiver under Section ____ was ( ) granted ( ) denied ( ) withdrawn.
[ ] Cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( )withdrawn.

Respondent's application for:
[x] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied (x) pretermitted ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
[ ] Cancellation under section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.
[ ] Adjustment of Status under Section _____ was ( ) granted ( ) denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.
[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.
[ ] Respondent's status was rescinded under section 246.
[ ] Respondent is admitted to the United States as a _____until _____.
[ ] As a condition of admission, respondent is to post a $_____ bond.
[ ] Respondent knowingly filed a frivolous asylum

application after proper notice.
[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.
[ ] Proceedings were terminated.
[ ] Other: _____.

Date: Apr 30, 2009

/s/ Ronald L. Mullins
RONALD L. MULLINS
Immigration Judge

Appeal: Reserved Appeal Due By: June 1, 2009
Reserved by respondent

* * *

[Certificate of Service Omitted for purposed of this Appendix]

APPENDIX D

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
Las Vegas, Nevada

File A 088 914 486

[April 30, 2009]

In the Matter of	)
	)
PEDRO MADRIGAL-BARCENAS,	)
	)
Respondent	)
	)

IN REMOVAL PROCEEDINGS

CHARGE: Section 212 (a)(6)(A)(i) of the Immigration and Nationality Act (Act), as amended; an alien present in the United States without admission or parole, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATION: Cancellation of removal for certain non-permanent residents.

ON BEHALF OF THE RESPONDENT:

William Levings, Esquire

ON BEHALF OF THE DEPARTMENT
OF HOMELAND SECURITY:

An Nguyen, Esquire
Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

It was on April 30, 2009 that a hearing most recently was convened regarding this removal proceeding. On this occasion the Immigration Court observed that previously rulings were made by the Immigration Court establishing the respondent to be removable pursuant to clear and convincing evidence, with reference to Section 212 (a)(6)(A)(i) of the Act. Exhibit 1.

With that the respondent has gone forward and identified Mexico, the country of citizenship, should his removal from the United States prove necessary in the future. It also was at previous hearings that the parties identified a contested relief from removal issue pertaining to the significance of the respondent's acknowledged prior conviction, in Nevada State Court, for possession of drug paraphernalia. Exhibit 2.

Having received the written arguments of both parties regarding the question of whether the respondent is eligible to go forward with pursuing relief from removal consisting of cancellation of removal for certain non-permanent residents, the Immigration Court has determined, during the April 30, 2009 hearing, that the respondent's criminal history is a bar to eligibility for that form of relief from removal to be granted. Exhibits 3-6.

Moreover, the respondent has given notice to the Immigration Court that there is no alternative form of relief from removal he seeks to obtain. Consequently, it is recognized by the Immigration Court that the respondent is a removable alien for whom relief from removal will not be provided. Therefore, it is the decision of the Immigration Court that the respondent be removed from the United States to Mexico.

ORDER

IT IS HEREBY ORDERED that the respondent shall be removed from the United States to Mexico.

RONALD L. MULLINS
Immigration Judge

April 30, 2009

CERTIFICATE PAGE

I hereby certify that the attached proceeding before RONALD L. MULLINS in the matter of:

PEDRO MADRIGAL-BARCENAS
A 088 914 486
Las Vegas, Nevada

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Pamela V. Turner
Pamela V. Turner (Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

July 16, 2009
(Completion Date)

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

File A 088 914 486

[April 30, 2009]

Matter of	)
	)
PEDRO MADRIGAL-BARCENAS,	)
	)
Respondent	)
	)

IN REMOVAL PROCEEDINGS

Transcript of Hearing

Before RONALD L. MULLINS, Immigration Judge

Date: April 30, 2009 Place: Las Vegas, Nevada

Transcribed by DEPOSITION SERVICES, INC. at Rockville, Maryland

Official Interpreter: Elsa Marcico

Language: Spanish

Appearances :

For the Department of Homeland Security:	For the Respondent:
An Nguyen, Esquire	William Levings, Esquire

JUDGE FOR THE RECORD

This is Immigration Court, Las Vegas, Nevada. I'm Immigration Judge Ronald Mullins, today is April 30, 2009, and we are convened on a non-detained master calendar docket in the removal proceeding of Petro Madrigal-Barcenas, A 088 914 486. The respondent is represented by William Levings, the Department of Homeland Security is represented today by An Nguyen, and the court's Spanish interpreter who has been sworn in is Ms. Elsa Marcico.

JUDGE TO MR. MADRIGAL

Q. Now with regards to the respondent's reliance on Spanish interpreter, Pedro, do you understand the interpreter speaking in Spanish?

A. Yes.

Q. All right. Now the respondent's residence address, is the at 829 N. Bruce Street, Las Vegas, Nevada 89101?

A. Yes.

Q. And the respondent's residence telephone number is that 702-501-7858?

A. Yes.

Q. All right.

JUDGE FOR THE RECORD

Here removability has been established by clear and convincing evidence, the respondent for himself has designated Mexico, the country of citizenship should removal from the United States prove necessary.

And with regards to relief from removal the respondent has an interest in pursuing cancellation of removal for certain non-permanent residence, and that has resulted in an issue being regarding the respondent's eligibility for cancellation of removal for certain non-permanent residence, and on that particular topic what has been a concern of the Department of Homeland Security as the respondent has a drug paraphernalia conviction, and so then with the parties contesting the significance of that drug paraphernalia conviction as compared to the respondent's eligibility for cancellation of removal for certain non-permanent residence the parties filed briefs on that topic of the significance of drug paraphernalia conviction.

And then what I have done is with substantial reliance on our law clerk here at the court I have reached the conclusion, and what I have done to try to eliminate for the parties the analysis that the Court has gone through regarding this drug paraphernalia conviction as an issue, I have released to the parties in the last few minutes what is captioned, the Immigration Court's Legal Memorandum, and it is essentially an analysis for the drug paraphernalia issue.

And what the Immigration Court will be doing is relying upon a line of cases that says the emphasis placed by the respondent in arguing the drug paraphernalia conviction has no significance.

The emphasis placed by the respondent on the lack of specificity of the particular type of drug that was the basis of drug paraphernalia conviction, that is misplaced reliance on that lack of specificity regarding

the specific type of drug and instead there is a another line of cases make it clear that there is a ver broad sort of interpretation with regards to what is considered to be a drug crime, and some of these more peripheral types of convictions, for instance involving drug transportation or possession of drug paraphernalia.

In these instances there is not a need that a drug be specified, because of the nature of the conviction there is not necessarily any drug that was a part of the criminal activity. So it would be futile to require that there be specificity regarding the type of drug involved.

And instead what is the concern and what is the rule is that if you have a drug conviction that clearly does have a connection to illicit drug activity, then is considered to be indeed a drug conviction that is within the ambient of controlled substance violations as contemplated by Section 212 and 237 of the Act.

JUDGE TO MR. LEVINGS

Q. All right. Now the purpose, sir, of hopefully by me releasing the legal memorandum to the parties is this, at some point in the future if it becomes an issue that I need to further document the record for the benefit of the parties on appeal, then I anticipate this memorandum is going to become an exhibit that is going to be proposed.

And the point there is, the analysis is what is what is important, so I have discontinued the notion that well we have to have an order, an interim order that explains essentially what this legal memorandum says.

This legal memorandum as with others of a similar nature is more direct, it makes the same point with

regards to expressing a ruling, and there is no great consequences with my signature being at the end of the printed word. So again this memorandum is going to be the basis of the more detailed analysis and summary of which I have just tried to provide the parties.

JUDGE TO MS. NGUYEN

Q All right. So with that, Ms. Nguyen, since I have ruled that the respondent has been convicted of a controlled substance violation as contemplated by the Immigration and Nationality Act, do you want to remind me, does that have any significance for you with regard to respondent pursuing cancellation of removal for certain non-permanent residence?

A. Yes, Your Honor, we would argue then that the application for cancellation be, we would make a motion to pretermit as he is not ineligible under Section 240A(b)(1)(C) of the Act for having been convicted of a 212(a)(2) offense.

Q. All right.

JUDGE TO MR. LEVINGS

Q. Mr. Levings, you don't have to comment, but I will give you a chance to so, of course I have already ruled on the controlled substance violation issue, but with regard to the aspects of the case that we have just been discussing, if you wish to add some comments feel free to do so. Anything?

A. Your Honor, I will rest on what is in the brief, I respectfully disagree with the Court's ruling, and I think that he is eligible for cancellation, and I will leave it at that.

Q. All right, very good. Now with this, of course I assume that the parties are operating in good faith and consequently I don't assume that the respondent anticipated I would be ruling against him.

Now I may have previously said that if I ruled adversely to the respondent today I expected him to be prepared to identify alternative relief that he intends to pursue. Are you ready to address that today, Mr. Levings?

A. We don't have any alternative relative, Your Honor.

Q. All right. So then with regards to resolving any additional issues in this case it seems to me that if the respondent is removable and there is no relief from removal that he intends to pursue, perhaps we can resolve this removal proceeding today.

Is there any other type of relief from removal whatsoever that the respondent wants to be considered for, Mr. Levings?

A. We are not requesting voluntary departure, Your Honor.

Q. Understood. All right, anything else you want to say, Mr. Levings?

A. No, Your Honor.

JUDGE TO MS. NGUYEN

Q. Anything else you want to say, Ms. Nguyen?

A. No, Your Honor.

JUDGE TO COUNSEL

Q. Are there any additional documents that the parties want to identify as exhibits? Maybe we should do that, let me, because I am about to go ahead and dictate a decision, that presumably is going to order the respondent removed and deported.

JUDGE FOR THE RECORD

So we have got the Exhibit 1, Notice to Appear, and I have got the 42(b) application that was filed March 25, it looks like 2008. I see a second 42(b) application filed the same day, March 25, 2008, and bless my soul, I have got a third 42(b) application filed June 1, 2008.

All right. Now with regards to other documents in the record of proceedings I have got respondent's supplemental documentation filed September 24, 2008. So those three 42(b) applications I am going to lump those together with this supplemental documentation filed September 2008.

All right. Now I have also got the criminal history documentation for the respondent, these are minute orders out of Nevada State Court, then I have got the briefs of the parties.

All right. Now ordinarily I don't make briefs exhibits, but Mr. Levings' brief has that schedule of illicit drugs, and I think it has some other references, so I am going to go ahead and make his brief an exhibit, then of course I will make the DHS brief an exhibit as well.

And then that legal memorandum where I have explained the analysis that I am relying on in ruling the respondent is not eligible for cancellation of removal for certain non-permanent residence, in

addition that is going to be an exhibit, so now I have to take another moment to go back and identify what these exhibits more specifically will be identified as.

All right. So as far as identifying what the exhibits are, that Notice to Appear read into evidence, Exhibit 1, the criminal history documentation as proposed Exhibit 2, the three EOIR 42(b) applications with supplemental documentation, all of that as a group is proposed Exhibit 3, Mr. Levings' brief, proposed Exhibit 4, the DHS brief, proposed Exhibit 5, the legal memorandum disposing of the controlled substance, proposed Exhibit 6.

JUDGE TO COUNSEL

Q. All right. Now if the parties do not have any additional documents that you intend to file, our request be considered as evidence, then I will inquire does either party an objection to anything I have identified as a proposed exhibit being entered into evidence at this time?

JUDGE TO MR. LEVINGS

Q. Mr. Levings?

A. No, Your Honor.

Q. All right.

JUDGE TO MS. NGUYEN

Q. Ms. Nguyen?

A. No objection, Your Honor.

Q. All right.

JUDGE FOR THE RECORD

We now have now have in evidence Exhibits 1 through 6.

JUDGE TO COUNSEL

Q. And it stands to reason I will ask anyway, there is no testimony the parties intend to present regarding the eligibility for cancellation of removal for certain non-permanent residence.

JUDGE TO MR. LEVINGS

Q. Is that correct, Mr. Levings?

A. That is correct, Your Honor.

JUDGE TO MS. NGUYEN

Q. Ms. Nguyen?

A. Correct, Your Honor.

Q. All right.

JUDGE TO COUNSEL

Q. Can the parties think of anything else we need to do before I dictate the oral decision resolving the remaining issues in this removal proceeding?

JUDGE TO MR. LEVINGS

Q. Mr. Levings?

A. No, Your Honor.

JUDGE TO MS. NGUYEN

Q. Ms. Nguyen?

A. No, Your Honor.

Q. Okay.

JUDGE FOR THE RECORD

So we are about to go into recess for that purpose as of now.

JUDGE RENDERS ORAL DECISION

JUDGE FOR THE RECORD

All right. We are reconvened on April 30, 2009.

JUDGE TO COUNSEL

Q. And, Mr. Levings, Ms. Nguyen, you both have had an opportunity to hear the outcome of this removal proceeding as I announced in the oral decision I have just dictated separately.

JUDGE TO MR. LEVINGS

Q. That is it, Mr. Levings, reserve or waive appeal?

A. Reserve, Your Honor.

Q. All right. Your Notice of Appeal must be filed with the Board of Immigration Appeals in Falls Church, Virginia by a 30-day deadline of June 1, 2009.

JUDGE TO MS. NGUYEN

Q. Ms. Nguyen?

A. Waive appeal, Your Honor.

Q. Understood.

JUDGE FOR THE RECORD

All right. A memorandum order will be executed and served on the parties momentarily indicating what has been said about the outcome of this case.

JUDGE TO COUNSEL

Q. Is there anything either party wishes to address?

MR. LEVINGS

Q. Mr. Levings?

A. No, Your Honor.

JUDGE TO MS. NGUYEN

Q. Ms. Nguyen?

A. No, Your Honor.

JUDGE FOR THE RECORD

With that there being nothing further we are adjourned.

HEARING CLOSED

Exhibit 6

Legal Memorandum

TO: Judge Mullins

FROM: Jared Frost

DATE: April 24, 2009

RE: Madrigal, A088-914-486, eligibility for cancellation of removal for certain nonpermanent residents

You asked that I review the record in this case and provide you with an analysis and recommendation as to whether the respondent is eligible for cancellation of removal for certain nonpermanent residents. The central issue is whether the respondent's 2008 conviction for possession of drug paraphernalia disqualifies him for relief under section 240A(b) of the Immigration and Nationality Act ("INA").

An alien is ineligible for cancellation of removal for certain nonpermanent residents if he has been convicted of an offense relating to a controlled substance. *See* INA §§ 240A(b)(1)(C),212(a)(2)(A)(i)(II). Section 212(a)(2)(A)(i)(II) makes inadmissible any alien convicted of "a violation of. . . any law or regulation of a State . . . *relating to* a controlled substance. . . ." (emphasis added). Because of the broad "relating to" language of section 212(a)(2)(A)(i)(II), th e provision has been interpreted to not only encompass possession or trafficking offenses of specific controlled substances, but also offenses surrounding the drug trade in general. See, e.g., *Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (possession of drug paraphernalia); *Johnson v.*

INS, 971 F.2d 340, 342-43 (9th Cir. 1992) (traveling in interstate commerce with intent to distribute proceeds of controlled substances); *Matter of Martinez-Gomez,* 14 I&N Dec. 104 (BIA 1972) (maintenance of a drug house).

The respondent's conviction seems to fit within the category of offenses surrounding the drug trade in general. In January 2008, the respondent was convicted under section 453.566 of the Nevada Revised Statutes ("NRS") for the possession of drug paraphernalia. Like the statute at issue in *Luu-Le,* NRS section 453.566 lists factors a court must consider in determining whether an object is drug paraphernalia. These factors include statements by the owner of the object concerning its use and the proximity of the object to a controlled substance. Furthermore, although the NRS defines the term "controlled substance" more broadly than the federal schedules, the state law definition need not "map perfectly the definition of 'controlled substance' as used in INA section 241(a)(2)(B)(i)" when the offense relates to the drug trade in general. *Luu-Le,* 224 F.3d at 915. Therefore, because NRS section 453.56 is plainly intended to criminalize behavior involving the production or use of controlled substances, at least some of which are also covered in the federal schedules, the respondent has been convicted of an offense "relating to" a controlled substance, and he is ineligible for cancellation of removal. *C.f. Luu-Le,* 224 F.3d at 915 (holding Arizona drug paraphernalia conviction is an offense "relating to" a controlled substance).

In his brief, the respondent argues *Luu-Le* should be limited to its facts because that decision conflicts

with a line of cases requiring the DHS to prove the substance underlying the alien's state law conviction is also prohibited in the Controlled Substances Act. However, all of the cases cited by the respondent involve trafficking or possession or under the influence offenses for specific substances. *See Ruiz-Vidal v. Gonzales,* 473 F.3d 1072 (9th Cir. 2007) (possession of methamphetamine); *Medina v. Ashcroft,* 393 F.3d 1063 (9th Cir. 2005) (attempting to be under the influence of THC-carboxylic acid); *Matter of Mena,* 17 I&N Dec. 38 (BIA 1979) (possession of heroin); *Matter of Paulus,* 11 I&N Dec. 274 (BIA 1965) (narcotic trafficking); *Gousse v. Ashcroft,* 339 F.3d 91 (2nd Cir. 2003) (sale of hallucinogen/narcotic). They are therefore distinguishable from those cases like *Luu-Le* that involve the drug trade in general. As previously noted, the Ninth Circuit has interpreted the ground of removability at INA section 212(a)(2)(A)(i)(II) to encompass both possession or trafficking offenses of specific controlled substances *and* offenses surrounding the drug trade in general. Consequently, the respondent's argument is unpersuasive.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-72049
Agency No. A088-914-486

[Filed June 29, 2013]

PEDRO MADRIGAL-BARCENAS, aka Juan Reynosa-Varsenas,

Petitioner,

v.

ERIC H. HOLDER JR., Attorney General,

Respondent.

ORDER

Before: NOONAN, TASHIMA, and GRABER, Circuit Judges.

The panel has voted to deny Petitioner's petition for panel rehearing. Judge Graber has voted to deny the petition for rehearing en banc, and Judges Noonan and Tashima have so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Petitioner's petition for panel rehearing and petition for rehearing en banc are DENIED.

APPENDIX G

8 U.S.C. § 1229b

TITLE 8. ALIENS AND NATIONALITY

CHAPTER 12. IMMIGRATION AND NATIONALITY IMMIGRATION INSPECTION, APPREHENSION, EXAMINATION, EXCLUSION, AND REMOVAL

§ 1229b. Cancellation of removal; adjustment of status

* * *

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents.

(1) In general. The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien--

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) [8

USCS § 1182(a)(2), 1227(a)(2), or 1227(a)(3)], subject to paragraph (5); and (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) Special rule for battered spouse or child.

(A) Authority. The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that--

(i) (I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme

cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 212(a) [8 USCS § 1182(a)], is not deportable under paragraphs (1)(G) or (2) through (4) of section 237(a) [8 USCS § 1227(a)], subject to paragraph (5), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

(B) Physical presence. Notwithstanding subsection (d)(2), for purposes of subparagraph (A)(ii) or for purposes of section 244(a)(3) [former 8 USCS § 1254(a)(3)] (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [8 USCS § 1101 note]), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a connection between the absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2). If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set forth in this subparagraph, subparagraph (A)(ii), and section 244(a)(3) [former 8 USCS § 1254(a)(3)] (as in effect before the title III-

A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [8 USCS § 1101 note]).

(C) Good moral character. Notwithstanding section 101(f) [8 USCS § 1101(f)], an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character under subparagraph (A)(iii) or section 244(a)(3) [former 8 USCS § 1254(a)(3)] (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [8 USCS § 1101 note]), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

(D) Credible evidence considered. In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(3) Recordation of date. With respect to aliens who the Attorney General adjusts to the

status of an alien lawfully admitted for permanent residence under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the date of the Attorney General's cancellation of removal under paragraph (1) or (2).

(4) Children of battered aliens and parents of battered alien children.

(A) In general. The Attorney General shall grant parole under section 212(d)(5) [8 USCS § 1182(d)(5)] to any alien who is a--

(i) child of an alien granted relief under section 240A(b)(2) [subsec. (b)(2) of this section] or 244(a)(3) [former 8 USCS § 1254(a)(3)] (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [8 USCS § 1101 note]); or

(ii) parent of a child alien granted relief under section 240A(b)(2) [subsec. (b)(2) of this section] or 244(a)(3) [former 8 USCS § 1254(a)(3)] (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [8 USCS § 1101 note]).

(B) Duration of parole. The grant of parole shall extend from the time of the grant of relief under section 240A(b)(2) [subsec.

(b)(2) of this section] or section 244(a)(3) [former 8 USCS § 1254(a)(3)] (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [8 USCS § 1101 note]) to the time the application for adjustment of status filed by aliens covered under this paragraph has been finally adjudicated. Applications for adjustment of status filed by aliens covered under this paragraph shall be treated as if they were VAWA self-petitioners. Failure by the alien granted relief under section 240A(b)(2) [subsec. (b)(2) of this section] or section 244(a)(3) [former 8 USCS § 1254(a)(3)] (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [8 USCS § 1101 note]) to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) may result in revocation of parole.

(5) Application of domestic violence waiver authority. The authority provided under section 237(a)(7) [8 USCS § 1227(a)(7)] may apply under paragraphs (1)(B), (1)(C), and (2)(A)(iv) in a cancellation of removal and adjustment of status proceeding.

(6) Relatives of trafficking victims.

(A) In general. Upon written request by a law enforcement official, the Secretary of

Homeland Security may parole under section 212(d)(5) [8 USCS § 1182(d)(5)] any alien who is a relative of an alien granted continued presence under section 107(c)(3)(A) of the Trafficking Victims Protection Act (22 U.S.C. 7105(c)(3)(A)), if the relative--

(i) was, on the date on which law enforcement applied for such continued presence--

(I) in the case of an alien granted continued presence who is under 21 years of age, the spouse, child, parent, or unmarried sibling under 18 years of age, of the alien; or

(II) in the case of an alien granted continued presence who is 21 years of age or older, the spouse or child of the alien; or

(ii) is a parent or sibling of the alien who the requesting law enforcement official, in consultation with the Secretary of Homeland Security, as appropriate, determines to be in present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement, irrespective of age.

(B) Duration of parole.

(i) In general. The Secretary may extend

the parole granted under subparagraph (A) until the final adjudication of the application filed by the principal alien under section 101(a)(15)(T)(ii) [8 USCS § 1101(a)(15)(T)(ii)].

(ii) Other limits on duration. If an application described in clause (i) is not filed, the parole granted under subparagraph (A) may extend until the later of--

(I) the date on which the principal alien's authority to remain in the United States under section 107(c)(3)(A) of the Trafficking Victims Protection Act (22 U.S.C. 7105(c)(3)(A)) is terminated; or

(II) the date on which a civil action filed by the principal alien under section 1595 of title 18, United States Code, is concluded.

(iii) Due diligence. Failure by the principal alien to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) of subparagraph (A), or in pursuing the civil action described in clause (ii)(II) (as determined by the Secretary of Homeland Security in consultation with the Attorney General), may result in revocation of parole.

(C) Other limitations. A relative may not be

granted parole under this paragraph if--

(i) the Secretary of Homeland Security or the Attorney General has reason to believe that the relative was knowingly complicit in the trafficking of an alien permitted to remain in the United States under section 107(c)(3)(A) of the Trafficking Victims Protection Act (22 U.S.C. 7105(c)(3)(A)); or

(ii) the relative is an alien described in paragraph (2) or (3) of section 212(a) [8 USCS § 1182(a)] or paragraph (2) or (4) of section 237(a) [8 USCS § 1227(a)].

8 U.S.C. § 1182

TITLE 8. ALIENS AND NATIONALITY

CHAPTER 12. IMMIGRATION AND NATIONALITY IMMIGRATION ADMISSION QUALIFICATIONS FOR ALIENS; TRAVEL CONTROL OF CITIZENS AND ALIENS

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission. Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds.

(A) Conviction of certain crimes.

(i) In general. Except as provided in clause (ii), any alien convicted of, or who admits having committed or who admits committing acts which constitute the essential elements of–

* * *

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

8 U.S.C. § 1227

TITLE 8. ALIENS AND NATIONALITY

CHAPTER 12. IMMIGRATION AND NATIONALITY IMMIGRATION INSPECTION, APPREHENSION, EXAMINATION, EXCLUSION, AND REMOVAL

(a) Classes of deportable aliens. Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses.

* * *

(B) Controlled substances.

(i) Conviction. Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

21 U.S.C. § 802

TITLE 21. FOOD AND DRUGS

CHAPTER 13. DRUG ABUSE PREVENTION AND CONTROL CONTROL AND E N F O R C E M E N T INTRODUCTORY PROVISIONS

§ 802. Definitions

As used in this title:

* * *

(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this title [21 USCS § 812]. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1954 [26 USCS §§ 5001 et seq.].

21 U.S.C. § 812

TITLE 21. FOOD AND DRUGS

CHAPTER 13. DRUG ABUSE PREVENTION AND CONTROL CONTROL AND ENFORCEMENT AUTHORITY TO CONTROL; STANDARDS AND SCHEDULES

§ 812. Schedules of controlled substances

(c) Initial schedules of controlled substances [Caution: For amended schedules, see 21 CFR Part 1308.]. Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 201 [21 USCS § 811], consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

Nev. Rev. Stat. Ann. § 453.566 (2013)

TITLE 40. Public Health And Safety.

CHAPTER 453. Controlled Substances. Drug Paraphernalia

453.566. Unlawful use or possession.

Any person who uses, or possesses with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of this chapter is guilty of a misdemeanor.