

CRIMES INVOLVING CONTROLLED SUBSTANCES

18.2-248.1 Sale, gift, distribution or possession with intent to sell, give, or distribute controlled substance

Elements

- sell, give, distribute or possess with intent to sell, give or distribute marijuana
- (a) violation with respect to:
 - (1) less than ½ oz. of marijuana is class 1 misdemeanor
 - (2) more than ½ oz but not more than 5 pounds is class 5 felony
 - (3) more than 5 pounds is felony punishable by 5-30 years
- if prove that gave, distributed, or possessed with intent to give or distribute marijuana only as an accommodation to another and not with intent to profit from any consideration received or expected nor to induce the recipient or intended recipient of the marijuana to use or become addicted to or dependent upon such marijuana, class 1 misdemeanor
- (b) class 4 felony
 - give, distributes, or possesses marijuana
 - as an accommodation and not with intent to profit
 - to an inmate of a state or local correctional facility
- (c) imprisonment of 5-30 years
 - manufactures marijuana OR
 - possesses marijuana with intent to manufacture such substance
 - not for his own use
- (d) minimum 5 year sentence for third or subsequent felony offense under this section

Crime involving moral turpitude

This offense is probably a crime involving moral turpitude because the statute has a knowing requirement. *See Josephs v. Comm.*, 390 S.E.2d 491 (Va. Ct. App. 1990) (reasoning that possession of a controlled drug gives rise to defendant's knowledge of its character). The BIA has held that where drug distribution or possession offenses involve a knowing requirement, they are crimes involving moral turpitude. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs was a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946). Therefore, a conviction under this statute is probably a crime involving moral turpitude.

Aggravated felony

(a)(1) Gift or distribution or possession with intent to give, distribute less than ½ oz of marijuana

Controlled substances

A conviction under this section of the statute, which punishes distribution, etc. of ½ oz. of marijuana or less, is not necessarily an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). This section of the statute does not require remuneration, so the offense therefore does not come within the common understanding of an "illicit trafficking offense," which requires some commercial element. *See Lopez v. Gonzales*, 127 S. Ct.

625 (2006); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). The Virginia statute punishes the gift of less than ½ oz. Also, under Virginia law, the definition of the term “distribute” extends well beyond the transfer of drugs for remuneration. *See Wood v. Comm.*, 197 S.E.2d 200 (Va. 1973) (interpreting the term “distribute” a predecessor to Va. Code Ann. § 18.2-248.1 to include “not only the illegal sale, barter, exchange or gift of controlled drugs but also any delivery or transfer, actual or constructive, of possession or title to such drugs from one person to another.”). In addition, in the federal statutes, the term “distribution” does not necessarily mean “sale” because 21 U.S.C. § 841(d)(3) gives a lighter punishment to distribution for no remuneration of a small amount of marijuana. *Id.*; *see also* 21 U.S.C. §§ 802(11), (8) (defining distribution of a controlled substance as delivering such substance, and defining delivering as the actual, constructive, or attempted transfer of a controlled substance). Therefore, not all offenses punishable under this statute have a commercial nature such that it is a trafficking offense.

In addition, the offense is not a felony punishable under 18 U.S.C. § 924(c)(2) as required by 8 U.S.C. § 1101(a)(43)(B). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); *Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990). Under 21 U.S.C. § 841(b)(4), a violation for distribution of a small amount of marijuana for no remuneration is treated as a simple possession offense under 21 U.S.C. § 844, which is a misdemeanor offense in the federal system. Because it would not be punishable as a felony in the federal system, it is not an aggravated felony. *Lopez v. Gonzales*, 127 S. Ct. 625 (2006).

A conviction under this section of the statute is divisible. A conviction under this section of the statute is likely to be an aggravated felony if the record of conviction reflects that the offense had a commercial element. *See Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). However, the BIA has held that for a drug trafficking offense to constitute an aggravated felony, it must carry a maximum punishment of more than one year. *See Matter of Davis*, 20 I&N Dec. 536 (BIA 1992); *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002); *Matter of Santos-Lopez*, 23 I&N Dec. 419 (BIA 2002). The Virginia offense is punishable as a class 1 misdemeanor and therefore does not exceed punishment of one year. Nonetheless, the Supreme Court in *Lopez* reasoned that any drug distribution offense that has a commercial element is an aggravated felony because it involves illicit trafficking in a controlled substance. Therefore, if the record of conviction reflects that the distribution was commercial in nature, it is probably an aggravated felony under 8 U.S.C. § 1101(a)(43)(B).

(a)(2) and (3) Gift or distribution or possession with intent to give, distribute more than ½ oz of marijuana

Controlled substances

Convictions under these sections are probably aggravated felonies because they are punishable as felonies under 18 U.S.C. § 924(c)(2) as required by 8 U.S.C. § 1101(a)(43)(B). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 841(a) punishes distribution, dispensing, or possession with intent to distribute a controlled substance. Also, the conviction is a felony under both the state and federal systems. Therefore, it is an aggravated felony. It is possible that the gift or distribution of a little more than ½ oz. of marijuana for no remuneration is not an aggravated felony because it

is not punishable as a felony under the federal statutes and does not involve illicit trafficking in a controlled substance. *See* analysis for Va. Code Ann. § 18.2-248.1(a)(1).

(a) Accommodation section

Controlled substances

An offense under the section of (a) of the statute, which punishes a defendant for giving, distributing or possessing with intent to give or distribute marijuana as an accommodation to another individual and not to profit thereby, is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). A conviction under this section would not meet the definition of illicit trafficking, since it explicitly states that a defendant would seek no remuneration for the drug. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). Also, the offense is not punishable as a felony under either state or federal law. *See Lopez*, 127 S. Ct. 625. Under 21 U.S.C. § 841(b)(4), a conviction for distribution of a small amount of marijuana for no remuneration is treated as a simple possession offense under 21 U.S.C. § 844, which is a misdemeanor offense. Therefore, a conviction under this statute is not a drug trafficking aggravated felony under 8 U.S.C. § 1101(a)(43)(B).

(b) Accommodation for inmate

Controlled substances

A conviction under this section of the statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). A conviction under this section would not meet the definition of illicit trafficking, since it explicitly states that a defendant would seek no remuneration for the drug. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). In addition, a conviction under this section of the statute is not an aggravated felony because it is not punishable as a felony in the federal system. *See Lopez*, 127 S. Ct. 625. 21 U.S.C. § 841(a) punishes distribution, dispensing, or possession with intent to distribute a controlled substance. 21 U.S.C. § 841(b)(4) treats distribution for no remuneration as a misdemeanor under the federal system.

(c) Manufacture or possession with intent to manufacture

Controlled substances

A conviction under this section of the statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because the offense is punishable as a felony under federal law. Manufacturing and possessing with intent to manufacture a drug are both punished as felonies under 18 U.S.C. § 924(c)(2), and therefore meet the definition of aggravated felony under 8 U.S.C. § 1101(a)(43)(B). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). Manufacturing and possessing with intent to manufacture are punished as felonies under 21 U.S.C. § 841(a).

(d) Third or subsequent offense

Controlled substances

A conviction under this section of the statute may be an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). If the defendant is convicted of a subsequent offense under the Controlled Substances Act, federal laws treat the subsequent offense as a felony. *See* 21 U.S.C. § 841(b)(3). However, in order for this offense to be an aggravated felony, it is

probably necessary for the record of conviction from the prior offense to be part of the record of conviction for the subsequent offense, because this is required by the federal system. *See Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006).

If the original offense is a felony under federal law, any subsequent offense is an aggravated felony under federal law. *See* analysis for sections of Va. Code Ann. § 18.2-248.1.

Other immigration consequences

An conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because this statute does not punish simple possession but rather possession with intent to distribute, give, sell, etc., it is not likely to come within the exception.

18.2-248.01 Transporting controlled substances into the Commonwealth

Elements

- transport into the Commonwealth
- by any means
- with intent to sell or distribute
- one ounce or more of cocaine, coca leaves or any salt, compound, derivative or preparation thereof

Crime involving moral turpitude

This offense is a crime involving moral turpitude because it punishes knowing transportation of drugs, since there is an intent to sell element in the statute. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs was a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946).

Aggravated felony

Controlled substances

Transportation with intent to sell or distribute is an aggravated felony because it is punishable as a felony under the 18 U.S.C. § 924(c) as required by 8 U.S.C. § 1101(a)(43)(B). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). This offense is similar to importation of a controlled substance, which is punished under 21 U.S.C. § 952 (importation of controlled substances into the territory of the U.S.). The fact that the Virginia statute does not punish importation into the U.S. is of no importance in determining whether the substantive elements match up because the importation into the U.S. is merely a federal jurisdiction requirement. *See Matter of Vasquez-Muniz*, 23 I&N Dec. 1415 (BIA 2000). In addition, this offense is an "illicit trafficking in a controlled substance" offense because the offense is commercial in nature. *See Lopez*, 127 S. Ct. 625; *Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because this statute does not punish simple possession but rather transportation with intent to distribute, give, sell, etc., and the drug is not marijuana, it does not come within the exception.

18.2-248.5 Illegal stimulants and steroids

Elements

(A) punishment for 1-10 years

- knowingly manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give or distribute
- any anabolic steroid

(B) class 1 misdemeanor

- knowingly sell or otherwise distribute
- without prescription
- to a minor any pill, capsule, or tablet containing any combination of caffeine and ephedrine sulfate

Crime involving moral turpitude

This offense is a crime involving moral turpitude because it punishes knowing transportation of drugs, since there is an intent to sell element to the statute. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs to be a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946).

Aggravated felony

(A) Manufacture, sell, give, distribute, or possess with intent to do above
Controlled substances

A conviction under this section of the statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). Manufacture, sale, distribution, or possession with intent to distribute are punishable as felonies in the federal system. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); 21 U.S.C. § 841(a) (punishing manufacture, sale, distribution, or possession with intent to distribute). Anabolic steroids are on federal schedule III, and the Virginia offense punishes manufacturing, selling, giving or possession with intent to manufacture, sell, give or distribute such steroids.

(B) Sale or distribution to minor
Controlled substances

A conviction under this section of the statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because selling or distributing to a minor any controlled substance is punishable as a felony in the federal system. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); 21 U.S.C. § 859(a) (punishing sale of controlled substances to minor); *Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990). Although this statute punishes

distribution of a chemical or combination thereof and not a controlled substance, this offense is still punishable as a felony under 18 U.S.C. § 924(c). 21 U.S.C. § 841(g)(1) punishes the distribution of a listed chemical as a felony. Ephedrine is a list I chemical in the federal system. 21 U.S.C. § 802(34)(C). Therefore, this Virginia offense is an aggravated felony.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because this statute does not punish simple possession but rather manufacture, sale, distribution, or possession with intent to distribute, give, sell, etc., and the drug is not marijuana, it does not come within the exception.

18.2-250 Simple possession of a controlled substance

Elements

- knowingly or intentionally possess a controlled substance
- punishment and classification vary depending on schedule of drug

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude. Because the language of the statute reads "it is unlawful for any person knowingly or intentionally to possess a controlled substance," the guilty mind requirement will render the conviction a crime involving moral turpitude. *See, e.g., Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1968) (where intent is not mentioned in statutes defining simple possession, there is no crime involving moral turpitude); *Matter of R-*, 4 I&N Dec. 644 (BIA 1952) (conviction for unlawful dispensing of drugs is not crime involving moral turpitude because there is no element of intent, motive or knowledge for a conviction).

Aggravated felony

Controlled substances

A conviction under this statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). A conviction under this section does not meet the definition of illicit trafficking, since the offense involves possession only. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). In addition, a conviction under this section of the statute is not an aggravated felony because it is not punishable as a felony in the federal system. *See Lopez*, 127 S. Ct. 625. A first time simple possession offense is not punishable as a felony in the federal system. 21 U.S.C. § 844(a). Therefore, a conviction under this Virginia statute is not an aggravated felony.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. However, the drugs punishable by these schedules

include drugs other than marijuana. Marijuana possession is punished separately under Va. Code Ann. § 18.2-250.1. Therefore, none of the offenses punishable under this statute will fit within the exception to the ground of deportability.

18.2-250.1 Possession of marijuana unlawful

Elements

(A) misdemeanor

- knowingly and intentionally
- possess marijuana
- second possession offense carries heavier punishment, but still class 1 misdemeanor

Crime involving moral turpitude

This offense probably is a crime involving moral turpitude because it involves knowingly and intentionally possessing a controlled substance and therefore it is not a mere regulatory statute. *See, e.g., Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1968) (where intent is not mentioned in statutes defining simple possession, there is no crime involving moral turpitude); *Matter of R-*, 4 I&N Dec. 644 (BIA 1952) (conviction for unlawful dispensing of drugs is not crime involving moral turpitude because there is no element of intent, motive or knowledge for a conviction).

Aggravated felony

First offense simple possession

Controlled substances

A conviction under this statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). A conviction under this section does not meet the definition of illicit trafficking, since the offense involves possession only. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). In addition, a conviction under this section of the statute is not an aggravated felony because it is not punishable as a felony in the federal system. *See Lopez*, 127 S. Ct. 625. A first time simple possession offense is not punishable as a felony in the federal system. 21 U.S.C. § 844(a). Therefore, a conviction under this section of the statute is not an aggravated felony.

Second offense simple possession

Controlled substances

A conviction under this section of the statute may be an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). If the defendant is convicted of a subsequent offense under the Controlled Substances Act, federal laws treat the subsequent offense as a felony. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); 21 U.S.C. § 841(b)(3). However, in order for this offense to be an aggravated felony, it is probably necessary for the record of conviction from the prior offense to be part of the record of conviction for the subsequent offense, because this is required by the federal system. *See Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because this statute punishes simple possession of marijuana, it is possible that a conviction will fit within the exception, unless the record of conviction indicates that the defendant possessed more than 30 grams of marijuana or that the defendant possessed such drug for other than his or her own use. A second offense for possession of marijuana will not fit within the exception because the exception only applies to *one* simple possession of marijuana offense.

18.2-251.2 Possession and distribution of flunitrazepam

Elements

- knowingly
- manufacture, sell, give, distribute or possess flunitrazepam

Crime involving moral turpitude

This offense is probably a crime involving moral turpitude because it involves knowingly and intentionally possessing or distributing a controlled substance and therefore it is not a mere regulatory statute. *See, e.g., Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1968) (where intent is not mentioned in statutes defining simple possession, there is no crime involving moral turpitude); *Matter of R-*, 4 I&N Dec. 644 (BIA 1952) (conviction for unlawful dispensing of drugs is not crime involving moral turpitude because there is no element of intent, motive or knowledge for a conviction).

Aggravated felony

Controlled substances

A conviction under this statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because the offense is punishable as a felony under federal law. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); 21 U.S.C. § 959 (possession of flunitrazepam is a felony). In addition, 21 U.S.C. § 841(a) punishes as a felony the manufacture, sale, distribution, or possession with intent to distribute a controlled substance. Therefore, a conviction under this Virginia statute is an aggravated felony.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because this statute punishes distribution offenses and the possession offenses punishable do not involve marijuana, any conviction under this statute does not come within the exception to the ground of deportability.

18.2-251.4 Defeating drug and alcohol screening tests

Elements

- 1) sell, give away, distribute, transport, or market human urine
 - with the intent of using the urine to defeat a drug or alcohol screening test
- OR
- 2) attempt to defeat a drug or alcohol test by the substitution of a sample;
- OR
- 3) adulterate a urine or other bodily fluid sample
 - with the intent to defraud a drug or alcohol screening test

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude because the offense involves fraud or deceit as an essential element. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951).

Aggravated felony

Controlled substances

A conviction under this statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). A conviction under this statute is not an offense that involves illicit trafficking in a controlled substance, since urine is not a controlled substance. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006); *Matter of Davis*, 20 I&N Dec. 171 (BIA 1990). It is also not punishable as a felony in the federal system because it is not listed in any of the federal statutes included in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(B).

Fraud offense

A conviction under this statute is an aggravated felony as an offense involving fraud or deceit under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds \$10,000. Because this offense rarely involves a financial loss to a victim, it is probably not an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i).

Other immigration consequences

Defrauding drug test

A conviction under this section of the statute will probably render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). While it is possible that this offense is not a crime relating to a controlled substance, the “relating to” language of 8 U.S.C. § 1227(a)(2)(B) is broad and therefore, it is likely that the offense of defrauding a drug test is a crime relating to a controlled substance. *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of paraphernalia is a crime relating to a controlled substance because the crime is linked to drugs). The only exception to the controlled substance ground of deportability is simple possession for one’s own use of 30 grams or less of marijuana. This offense does not fit within the exception because it is not a possession of marijuana offense.

Defrauding alcohol test

A conviction under this section of the statute will not render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B) if the defendant is convicted for defrauding an alcohol test because alcohol is not on the federal controlled substances list.

18.2-255 Distribution of certain drugs to persons under 18 prohibited

Elements

(A) punishable for 10-50 years

- person who is at least 18 years
- knowingly and intentionally
 - (i) distribute any drug classified in schedules I-IV or marijuana to any person under 18 years of age who is at least 3 years his junior; OR
 - (ii) cause any person under 18 years of age to assist in such distribution of any drug classified in schedules I-IV or marijuana

(B) class 6 felony

- person who is at least 18 years old
- knowingly and intentionally
 - (i) distribute any imitation controlled substance to a person under 18 years of age who is at least 3 years his junior; OR
 - (ii) cause any person under 18 years of age to assist in such distribution of any imitation controlled substance

Crime involving moral turpitude

(A)(i) and (ii) Distribution to minors or causing minors to assist in distribution

This offense is probably a crime involving moral turpitude because the statute has a knowing and intentional requirement. *See Josephs v. Comm.*, 390 S.E.2d 491 (Va. Ct. App. 1990) (reasoning that possession of a controlled drug gives rise to defendant's knowledge of its character). The BIA has held that where drug distribution or possession offenses involve a knowing requirement, they are crimes involving moral turpitude. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs is a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946). If the defendant is convicted of causing minors to distribute controlled substances, this offense is also a crime involving moral turpitude because the BIA has held that aiding and abetting offenses are crimes involving moral turpitude if the underlying offense is a crime involving moral turpitude. *See Matter of Short*, 20 I&N Dec. 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336 (BIA 1977).

(B)(i) and (ii) Distribution of imitation controlled substance or causing minors to assist in distribution of imitation controlled substance

A conviction under these sections of the statute are probably crimes involving moral turpitude because they involve fraud or deceit. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951). If the defendant is convicted of causing minors to distribute imitation controlled substances, this offense is also a crime involving moral turpitude because the

BIA has held that aiding and abetting offenses are crimes involving moral turpitude if the underlying offense is a crime involving moral turpitude. *See Matter of Short*, 20 I&N Dec. 136 (BIA 1989); *Matter of Martinez*, 16 I&N Dec. 336 (BIA 1977).

Aggravated felony

(A)(i) and (ii) Distribution to minors or causing minors to assist in distribution
Controlled substances

A conviction under either of these sections of the statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). The offense of distribution to children under 18 is punishable as a felony in the federal system, under 21 U.S.C. § 859, and therefore is an aggravated felony. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The offense of causing a minor to assist in distribution is punishable as a felony under 21 U.S.C. § 861. Therefore, a conviction under either of these sections of the statute is an aggravated felony.

(B)(i) and (ii) Distribution of imitation controlled substance or causing minors to
assist in distribution of imitation controlled substance

Controlled substance

A conviction under this section of the statute for distribution of an imitation controlled substance is not necessarily an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). The offense is not punishable as a felony in the federal system. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 841(a)(2) punishes the distribution of a counterfeit substance. However, a conviction under 21 U.S.C. § 841(a)(2) requires that the counterfeit substance be a *controlled* substance. *See U.S. v. Sampson*, 140 F.3d 585 (4th Cir. 1988) (holding that counterfeit cocaine made of candle wax, flour and baking soda does not constitute a “counterfeit substance” within meaning of 21 U.S.C. § 841(a)(2) because it is not a controlled substance). Therefore, if a defendant is convicted of distributing a substance that is not a controlled substance at all, this conviction is not an aggravated felony. In addition, the offense does not involve illicit trafficking in a controlled substance if the substance is not a controlled substance. *See Lopez*, 127 S. Ct. 625; *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992).

A conviction for causing minors to assist in the distribution of an imitation controlled substance is probably not an aggravated felony. Although the offense of causing a minor to assist in distribution is punishable under 21 U.S.C. § 861, the defendant must cause a minor to assist in violating other portions of the controlled substance laws. Because distribution of an imitation controlled substance is not necessarily an aggravated felony, causing a minor to distribute imitation controlled substances is not likely to be an aggravated felony. *See Sampson*, 140 F.3d 585.

If the record of conviction reflects that the imitation substance was actually a controlled substance on the federal list, this conviction is an aggravated felony.

Fraud offense

A conviction under this section of the statute is probably an offense involving fraud or deceit and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds \$10,000. A conviction for causing a minor to distribute an imitation controlled substance is an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds \$10,000 because a conviction for

aiding and abetting is an aggravated felony if the underlying offense is an aggravated felony. *See Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007).

Other immigration consequences

(A)(1) and (2) Distribution to minors or causing minors to assist in distribution

A conviction under this section of the statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because this statute does not punish simple possession but rather distribution, it does not come within the exception.

(B)(1) and (2) Distribution of imitation controlled substance or causing minors to assist in distribution of imitation controlled substance

A conviction under this section of the statute will probably render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). Because the offense involves distribution of an imitation controlled substance, it is less likely to be a crime *relating* to a controlled substance. However, given the broad nature of the words "relating to," it is likely that a conviction under either of these sections will be a crime relating to a controlled substance. *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of paraphernalia is a crime relating to a controlled substance because the crime is linked to drugs).

18.2-255.1 Distribution, sale or display of printed material advertising instruments for use in administering marijuana or controlled substances to minors

Elements

- knowingly
- sell, distribute, or display for sale to a minor
- any book, pamphlet, periodical, or other printed matter that he knows advertises for sale any instrument, device, article, or contrivance for advertised use in unlawfully ingesting, smoking, administering, preparing or growing marijuana or a controlled substance

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude because the statute has a knowing and intentional requirement. The BIA has held that where a drug distribution or possession offense involves a knowing requirement, it is a crime involving moral turpitude. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs to be a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946). Although this statute punishes the knowing distribution, sale or display for sale of advertisements for drug paraphernalia, it is probably a crime involving moral turpitude. The BIA reasoned in *Matter of Khourn* that drug distribution was morally turpitudinous because the defendant intends to corrupt others. Following this reasoning, since the use of paraphernalia is to take drugs, it is likely that this statute punishes acts

that equally corrupt others, especially minors, as the statute punishes the sale of such advertisements to minors.

Aggravated felony

Controlled substances

A conviction under this statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). The acts punished under this statute are punishable as a felony in the federal system. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 863(a) punishes the sale or offering for sale of drug paraphernalia, which has the same elements as the Virginia statute. Therefore, this offense is an aggravated felony because the elements of the Virginia offense are analogous to the elements of the federal felony.

Other immigration consequences

A conviction under this statute will probably render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). Although the statute punishes sale, distribution, or display of advertisement of paraphernalia, it is probably a crime relating to a controlled substance due to the broad language of “relating to” in 8 U.S.C. § 1227(a)(2)(B). *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of drug paraphernalia is a crime relating to a controlled substance for the purposes of 8 U.S.C. § 1227(a)(2)(B)). The only exception to the controlled substance ground of deportability is a simple possession for one’s own use of 30 grams or less of marijuana. Because this statute does not punish simple possession, it does not come within the exception.

18.2-255.2 Prohibiting the sale of drugs on or near certain properties

Elements

(A)

- manufacture, sell, or distribute or possess with intent to sell, give or distribute
- any controlled substance, imitation controlled substance or marijuana
 - (i) upon the property, including the buildings and grounds, of any public or private institution of higher education; or child day care center; or
 - (ii) upon public property or any property open to public use within 1,000 feet of such school property; or
 - (iii) on any school bus;
 - (iv) upon a designated school bus stop, or upon either public property or any property open to the public use which is within 1,000 feet of such school bus stop, during the time when school children are waiting to be transported or picked up from school or a school-sponsored activity
 - (v) upon the property, including the buildings and grounds, of any publicly owned or publicly operated recreation or community center facility or any public library;
 - (vi) upon the property of any state facility or upon public property or property open to public use within 1,000 feet of such institution

(B)

- second or subsequent conviction under this statute punishable by 1-5 years
- sale of marijuana only as an accommodation to another individual and not with intent to

profit or induce the recipient to use or become addicted to or dependent upon controlled substance punishable as class 1 misdemeanor

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude. The BIA has held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs was a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946). The BIA has reasoned that a statute punishing the knowing distribution of drugs was a crime involving moral turpitude because the offense was inherently turpitudinous, since it involves corrupting others by distributing drugs. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). Even if the defendant is punished under the section for distribution of imitation drugs, this offense is probably a crime involving moral turpitude because it involves fraud and deceit. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951).

Aggravated felony

(A) Manufacture, sell, or distribute or possess with intent to sell, give or distribute a controlled substance on certain properties

Controlled substances

A conviction under this section of the statute is not necessarily an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because not all offenses punishable under the Virginia statute are punishable as a felony under the federal analogue statute. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 860 punishes manufacture, distribution, dispensing, or possessing with intent to manufacture, distribute, or dispense a controlled substance on certain properties. Not all of the properties are the same in the Virginia statute and the federal statute. The Virginia statute punishes a defendant for sale in many of the same places punishable under the federal statute; however, the Virginia statute additionally punishes the sale of drugs on a school bus, at a bus stop or in front of a daycare center. Because the statutes do not have the same elements, the Virginia statute is divisible. Therefore, it is necessary to consult the record of conviction to determine whether this offense is an aggravated felony.

(A) Manufacture, sell, or distribute or possess with intent to sell, give or distribute an imitation controlled substance

Controlled substances

The offense of distribution of an imitation controlled substance is probably not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because it is not punishable under the federal statutes as a felony. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 841(a)(2) punishes the distribution of a counterfeit substance. However, because the counterfeit substance must still be a *controlled* substance, distribution of a substance that is not a controlled substance at all cannot be punished under this statute. *See U.S. v. Sampson*, 140 F.3d 585 (4th Cir. 1998) (holding that counterfeit cocaine made of candle wax, flour and baking soda does not constitute “counterfeit substance” within meaning of 21 U.S.C. § 841(a)(2)).

The offense is also not an illicit trafficking in a controlled substance because the substance is not a controlled substance. *See Lopez*, 127 S. Ct. 625; *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992).

Therefore, a Virginia conviction under this section is not necessarily an aggravated felony. However, if the record reflects that the imitation substance was actually a controlled substance on the federal list, then a conviction under this section of the statute is an aggravated felony.

(B) Distribution for no remuneration of small amount of marijuana

Controlled substances

A conviction under this section of the statute is not necessarily an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). Distribution of a small amount of marijuana for no remuneration is punishable as a misdemeanor in the federal system. *See* 21 U.S.C. § 841(b)(4). However, the federal statute punishing distribution on school and other grounds, 21 U.S.C. § 860, does not make any exception in punishment for distribution of a small amount of marijuana for no remuneration. Therefore, because the elements of the Virginia offense are similar to the elements of 21 U.S.C. § 860, which is punishable as a felony, a conviction under this section of the Virginia statute is probably an aggravated felony. However, it is necessary to consult the record of conviction because not all locations of the offense in Virginia are punishable under 21 U.S.C. § 860. *See* analysis for Va. Code Ann. § 18.2-255.2(A).

Other immigration consequences

Manufacture, sell, or distribute or possess with intent to sell, give or distribute a controlled substance

A conviction under this section of the statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). The only exception to the controlled substance ground of deportability is a simple possession for one's own use of 30 grams or less of marijuana. Because most of the offenses punished under this section punish possession with intent to distribute, give, sell, etc., it is not likely to come within the exception. However, a defendant can fit within the exception if the offense is for simple possession of marijuana only and the record of conviction indicates that the amount is 30 grams or less.

Manufacture, sell, or distribute or possess with intent to sell, give or distribute an imitation controlled substance

A conviction under this section of the statute will probably render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). Because the offense involves distribution of an imitation controlled substance, it is less likely to be a crime *relating* to a controlled substance. However, given the broad nature of the words "relating to," it is likely that these offenses will be crimes relating to a controlled substance. *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of paraphernalia is a crime relating to a controlled substance because the crime is linked to drugs).

18.2-258 Knowingly keeping, establishing, permitting house where people are under the influence of drugs or selling or manufacturing drugs

Elements

- owner, lessor, agent of any lessor, manager, chief executive officer, operator, or tenant
- knowingly permits, establishes, keeps or maintains
- common nuisance, defined as:
 - office, store, shop, restaurant, hall, theater, poolroom, clubhouse, storehouse, warehouse, dwelling house, apartment, building of any kind, vehicle, vessel, boat, or aircraft
 - with the knowledge of the owner, lessor, agent of any such lessor, manager, chief executive officer, operator, or tenant thereof
 - is frequented by persons under the influence of illegally obtained controlled substances or marijuana
 - or for the purpose of illegally obtaining possession of, manufacturing or distributing controlled substances or marijuana
 - or is used for the illegal possession, manufacture, or distribution of controlled substances or marijuana

Crime involving moral turpitude

The BIA has held that knowingly maintaining or permitting a house of prostitution is a crime involving moral turpitude. *See Matter of Lambert*, 11 I&N Dec. 430 (BIA 1965); *Matter of W*, 3 I&N Dec. 231 (BIA 1948). Although this Virginia statute does not punish the keeping of a house of prostitution but rather a house where drugs are used, manufactured, or sold, it is probably a crime involving moral turpitude. The offenses that happen inside the house are crimes involving moral turpitude and therefore the owner's knowledge that such events are going on will likely render this offense a crime involving moral turpitude. *See, e.g., See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997) (holding that a statute punishing the knowing distribution of drugs was a crime involving moral turpitude because the offense was inherently turpitudinous since it involves corrupting others by distributing drugs); *Matter of Y*, 2 I&N Dec. 600 (BIA 1946) (holding that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs is a crime involving moral turpitude).

Aggravated felony

Controlled substances

A conviction under this statute is probably an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because it is punishable as a felony in the federal system. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 856 punishes as a felony the maintenance of a place where drugs are manufactured or sold or used. The Virginia statute also punishes the maintenance of a place where people are under the influence of illegally obtained controlled substances, which is similar to keeping a place where drugs are used under the federal statute. *But see Eudave-Mendez v. Keisler*, 2007 U.S. App. LEXIS 23415 (9th Cir. 2007) (holding that a state statute punishing the knowing maintenance of a drug house was not an aggravated felony because the state statute did not punish a defendant for knowingly and intentionally maintaining the drug house). Therefore, a

conviction under this Virginia statute is probably an aggravated felony, as only the Ninth Circuit has found that such a conviction is not. Because this offense is probably an aggravated felony, a subsequent offense under this statute is also an aggravated felony.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). Although the statute does not actually punish use or distribution of controlled substances, but rather maintaining a house where such activity is going on, it is likely to come within this ground of deportability because of the broad reading of “relating to” of 8 U.S.C. § 1227(a)(2)(B). *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of paraphernalia is a crime relating to a controlled substance because the crime is linked to drugs). The only exception to the controlled substance ground of deportability is a simple possession for one’s own use of 30 grams or less of marijuana. Since the acts punished under this statute do not involve possession, no conviction under this statute will fit within the exception.

18.2-258.1 Obtaining drugs, procuring administration of controlled substances, etc., by fraud, deceit or forgery

Elements

(A)

- obtain or attempt to obtain any drug or procure or attempt to procure the administration of any controlled substance or marijuana
 - (i) by fraud, deceit, misrepresentation, embezzlement, or subterfuge; or
 - (ii) by forgery or alteration of a prescription or of any written order; or
 - (iii) by the concealment of a material fact; or
 - (iv) by the use of a false name or the giving of a false address

(B)

- furnish false or fraudulent information in or omit any information from, or willfully make a false statement in
- any prescription, order, report, record, or other document required under the Virginia Drug Control Act

(C)

- use in the course of manufacture or distribution of a controlled substance or marijuana
- license number which is fictitious, revoked, suspended, or issued to another person

(D)

- for the purpose of obtaining any controlled substance or marijuana
- falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, pharmacist, physician, dentist, veterinarian or other authorized person

(E)

- make or utter any false or forged prescription or false or forged written order

(F)

- affix any false or forged label to a package or receptacle containing any controlled substance

Crime involving moral turpitude

Every conviction under this statute involves moral turpitude because all sections punish offenses that involve fraud or deceit. *See generally Jordan v. DeGeorge*, 341 U.S. 223 (1951); *see also Matter of Acosta*, 14 I&N Dec. 338 (BIA 1973) (conviction punishing false statements involve moral turpitude); *Matter of Jimenez*, 14 I&N Dec. 442 (BIA 1973) (forgery involves moral turpitude).

Aggravated felony

(A) Obtaining controlled substances through fraud or deceit

Controlled substances

A conviction under this section of the statute is an aggravated felony under U.S.C. § 1101(a)(43)(B) because it is punishable as a felony under federal law. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 843(a)(3) punishes obtaining possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge. The Virginia statute punishes obtaining or attempting to obtain possession by fraud, deceit, misrepresentation, embezzlement, or subterfuge or by forgery of prescription or by concealment of a material fact or by use of a false name or address. Although the Virginia statute does not exactly parallel the language of 21 U.S.C. § 843(a)(3), all of the Virginia offenses punished under this section are punishable under the federal statute because they punish the obtaining of a controlled substance by fraud or deceit. Therefore, a conviction under this section of the Virginia statute is an aggravated felony.

Fraud offense

A conviction under this section of the statute involves fraud or deceit and therefore will be an aggravated felony as a fraud offense under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds \$10,000.

(B) False statements in reports or applications

Controlled substances

A conviction under this section of the statute is an aggravated felony under U.S.C. § 1101(a)(43)(B) because it is punishable as a felony under federal law. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 843(a)(4)(A) punishes the furnishing of any false or fraudulent information in a report, application, record, or other documentation required under the Controlled Substances Act. Because this section of the Virginia statute is analogous to the federal statute, it is an aggravated felony.

Fraud offense

A conviction under this section of the statute involves fraud or deceit and therefore is an aggravated felony as a fraud offense under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds \$10,000.

(C) Use of fictitious license number in the course of manufacturing or distributing a controlled substance

Controlled substances

A conviction under this section of the statute is an aggravated felony under U.S.C. § 1101(a)(43)(B) because it is punishable as a felony under federal law. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 843(a)(2) punishes the use of a fictitious, revoked, suspended, expired registration number or a registration number that belongs to

someone else. The Virginia statute tracks the federal analogue almost exactly and therefore, the offense is an aggravated felony.

Fraud offense

A conviction under this section of the statute involves fraud or deceit and therefore will be an aggravated felony as a fraud offense under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds \$10,000.

(D) Falsely assuming the title of a manufacturer for the purpose of obtaining a controlled substance

Controlled substances

A conviction under this section of the statute is probably an aggravated felony under U.S.C. § 1101(a)(43)(B) because it is punishable as a felony under federal law. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 843(a)(4)(A) punishes the presentation of false identification where the person is receiving a listed chemical and the person is required to present identification. Although the Virginia statute does not exactly track the language of the federal statute, the offenses punished under the Virginia statute are encompassed in those punishable under the federal statute. The Virginia statute punishes a person for holding himself out to be a manufacturer, pharmacist, etc. for the purpose of obtaining any controlled substance. The federal statute punishes a defendant for presenting false identification in order to receive a listed chemical. That which the defendant seeks to obtain is different in the two statutes, but the chemical and controlled substance are substantially similar. Therefore, a conviction under this section of the statute is probably an aggravated felony.

Attempted controlled substances

A conviction under this section of the statute is probably an attempted controlled substance offense under 8 U.S.C. §§ 1101(a)(43)(B) and (U). The acts punished under this section of the Virginia statute constitute an attempt to commit a felony punishable under the federal drug statutes. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). 21 U.S.C. § 843(a)(3) punishes as a felony obtaining any controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge. The Virginia statute punishes a defendant for obtaining a controlled substance by holding himself out to be a manufacturer, pharmacist. The acts punishable under the Virginia statute amount to attempting to obtain a controlled substance by deception, which is punishable under 21 U.S.C. § 843(a)(3). The assumption of the role of pharmacist, etc., is a substantial step toward the commission of the underlying offense and the statute contains the requisite intent to obtain a controlled substance. *See Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999). Therefore, a conviction under this section of the Virginia statute is an aggravated felony.

Fraud offense

A conviction under this section of the statute involves fraud or deceit and therefore is an aggravated felony as a fraud offense under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds \$10,000.

(E) Make or utter any false or forged prescription or order

Controlled substances

A conviction under this section of the statute is an aggravated felony under U.S.C. § 1101(a)(43)(B) because it is punishable as a felony under federal law. *See Lopez v.*

Gonzales, 127 S. Ct. 625 (2006). 21 U.S.C. § 843(a)(4)(A) punishes the furnishing of any false or fraudulent information in a report, application, record, or other documentation required under the Controlled Substances Act. The prescription is a required document under 21 U.S.C. § 830(a), as referenced in 21 U.S.C. § 843(a)(4)(A). This section of the Virginia statute punishes the furnishing of false information on a report required in relation to distribution of legal controlled substances. Therefore, the offense is an aggravated felony.

Fraud offense

A conviction under this section of the statute involves fraud or deceit and therefore is an aggravated felony as a fraud offense under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds \$10,000.

Forgery offense

A conviction under this section of the statute is a forgery offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(R) if the sentence imposed is at least one year.

(F) Affixing false or forged label to package containing controlled substance

Controlled substances

A conviction under this section of the statute is probably an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because it is punishable as a felony under federal law. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The acts punished under this section are substantially similar to the acts punished under 21 U.S.C. § 843(a)(5), which punishes the imprinting of a reproduced trademark on a container of any drug so as to render it a counterfeit substance. Although the Virginia statute does not punish the exact same acts because the Virginia statute punishes the switching of labels, rather than the switching of labels so as to render a package a counterfeit substance, the elements are very similar. Therefore, it is probably an aggravated felony.

The offenses punished under this section of the Virginia statute are also similar to the acts punished by 21 U.S.C. § 842(a)(4), which punishes the obliteration, removal, or alteration of a symbol or label for a controlled substance container. Therefore, the offense is probably an aggravated felony as it is very similar to 21 U.S.C. § 842(a)(4).

Fraud offense

A conviction under this section of the statute involves fraud or deceit and therefore is an aggravated felony as a fraud offense under 8 U.S.C. § 1101(a)(43)(M)(i) if the loss to the victim exceeds \$10,000.

Forgery offense

A conviction under this section of the statute is a forgery offense and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(R) if the sentence imposed is at least one year. Although the Virginia offense does not punish the actual making of a forged instrument, it punishes an offense “relating to” forgery, which is included in the aggravated felony definition.

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). Although the statute does not actually punish the use or distribution of controlled substances, but rather

obtaining through fraud and other like offenses, it is likely to come within this ground of deportability because of the broad reading of “relating to” of 8 U.S.C. § 1227(a)(2)(B). *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of paraphernalia is a crime relating to a controlled substance because the crime is linked to drugs). The only exception to the controlled substance ground of deportability is a simple possession for one’s own use of 30 grams or less of marijuana. Because the acts punished under this statute do not involve possession, no conviction under this statute will fit within the exception.

54.1-3466 Possession or distribution of controlled paraphernalia

Elements

- possess or distribute controlled paraphernalia
- paraphernalia mean a hypodermic syringe, needle or other instrument or implement or combination thereof adapted for the administration of controlled dangerous substances by hypodermic injections under circumstances which reasonably indicate an intention to use such controlled paraphernalia for purposes of illegally administering any controlled drug, or gelatin capsules, glassine envelopes or any other container suitable for the packaging of individual quantities of controlled drugs in sufficient quantity to and under circumstances which reasonably indicate an intention to use any such item for the illegal manufacture, distribution, or dispensing of any such controlled drug
- evidence of such circumstances shall include, but not be limited to, close proximity of any such controlled paraphernalia to any adulterants or equipment commonly used in the illegal manufacture and distribution of controlled drugs including, but not limited to, scales, sieves, strainers, measuring spoons, staples and staplers, or procaine hydrochloride, mannitol, lactose, quinine, or any controlled drug or any machine, equipment, instrument, implement, device or combination thereof which is adapted for the production of controlled drugs under circumstances which reasonably indicate an intention to use such item or combination thereof to produce, sell, or dispense any controlled drug in violation of the provisions of this chapter

Crime involving moral turpitude

This offense is probably a crime involving moral turpitude because the statute has an implied requirement that the defendant intend to use the paraphernalia to use a controlled substance. The BIA has held that where a drug distribution or possession offense involves a knowing requirement, it is a crime involving moral turpitude. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs is a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946). Although this statute punishes the possession or distribution of drug paraphernalia, it is likely a conviction under this statute is a crime involving moral turpitude. The BIA reasoned in *Matter of Khourn* that drug distribution was morally turpitudinous because the defendant intends to corrupt others. Following this reasoning, since the use of paraphernalia is to take drugs, it is likely that this statute punishes acts which equally corrupt others or oneself. Therefore, a conviction under this statute is probably a crime involving moral turpitude.

Aggravated felony

Possession of paraphernalia

Controlled substances

A conviction under this section of the statute is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because it is not punishable in the federal statutes listed in 18 U.S.C. § 924(c). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The closest federal analogue to this Virginia statute is 21 U.S.C. § 863(a), which punishes the sale or offer for sale of drug paraphernalia. However, the Virginia statute punishes *possession*, not sale, transportation, or importation of drug paraphernalia, all of which are the offenses punished under 21 U.S.C. § 863(a). Therefore, a conviction for possession of paraphernalia is not an aggravated felony because there is no federal analogue to the Virginia statute in the federal drug statutes listed in 18 U.S.C. § 924(c).

Distribution of paraphernalia

Controlled substances

A conviction under this section of the statute is not necessarily an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because not all offenses listed in the section are punishable under the federal statutes listed in 18 U.S.C. § 924(c). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The closest federal analogue to this Virginia statute is 21 U.S.C. § 863(a), which punishes the sale or offer for sale of drug paraphernalia. However, the Virginia statute punishes *distribution*, not sale, transportation, or importation of drug paraphernalia, all of which are the offenses punished under 21 U.S.C. § 863(a). In another statute punishing the sale of paraphernalia, the Virginia legislature indicates a clear distinction between sale and distribution. *See* Va. Code Ann. §§ 18.2-265.3(B), (C) (reducing the punishment for distribution of paraphernalia to minors as opposed to sale of paraphernalia to minors). In addition, in the federal statute, the term “distribution” does not necessarily mean “sale” because 21 U.S.C. § 841(d)(3) gives a lighter punishment to distribution for no remuneration of a small amount of marijuana. *Id.*; *see also* 21 U.S.C. § 802(11), (8) (defining distribution of a controlled substance as delivering such substance, and defining delivering as the actual, constructive, or attempted transfer of a controlled substance). Therefore, not all distributions of paraphernalia are sales of paraphernalia. Thus, not all offenses punished under this section of the Virginia statute are aggravated felonies.

In addition, a conviction under this section of the statute is not an illicit trafficking in a controlled substance because the statute does not punish any sale of a controlled substance; it merely punishes distribution of paraphernalia. *See Lopez*, 127 S. Ct. 625; *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). Moreover, there is no commercial element because a defendant need not get any remuneration, as it is clear from the statute’s structure that this section is intended to punish distribution, not sale.

However, if the record of conviction indicates that there was remuneration for the paraphernalia, the offense is probably an aggravated felony as an analogue to 21 U.S.C. § 863(a).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). Although the statute punishes possession or distribution of paraphernalia, it is probably a crime relating to a controlled substance due to the broad language of “relating to” in 8 U.S.C. § 1227(a)(2)(B). See *Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of drug paraphernalia is a crime relating to a controlled substance for the purposes of 8 U.S.C. § 1227(a)(2)(B)). The only exception to the controlled substance ground of deportability is a simple possession for one’s own use of 30 grams or less of marijuana. Since this statute does not punish simple possession of a drug, it does not come within the exception.

18.2-265.3 Penalties for sale, etc., of drug paraphernalia

Elements

(A) class 1 misdemeanor

- sells or possesses with intent to sell drug paraphernalia
- knowing, or under the circumstances where one reasonably should know, that it is either designed for use or intended use by such person for use to illegally plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body marijuana or a controlled substance

(B) class 6 felony

- violation of subsection A by selling drug paraphernalia to a minor who is at least 3 years junior to the defendant

(C) class 1 misdemeanor

- violation of subsection A by distributing drug paraphernalia to a minor

Crime involving moral turpitude

This offense is probably a crime involving moral turpitude because the statute has a knowing requirement. The BIA has held that where drug distribution or possession offenses involve a knowing requirement, they are crimes involving moral turpitude. See *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs is a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946). Although this statute punishes the knowing distribution or sale of drug paraphernalia, a conviction under this statute is probably a crime involving moral turpitude. The BIA reasoned in *Matter of Khourn* that drug distribution was morally turpitudinous because the defendant intends to corrupt others. Following this reasoning, because the use of paraphernalia is to take drugs, it is likely that this statute punishes acts that equally corrupt others. Therefore, a conviction under this statute is probably a crime involving moral turpitude.

Aggravated felony

(A) Sell or possess with intent to sell drug paraphernalia

Controlled substances

A conviction under this section of the statute is an aggravated felony under 8

U.S.C. § 1101(a)(43)(B) because it is punishable as a felony in the federal system. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The federal analogue to this Virginia statute, 21 U.S.C. § 863(a), punishes the sale or offer for sale of drug paraphernalia. Because the elements are the same in the Virginia offense and the federal offense, a conviction under this section of the Virginia statute is an aggravated felony.

(B) Sale of paraphernalia to minors

Controlled substances

A conviction under this section of the statute is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because it is punishable as a felony in the federal system. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The federal analogue to this Virginia statute, 21 U.S.C. § 863(a), punishes the sale or offer for sale of drug paraphernalia. Because the elements are the same in the Virginia offense and the federal offense, a conviction under this section of the Virginia statute is an aggravated felony.

(C) Distribution of paraphernalia to minors

Controlled substances

A conviction under this section of the statute is not necessarily an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) because not all offenses are punishable in the federal statutes listed in 18 U.S.C. § 924(c). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The closest federal analogue to this Virginia statute is 21 U.S.C. § 863(a), which punishes the sale or offer for sale of drug paraphernalia. However, the Virginia statute punishes *distribution*, not sale, transportation, or importation of drug paraphernalia, all of which are the offenses punished under 21 U.S.C. § 863(a). The Virginia statute specifically reduces the punishment for distribution to minors as opposed to sale to minors. Va. Code Ann. §§ 18.2-265.3(B), (C). Therefore, based on the structure of the Virginia statute, it is clear that the legislature intended to punish distribution or paraphernalia as a lesser offense than sale of paraphernalia.

The other close federal analogue to this Virginia statute is 21 U.S.C. § 859(a), which punishes the distribution of a controlled substance to a minor. The Virginia offense does not contain the same elements as 21 U.S.C. § 859(a), however, because the Virginia offense only punishes distribution of paraphernalia, not the controlled substance itself. Therefore, a conviction under this section of the Virginia statute is not an aggravated felony because it does not have a federal analogue in 18 U.S.C. § 924(c). Not all distributions of paraphernalia are sales of paraphernalia. Therefore, not all offenses punished under this section of the Virginia statute are aggravated felonies.

In addition, a conviction under this section of the statute is not an illicit trafficking in a controlled substance because the statute does not punish any sale of a controlled substance; it merely punishes distribution of paraphernalia. *See Lopez*, 127 S. Ct. 625; *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). Moreover, there is no commercial element because a defendant need not get any remuneration, as it is clear from the statute's structure that this section is intended to punish distribution, not sale.

However, if the record of conviction indicates that there was remuneration for the paraphernalia, the offense is probably an aggravated felony as an analogue to 21 U.S.C. § 863(a).

Other immigration consequences

A conviction under this statute will render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). Although the statute punishes sale, distribution, or possession with intent to sell paraphernalia, it is probably a crime relating to a controlled substance due to the broad language of “relating to” in 8 U.S.C. § 1227(a)(2)(B). *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of drug paraphernalia is a crime relating to a controlled substance for the purposes of 8 U.S.C. § 1227(a)(2)(B)). The only exception to the controlled substance ground of deportability is a simple possession for one’s own use of 30 grams or less of marijuana. Since this statute does not punish simple possession, it does not come within the exception.

18.2-265.5 Advertisement of drug paraphernalia prohibited

Elements

- place in any newspaper, magazine, handbill or other publication any advertisement
- knowing or under the circumstances where one reasonably should know that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended by such person for use as drug paraphernalia

Crime involving moral turpitude

A conviction under this statute is probably a crime involving moral turpitude because the statute has a knowing requirement. The BIA has held that where a drug distribution or possession offense involves a knowing requirement, it is a crime involving moral turpitude. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The BIA has also held that a statute punishing the unlawful manufacture, sale, gift or distribution of drugs is a crime involving moral turpitude. *Matter of Y*, 2 I&N Dec. 600 (BIA 1946). Although this statute punishes the knowing advertisement of drug paraphernalia, a conviction under this statute is probably a crime involving moral turpitude. The BIA reasoned in *Matter of Khourn* that drug distribution was morally turpitudinous because the defendant intends to corrupt others. Following this reasoning, because the use of paraphernalia is to take drugs, it is likely that this statute punishes acts which equally corrupt others. Therefore, a conviction under this statute is probably a crime involving moral turpitude

Aggravated felony

Controlled substances

A conviction under this statute is probably an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(B) and (U). The actions punishable are not directly punishable under the federal statutes listed in 18 U.S.C. § 924(c). *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The closest federal analogue to this Virginia statute is 21 U.S.C. § 863(a), which punishes the sale or offer for sale of drug paraphernalia. However, the Virginia statute punishes *advertisement*, not sale, transportation, or importation of drug paraphernalia, all of which are the offenses punished under 21 U.S.C. § 863(a). The Virginia statute punishes placing ads when the defendant knows or reasonably should know that the purpose of the advertisement in whole or in part is to promote the sale of objects designed

or intended to be used as drug paraphernalia.

Another federal analogue to this Virginia offense is 21 U.S.C. § 843(c), which punishes the placing of an ad when the defendant knows it has the purpose of seeking or offering illegally to receive, buy, or distribute a controlled substance. The Virginia statute punishes the advertisement of *paraphernalia*, not a controlled substance.

Nonetheless, the advertisement of drug paraphernalia is probably an attempt to sell drug paraphernalia, since it requires a substantial step towards the commission of the offense. *See Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999). Therefore, a conviction under this statute is probably an aggravated felony under 8 U.S.C. §§ 1101(a)(43)(B) and (U).

Other immigration consequences

A conviction under this statute will probably render a non-citizen deportable for a crime relating to a controlled substance under 8 U.S.C. § 1227(a)(2)(B). Although the statute punishes advertisement of paraphernalia, it is probably a crime relating to a controlled substance due to the broad language of “relating to” in 8 U.S.C. § 1227(a)(2)(B). *See Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that possession of drug paraphernalia is a crime relating to a controlled substance for the purposes of 8 U.S.C. § 1227(a)(2)(B)). The only exception to the controlled substance ground of deportability is a simple possession for one’s own use of 30 grams or less of marijuana. Because this statute does not punish simple possession, it does not come within the exception.