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**PRACTICE ADVISORY**[*]
June 8, 2015

# *MELLOULI V. LYNCH*: FURTHER SUPPORT FOR A STRICT CATEGORICAL APPROACH FOR DETERMINING REMOVABILITY UNDER DRUG DEPORTATION AND OTHER CONVICTION-BASED REMOVAL GROUNDS

## INTRODUCTION

On June 1, the U.S. Supreme Court strongly reaffirmed general applicability of the traditional strict categorical approach for determining removability in the immigration context. *Mellouli v. Lynch*, No. 13-1034, 2015 WL 2464047 (June 1, 2015). Under the "categorical approach," a noncitizen is not subject to removal or other negative immigration consequences based on a criminal conviction unless *all* of the conduct covered under the statute of conviction (or, under the "modified categorical approach," *all* the conduct covered under a divisible portion of the statute defining a separate crime) fits within the alleged criminal removal classification. In *Mellouli*, however, the government essentially argued that the language of the drug deportation ground—applying to an offense "relating to" a controlled substance—takes the controlled substance deportation ground outside the strictures of the traditional categorical approach and allows an adjudicator to find removability even where the statute of conviction covers some conduct outside the removal ground. The Supreme Court rejected the government's argument, once again observing that the categorical approach "has a long pedigree in our Nation's immigration laws," *Mellouli*, 2015 WL 2464047, at *5 (quoting *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684, 185 (2013)).

Specifically, the Court **held that an individual convicted of a state drug paraphernalia offense is not deportable under the deportability ground for 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 substance listed in the federal controlled substance schedules**. The Court based its holding in part on a finding that the law of the convicting jurisdiction (Kansas) did not require proof by the prosecutor that Mr. Mellouli had used the paraphernalia in question (a sock) to conceal a substance controlled under federal law, as opposed to a substance controlled only under Kansas law. The Court's decision thus overrules the Board of Immigration Appeals ("BIA") decision in *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009) (finding that there was no need to show the specific controlled substance

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[*] The authors of this Practice Advisory are Manny Vargas, Sejal Zota, Andrew Wachtenheim, Dan Kesselbrenner, and Trina Realmuto. We wish to acknowledge several individuals for their assistance in collecting examples of state controlled substances not on the federal schedules in the advisory's Appendix A, including Kate Evans and counsel for Mr. Mellouli, Russell Abrutyn, Heidi Altman and the Capital Area Immigrants' Rights Coalition, IDP intern Amanda Barfield, Michael Mehr, and NYU Immigrant Rights Clinic students Katie Kavanagh and Amelia Marritz.

involved in a paraphernalia conviction because paraphernalia statutes relate to "the drug trade in general"). **In addition, the Court's opinion offers support for fighting removal based on *any* drug conviction where the state statute at the time of conviction covered any substance(s) not listed in the federal schedules.** *See* Section I of this advisory and Appendix A (Examples of State Controlled Substances Not Included in Federal Controlled Substance Schedules).

More broadly, the Court's decision represents a strong reaffirmation of the general applicability of the categorical approach for determining removability based on a past criminal conviction, and provides support for a strict version of the approach. As discussed in Section II of this advisory, the Court's majority opinion reiterates or supports the following important principles useful for the defense of any noncitizen subject to removal or other negative conviction-based immigration consequences:

- *Mellouli* reiterates that the **categorical approach** looks to the statutory definition of the offense of conviction, not to the noncitizen's actual conduct, and that the adjudicator must presume that the conviction rested upon nothing more than the least of the acts criminalized, i.e., the minimum conduct. And *Mellouli* makes clear that this strict approach applies despite the "relating to" language of the controlled substance deportability ground (*See* Section II(A)).

- *Mellouli* indicates that a showing of **realistic probability** that the state would prosecute someone for the minimum conduct covered under the statute of conviction is unnecessary or met where the statute of conviction expressly covers such conduct (*See* Section II(B)).

- *Mellouli* provides support for a strict elements versus means test for determining when a statute is divisible permitting application of the **modified categorical approach** given the Court's focus on the "elements" that make up the crime of conviction (*See* Section II(C)).

- *Mellouli* provides support for challenging any court decisions that have applied a noncitizen **burden of proof** provision to find a noncitizen inadmissible or ineligible for relief where a record of conviction was inconclusive, or at least any decision where a burden of proof provision was so applied based on a determination that the categorical approach was inapplicable in the controlled substance offense context (*See* Section II(D)).

- *Mellouli* also provides supports for other challenges to removal based on convictions under drug look-alike statutes, crime involving moral turpitude charges, or sexual abuse of a minor charges, and also for post-conviction relief claims based on failure to negotiate effectively to minimize immigration consequences (*See* Section II(E)).

Finally, this practice advisory discusses suggested strategies for cases affected by the *Mellouli* decision and a sample motion to reconsider and terminate proceedings. (*See* Section III).

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## I. THE *MELLOULI* DECISION

Moones Mellouli, a lawful permanent resident, was ordered removed for a conviction relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B)(i) for a Kansas misdemeanor conviction for possession of drug paraphernalia. In its June 1 decision, the Supreme Court vacated Mr. Mellouli's removal order, finding that his conviction did not constitute a conviction relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B)(i). In finding Mr. Mellouli's removal order unlawful, the Court issued several key rulings that articulate how it is determined whether a drug or other criminal conviction may trigger an adverse immigration consequence.

### A. Factual Background

Mr. Mellouli first came to the United States as a visiting student in 2004. He became a conditional permanent resident in 2009. Soon after Mr. Mellouli was accorded permanent resident status, he was arrested in 2010 and charged with possessing four pills of Adderall stored in his sock. He pleaded guilty instead to misdemeanor possession of drug paraphernalia—the sock. The record of conviction ("ROC") was silent regarding the specific identity of the substance controlled by Kansas law that related to Mr. Mellouli's drug paraphernalia conviction; the ROC contained no mention of Adderall or any other substance.

In 2012, the Department of Homeland Security ("DHS") arrested, detained, and commenced removal proceedings against Mr. Mellouli, charging him under 8 U.S.C. § 1227(a)(2)(B)(i) as deportable for a conviction relating to a controlled substance as defined in 21 U.S.C. § 802 for his Kansas conviction for possession of drug paraphernalia under Kan. Stat. Ann. § 21-5709(b)(2) (2013 Cum. Supp.). The Immigration Judge sustained the charge of deportability and, because Mr. Mellouli had not yet acquired the five years of permanent resident status to be eligible for cancellation of removal, ordered his removal to Tunisia. The BIA and U.S. Court of Appeals for the Eighth Circuit affirmed the removal order.

### B. Legal Background

The *Mellouli* case implicates the BIA's 1965 precedential decision in *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965). There the BIA analyzed a state drug possession offense, and held that where the state drug law is "not confined to federally controlled substances," the conviction cannot render the immigrant deportable unless it can be established that conviction relates to a federally controlled substance. *Mellouli*, 2015 WL 2464047, at *6.

In 2009, however, the BIA issued *Martinez-Espinoza*, holding that a drug paraphernalia conviction necessarily relates to a controlled substance for immigration purposes because it relates to the drug trade generally. *Id.* at *7 (citing *Martinez-Espinoza*, 25 I&N Dec. at 121). The BIA declined to extend the *Paulus* rule from possession offenses to paraphernalia offenses. *Id.* (internal citations omitted). In affirming Mr. Mellouli's removal order, the BIA rested its decision on *Martinez-Espinoza*. *Id.*

The Eighth Circuit affirmed the removal order and deferred to the BIA's rationale about paraphernalia offenses articulated in *Martinez-Espinoza*. *Id.* at *8. Additionally, the Eighth

Circuit held that, if there is "*nearly a complete overlap*" between the drugs controlled under the state and federal law, a paraphernalia conviction categorically relates to a controlled substance. *Id.* (quoting *Mellouli v. Holder*, 719 F.3d 995, 1000 (8th Cir. 2013)).

### C. Holding and Key Rulings

In *Mellouli*, Justice Ginsburg, writing for the majority, outright rejects the way in which the BIA and Eighth Circuit construed the immigration statute's controlled substance provision at 8 U.S.C. § 1227(a)(2)(B)(i). First, the majority opinion engages the BIA's "disparate approach[es]" employed in *Paulus* and *Martinez-Espinoza*, and finds that it makes "scant sense" to attach a different and more severe immigration consequence to paraphernalia convictions than to possession and distribution convictions. *Id.* at *13. Accordingly, the Court gives no deference to the BIA's decision (which relied on *Martinez-Espinoza*), *id.* at *1, *7, and requires that the *Paulus* rule extend to paraphernalia convictions as well. *Id.* at *7.

Second, the *Mellouli* decision rejects the attempts by the Eighth Circuit and by the Solicitor General to ameliorate the flaws in the BIA's underlying decisions in Mr. Mellouli's case and in *Martinez-Espinoza*. The Eighth Circuit and the Solicitor General promote a rule that abandons the *Paulus* requirement for *all* drug offenses, not just paraphernalia offenses, provided the state schedule "substantially overlap[s] the federal schedules." *Id.* at *2. In *Mellouli*, the majority opinion finds this rule is an impermissible reading of the immigration statute and applies the *Paulus* rule to determine whether any state drug offense constitutes a conviction under 8 U.S.C. § 1227(a)(2)(B)(i). According to the Court, the immigration statute requires "a direct link between an alien's crime of conviction and a particular federally controlled drug" to trigger removal. *Id.* at *9. The Government cannot establish deportability where "[no] controlled substance (as defined in [§802]) figures as an element of the offense." *Id.* at *8.[1]

Furthermore, in determining whether Mr. Mellouli's paraphernalia conviction was related to a federally controlled substance, the Court ruled that the relevant inquiry is whether the State drug schedules were broader than the federal schedules *at the time of his conviction. Id.* at *6 ("At the time of Mellouli's conviction, Kansas' schedules included at least nine substances not included in the federal lists"); *id.* at *11 (same). *Mellouli* therefore abrogates cases like *Gousse v. Ashcroft*, 339 F.3d 91, 99 (2d Cir. 2003), that have held that changes to the federal schedules subsequent to the date of conviction for the noncitizen are to be applied retroactively to eliminate those substances as a basis for mismatch.

[1] The ground of inadmissibility for controlled substances has the identical language about "relating to a controlled substance…(as defined in 21 U.S.C. § 802)" as the deportability provision the Court analyzed in *Mellouli*. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II). Thus, the Court's analysis should apply also to an inadmissibility charge based on a drug conviction. To the extent that the government argues that the result would be different based on the noncitizen's burden of proof in the inadmissibility context, the practitioner should be aware that, if the noncitizen is a lawful permanent resident seeking readmission after a trip abroad, the BIA recognizes that DHS bears the burden of proving that a returning permanent resident has a conviction under 8 U.S.C. § 1182(a)(2)(A)(i)(II) that would make the returning resident an applicant for admission subject to inadmissibility. *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011). This means that had Mr. Mellouli been charged as inadmissible the Court would have interpreted the same statutory language and reached the same result under *Paulus* that it did under the deportability charge.

In the course of its decision, the Court issued several key rulings regarding application of the controlled substance deportability ground:

- The categorical approach is the required methodology for determining whether a conviction triggers removal for conviction for a controlled substance offense. *Mellouli*, 2015 WL 2464047, at *6. The categorical approach "looks to the statutory definition of the offense of conviction, not to the particulars of the alien's behavior." *Id.* at *5 (quoting Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N.Y.U.L. Rev. 1669, 1701, 1746 (2011)).
- The Kansas statute under which Mr. Mellouli pleaded guilty, Kan. Stat. Ann. § 21-5709(b)(2), does not categorically relate to a controlled substance in the immigration statute because Kansas controlled substances that the federal government does not. *Id.* at *6, *11.
- BIA precedent in *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965) and *Matter of Fong*, 10 I&N Dec. 616 (BIA 1964) requires that for a state conviction to trigger removal under the immigration statute, the conviction must be related to a federally controlled substance. *Mellouli*, 2015 WL 2464047, at *6. The *Mellouli* decision holds that *Paulus*'s requirement extends to paraphernalia offenses as well (and all other drug offenses), thereby overruling *Martinez-Espinoza*. *Id.* at *7.
- When determining whether a state controlled substance conviction relates to a federally controlled substance for immigration purposes, the relevant inquiry is whether the state controlled substance schedules overlapped with the federal schedules *at the time of the immigrant's conviction*. *Id.* at *3.
- The minimum conduct punishable under a statute of conviction is established by the statutory language itself, and is sufficient to defeat deportability under the categorical approach. *Mellouli*, 2015 WL 2464047, at *3.

**Practice Tip:** When representing a noncitizen charged as removable for a state drug conviction, investigate mismatches between the state and federal controlled substance schedules *at the time of the noncitizen's conviction*. As a starting point, one can find some examples of state controlled substances that are not, or in the past have not been, listed on federal schedules by consulting **Appendix A (Examples of State Controlled Substances Not Included in Federal Controlled Substance Schedules)**. Appendix A first lists the nine Kansas substances not on the federal schedules at the time of Mr. Mellouli's conviction, and identifies some of the other states that also list these substances on their state lists. In addition, Appendix A identifies some other substances listed in states other than Kansas that are also not on the federal schedules. However, Appendix A is a very incomplete listing and largely does not address past mismatches. For a more comprehensive analysis for a particular client's past state conviction, one must compare what the state listed at the time of the noncitizen's conviction with the list of substances controlled by the federal government at that time. Note that you may need to investigate alternative names for substances, as the relevant question is whether the state and federal substances are chemically the same. In order to find what drugs are currently on the federal schedules, either by statute or regulation, and when they were added, one can consult U.S. Department of Justice resources posted at http://www.deadiversion.usdoj.gov/schedules/.

## II. THE DECISION'S POTENTIAL BROADER IMPLICATIONS

The Supreme Court's decision in *Mellouli* also has important broader implications for challenges to government deviations from the categorical approach. This section presents a preliminary analysis of some of these potential broader implications and arguments.

### A. Categorical Approach

*Mellouli*'s holding affirms the application of the categorical approach to the controlled substance ground of removal, 8 U.S.C. § 1227(a)(2)(B)(i). The categorical approach "looks to the statutory definition of the offense of conviction, not to the particulars of the alien's behavior." *Mellouli*, 2015 WL 2464047, at *5. Under this approach, the adjudicator must presume that the conviction rested upon nothing more than the least of the acts criminalized. Only when the state statute, at its minimum, necessarily and in every case satisfies the generic definition in the federal statute is that conviction a "categorical match." *Moncrieffe*, 133 S. Ct. at 1684.

Thus, *Mellouli* abrogates cases that did not apply the categorical approach to § 1227(a)(2)(B)(i). In particular, in *Rojas v. Atty. Gen.*, the Third Circuit required the government to demonstrate a tie between the state paraphernalia offense and the federal drug schedules to come within § 1227(a)(2)(B)(i). 728 F.3d 203 (3d Cir. 2013) (en banc). But the Court also found that the categorical approach did not apply to § 1227(a)(2)(B)(i) because of the potentially underinclusive result. *Id.* at 216 n.14. Thus, *Mellouli* abrogates the portion of *Rojas* that deviated from the categorical approach.

More broadly, this is the first time that the Supreme Court has applied the categorical approach in removal proceedings outside the context of an aggravated felony. Notably, it did so even though the language of the drug ground speaks of violations "relating to" a controlled substance. In doing so, the Court relied heavily on the requirement of a "conviction" to trigger the consequences of § 1227(a)(2)(B)(i). *See Mellouli*, 2015 WL 2464047, at *5 ("[C]ongress, by tying immigration penalties to convictions, intended to 'limi[t] the immigration adjudicator's assessment of a past criminal conviction to a legal analysis of the statutory offense,' and to disallow '[examination] of the facts underlying the crime.'"); *id.* (explaining that the categorical approach is "rooted in the Congress' specification of conviction, not conduct"). Like *Moncrieffe*, *Mellouli* makes clear that a federal statute's use of the phrase "convicted of" unambiguously conveys Congressional intent to require the categorical approach.

The Court in a footnote also framed its one previous departure from the categorical approach in *Nijhawan v. Holder*, 557 U.S. 29 (2009) as "atypical." *Id.* at *14 n.3. Taken together with the emphasis on "conviction," this language provides additional support for the use of the categorical approach as the presumptive method of analysis where removal grounds are triggered by a conviction.

Moreover, the Court's application of the categorical approach to a removal ground containing the "relating to" language should provide additional support for challenges to agency decisions or government arguments that call for applying something short of the categorical approach to other grounds containing similar "relating to" language, including:

- 8 U.S.C. § 1101 (a)(43)(K)(i) (an offense that relates to the owning, controlling, managing, or supervising of a prostitution business);
- 8 U.S.C. § 1101(a)(43)(Q) (an offense relating to a failure to appear for sentence);
- 8 U.S.C. § 1101 (a)(43)(R) (an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles);
- 8 U.S.C. § 1101 (a)(43)(S) (an offense relating to obstruction of justice, perjury, or bribery of a witness); and
- 8 U.S.C. § 1101 (a)(43)(T) (an offense relating to a failure to appear to answer to a felony charge).

In cases involving "relating to" statutes, some courts have not required a strict element-by-element match between the offense of conviction and the federal baseline, the hallmark of the categorical approach. Instead, they have focused on the nature of the defendant's conviction, and whether it "stand[s] in relation," "pertain[s]," has "bearing of concern," or "refer[s]" to the object or crime of comparison. *Desai v. Mukasey,* 520 F.3d 762, 764 (7th Cir. 2008) (internal citations omitted). *See also Kamagate v. Ashcroft*, 385 F.3d 144, 154 (2d Cir. 2004) (declining to construe "relating to" narrowly).

Based on this looser approach, the government in *Mellouli* argued for a construction of §1227(a)(2)(B)(i) which would reach state convictions in which no federally-controlled substance is as an element of the offense. In rejecting that construction, the Court acknowledged the broad nature of the "relating to" language, but concluded that the "context" here called for a narrower reading. *Mellouli*, 2015 WL 2464047, at *8. It also emphasized that the government's construction "stretches to the breaking point," with no end in sight. *Id*. *Mellouli* thus provides additional support to challenge *stretched* readings of the law involving "relating to" statutes, and to advocate for more limiting interpretations, particularly where the statute's context supports such a reading.

**B. Realistic Probability**

In the past, the Court has identified a limitation on the strict categorical approach: "our focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be a 'realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" *Moncrieffe*, 133 S. Ct. at 1684-85 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

In *Mellouli*, however, the Court reversed the decision below without discussing the realistic probability test. It did not remand the case, but found Mr. Mellouli not deportable, which it could not have done without finding either that the realistic probability test did not apply here, or that it had been satisfied. And there was no question that the issue was presented as the government raised it in both its brief in opposition to certiorari, BIO at 9-12, and in its brief on the merits. Resp't Br. at 39-40 n.6. Mr. Mellouli also briefed the issue considerably in his opening brief. Pet'r Br. at 42-56. Thus, the Court would have had to consider the realistic probability requirement in order to rule favorably for Mr. Mellouli.

This is significant because the Board has found – in a case involving drug distribution – that an immigrant must satisfy a realistic probability by providing evidence of actual prosecutions. *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014). It held so even though the Connecticut statute at issue *on its face* includes drugs that are not on the federal schedules. *Id*. at 420-21. In doing so, the Board ignored Circuit law to the contrary holding that the realistic probability standard is satisfied where the criminal statute expressly covers the conduct falling outside the removal ground. *See, e.g.*, *Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1072 (11th Cir. 2013) (finding that "realistic probability" is created where the statute's language expressly demonstrates "that it will punish crimes that do qualify as theft offenses and crimes that do not."); *Jean-Louis v. Attorney General*, 582 F.3d 462, 481 (3d Cir. 2009) (holding that "no application of 'legal imagination' to the Pennsylvania simple assault statue is necessary" because "[t]he elements of" the assault statute "are clear"); *U.S. v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (finding that because Oregon burglary statute explicitly covers vehicles and boats "that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of" burglary); *see also U.S. v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (*en banc*) ("We do not need to hypothesize about whether there is a 'realistic probability' that Maryland prosecutors will charge defendants engaged in non-violent offensive physical contact with resisting arrest; we know that they can because the state's highest court has said so.") These courts have found that the petitioner need not point to actual cases involving prosecutions for conduct expressly covered in the statute of conviction or expressly included by case law interpreting the statute.

Now, though, *Mellouli* strongly indicates that *Matter of Ferreira's* requirement of proof of actual prosecutions is incorrect. The *Mellouli* Court's outright reversal without addressing the realistic probability test demonstrates that any realistic probability requirement is met where the state statute expressly covers non-federally controlled substances. This is because, where a state law is facially broader than the federal statute, no "legal imagination" is required to conclude that states will prosecute the crimes expressly defined in their own laws. In contrast, *Moncrieffe* and *Duenas-Alvarez* were concerned with the application of legal imagination to state statutes whose terms *did not* expressly cover the overbroad conduct. For additional support, practitioners should point to the Circuit Court cases that have upheld this rationale. *See Ramos*, 709 F.3d at 1072; *Jean-Louis*, 582 F.3d at 481; *Grisel*, 488 at 850; *Aparicio-Soria*, 740 F.3d at 158.

In the alternative, practitioners can argue that the realistic probability test does not apply at all to this context. In interpreting § 1227(a)(2)(B)(i), the Court in *Mellouli* deferred to and extended the Board's test in *Matter of Paulus*, 11 I&N Dec. 274. Significantly, the Board has applied *Paulus* for decades without requiring a realistic probability of prosecution. Thus, because the *Mellouli* Court affirmed and extended *Paulus*, which historically has not required such a showing, the Court here also did not.

**Practice Tip:** If an immigration adjudicator rejects these arguments and requires a noncitizen to submit evidence of actual prosecutions/convictions of the overbroad conduct even when such conduct is expressly covered by the statute, a practitioner should collect whatever evidence of state prosecutions or convictions of the overbroad conduct is available. For relevant arguments/strategies, *see* IDP and NIP-NLG, The Realistic Probability Standard: Fighting Government Efforts To Use It To Undermine The Categorical Approach (Nov. 5, 2014). If only

evidence of prosecutions, not convictions, is available, consider arguing that the *Mellouli* reversal must at least mean that the evidence of prosecution submitted by Mr. Mellouli himself was sufficient to satisfy the realistic probability requirement. In his briefing to the Court, Mr. Mellouli submitted evidence only of three Kansas *prosecutions* for non-federally controlled substances. *See* Pet'r Br. at 52; Pet'r Reply Br. at 14-15 n.4. At a minimum, then, the *Mellouli* reversal confirms that evidence of *prosecution*, as opposed to *conviction*, satisfies the realistic probability requirement.

### C. Modified Categorical Approach

In *Descamps v. United States*, the Supreme Court held that the modified categorical approach applies *only* when the statute at issue "sets out one or more *elements* of the offense in the alternative," at least one of which would match the generic ground and one of which would not. 133 S. Ct. 2276, 2281 (2013) (emphasis added). The Court further defined "elements" as facts a jury must find "unanimously and beyond a reasonable doubt," and distinguished "means" which a jury need not find in order to secure a conviction. *Id*. at 2288. Thus, only where the statute lists elements, may the adjudicator apply the modified categorical approach and look to the record of conviction to determine the offense of conviction.[2]

The Board has also adopted this rule, but there is disagreement among the circuit courts. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 478, 483 n.3 (BIA 2015) (agreeing with and citing the Fourth, Ninth, and Eleventh Circuits as adopting the jury-unanimity approach but citing to other courts for a divergent approach). *Id*.

In *Mellouli*, the Court did not determine whether the Kansas statute was divisible because the government had not presented that question. *Mellouli*, 2015 WL 2464047, at *14 n.4. *Mellouli* however implicitly supports the means versus elements test of divisibility. The Court held that "to trigger removal under § 1227(a)(2)(B)(i), the Government must connect an *element* of the alien's conviction to a drug 'defined in [§ 802].'" *Id*. at *9. The Court further elaborated "when the *elements that make up the state crime* of conviction relate to a federally controlled substance," that the removal provision is satisfied. *Id.* at *8. In applying that test to Mr. Mellouli, the Court found that "[no] controlled substance (as defined in [§ 802]) figures as an element of his offense." *Id*. It reasoned that was so because it "required no proof by the prosecutor that Mellouli used his sock to conceal a substance under § 802." *Id.* at *6. Taken together, the Court's reasoning indicates that an element is something that must proven by the prosecutor and found by the court or jury, which is what both *Descamps* and *Chairez* have held. And because *Descamps* requires alternative *elements* to trigger the modified categorical approach, *Mellouli* supports the means versus elements divisibility test.

[2] For a fuller explanation of this analysis, *see* IDP and NIP-NLG, *Matter of Chairez-Castrejon*: BIA Applies *Moncrieffe* and *Descamps* to Modify and Clarify Its Views On Proper Application of the Categorical Approach (July 31, 2014).

**Practice Tip**: If the defendant is convicted of a paraphernalia or other drug-related offense that does not require that a specific controlled substance be identified and the state drug schedules are broader than the federal schedules, she may have an argument under the means versus elements divisibility test that the statute is indivisible, and that no conviction under the statute triggers removal under controlled substance grounds. This may be possible at least in circuits that have adopted the *Descamps* test or in circuits that have not ruled yet. If, however, the identity of the drug is an element, and the statute is divisible, the defendant, if possible, should, like Mr. Mellouli, not allocute to any specific drug. An Alford plea might also protect the defendant from a deportability charge because the DHS will not have evidence to prove conclusively that the drug would come within the federal drug schedules.

### D. Burden of Proof

Another way that the government has chipped away at the categorical approach in recent years is by finding that, when the burden of proof is on a noncitizen to establish eligibility for relief from removal (as well as eligibility for lawful admission or for naturalization), a noncitizen fails to meet that burden when a record of conviction consulted under the modified categorical approach is inconclusive. The BIA takes the position that a noncitizen's statutory burden to establish eligibility for relief means that the noncitizen must affirmatively prove that the conviction is not a disqualifying offense. *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009). And some courts have adopted the government's position. *See, e.g., Salem v. Holder*, 657 F.3d 111 (4th Cir. 2011). In 2013, however, the Supreme Court indicated that, when a record of conviction is inconclusive, the presumption is that an individual was convicted of only the minimum conduct covered under the statute of conviction. *Moncrieffe v. Holder*, 133 S. Ct. at 1684.

Mr. Mellouli's case did not come up in the relief eligibility context. However, the Court repeats *Moncrieffe's* admonition that an adjudicator must "presume that the conviction rested upon nothing more than the least of the acts criminalized." *Mellouli*, 2015 WL 2464047, at *5. In combination with *Moncrieffe's* statement that the analysis is the same in the relief eligibility context as in the deportability context, *Moncrieffe*, 133 S. Ct. at 1685, n.4, and its conclusion that a noncitizen found not deportable as an aggravated felon based on an inconclusive record may seek relief from removal, *id.*, at 1692, *Mellouli's* reaffirmation of this legal presumption provides further support for arguing the irrelevancy of a factual issue burden of proof provision in analyzing the legal effect of an inconclusive record of conviction.[3]

Furthermore, on June 8, 2015 in *Madrigal-Barcenas v. Lynch*, No. 13-697, the Supreme Court granted the petition for certiorari, vacated the judgment, and remanded (GVR) the case for further consideration in light of *Mellouli*. *Madrigal-Barcenas* raised the same drug paraphernalia issue as *Mellouli*, but in the relief eligibility context. The GVR in *Madrigal-Barcenas*, where the

[3] The scope of the general flaws in the BIA's reasoning in *Almanza* is beyond the scope of this advisory. For a fuller explication of the possible arguments based on *Moncrieffe*, *see* discussion post-*Moncrieffe* in American Immigration Council (AIC), IDP, and NIP-NLG, *Moncrieffe v. Holder*: Implications for Drug Charges and Other Issues Involving the Categorical Approach (May 2, 2013), pp. 7-9; *see also* IDP and Mills Clinic, Stanford Law School, Criminal Bars to Relief and Burden of Proof Considerations (March 8, 2012).

Solicitor General had argued that the relief eligibility burden of proof provided a separate basis for denying cert, *see* BIO, 2014 WL 1760333, at *9-10 (". . . there is no [circuit] conflict in the context of cases—like petitioner's case—that involve a concededly removable alien who bears the burden of establishing that he did not commit a controlled-substance offense in order to be eligible for discretionary relief from removal."), demonstrates that the Supreme Court does not view a shift in the burden of proof as necessarily changing the outcome of the case.

Lastly, the Court's decision in *Mellouli* has a direct impact on cases interpreting burden of proof and eligibility for relief in the Third Circuit. As discussed above, the *Mellouli* Court's holding that the categorical approach applies to the controlled substance ground of deportability abrogates the Third Circuit's decision in *Rojas v. Att'y Gen*, 728 F.3d 203, 209 (3d Cir. 2013) (en banc), which had reached the opposite conclusion. Relying on *Rojas*' now rejected reasoning, the Third Circuit in *Syblis v. Att'y Gen*, 763 F.3d 348 (3d Cir. 2014) held that a Virginia statute that included substances that are not federally controlled "related to" a controlled substance because a "law need not require for its violation the actual involvement of a controlled substance in order 'to relate' to a controlled substance." This conclusion was critical to the decision to find that Mr. Syblis did not meet his relief eligibility burden of proof with an inconclusive record of conviction. Had the categorical approach applied, the Third Circuit's decision in *Thomas v. Att'y Gen.,* 625 F.3d 134 (3d Cir. 2010) would have been controlling. In *Thomas*, the Third Circuit held that a conviction could *not* be deemed to fall into a criminal classification barring eligibility for relief where the record of conviction was inconclusive. *Id.* at 148. Indeed, *Syblis* distinguished *Thomas* stating: "In *Thomas,* our inquiry required resort to the categorical approach, which we have expressly rejected here." 763 F.3d at 357, n.12. Now that the *Mellouli* Court held that the categorical approach does apply to the controlled substance ground of deportability, the reasoning in *Syblis* falls apart like a house of cards.

### E. Other Implications

This section sketches arguments about other potential implications of the Court's decision in *Mellouli*. Rather than being fully elaborated arguments, the discussion intends to plant seeds that readers will later be able to nurture and develop.

#### 1. Drug Look-Alike Statutes.

The Seventh Circuit has held that a conviction for violating an Illinois statute that punishes possessing or distributing a substance designed to appear to be a controlled substance is a controlled substance under the immigration statute. *Desai v. Mukasey*, 520 F.3d 762, 764 (7th Cir. 2008). This type of provision is known as a "look-alike" statute. Laws like the Illinois statute at issue in *Desai* punish, for example, selling chocolates designed to look like psilocybin, a federally controlled substance. The Seventh Circuit recognized that the federal drug schedules do not classify look-alike substances as controlled substances under 21 U.S.C. § 802. Nevertheless, the Seventh Circuit adopted an expansive view of "relating to" and held that a conviction for a look-alike substance triggered immigration consequences. *Desai*, 520 F.3d at 764. The Court's decision in *Mellouli* arguably abrogates *Desai* because *Mellouli* holds that an offense cannot trigger the controlled substance ground of removability where"[no] controlled substance (as defined in [§802]) figures as an element of the offense." *Mellouli*, 2015 WL

2464047, at *8. Because a look-alike statute by definition punishes offenses where there is no actual controlled substance as an element of the offense, such offenses should no longer be deportable offenses under *Mellouli*.

### 2. Crimes Involving Moral Turpitude

That the *Mellouli* Court applied the categorical approach to the conviction-based controlled substance deportability ground lends support to the ongoing saga about whether the categorical approach applies to determining whether one has been convicted of a crime involving moral turpitude ("CIMT"). In April 2015, former Attorney General Holder vacated former Attorney General Mukasey's decision that went beyond the categorical approach to determine deportability for CIMTs. *Matter of Silva-Trevino*, 26 I&N Dec. 550 (A.G. 2015); *see also Bobadilla v. Holder*, 679 F.3d 1052, 1057 (8th Cir. 2012); *Mata-Guerrero v. Holder*, 627 F.3d 256, 260 (7th Cir 2008) (deferring to former Attorney General Mukasey's opinion). Since that vacatur, however, the government has argued that the strict categorical approach does not apply to moral turpitude deportability because there is no generic offense that has moral turpitude as an element.[4] In dissenting in *Mellouli,* Justice Thomas interpreted the term "relating to…a controlled substance" as being of a descriptive character rather than defining a generic offense. *Mellouli*, 2015 WL 2464047, at *13-14. Nevertheless, the majority applied the strict categorical approach to the controlled substance deportability ground and said that the language of the controlled substance ground "refers to crimes generically defined." *Id.* at *14 n.3. A practitioner facing a government argument that the term "crime involving moral turpitude" is merely descriptive and does not define a generic crime can argue that the decision in *Mellouli* provides further supports for applicability of a strict categorical approach to moral turpitude deportability based on the Court's focus on Congress' "specification of conviction, not conduct, as the trigger for immigration consequences." *Id.* at *5.

### 3. Sexual Abuse of a Minor Aggravated Felony

The Court in *Mellouli* expressly rejected the BIA's attempt to fashion a "disparate approach" to a single statutory provision. *Mellouli*, 2015 WL 2464047, at *7. As noted above, the *Mellouli* Court criticized the BIA for having one interpretation for drug possession and trafficking cases, and a separate interpretation for offenses involving the drug trade, including paraphernalia. Similarly, the BIA also has two disparate interpretations for determining when a conviction for sexual abuse of a minor is a sexual abuse of a minor ("SAM") aggravated felony. *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 995 (BIA 1999) (looking to 18 U.S.C. § 3509(a)(8) as guidance for SAM); *Matter of Esquivel-Quintana*, 26 I&N Dec. 469 (BIA 2015) (applying age difference requirement to statutory rape cases). In *Mellouli*, the Court reversed the BIA for not interpreting the immigration statute "as a symmetrical and coherent regulatory scheme" with respect to its controlled substance provisions. *Mellouli*, 2015 WL 2464047, at *7 (citing *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120,133 (2000) (internal quotation marks omitted)). The SAM cases are so muddled it is not even apparent whether the BIA has

[4] Pursuant to the Attorney General's order, the BIA has requested briefing on the proper methodology it should apply to determine moral turpitude, when a fact-finder should use the modified categorical approach, and whether a fact-finder can apply a heightened discretionary act based on a conviction that does not result in inadmissibility. *See Matter of Silva-Trevino*, 26 I&N Dec. 550, 553-54 (A.G. 2015).

created two different tests or, as Judge Posner has opined in a dissent, no test at all. *Velasco-Giron v. Holder*, 773 F.3d 774, 782-83 (7th Cir. 2014). In raising challenges to the BIA's SAM case law, practitioners should consider noting that SAM interpretations arguably suffer from the same lack of consistency that the Court found deficient in *Mellouli*. If coherence is required to determine deportability for a state drug offense it should also be required to determine deportability for a state SAM conviction. This argument may be particularly useful in the Second and Third Circuits because those courts treat the BIA's decision in *Rodriguez-Rodriguez* as having provided a definition of SAM, and not merely a guide. *Mugalli v. Ashcroft*, 258 F.3d 52, 59 (2d Cir. 2001); *Restrepo v. Att'y Gen*., 617 F.3d 787, 791-92, 796 (3d Cir. 2010).

#### 4. Post-Conviction Relief

In discussing the benefits of the categorical approach, the Court explained that it "enables aliens to anticipate the immigration consequences of guilty pleas in criminal court, and to enter 'safe harbor' guilty pleas [that] do not expose the [alien defendant] to the risk of immigration sanctions." *Mellouli*, 2015 WL 2464047, at *5 (internal citations omitted). Here, the Supreme Court built upon its prior precedent in *Padilla v. Kentucky* to once again acknowledge the outsized influence that immigration consequences carry in the noncitizen defendant's calculus to plead guilty. 130 S. Ct. 1473 (2010). But the Court went even further by recognizing defense counsel's role in negotiating and mitigating potential adverse immigration consequences providing additional support for *requiring* defense counsel to negotiate effectively to minimize immigration consequences, where possible. *See also Missouri v. Frye*, 132 S. Ct. 1399, 1406 (2012) (reaffirming that defense counsel's duty to provide effective assistance includes "the negotiation of a plea bargain"); *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012). Indeed, the Court was motivated here at least in part because Mr. Mellouli's counsel in fact did negotiate a plea to a paraphernalia offense—but without specifying the substance—specifically to avoid adverse immigration consequences. *See Mellouli*, 2015 WL 2464047, at *14, n. 5. Thus, practitioners should use *Mellouli* as additional support for asserting a claim that defense counsel has not complied with his/her duty to provide effective assistance of counsel where s/he did not negotiate effectively to minimize adverse immigration consequences.

## III.. SUGGESTED STRATEGIES FOR CASES AFFECTED BY *MELLOULI*

This section offers strategies to consider for individuals whose cases are affected by *Mellouli*. Accompanying this advisory is a sample motion to reconsider for individuals who are seeking termination because they are no longer removable as a result of the *Mellouli* decision. *See* Appendix B (Sample Motion to Reconsider to Terminate Removal Proceedings).

### A. Individuals in Pending Removal Proceedings

Individuals who are in removal proceedings (either before an Immigration Judge ("IJ") or on appeal at the BIA) and whose cases are affected by *Mellouli* should promptly bring the decision to the attention of the IJ or BIA, explaining how the decision controls the deportability or inadmissibility or relief eligibility question at issue. For example, if an individual is only charged with controlled substance deportability/inadmissibility based on a state drug paraphernalia or other drug-related conviction where the government has not established any

connection to a federally controlled substance, the individual could file a motion to terminate. *See* Section I(C). Similarly, if an individual is only charged with deportability/inadmissibility based on a "related to" offense/s, the individual could also file a motion to terminate. *See* Section II(A). If a "related to" offense is one of two or more grounds of removability, the individual could argue that *Mellouli* eliminates the relevant ground. Or, if the person becomes eligible for a form of relief from removal (e.g., cancellation of removal) as a result of *Mellouli*, the individual could argue that *Mellouli* eliminates the prior bar to relief.

An individual could bring the *Mellouli* decision to the attention of the IJ or BIA by filing a notice of supplemental authority, a motion to terminate (if appropriate), or a merits brief. If the case is on appeal at the BIA and the person is eligible for relief as a result of the decision, it is advisable to file a motion to remand *before* the BIA rules on the appeal to preserve his or her statutory right to later file *one* motion to reconsider and reopen.

### B. Individuals with Final Orders

*Petition for Review*. Individuals with pending petitions for review should consider filing a motion to summarily grant the petition or a motion to remand the case to the Board, whichever is appropriate. The Department of Justice attorney on the case may even consent to such a motion. Regardless whether a motion to remand is filed, if briefing has not been completed, the opening brief and/or the reply brief should address *Mellouli*. If briefing has been completed, the petitioner may file a letter under Federal Rule of Appellate Procedure (FRAP) 28(j) ("28(j) Letter") informing the court of the decision and its relevance to the case.

*Denied Petition for Review*. If the court of appeals already denied a petition for review, and the time for seeking rehearing has not expired (*see* FRAP 35 and 40 and local rules), a person may file a petition for rehearing, explaining *Mellouli*'s relevance to the case and its impact on the outcome. If the court has not issued the mandate, a person may file a motion to stay the mandate. *See* FRAP 41 and local rules. If the mandate has issued, the person may file a motion to recall (withdraw) the mandate. *See* FRAP 27 and 41, and local rules. Through the motion, the person should ask the court to reconsider its prior decision in light of *Mellouli* and remand the case to the BIA. In addition, a person may file a petition for certiorari with the Supreme Court within 90 days of the issuance of the circuit court's judgment (not mandate). The petition should request the Court grant the petition, vacate the circuit court's judgment, and remand for further consideration in light of *Mellouli*.

*Administrative Motion to Reconsider*. Regardless whether an individual sought judicial review, he or she may file a motion to reconsider or a motion to reopen with the Board or the immigration court (whichever entity last had jurisdiction over the case).[5] As with all cases where a motion is filed, there may be some risk that DHS may arrest the individual (if the person is not detained). This risk may increase when the motion is untimely.

It generally is advisable to file the motion within 30 days of the removal order, or, if 30 days have passed, before the 90 day motion to reopen deadline. *See* 8 U.S.C. §§ 1229a(c)(6)(B)

[5] There are strong arguments that fundamental changes in the law warrant reconsideration because they are "errors of law" in the prior decision. *See* 8 U.S.C. 1229a(c)(6)(C).

and 1229a(c)(7)(C)(i); *see also* 8 C.F.R. § 103.5 (for individuals in administrative removal proceedings, providing 30 days for filing a motion to reopen or reconsider a DHS decision).[6] If the time for filing has elapsed, motions should be filed, if at all possible, within 30 (or 90) days of June 1, 2015, the date the Court issued its decision in *Mellouli*, i.e., by **July 1, 2015, or August 31, 2015**, respectively.[7] Filing within this time period supports the argument that the statutory deadline should be equitably tolled. In order to show due diligence as required by the equitable tolling doctrine, individuals should file within 30 days after *Mellouli* and argue that the filing deadline was equitably tolled until the Supreme Court issued its decision or until some later date. If the individual is *inside the United States* (and has not departed since the issuance of a removal order) and the statutory deadline has elapsed, counsel *might* consider making an *alternative* request for *sua sponte* reopening.[8]

### C. Additional Considerations for Individuals Abroad.

An individual's physical location outside the United States *arguably* should not present an obstacle to returning to the United States if the court of appeals grants the petition for review. Such individuals should be "afforded effective relief by facilitation of their return." *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Thus, if the court of appeals grants a petition for review or grants a motion to stay or recall the mandate and then grants a petition for review, DHS *should* facilitate the petitioner's return to the United States.[9]

Noncitizens outside the United States may file administrative motions notwithstanding the departure bar regulations, 8 C.F.R. §§ 1003.2(d) and 1003.23(b), if removal proceedings were conducted within any judicial circuit, with the exception of removal proceedings conducted in the Eighth Circuit.[10] If filing a motion to reconsider or reopen in the Eighth Circuit, the BIA

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[6] One court suggested that a person may file a petition for review if DHS denies the motion. *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 n.1 (1st Cir. 2004). *But see Tapia-Lemos v. Holder*, 696 F.3d 687, 690 (7th Cir. 2012) (dismissing petition for review of denial of motion to reopen under 8 C.F.R. § 103.5 for lack of jurisdiction).

[7] In fact, the ninetieth day falls on Sunday, August 30, 2015, but, by regulation, a person has until the end of the next day which is not a Saturday, Sunday or legal holiday. *See* 8 C.F.R. § 1001.1(h) (defining the term day).

[8] Note, however, that courts of appeals have held that they lack jurisdiction to review the BIA's denial of a *sua sponte* motion. *See Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Mosere v. Mukasey*, 552 F.3d 397 (4th Cir. 2009); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (en banc) (per curiam); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999).

[9] For more information about returning to the United States after prevailing in court or on an administrative motion, *see* NIP-NLG, NYU Immigrant Rights Clinic, and AIC, Return to the United States After Prevailing on a Petition for Review or Motion to Reopen or Reconsider (April 27, 2015).

[10] Although the BIA interprets the departure bar regulations as depriving immigration judges and the BIA of jurisdiction to adjudicate post-departure motions, *see Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008), the courts of appeals (except the Eighth Circuit, which has not decided the issue) have invalidated the bar. *See Perez Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013); *Luna v. Holder*, 637 F.3d 85 (2d Cir.

or immigration judge likely will refuse to adjudicate the motion for lack of jurisdiction based on the departure bar regulations. It is important to note that the cases invalidating the departure bar regulation involved statutory (not *sua sponte*) motions to reopen or reconsider. In those cases, the courts found the regulation is unlawful either because it conflicts with the motion to reopen or reconsider statute or because it impermissibly contracts the BIA's jurisdiction. Thus, whenever possible, counsel should make an argument that the motion qualifies under the motion statutes (INA §§ 240(c)(6) or 240(c)(7)), i.e., that the motion is timely filed or that the filing deadline should be equitably tolled, and impermissibly contracts the agency's congressionally-delegated authority to adjudicate motions. Counsel should consider arguing that the statutory deadline should be equitably tolled due to errors outside the noncitizen's control that are discovered with diligence or ineffective assistance of counsel. If the person did not appeal her or his case to the Board or circuit court, counsel may wish to include a declaration from the person explaining the reason, including lack of knowledge about the petition for review process or inability to afford counsel. Counsel should also review the record to determine whether the immigration judge, DHS counsel, or prior counsel led the noncitizen to believe that any further appeals would be futile.

Significantly for individuals who have been deported or who departed the United States, it may be advisable *not* to request *sua sponte* reopening because the departure bar litigation has not been as successful in the *sua sponte* context. *See, e.g.*, *Desai v. AG of the United States*, 695 F.3d 267 (3d Cir. 2012); *Zhang v. Holder*, 617 F.3d. 650 (2d Cir. 2010); *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009). In addition, as stated above (see n.8, *supra*), most courts of appeals have held that they lack jurisdiction to review *sua sponte* motions.[11]

If the BIA denies a motion to reconsider or reopen based on the departure bar regulations and/or the BIA's decision in *Matter of Armendarez*, please contact Trina Realmuto at trina@nipnlg.org.

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2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. United States AG*, 681 F.3d 1236 (11th Cir. 2012).

[11] For additional information on the departure bar regulations, *see* NIP-NLG and AIC, Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues (Nov. 20, 2013).

## APPENDIX A

### Examples of State Controlled Substances Not Included in Federal Controlled Substance Schedules

Note: This chart is not intended to be comprehensive. It is meant instead to provide some examples of non-federally controlled substances that are, or have been, listed by some states, as identified in case law or by practitioners who have researched the controlled substance lists in certain states. The hope is that the chart will provide a starting point for immigrants and their advocates seeking to find and identify non-federal substances listed by their own states.[12] The user should be aware that mismatches may be difficult to identify because of the technical names used for many substances and because substances are added or removed from the state and federal lists/schedules on a frequent basis. One must do careful research to find and confirm specific state substances that were not included in the federal schedules during the time periods relevant for analyzing the immigration implications of a particular criminal charge/conviction.

| STATE | STATE SUBSTANCES NOT LISTED IN FEDERAL SCHEDULES (partial list even for the states included in chart) | STATE LAW & CASE LAW CITES [& relevant dates, if known] |
|---|---|---|
| **Kansas** (Mellouli's state of conviction) **as well as some other states including the Kansas non-federal substances in their controlled substance lists** (see last column) | • Salvia Divinorum or Salvinorum A | Kan. Stat. Ann. § 65-4105(d)(30) [since 2008] – also included in CS lists in **AL, AR, CO, CT, DE, IL, IN, IA, KY, MI, MS, MO, MT, NE, ND, OH, OK, PA, RI, TX, VA, WV, WI, WY** |
| | • Datura Stramonium, commonly known as Gypsum Weed or Jimson Weed | Kan. Stat. Ann. § 65-4105(d)(31) [since 2008] – also included in CS list in **RI** |
| | • 1–(3–[trifluoromethylphenyl]) piperazine | Kan. Stat. Ann. § 65-4105(d)(36) [since March 2010] – also included in CS lists in **HI, MI, ND, RI, SD, TX** |
| | • Butyl nitrite | Kan. Stat. Ann. § 65-4111(g) – also included in CS lists in **ID, ME, MA, MO, TN, WV**<br><br>Kan. Stat. Ann. § 65-4113(d)(1) |

[12] Professor Sarah French Russell in her article also catalogues some of the states that criminalize drugs that are not on the federal schedules, including benzylfentanyl, thenylfentanyl, and chorionic gonadotropin. *See* Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing, 43 UC Davis L. Rev. 1135, 1205-1213 (2010). This article may be a helpful starting point to research a state's mismatch, but practitioners should confirm that her research remains current.

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|---|---|---|
| | • Propylhexedrine<br>• Pseudoephedrine<br>• Ephedrine<br>• 1–Pentyl–3–(1–naphthoyl)indole<br>• 1–Butyl–3–(1–naphthoyl)indole | Kan. Stat. Ann. § 65-4113(f) – also included in CS lists in **AR, ID, IN, IA, LA, MN, MS, MO, OK, WV, WI**<br><br>Kan. Stat. Ann. § 65-4113(e) – also included in CS lists in **AZ, AR, CO, ID, IL, IA, LA, MI, MN, MS, MO, MT, NE, OH, OK, SD, WV, WI**<br><br>Kan. Stat. Ann. § 65-4105(d)(33) [since 2010, but added to federal schedules in March 2011]<br><br>Kan. Stat. Ann. § 65-4105(d)(34) [since 2010, but added to federal schedules in March 2011] |
| **California** | • Khat<br>• Chorionic gonadotropin<br>• Geometrical isomers of controlled substances<br>• Androisoxazole<br>• Dihydromesterone | CHSC § 11055(d)(7) (prohibiting "[k]hat, which includes all parts of the plant classified botanically as Catha Edulis"); *see also Coronado v. Holder*, 747 F.3d 662, 667 (9th Cir. 2014); *see also, e.g., United States v. Hassan*, 578 F.3d 108, 114 (2d Cir.2008) ("Khat itself is not a controlled substance under United States law.")<br><br>CHSC § 11056(f)(32); *see also Coronado v. Holder*, 747 F.3d 662, 666 n.1 (9th Cir. 2014)<br><br>CHSC § 11033; *see also Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007)<br><br>CHSC § 11056(f)(1); *see also Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078 n.6 (9th Cir. 2007)<br><br>CHSC § 11056(f)(8) |
| **Connecticut** | • Benzylfentanyl | Conn. Agencies Regs. § 21a-243-7(a)(10), para. 52 [from 1987 thru at least 2010]; *see also, e.g., U.S. v.* |

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|---|---|---|
| | | *Madera*, 521 F.Supp.2d 149, 154-55 (D. Conn. 2007) |
| | • Thenylfentanyl | Conn. Agencies Regs. § 21a-243-7(a)(10), para. 52 [from 1987 thru at least 2010]; *see also, e.g., U.S. v. Madera*, 521 F.Supp.2d 149, 154-55 (D. Conn. 2007) |
| **Michigan** | • 3-Chlorophenylpiperazine (MCPP) | MCL § 333.7212(1)(j) |
| | • 1-(3-Trifluoromethylphenyl)piperazine (TFMPP) | MCL § 333.7212(1)(k) |
| | • 4-Methyl-alpha-pyrrolidinobutyrophenone (MPBP) | MCL § 333.7212(1)(o) |
| | • 5,6-Methylenedioxy-2-aminoindane (MDAI, Woof-woof) | MCL § 333.7212(1)(q) |
| | • Naphyrone (Naphthylpyrovalerone) (NRG-1, Rave) | MCL § 333.7212(1)(r) |
| | • Pyrovalerone (1-(4-Methylphenyl)-2-(1-pyrrolidinyl)-1-pentanone) | MCL § 333.7212(1)(s) |
| | • Salvia Divinorum | MCL § 333.7212(1)(v) |
| | • Edrisal tabs | MCL § 333.7216(1)(a) |
| | • Genegesic caps | MCL § 333.7216(1)(a) |
| | • Hovizyme tabs | MCL § 333.7216(1)(a) |
| | • Mediatric tabs | MCL § 333.7216(1)(a) |
| | • Mediatric liquids | MCL § 333.7216(1)(a) |
| | • Special formula 711 tabs | MCL § 333.7216(1)(a) |

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|---|---|---|
| | • Thora Dex No. 1 tab<br>• Thora Dex No. 2 tab<br>• Loperamide | MCL § 333.7216(1)(a)<br>MCL § 333.7216(1)(a)<br>MCL § 333.7220(1)(a) |
| **New York** | • Chorionic gonadotropin<br>• Ethylpropion<br>• HU-211 (Dexanabinol)<br>• Tramadol | N.Y. Pub. Health Law § 3306, Schedule III(g), previously Schedule II(j)& (h)(2) [since 1/12/90]<br>N.Y. Pub. Health Law § 3306, Schedule I(f)(15) [since 12/11/13]; 34 N.Y. Reg. 16 (Aug. 22, 2012) [since 8/7/12]<br>34 N.Y. Reg. 16 (Aug. 22, 2012) [since 8/7/12]<br>N.Y. Pub. Health Law § 3306, Schedule IV(f)(3) [since 8/27/12, but added to federal schedules on 8/18/14] |
| **Pennsylvania** | • Dextrorphan<br>• 1–(3–[trifluoromethylphenyl]) piperazine<br>• Propylhexedrine | 28 Pa. Code § 25.72(b)(1)(xiii); *see also Rojas v. Atty. Gen.*, 728 F.3d 203, 206 (3d Cir. 2013)<br>28 Pa. Code § 25.72(b)(6)(xxix); *see also Rojas v. Atty. Gen.*, 728 F.3d 203, 206 (3d Cir. 2013)<br>28 Pa. Code § 25.72(f)(2); *see also Rojas v. Atty. Gen.*, 728 F.3d 203, 206 (3d Cir. 2013) |
| **Virginia** | • Salvinorin A<br>• 4-methoxymethcathinone (other names: methedrone; bk-PMMA)<br>• 3,4-methylenedioxyethcathinone (other name: ethylone) (*note*: similar to 7540 but not exact match) | VA Code Ann. §§ 54.1-3445 – 54.1-3455 |

| | | |
|---|---|---|
| | • 4-methoxy-alpha-pyrrolidinopropiophenone (other name: MOPPP) (*note*: similar to 7498 but not exact match);<br>• 3,4-methylenedioxy-alpha-pyrrolidinopropiophenone (other name: MDPPP) (*note*: similar to 7540 but not exact match)<br>• 6,7-dihydro-5H-indeno-(5,6-d)-1,3-dioxol-6-amine (other name: MDAI)<br>• N,N-diallyl-5-methoxytryptamine (other name: 5-MeO-DALT) (*note*: similar to 7431, 7439 but not exact match)<br>• Methoxetamine (other names: MXE, 3-MeO-2-Oxo-PCE)<br>• 4-Fluoromethamphetamine (other name: 4-FMA)<br>• 4-Fluoroamphetamine (other name: F-4A)<br>• (2-aminopropyl)benzofuran (other name: APB)<br>• (2-aminopropyl)-2,3-dihydrobenzofuran (other name: APDB)<br>• Acetoxydimethyltryptamine (other names: AcO-Psilocin, AcO-DMT, Pscilacetin)<br>• Benocyclidine (other names: BCP, BTCP)<br>• N-1-benzyl-4-piperidyl]N-phenylpropanamide (other | |

| | | |
|---|---|---|
| | name: benzylfentanyl), its optical isomers, salts and salts of isomers<br><br>• N-1-(2-thienyl)methyl-4-piperidyl]-N-phenylpropanamide (other name: thenylfentanyl), its optical isomers, salts and salts of isomers<br><br>• 5-alpha-epoxy-6-methoxy-17-methylmorphinan-3-ol | |

## APPENDIX B

**SAMPLE**
**MOTION TO RECONSIDER TO TERMINATE REMOVAL PROCEEDINGS**
**(FOR FILING WITH THE BIA)**

This motion is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice. DO NOT TREAT THIS SAMPLE MOTION AS LEGAL ADVICE.

This motion is applicable to:

(1) Cases where INA § 237(a)(2)(B)(i) was the sole ground of removability and, as a result of *Mellouli v. Lynch*, the person is no longer deportable

- OR -

(B) Cases where a returning lawful permanent resident was charged with inadmissibility under INA § 212(a)(2)(A)(i)(II) and, as a result of *Mellouli v. Lynch*, the person is no longer inadmissible.

Accordingly, the motion seeks reconsideration and termination of removal proceedings.

This sample motion is intended for filing with the Board of Immigration Appeals (BIA). If the person did not appeal to the BIA, the motion should be filed with the Immigration Court and different regulations apply.

In cases where INA § 237(a)(2)(B)(i) or INA § 212(a)(2)(A)(i)(II) was one of two or more grounds of removability and the person is still removable, counsel should assess whether the person now is eligible for relief from removal as a result of *Mellouli v. Lynch*. These respondents would need to seek reconsideration and the opportunity to apply for relief from removal.

[If applicable: DETAINED]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | |
| _____, | ) | A Number:_____ |
| | ) | |
| Respondent. | ) | |
| | ) | |
| In Removal Proceedings. | ) | |
| _____ | ) | |

**MOTION TO RECONSIDER AND TERMINATE**
**IN LIGHT OF *MELLOULI v. LYNCH***

## I. INTRODUCTION

Pursuant to § 240(c)(6) of the Immigration and Nationality Act (INA), Respondent, _____, hereby seeks reconsideration in light of the Supreme Court's recent precedent decision in *Mellouli v. Lynch*, No. 13-1034, -- U.S. --, 2015 WL 2464047 (June 1, 2015). In *Mellouli*, the Supreme Court held a state drug paraphernalia conviction does not trigger deportability under INA § 237(a)(2)(B)(i) when the Department of Homeland Security (DHS) has not shown that the conviction related to a substance listed in the federal controlled substance schedules. 2015 WL 2464047 at 3. In so holding, the Court held that *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965)—requiring that state conviction must relate to a federally controlled substance to trigger removal—extends to paraphernalia offenses. *Id*. at *6-*7. Furthermore, the Court overruled the Board's contrary decision in *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009). *Id*.

The Board should reconsider its decision and terminate removal proceedings against Respondent because the Court's decision in *Mellouli v. Lynch* controls this case.

## II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

The Department of Homeland Security (DHS) alleged that Respondent [was admitted as a lawful permanent resident on _____ OR entered the United States as a _____ on or about ___]. *See* Notice to Appear, dated ____. DHS further charged Respondent with [deportability under INA § 237(a)(2)(B)(i) OR inadmissibility under INA § 212(a)(2)(A)(i)(II)] for having been convicted of a state offense "relating to a controlled substance (as defined in section 802 of title 21)….."

On _____, the Immigration Judge (IJ) found Respondent [deportable as charged OR inadmissible as charged]. *See* IJ Decision. This Board affirmed the IJ's decision on _____**.** *See* BIA Decision.

Pursuant to 8 C.F.R. § 1003.2(e), Respondent declares that:

(1) The validity of the removal order [has been or is OR has not been and is not] the subject of a judicial proceeding. [If applicable] The location of the judicial proceeding is: _____. The proceeding took place on: _____. The outcome is as follows _____.

(2) Respondent [is OR is not] currently the subject of a criminal proceeding under the Act. The current status of this proceeding is: _____.

(3) Respondent [is OR is not] currently the subject of any pending criminal proceeding under the Act.

## III. STANDARD FOR RECONSIDERATION

A motion to reconsider shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. § 1003.3(b)(1). In

general, a respondent may file one motion to reconsider within 30 days of the date of a final removal order. INA § 240(c)(6)(A)&(B), 8 C.F.R. § 1003.2(b)(2).

[If motion is filed within 30 days of BIA's decision] The Board issued its decision in Respondent's case on _____. This motion is timely filed within 30 days of the date of that decision].

[If more than 30 have elapsed since the date of the Board's decision] The Board issued its decision in Respondent's case on _____. The Board should treat the instant motion as a timely filed statutory motion to reconsider because Respondent merits equitable tolling of the time [if applicable: and numeric] limitations. *See* § IV.C., *infra*; *see also* 8 C.F.R. § 1003.1(d)(1)(ii) ("a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.").

## IV. ARGUMENT

In *Mellouli v. Lynch*, the Supreme Court addressed how immigration judges and this Board should interpret and apply INA § § 237(a)(2)(B)(i), which renders deportable a noncitizen who:

> . . . 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 802 of title 21),* other than a single offense involving possession for one's own use of 30 grams or less of marijuana . . ..

Emphasis added. [Insert if respondent is a returning LPR: Section 212(a)(2)(A)(i)(II) contains virtually identical language, rendering inadmissible any noncitizen "convicted of, or 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 802 of title 21).*"

The state of Kansas charged the petitioner in *Mellouli*, *supra*, with possessing four pills of Adderall stored in his sock. *Mellouli*, 2015 WL 2464047 at *3. In 2010, he pleaded guilty to misdemeanor possession of drug paraphernalia—the sock. *Id.* Significantly, the record of conviction did not mention Adderall or any other controlled substance by name. *Id.* at *5, n.5. Notwithstanding the absence of any mention of a controlled substance in the record of convictions, an IJ found the petitioner deportable under INA § 237(a)(2)(B)(i) for having been convicted of a drug paraphernalia offense "relating to" a controlled substance defined under federal law. *Id.* at *7. Both this Board and the Eighth Circuit Court of Appeals affirmed the IJ's deportability finding. *Id.*

The Supreme Court reversed, concluding that the petitioner was not deportable for an offense "relating to" a controlled substance under INA § 237(a)(2)(B)(j). In so holding, the Court rejected the Board's decision in *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009). In that case, the Board erroneously concluded that "a paraphernalia conviction 'relates to' any and all controlled substances, *whether or not federally listed*, with which the paraphernalia can be used." *Mellouli*, 2015 WL 2464047 at *7 (citing *Martinez-Espinoza*, 25 I&N Dec. at 120–121) (emphasis added).

The Court, however, endorsed and affirmed the Board's decision in *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965), in which the Board held that a state drug possession conviction cannot render a noncitizen deportable unless the government proves—through the record of conviction—that the conviction relates to a controlled substance under federal law, i.e., 21

U.S.C. § 802 and 21 C.F.R. §§ 1308.11 - 1308.15 (federal controlled substance schedules). *Mellouli*, 2015 WL 2464047 at *6.

The Supreme Court concluded that courts must apply the *Paulus* rule to determine whether any state drug conviction constitutes a deportable offense under INA § 237(a)(2)(B)(i). Specifically, the Court held that any finding of deportability under this statutory provision requires "a direct link between [a noncitizens] crime of conviction and a particular federally controlled drug." *See Mellouli*, 2015 WL 2464047 at *9; *see also id*. ("to trigger removal under § 1227(a)(2)(B)(i), the Government must connect an element of the [noncitizen's] conviction to a drug 'defined in [§ 802].').

[Insert if applicable] Like the petitioner in *Mellouli*, Respondent was charged with and found [deportable under INA § 237(a)(2)(B)(i) OR inadmissible under INA § 212(a)(2)(A)(i)(II)] for having been convicted of a drug paraphernalia offense "relating to" a controlled substance. *See* BIA Decision at p. __. As in *Mellouli*, there is no evidence that the state conviction relates to a federally controlled substance. In light of the Supreme Court's decision in *Mellouli*, the Board should grant reconsideration and terminate removal proceedings against Respondent.

[If more than 30 days have elapsed since the BIA's decision, insert section C]

## C. THE BOARD SHOULD TREAT THE INSTANT MOTION AS A TIMELY FILED STATUTORY MOTION BECAUSE RESPONDENT MERITS EQUITABLE TOLLING OF THE TIME AND NUMERICAL LIMITATIONS.

### 1. Standard for Equitable Tolling

A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, INA § 240(c)(6)(B), 8 C.F.R. § 1003.2(b)(2), or as soon as practicable after finding out about the decision. The Supreme Court issued its decision in *Mellouli* on June 1,

2015. Respondent is filing this motion as soon as practicable after finding out about the decision. [If available] *See* Declaration of Respondent (addressing circumstances leading to the instant motion).

The Supreme Court soon will address whether the deadline for filing a motion to reopen is subject to equitable tolling in *Mata v. Holder*, No. 14-185. Notably, both the petitioner in that case and the U.S. Solicitor General's Office agree that the 90-day statutory deadline for filing a motion to reopen is subject to equitable tolling, *see* Brief of Respondent Attorney General Eric J. Holder, *available at* http://www.scotusblog.com/case-files/cases/mata-v-holder/. The Court's decision will issue before the end of this term.

The Supreme Court concisely and repeatedly has articulated the standard for determining whether an individual is "entitled to equitable tolling." *See, e.g., Holland v. Florida*, 560 U.S. 631, 632 (2010). Specifically, an individual must show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). *See also Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 (2012); *Lawrence v. Florida*, 549 U.S. 327, 336 (2007). The Supreme Court also requires that those seeking equitable tolling pursue their claims with "reasonable diligence," but petitioners need not demonstrate "maximum feasible diligence." *Holland*, 560 U.S. at 653 (internal quotations omitted).

The Supreme Court's equitable tolling test accords with the test of all nine circuits that already have recognized that motion deadlines are subject to equitable tolling. *Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000) (Sotomayor, J.) ("[e]quitable tolling requires a party to pass with reasonable diligence though the period it seeks to have tolled") (internal citations omitted). *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005) (explaining that petitioner must "exercise

reasonable diligence in investigating and bringing the claim") (internal quotation omitted); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013) (explaining that equitable tolling is proper when (1) wrongful conduct by the opposing party prevented petitioner from timely asserting her claim or (2) extraordinary circumstances beyond petitioner's control made it impossible to file the claims on time); *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010) (defining equitable tolling as the doctrine that the statute of limitations will not bar a claim if, despite diligent efforts, litigant did not discover the injury until after the limitations period had expired") (internal quotation omitted); *Pervaiz v. Gonzales*, 405 F.3d 488, 489 (7th Cir. 2005) ("…[T]he test for equitable tolling, both generally and in the immigration context, is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could reasonably have been expected to have filed earlier") (citations omitted); *Ortega-Marroquin v. Holder*, 640 F.3d 814, 819-20 (8th Cir. 2011) (recognizing that equitable tolling of the motion deadline allows it to be treated as though it had been timely filed pursuant to the statute); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184-85 (9th Cir. 2001) (holding that "all one need show is that by the exercise of reasonable diligence the proponent of tolling could not have discovered essential information bearing on the claim") (internal quotation omitted); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002) (holding that BIA must consider noncitizens due diligence in evaluating whether equitable tolling of motion to reopen deadline is warranted); *Avila-Santoyo v. AG*, 713 F.3d 1357 (11th Cir. 2013) (en banc) (explaining that equitable tolling requires litigant to show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way). *Cf. Toora v. Holder*, 603 F.3d 282, 284 (5th Cir. 2010) (reviewing BIA decision in which BIA concluded "no equitable tolling excused the late [filed motion to reopen] because [petitioner] failed to exercise due diligence…"); *Bolieiro v. Holder*, 731 F.3d 32, 2013 U.S. 39

n.7 (1st Cir. 2013) ("Notably, every circuit that has addressed the issue thus far has held that equitable tolling applies to . . . limits to filing motions to reopen.").

**2. Respondent Is Diligently Pursuing [Her/His] Rights and Extraordinary Circumstances Prevented Timely Filing this Motion.**

There is rebuttable presumption that equitable tolling is read into every federal statute of limitations. *Holland v. Florida*, 560 U.S. 631, 631 (2010) (quoting *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)). This means that a deadline may be extended where the litigant acted diligently in pursuing his or her rights, but an extraordinary circumstance stood in the way. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Separately, but relatedly, the INA requires that a motion to reconsider "shall specify the errors or law or fact in the previous order and shall be supported by pertinent authority." INA § 240(c)(6)(B); 8 C.F.R. § 1003.23(b)(3).

Respondent first learned of the Supreme Court's decision in *Mellouli* on _____ when _____. *See* Respondent's Declaration. Respondent has exhibited the requisite "due diligence" and "extraordinary circumstances" because [she/he] is filing the instant motion to reopen within ___ days of discovering that [she/he] is not [deportable / inadmissible]. As set forth in Respondent's accompanying declaration, Respondent attempted to challenge the Immigration Judge's decision by appealing the decision to this Board, [if applicable] and later via Petition for Review to the U.S. Court of Appeals for the _____ Circuit. [If Respondent did not seek circuit review, explain the reason why and support claims with corroborating evidence if possible); If Respondent sought review, explained what happened].

## V. CONCLUSION

The Board should reconsider its prior decision in this case and terminate removal proceedings against Respondent.

Dated: _____ Respectfully submitted,

_____

[Attach proof of service on opposing counsel]