



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF J-L-P-L

DATE: JULY 5, 2016

APPEAL OF PHILADELPHIA, PENNSYLVANIA FIELD OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF  
INADMISSIBILITY

The Applicant, a native and citizen of Chile, seeks a waiver of inadmissibility for a controlled substance violation. *See* Immigration and Nationality Act (the Act) § 212(h), 8 U.S.C. § 1182(h). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to lawful permanent residence must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The USCIS Director, Philadelphia, Pennsylvania Field Office denied the application, finding that the Applicant was inadmissible for a controlled substance violation, specifically, possession of drug paraphernalia. The Director then determined that the evidence was insufficient to establish that a qualifying relative would suffer extreme hardship if the application were denied.

The matter is now before us on appeal. In the appeal, the Applicant asserts that he is not inadmissible and that he has established that his U.S. citizen father would suffer extreme hardship if his application was denied. He submits a brief, court documents, and his father's and his own declarations on appeal.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further proceedings consistent with this decision.

**I. LAW**

The Applicant is seeking to adjust status to lawful permanent resident and has been found inadmissible for a controlled substance violation, specifically, possession of drug paraphernalia. Section 212(a)(2)(A)(i)(II) of the Act, provides that any foreign national convicted of any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of the Controlled Substances Act (21 U.S.C. § 802)), is inadmissible. Section 802 limits the term "controlled substance" to a "drug or other substance" included in one of the five federal schedules. 21 U.S.C. § 802(6).

(b)(6)

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Drug paraphernalia convictions may “relate to” controlled substances and therefore make an individual inadmissible under section 212(a)(2)(A)(i)(II) of the Act, but we must conduct a categorical inquiry into whether the law violated relates to a controlled substance on the schedules listed in section 802 of the Controlled Substance Act. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1981 (2015). If the law encompasses any substance not found on the section 802 schedules, then it is not categorically a violation covered by section 212(a)(2)(A)(i)(II) of the Act. *Id.* If the statute is divisible – lists “potential offense elements in the alternative, render[ing] opaque which element played a part in the defendant’s conviction” – then we engage in the modified categorical inquiry by reviewing the record of conviction to determine which of the alternative elements formed the basis of the conviction. *Descamps v. United States*, 133 S. Ct. 2276, 2283-85 (2013). The record of conviction is a narrow, specific set of documents, which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *See Shepard v. U.S.*, 544 U.S. 13, 16 (2005).

## I. ANALYSIS

The Director found the Applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act, citing the Applicant’s conviction for possession of drug paraphernalia. We must look to the statute of conviction to determine if the Applicant was convicted of an offense relating to a controlled substance as defined in the Controlled Substance Act. We may also consider the record of conviction in this case, because the Delaware state statute encompasses at least one substance not found on the section 802 schedules. We find the Applicant is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act and does not require a waiver of inadmissibility.

### A. Inadmissibility

As stated above, the Applicant has been found inadmissible under section 212(a)(2)(A)(i)(II) of the Act for a controlled substance violation, specifically, possession of drug paraphernalia. The Applicant contests the finding of inadmissibility. He asserts that his conviction does not relate to a controlled substance as defined in the Controlled Substance Act. He further asserts that the Director improperly considered a police report to establish the involvement of a controlled substance.

The record reflects that the Applicant was convicted in the [REDACTED] State of Delaware in 2004 for possession of drug paraphernalia, a violation of Del. Code Ann. Tit. 16 § 4771(a). He was sentenced to 60 days’ confinement, suspended for one year probation.

After the Applicant filed the instant appeal, the [REDACTED] held that an individual convicted of a state drug paraphernalia offense was not deportable for a conviction of an offense “relating to” a controlled substance as defined in federal law, where the government had not shown that the conviction related to a controlled substance as defined in the Controlled Substance Act. The Court based its holding, in part, on finding that the law of the convicting jurisdiction did not require proof by the prosecutor that the defendant had used the paraphernalia in question to conceal a substance controlled under federal law, as opposed to a substance controlled only under state law.

*Mellouli v. Lynch*, 135 S. Ct. 1980, 1991 (2015). The Court reaffirmed the general applicability of the categorical approach for determining removability in the immigration context. *Mellouli v. Lynch* at 1982.<sup>1</sup> The categorical approach “looks to the statutory definition of the offense of conviction, not to the particulars of the [foreign national’s] behavior.” *Id.*; see also *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

At the time of the Applicant’s conviction for possession of drug paraphernalia, Del. Code Ann. Tit. 16 § 4771(a) provided that it was unlawful “for any person to use, or possess with intent to use, drug paraphernalia.” The statute defining the offense to which the Applicant pled guilty defined drug paraphernalia as equipment, products, and materials used for storing a controlled substance as defined by Delaware law. Delaware defines a controlled substance as any drug included on its own schedules and does not refer to the Controlled Substance Act or any other federal law. Since the Delaware law encompasses a substance not barred by the Controlled Substance Act, a conviction under Del. Code Ann. Tit. 16 § 4771(a) is not categorically a violation covered by section 212(a)(2)(A)(i)(II) of the Act.

In accordance with *Mellouli*, we will employ the categorical approach to determine whether the Applicant’s offense qualifies as a law relating to a controlled substance. The categorical approach requires us to first match the statute to the generic crime. The statute criminalizes possession of drug paraphernalia involving Delaware controlled substances. The generic crime relates to federally controlled substances. The statute does not match the generic crime because the state and federal lists of controlled substances are not identical.

We see no material difference between the state statute at issue in *Mellouli* and the Delaware statute at issue in this case. As with the state statute in *Mellouli*, at the time of the Applicant’s conviction, Delaware law listed at least one substance that was not on the Controlled Substance Act schedules. Compare 21 U.S.C. § 802(6) with 16 Del. C. § 4714 (listing peyote as a controlled substance). Because the Delaware statute penalized possession of paraphernalia in connection with a controlled substance that is not part of the controlled substances schedules under federal law, the Applicant’s conviction is not categorically for violation of a law relating to a controlled substance, as defined by the Controlled Substance Act.

Since the statute is not a categorical match for the generic offense, we consider whether the statute is divisible. In *Descamps v. United States*, 133 S. Ct. 2276 (2013), the Supreme Court explained that a criminal statute is divisible, so as to warrant a modified categorical inquiry, only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of “elements,” more than one combination of which could support a conviction; and

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<sup>1</sup> In *Mellouli*, the Court analyzed the deportability provision at section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i). Since the ground of inadmissibility for controlled substances at section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), has the same language “relating to a controlled substance” as the deportability provision of the Act, the Court’s analysis is applicable to an inadmissibility charge based on a controlled substance conviction.

(2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard. 133 S. Ct. at 2281, 2283.

The Delaware statute lists multiple discrete offenses as enumerated alternatives, i.e., subsection (a) relates to the use or possession with intent to use drug paraphernalia and section (b) relates to the sale of drug paraphernalia. At least one, but not all, of those listed offenses is a categorical match to the relevant generic standard. The minimal conduct required for a conviction does not involve the sale of drug paraphernalia.

The Delaware statute incorporates its own controlled substance schedules. Under the Delaware statute, a conviction is possible for conduct involving a federal controlled substance and for conduct that does not; hence, the statute is divisible. Since 16 Del. C. § 4771 is a divisible statute, we employ the modified categorical approach in order to ascertain whether the Applicant was convicted of a violation of a law relating to a controlled substance, as defined in the Controlled Substance Act. The modified categorical approach allows us to look at the record of conviction. The record of conviction is a narrow, specific set of documents. See *Matter of Louissant*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)); see also *Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”) Police reports are not part of the record of conviction, so we may not consider them in our analysis.

According to the court disposition, the Applicant pleaded guilty to possession of drug paraphernalia. The limited record of conviction does not identify the specific controlled substance involved. The Applicant’s drug paraphernalia conviction does not render him inadmissible, because the record of conviction, consisting of a charging document and a certified court disposition, does not establish that the Applicant was convicted of an offense related to a controlled substance, as defined in the Controlled Substance Act.

### III. CONCLUSION

The Applicant has the burden of proving he is not inadmissible. See section 291 of the Act, 8 U.S.C. § 1361. The Applicant has met that burden. The Applicant is not inadmissible and does not require a waiver.

**ORDER:** The decision of the Field Office Director, Philadelphia Field Office, is withdrawn. The matter is remanded to the Field Office Director, Philadelphia Field Office, for further proceedings consistent with the foregoing opinion.

Cite as *Matter of J-L-P-L-*, ID# 16432 (AAO July 5, 2016)