

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

OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? ¹	COMMENTS AND PRACTICE TIPS
Manufacture, sell, give, distribute or possess w/intent to manufacture, sell, give,	18.2-248	Yes	Yes ²	Yes, a crime related to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a <i>not guilty</i> plea to avoid determination that 251 plea will be considered a “conviction.” [See FN 8].

¹ Including, but not limited to: controlled substance offense, prostitution offense, commercialized vice offense, firearm offense, crimes of domestic violence, crimes of stalking, and crimes against children.

² An offense under Virginia Code § 18.2-248 is likely to be charged as an aggravated felony under 8 U.S.C. § 1101(a)(43) (B) (illicit trafficking in a controlled substance) and a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). However, an immigration attorney could argue that the Virginia statute is overbroad under both the aggravated felony trafficking ground and the controlled substance removability ground because it criminalizes offenses involving controlled substances in the Virginia schedules that are not included in the federal drug schedules found at 21 U.S.C. § 802 and, therefore, cannot trigger immigration consequences. See *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Descamps v. United States*, 133 S. Ct. 2276 (2013). For example, salvia and numerous other substances are included in the Virginia drug schedules and not in the federal drug schedules. However, there is no binding decision on the overbreadth of the Virginia controlled substance schedules and such an argument is relatively untested and presents many legal hurdles. These include needing to prove that there is a “realistic probability” that the state government prosecutes people based on controlled substances that are not included on the federal schedules. See *Matter of Mendoza Osorio*, 26 I&N Dec. 703 (BIA 2016); *Matter of Ferreira*, 26 I. & N. Dec. 415 (BIA 2014). Furthermore, if the statute of conviction (Virginia Code § 18.2-248 or Virginia Code § 18.2-250) is considered to be “divisible,” the Immigration Judge may look at the record of conviction to determine whether the defendant was convicted of possessing a particular federally controlled substance. See Practice Tips for ways to preserve relevant defenses for your non-citizen client. For more practice tips regarding immigration consequences of Virginia drug offenses, see CAIR Coalition practice advisory on this issue at <http://www.caircoalition.org/wp-content/uploads/2015/07/CSA-Practice-Advisory-Final-20150720.pdf>.

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

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distribute controlled subst. or imitation controlled substance					Keep reference to particular controlled substance(s) out of record of conviction. ³ However, if controlled substance that serves as the basis for conviction is <i>not</i> in the federal drug schedules, emphasize that fact in the record.
Transporting controlled substances into the Comm.	18.2-248.01	Yes	Probably, under 8 U.S.C. § 1101(a)(43)(B) [but see FN 2]	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a <i>not guilty</i> plea to avoid determination that 251 plea will be considered a “conviction.” [See FN 8]. Keep reference to particular controlled substance(s) out of record of conviction

³ For immigration purposes, the “record of conviction” includes the statutory definition of the offense, the charging document, the written plea agreement, the transcript of the plea colloquy and any explicit factual finding by the trial judge to which the defendant consented. *See Shepard v. United States*, 544 U.S. 13 (2005). Immigration practitioners argue that the lab report or certificate should *not* be included in this record. For more practice tips regarding immigration consequences of Virginia drug offenses, see CAIR Coalition practice advisory on this issue at <http://www.caircoalition.org/wp-content/uploads/2015/07/CSA-Practice-Advisory-Final-20150720.pdf>.

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					<p>[see FN 3 for discussion of what documents are considered to be within the record of conviction]. However, if controlled substance that serves as the basis for conviction is <i>not</i> in the federal drug schedules, emphasize that fact in the record.</p> <p>Seek alternative plea to 18.2-248.1(a)(1), 18.2-248.1(b), 18.2-250 or 18.2-250.1 to decrease likelihood that conviction will be deemed an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) (<i>note</i>: although none of these are likely to be entirely without immigration consequences).</p>

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Sale, gift, distribution or possession with intent to sell, give or distribute marijuana	18.2-248.1(a)	Yes	Probably not if conviction under 248.1(a)(1); Possibly not if conviction under 248.1(a)(2); Yes if conviction under 248.1(a)(3), under 8 U.S.C. § 1101(a)(43)(B) ⁴	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) ⁵	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a <i>not guilty</i> plea to avoid determination that 251 plea will be considered a “conviction.” [See FN 8]. Keep reference to remuneration out of record of conviction (alternatively, make it clear that there was no intent to profit, if applicable) [see FN 3 regarding what constitutes the record].

⁴ There is a strong argument that a conviction under Va. Code § 18.2-248.1(a)(1) is not an aggravated felony because the Supreme Court held in *Moncrieffe v. Holder* that if “a noncitizen’s conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the conviction is not for an aggravated felony under the INA.” 133 S.Ct. 1678, 1693-94 (2013). Under Va. Code § 18.2-248.1(a)(1) and (2), a person can be convicted for distributing a small amount of marijuana without remuneration. Therefore, under *Moncrieffe* it is probably not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). On the other hand, convictions under Va. Code § 18.2-248.1(a)(3) are more likely to be considered aggravated felonies.

⁵ In *Cespedes v. Holder*, 542 Fed.Appx. 227, 229 (4th Cir. 2013) (unpublished), the Fourth Circuit agreed with the Board of Immigration Appeals that a conviction under Virginia Code § 18.2-248.1 was a crime relating to a controlled substance and could not fall within the exception to the controlled substance grounds of deportability at 8 USC § 1227(a)(2)(B)(i) for a single offense involving mere possession of a small amount of marijuana.

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					Include affirmative statement of small amount of marijuana if applicable; if not, keep record vague.
	18.2-248.1(b)	Yes	Probably not, under 8 U.S.C. § 1101(a)(43)(B) [see FN 4]	Yes, a crime relating to a controlled substance	Plead to 18.2-248.1(a)(1) or 18.2-248.1(b) to have strongest argument that offense is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) (<i>Note:</i> such a plea <i>would still have</i> immigration consequences under the controlled substances and CIMT grounds of deportability/inadmissibility).
	18.2-248.1(c)	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(B) [see FN 4]	Yes, a crime relating to a controlled substance	
Illegal stimulants and steroids	18.2-248.5(A)	Yes	Yes, under 8 U.S.C. §1101(a)(43)(B)	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a <i>not guilty</i> plea to avoid determination that 251 plea will be considered a “conviction.” [See FN 8].
	18.2-248.5(B)	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(B)	Yes, a crime relating to a controlled substance, , 8 U.S.C. § 1227(a)(2)(B)	Seek alternative plea to simple possession under 18.2-250 to avoid aggravated felony conviction (<i>Note:</i> such a plea <i>would still have</i> immigration

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					consequences under the controlled substances grounds of deportability/inadmissibility).
Possession of controlled substances	18.2-250	Maybe ⁶	No (unless controlled substance is flunitrazepam or offense is explicitly prosecuted as a recidivist offense) ⁷	Yes, a crime relating to a controlled substance, , 8 U.S.C. § 1227(a)(2)(B) (<i>but see</i> FN2)	Seek sentencing under 18.2-251 first-time offender diversion program; to avoid a “conviction” for immigration purposes ensure that client enters <i>not guilty</i> plea and does not admit or stipulate to facts sufficient. ⁸ Keep reference to particular controlled substance(s) out of record of conviction [see FN 3 for discussion of what

⁶ Many simple possession offenses do not constitute crimes involving moral turpitude because they contain no *mens rea* element. *Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1968). However, this statute contains the elements of “knowingly” or “intentionally” possessing a controlled substance and therefore may be considered a CIMT. *See, e.g., Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997).

⁷ Generally, a state offense must have an element of “trafficking” to be deemed an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). *See Lopez v. Gonzalez*, 549 U.S. 47 (2006); *Matter of Davis*, 20 I&N 536, 541 (BIA 1992). Virginia Code § 18.2-250 has no such trafficking element and, therefore, it is very unlikely that a conviction under the statute could be charged as an aggravated felony for immigration purposes. However, federal law criminalizes a small number of simple possession offenses as drug trafficking aggravated felonies even without the presence of the element of trafficking. *See Lopez*, 549 U.S. at 55 n. 6, This group includes recidivist offenses where it is clear in the state record of conviction that a criminal penalty is being assessed as a result of recidivism and the defendant has been given an opportunity to contest that determination. *Carachuri-Rosendo*, 130 S. Ct. 2577 (2010).

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					documents constitute the record of conviction]. Keep references to recidivism or previous controlled substance related convictions out of the record of conviction to preserve argument that offense is not an aggravated felony. Avoid any reference to flunitrazepam in the record of conviction to avoid determination that offense is aggravated felony.
Possession of marijuana (first	18.2-250.1	Maybe (see FN6)	No	Yes, a crime relating to a controlled substance, 8 U.S.C. §	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a <i>not guilty</i> plea to avoid

Possession of flunitrazepam also falls within the group of offenses that may be prosecuted as a federal drug trafficking offense. See 21 U.S.C. § 844(a). Thus, in a very narrow range of cases, simple possession offenses might constitute aggravated felonies.

⁸ See CAIR Coalition Practice Advisory, “Avoiding or Withdrawing a ‘Conviction’ for Immigration Purposes,” for more information on the ways in which a first offender disposition can be structured to avoid a “conviction” for immigration purposes: <http://www.caircoalition.org/wp-content/uploads/2016/04/4.28.16-PA-Avoiding-or-Withdrawing-Conviction.pdf>.

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offense)				1227(a)(2)(B); for the purposes of the grounds of deportability a single offense involving possession for one's own use of 30 grams or less of marijuana under 8 U.S.C. § 1227(a)(2)(B) constitutes an exception; this exception does <i>not</i> apply to the controlled substances ground of inadmissibility at U.S.C. § 1182(a)(2)(A)	<p>determination that 251 plea will be considered a "conviction." [See FN 8].</p> <p>Create affirmative record that amount of marijuana involved was 30 grams or less of marijuana to avoid controlled substance grounds of deportability (<i>note</i> that this will only avoid these grounds for first offenses and will not avoid the grounds of inadmissibility). If this is impossible, do not emphasize amount in record.</p> <p>Seek sentencing under 18.2-251 first-time offender diversion program with a <i>not guilty</i> plea to avoid determination that 251 plea will be considered a "conviction." [See FN 8.]</p>

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Possession of marijuana (second or subsequent offense)	18.2-250.1	Maybe [see FN6]	Possibly under 8 U.S.C. § 1101(a)(43)(B) ⁹	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)	Keep any previous record for simple possession out of record of conviction to avoid possible determination that offense is an aggravated felony based on recidivism (See FN7).
Possession and distribution of flunitrazepam	18.2-251.2	Yes	Yes, under 8 U.S.C. §1101(a)(43)(B)	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a <i>not guilty</i> plea to avoid determination that 251 plea will be considered a “conviction.” [See FN 8]. Seek alternate plea to 18.2-250 and eliminate any reference to flunitrazepam in the record to avoid offense being deemed an aggravated felony (<i>note</i> : such a plea <i>would still have</i> immigration consequences under the controlled

⁹ Recidivist possession offenses can constitute drug trafficking felonies under federal law. 21 U.S.C. § 844(a). However, the Supreme Court has held that a second controlled substances act offense does not correspond to the federal recidivist felony ground unless a prosecutor explicitly charges a defendant as a recidivist. *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577, 2587 (2010). Thus, Va. Code 18.2-250.1 would only be deemed an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) if it was explicitly charged as a recidivism offense under state law..

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					substances ground of deportability).
Defeating drug and alcohol screening tests	18.2-251.4(2)	Probably	No	Probably not a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)	
Distribution of certain drugs to persons under 18	18.2-255(A)	Probably	Probably under 8 U.S.C. § 1101(a)(43)(B) (arguably not if offense is specified as marijuana) [see FN 4]	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a <i>not guilty</i> plea to avoid determination that 251 plea will be considered a “conviction.” [See FN 8]. Keep reference to particular controlled substance(s) distributed out of record of conviction [see FN 3 regarding what constitutes the record]. If offense involved was marijuana, specify as such but do not include amount or whether
	18.2-255(B)	Probably	Possibly, under 8 U.S.C. § 1101(a)(43)(B) ¹⁰	Yes, a crime relating to a controlled substance [but see	

¹⁰ Under 21 U.S.C. § 841(a)(2), distribution of a “counterfeit” substance can constitute a drug trafficking offense but only if the “counterfeit” substance is itself a “controlled substance.” *U.S. v. Sampson*, 140 F.3d 585 (4th Cir. 1998). Thus, in order for Va. Code 18.2-255(B) to constitute an aggravated felony

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				FN2]	remuneration was exchanged to preserve defense against aggravated felony designation If conviction under (B), make clear in record that the imitation substance was not itself a “controlled substance” under the federal controlled substances act.
Distribution, sale or advertisement of paraphernalia	18.2-255.1	Possibly ¹¹	Probably not, under 8 U.S.C. § 1101(a)(43)(B) ¹²	Possibly a crime relating to a controlled	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a <i>not guilty</i> plea to avoid

under 8 U.S.C. § 1101(a)(43)(B), the “imitation controlled substance” at issue would still need to be a controlled substance under federal law. If the imitation substance is not a controlled substance, an immigration practitioner could argue that the statute is overbroad and not a match for a federal drug trafficking aggravated felony. *See Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); FN 2.

¹¹ While the BIA has held that the knowing distribution of narcotics constitutes a crime involving moral turpitude, *Matter of Khourn*, 211 I. & N. Dec. 1041 (BIA 1997), this statute criminalizes the sale or distribution of written materials concerning the usage of narcotics. An immigration practitioner could therefore argue that this is one step removed from the type of statute addressed in *Matter of Khourn* and should not constitute a crime involving moral turpitude.

¹² An immigration practitioner would have a strong argument that this offense cannot constitute a “drug trafficking aggravated felony” because it does not match the “common sense” definition of drug trafficking, as described by the Supreme Court in *Lopez v. Gonzales*, 549 U.S. 47 (2006). However, under 21 U.S.C. § 863(a), federal law does punish the sale or offering for sale of drug paraphernalia as a felony offense. Although Va. Code 18.2-255.1

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to minor				substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	determination that 251 plea will be considered a “conviction.” [See FN 8]. Keep reference to particular controlled substance(s) out of record of conviction [see FN 3 regarding what constitutes the record] If applicable, create record that printed material contained only small mention of paraphernalia among other items/issues unrelated to controlled substances.
Sale of drugs near certain properties	18.2-255.2	Probably	Possibly, under 8 U.S.C. § 1101(a)(43)(B) [but see FN 2 and 4]	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN2]	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a <i>not guilty</i> plea to avoid determination that 251 plea will be considered a “conviction.” [See FN 8]. Keep reference to particular controlled

arguably prohibits the offering for sale of drug paraphernalia, an immigration practitioner could argue that the statute is overbroad because it appears to criminalize the distribution of printed material that may be unrelated to controlled substances other than the presence of a drug paraphernalia-related advertisement.

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					<p>substance(s) out of record of conviction [see FN 3 regarding what constitutes the record]</p> <p>Plead instead to 18.2-248.1(a)(1) or 18.2-248.1(b) to have strongest argument that offense is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) (<i>Note: such a plea would still have immigration consequences under the controlled substances and CIMT grounds of deportability/inadmissibility</i>).</p>
Keeping drug house	18.2-258	Probably	Possibly (but probably not) under 8 U.S.C. §1101(a)(43)(B) ¹³	Probably a crime relating to a controlled substance, 8 U.S.C. §	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a <i>not guilty</i> plea to avoid determination that 251 plea will be

¹³ An immigration practitioner would have a strong argument that this offense cannot constitute a “drug trafficking aggravated felony” because it does not match the “common sense” definition of drug trafficking, as described by the Supreme Court in *Lopez v. Gonzales*, 549 U.S. 47 (2006). However, the federal definition of “drug trafficking crime” is set forth in 8 U.S.C. § 924(c)(2) and includes the federal statute for “Maintaining drug-involved premises” under 21 U.S.C. § 856. That statute makes it a felony to knowingly operate a place for the purpose of “manufacturing, distributing, or using any

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				1227(a)(2)(B) [but see FN 2]	considered a “conviction.” [See FN 8]. Keep reference to particular controlled substance(s) out of record of conviction [see FN 3 regarding what constitutes the record] To avoid aggravated felony, preserve argument (discussed in FN 12) by ensuring that conduct in record does not match that included in related federal offense.
Obtaining drugs by fraud, deceit, or forgery	18.2-258.1(A)	Yes	Possibly under 8 U.S.C. § 1101(a)(43)(B) ¹⁴	Yes, a crime relating to a controlled substance, 8 U.S.C. §	If first offender, seek sentencing under 18.2-251 first-time offender diversion program with a <i>not guilty</i> plea to avoid

controlled substance,” and “managing or controlling” the property while “knowingly and intentionally” making it available for the “unlawful[] manufacturing, storing, distributing, or using a controlled substance.” An immigration practitioner could argue that Va. Code 18.2-258 is overbroad and therefore cannot constitute a drug trafficking aggravated felony because it appears to criminalize at least some conduct that is not prohibited by the federal statute, such as an owner having knowledge that his property is “frequented by persons under the influence of illegally obtained controlled substances.”

¹⁴ In order to constitute an aggravated felony, the offense elements would likely need to match those in the related federal offense, 21 U.S.C. § 843(a)(3).

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OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY? ¹	COMMENTS AND PRACTICE TIPS
			<p>Yes, under 8 U.S.C. § 1101(a)(43)(M) if the loss to the victim exceeds \$10,000</p> <p>Possibly, under 8 U.S.C. § 1101(a)(43)(R) if the sentence imposed is at least one year</p> <p>Possibly under (G) if sentence imposed is at least one year</p>	<p>1227(a)(2)(B) [but see FN 2]¹⁵</p>	<p>determination that 251 plea will be considered a “conviction.” [See FN 8].</p> <p>Keep reference to particular controlled substance(s) out of record of conviction [see FN 3 regarding what constitutes the record] unless offense relates to 30 grams or less of marijuana for personal use and is client’s first drug offense, which is an exception to the controlled substances act ground of deportability. In that case, make clear that drug was marijuana and amount was 30 grams or less.</p> <p>However, if controlled substance that serves as the basis for conviction is <i>not</i> in the federal drug schedules, emphasize</p>

¹⁵ An offense under this statute is most likely a crime relating to a controlled substance offense. However, an immigration attorney could argue that the Virginia statute is overbroad because it criminalizes controlled substances that are not included in the federal drug schedules found at 21 U.S.C. § 802. See FN 2; *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015).

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	18.2-258.1(B)	Yes	Probably, under 8 U.S.C. § 1101(a)(43)(B) Probably, under (M) if the loss to the victim exceeds \$10,000	Yes, a crime relating to a controlled substance	that fact in the record. Make clear in record of conviction that loss to the victim was less than \$10,000 to avoid fraud aggravated felony ground; otherwise, do not emphasize amount of loss in record. Keep sentence under one year to avoid theft aggravated felony ground.
	18.2-258.1(C)	Yes	Yes, under 8 U.S.C. § 1101(a)(43) (B) Possibly, under (M) if the loss to the victim exceeds \$10,000	Yes, a crime relating to a controlled substance Possibly 8 U.S.C. 1182(a)(2)(C) if reason to believe drug trafficking	To avoid an aggravated felony, consider alternative plea to 18.2-95 grand larceny or 18.2-96 petit larceny with sentence under one year (but note that this will not avoid the CIMT grounds of removability)
	18.2-258.1(D)	Yes	Possibly, under 8 U.S.C. § 1101(a)(43)(B)	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but	

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			Possibly, under (M) if the loss to the victim exceeds \$10,000	see FN 2]	
	18.2-258.1(E)	Probably	Possibly, under (R) if the sentence imposed is at least one year	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	
	18.2-258.1(F)	Probably	Possibly, under (R) if the sentence imposed is at least one year	Yes, a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	
Possession of controlled paraphernalia	54.1-3466	Probably	No	Possibly a crime relating to a controlled substance, 8 U.S.C. §	If possession of paraphernalia relates to a single instance of possession for one's own use of less than 30 grams of marijuana, emphasize that fact in record

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				1227(a)(2)(B) [but see FN 2] ¹⁶	to preserve argument that the controlled substances ground of deportability is inapplicable. <i>See Matter of Davey</i> , 26 I. & N. Dec. 37 (2012). Otherwise, do not specify in the record the type of drug associated with the possession of paraphernalia or the type of paraphernalia [see FN 3 regarding what constitutes the record].
Sale, etc., of drug paraphernalia	18.2-265.3(A)	Probably	Possibly, under 8 U.S.C. § 1101(a)(43)(B) [but see FN 2 and FN 4]	Probably a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but	Plead to 18.2-265.3(C) and keep reference to remuneration out of record of conviction to demonstrate that conviction should not be considered an aggravated felony because it is

¹⁶ In *Mellouli v. Lynch*, the Supreme Court held that in order to trigger deportability under 8 U.S.C. § 1227(a)(2)(B)(i) (crime relating to a controlled substance), the government must prove the connection between a drug paraphernalia conviction and a substance listed in the federal drug schedules at 21 U.S.C. § 802. *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015). The *Mellouli* Court held that a state statute is overbroad if it criminalizes controlled substances that are not criminalized under 21 U.S.C. § 802 and, therefore, cannot trigger immigration consequences. There is currently no binding decision applying *Mellouli* to the Virginia controlled substance schedules. However, an immigration attorney could argue that a conviction under this statute is overbroad as it includes paraphernalia related to controlled substances criminalized in Virginia and not in the federal CSA (see FN 2).

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				see FN 2]	inconsistent with 21 U.S.C. § 863(a), which makes sale of drug paraphernalia a drug trafficking offense under federal law. Keep reference to particular controlled substance(s) related to paraphernalia out of record of conviction [see FN 3 regarding what constitutes the record].
	18.2-265.3(B)	Probably	Possibly, under 8 U.S.C. § 1101(a)(43)(B) [but see FN 2 and FN 4]	Probably a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	
	18.2-265.3(C)	Probably	Probably not under 8 U.S.C. § 1101(a)(43)(B), if record of conviction does not show any evidence of sale of controlled substances or attempted sale (e.g. element of remuneration)	Probably a crime relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	
Advertisement of	18.2-	Possibly (See FN 10)	Probably not,	Probably a crime	Keep reference to particular controlled

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drug paraphernalia	265.5		under 8 U.S.C. § 1101(a)(43)(B) [See FN 12]	relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B) [but see FN 2]	substance(s) out of record of conviction [see FN 3 regarding what constitutes the record].

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