UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
KROME SERVICE PROCESSING CENTER
MIAMI, FLORIDA

IN THE MATTER OF:	)	
	)	
(b)(6)	)	**IN REMOVAL PROCEEDINGS**
	)	
	)	
RESPONDENT	)	
	)	

CHARGES: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA), an alien without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General.

Section 212(a)(7)(A)(i)(I) of the INA: Any alien who at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, or who is not in possession of a valid unexpired passport, or other suitable document, or identity and nationality document if such document is required by regulations issued by the Attorney General pursuant to Section 211(a) of the Act.

ON BEHALF OF RESPONDENT
Michael Vastine, Esq.
Sui Chang, P.A.
Immigration Law & Litigation Group
3250 Grand Avenue, Suite 201
Miami, FL 33133

ON BEHALF OF DEPARTMENT
Rodion Tadenev, ACC
Department of Homeland Security, ICE
18201 SW 12th Street, Suite 200
Miami, Florida 33194

ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

(b)(6) (Respondent) is a native and citizen of Mexico. *See* Exhibit 1, Notice to Appear (NTA). Respondent entered the United States in approximately 1990. *Id.* At that time, he was not admitted or paroled into the United States and he did not possess a travel document to allow lawful entry into the United States. *Id.*

On May 1, 2017, the Department of Homeland Security (DHS) filed a Notice to Appear (NTA) against Respondent. The filing of the NTA commenced proceedings and vested jurisdiction with the Court. *See* 8 CFR § 1003.41.14(a). The NTA has been admitted into evidence as Exhibit 1. DHS charged Respondent with removability pursuant to INA § 212(a)(6)(A)(i) and INA § 212(a)(7)(A)(i)(I). *Id.*

At a Master Calendar Hearing on May 1, 2017, Respondent admitted the six (6) factual allegations contained within the NTA and conceded removability pursuant to the aforementioned charges. At that time, Respondent indicated that he would seek cancellation of removal for certain non-permanent residents. The Department of Homeland Security noted that Respondent's criminal history shows a conviction in (b)(6) for possession of cocaine, which would pose a bar to relief INA § 240A(b)(1)(C). *See* Exh. 2, Form I-213.

At the next Master Calendar Hearing on May 23, 2017, Respondent filed an amended Form EOIR-42B[1] and a copy of the Motion to Vacate Respondent's (b)(6) conviction for possession of cocaine in violation of Fla. Stat. § 893.13(6)(A) that he filed with the Circuit Court for (b)(6) Judicial Circuit in (b)(6) County, Florida on (b)(6). *See* Exh. 4. Respondent also filed a *draft* copy of Form I-918, Application for U Nonimmigrant Visa. *See* Exh. 5. To date, the Court is not aware of other status of Form I-918, i.e. whether a designated law enforcement official has signed Form I-918, Supplement B and whether Respondent has filed the Form I-918 with the United States Citizenship and Immigration Service (USCIS).

Respondent requested a continuance to acquire a vacateur from the (b)(6) County Circuit Court. This Court granted Respondent's request for a continuance, but indicated that this would be the only continuance granted for thr purpose of pursuing post-conviction relief.

The next Master Calendar Hearing took place on June 13, 2017. Respondent filed a letter dated June 12, 2017 from Attorney Patrick Trese, Respondent's attorney on the Motion to Vacate. *See* Exh. 6. Attorney Trese's letter states that he is in negotiations with the State Attorney's Office with regard to the Motion to Vacate. Respondent stated his intention to go forward on his appliaction for Cancellation of Removal. DHS takes the position that the (b)(6) cocaine conviction poses a statutory bar. At Respondent's request, the Court granted a continuance to allow Respondent to brief the issue of statutory eligibility. The Court gave Respondent until June 27, 2017 to file a written brief and reset the case to July 6, 2017 to determine whether Respondent is statutorily eligible to seek cancellation of removal.

Respondent filed a timely brief in support of eligibility for cancallation of removal under INA § 240A(b).

II. Summary of the Evidence

The record in this proceeding consists of documentary exhibits one (1) through seven (7). At this stage, the case turns on a purely legal issue, so no testimonial evidence has been provided. All documentary evidence have been considered in their entirety regardless of whether specifically mentioned in this decision.

A. Documentary Evidence

Exhibit 1: NTA dated February 21, 2017 containing the charges of inadmissibility under INA § 212(a)(6)(A)(i) and § 212(a)(7)(A)(i)(I)

[1] Respondent initially filed Form EOIR-42B on March 20, 2017 before this Court took over the case. *See* Exh. 3.

Exhibit 2:	Form I-213, Record of Deportable/Inadmissible Alien (field March 20, 2017)
Exhibit 3:	Respondent's Notice of Filing EOIR-42B (filed March 20, 2017)
Exhibit 4:	Respondent's Notice of Filing Amended Form EOIR-42B and Proof of Filing Motion to Vacate (filed May 23, 2017)
Exhibit 5:	Respondent's Notice of Filing Form I-918, Application for U Nonimmigrant Status (filed on May 23, 2017)
Exhibit 6:	June 12, 2017 Letter from Attorney Patrick Trese (filed June 13, 2017)
Exhibit 7:	Respondent's Brief Establishing Eligibility for Cancellation of Removal for Nonpermanent Residents Under Section 240A(b) of the Immigration and Nationality Act (filed June 27, 2017)

III. REMOVABILITY

A. Burden of Proof

DHS must prove by clear and convincing evidence that Respondent is subject to removal as charged. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. INA § 240(c)(3)(A).

B. Factual Findings on Allegations in Notice to Appear

On May 1, 2017, Respondent admits allegations one (1) through six (6). *See* Exh. 1. Based on Respondent's admissions and concessions, as well as Exhibit 2, I find that as a matter of fact, allegations one (1) through six (6) are true by evidence that is clear and convincing.

C. Statement of Law on Removability

i. Burden of Proof

DHS must prove by clear and convincing evidence that Respondent is an alien. Once alienage has been established, Respondent must prove by clear and convincing evidence that he is lawfully present in the United States pursuant to a prior admission. INA § 240(c)(2)(B); 8 C.F.R. § 1240.8(c).

DHS charges Respondent with inadmissibility pursuant to INA § 212(a)(6)(A)(i) and INA § 212(a)(7)(A)(i). On May 1, 2017, Respondent conceded foreign birth and conceded removability under the aforementioned charges. Based on Respondent's admissions and concessions, the Court found that Respondent is removable by clear and convincing evidence under INA § 212(a)(6)(A)(i) and INA § 212(a)(7)(A)(i)(I) on May 1, 2017.

ELIGIBILTY FOR CANCELLATION OF REMOVAL UNDER INA § 240A(b)

A. Statutory Requirements

Respondent shall have the burden of establishing that he is eligible for any requested benefit or privilege and that it should be granted as a matter of discretion. Among other things, Respondent must demonstrate to the Court that he has not been convicted has not been convicted of an offense under INA 212(a)(2), 237(a)(2) or 237(a)(3). INA § 240A(b)(1)(C).

If the evidence indicates that one or more grounds for mandatory denial of the application for relief apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply. *See* 8 C.F.R. § 1240.8(d). In this case, Respondent has been convicted of possession of cocaine in violation of Fla. Stat. § 893.13(6)(A). *See* Exh. 4, Motion to Vacate. As such, the evidence indicates that Respondent has been convicted of an offense that triggers a ground of mandatory denial under INA § 240A)(b)(1)(C). Therefore, Respondent bears the burden of demonstrating by a preponderance of the evidence that such ground of mandatory denial does *not* apply.

B. Categorical and Modified Categorical Approaches

An alien is ineligible for cancellation of removal for certain nonpermanent residents if, among other things, he has been convicted of violating any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21). *See* INA §§§ 240A(b)(1)(C), 212(a)(2)(A)(i)(II), 237(a)(2)(B)(i).

To determine whether an alien has been convicted violating a law relating to a controlled substance, the court must apply the "categorical approach." *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *Donawa v. U.S. Attorney Gen.*, 735 F.3d 1275, 1280 n.3 (11th Cir. 2013). Under the categorical approach, the court determines whether the state controlled substance offense involves a substance that is punishable under the federal controlled substance schedules. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1988 (2015). Thus, a state offense is a categorical match to a generic federal offense only if a conviction under the state statute necessarily involved facts equating to the generic of the federal offense." *Id.* (alterations in original) (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005)).

The elements of an offense are the "constituent parts of a crime's legal definition"—what the jury must find beyond a reasonable doubt or what a defendant necessarily admits when pleading guilty—while facts "need neither be found by a jury nor admitted by a defendant." *Mathis*, 136 S. Ct. at 2248 (internal quotation marks omitted). Where a statute covers any more conduct than the generic offense, it is not a categorical match. *Id.* However, there must be a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. *Moncrieffe*, 133 S. Ct. at 1685 (internal quotation marks omitted) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)); *see Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014); *But see Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) ("*Duenas-Alvarez* does not require this showing when the statutory language itself, rather than 'the application of legal imagination' to that language,

creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition.").

If the statute is "divisible," the Court applies the "modified categorical approach." *Mathis*, 136 S. Ct. at 2249; *Descamps*, 133 S. Ct. at 2281, 2283; *see Chairez*, 26 I&N Dec. at 822-24. A statute is divisible if it sets out one or more elements of the offense in the alternative and not all of the alternatives meet the generic federal definition. *Descamps*, 133 S. Ct. at 2281. Under the modified categorical approach, the Court may examine the record of conviction, which includes the charging document, plea, verdict or judgment, and sentence. *Id.* at 2284-85. This examination allows the Court to determine what crime, with what elements, a [respondent] was convicted of. *Mathis*, 136 S. Ct. at 2249. The Court then compares that particular crime to the generic offense. *Id.*

C. Application of Categorical and Modified Categorical Approaches

i. Categorical Approach

Respondent's Motion to Vacate indicates that he entered into a plea to possession of cocaine in violation of Fla. Stat. § 893.13(6)(A) in case Number (b)(6) and that he was sentenced to a term of probation. *See* Exh. 4, Motion to Vacate. Respondent contends that the Florida controlled substances schedule is broader that the federal controlled substance schedule with regard to its definition of cocaine. Fla. Stat. § 893.03(a)(4) lists cocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative or preparation of cocaine or ecgonine. Respondent claims that the federal controlled substances schedule, as it relates to cocaine, includes cocaine, its salts, optical and geometric isomers, and salts of isomers. 21 USC § 802(17)(D) (Controlled Substances Act (CSA)). Respondent argues that since the federal CSA schedule doesn't include **compounds, derivatives or preparations** of cocaine or ecgonine and the Florida controlled substance list does, the Florida statute is broader than the federal schedule (emphasis added).

However, Respondent's citation to 21 USC § 802(17)(D) does not paint the complete picture of the federal CSA schedule as it relates to cocaine. 21 USC § 802(17)(D) is a recitation of the definition of a "narcotic drug," not the more expansive federal CSA schedule. Schedule II of the CSA, 21 USC 812(a)(4), includes **cocaine**, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any **compound, mixture or preparation** which contains any quantity of any of the substances referred to in this paragraph (emphasis added). As such, Respondent's argument that the federal CSA schedule doesn't include compounds and preparations of cocaine fails.

Respondent is left with the argument that the Florida statute contains the word **derivative** and the federal CSA schedule contains the word **mixture** (emphasis added). The Court firmly believes that Congress does not expect the Court to conduct a comparison of the chemical composition of a cocaine mixture versus the chemical composition of a cocaine derivative. Immigration Judges are not chemists. The fact of the matter is that both the Florida statute and the federal CSA schedule reach offenses involving some permutation of cocaine.

In the alternative, and for the sake of argument, the Court will presume that "mixture" and "derivative" have two distinct meanings and are not equivalent. As such, the Florida statute potentially reaches a substance that it outside the federal CSA schedule as it relates to cocaine. Even based on this presumption, Respondent's argument fails, as the Court is permitted to reach the modified categorical approach.

The Court finds that Fla. Stat. § 893.13(6)(A) statute is divisible, as the identity of the substance is an element of the offense that the State must prove in order to attain a conviction. *See* Crim. Jury Inst. 25.7. Since the identity of the substance is an element, there are several distinct alternative offenses that can satisfy the State of Florida's burden to acquire a conviction for possession of a controlled substance under INA § 893.13(6)(A). As such, the Court can proceed to the modified categorical approach to determine the nature of the substance involved. *Descamps*, 133 S. Ct. at 2281 (holding that statute is divisible if it sets out one or more elements of the offense in the alternative and not all of the alternatives meet the generic federal definition).

ii. Modified Categorical Approach

Under the modified categorical approach, the Court may examine the record of conviction, which includes the charging document, plea, verdict or judgment, and sentence to determine what offense Respondent was convicted of committing. *Descamps*, 133 S. Ct. at 2284-85.

Unlike the burden of demonstrating removability, the burden of establishing eligibility for relief rests with Respondent. INA § 240(c)(4)(A)(i) places the burden on Respondent to establish that he satisfies all eligibility requirements. Further, 8 CFR § 1240.8(d) dictates that if the evidence indicates that one or more grounds of mandatory denial apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

The Department of Homeland Security has alleged that Respondent has a conviction in (b)(6) for possession of cocaine. *See* Exh. 2, Form I-213. Respondent appears to admit the same. *See* Exh. 4, Motion to Vacate in Case No. (b)(6). The motion indicates that Respondent entered a plea of guilty to possession of cocaine on (b)(6) in the (b)(6) (b)(6) County Circuit Court. *Id.* As such, the evidence indicates that Respondent has been convicted of a controlled substance offense involving cocaine, a substance listed on Schedule II of the federal CSA. *See* Schedule II under the CSA, 21 USC 812(a)(4).

At the very least, the evidence presented in this case indicates that Respondent's (b)(6) conviction involved a controlled substance that appears on the federal CSA, Schedule II, which would trigger INA § 212(a)(2)(A)(i)(II) and INA § 237(a)(2)(B)(i). Respondent has not presented evidence sufficient to rebut this conclusion. As such, he has not met his burden of establishing that he would be eligible for cancellation of removal under INA § 240A(b). *Matter of Alamanza-Arena*, 24 I&N Dec. 771 (BIA 2009) (holding that an alien who has been convicted

of an offense under a divisible statute has the burden to establish that the conviction was not pursuant to any part of the statute that would render him ineligible for relief from removal).[2]

V. CONCLUSION

Respondent has not met his burden of demonstrating by clear and convincing evidence that he has not been convicted of violating any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21). *See* INA §§§ 240A(b)(1)(C), 212(a)(2)(A)(i)(II), 237(a)(2)(B)(i). As such, the Court finds that Respondent has not met his burden of establishing statutory eligibility for cancellation of removal for certain nonpermanent residents under INA § 240A(b).

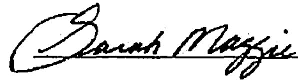
In light of the foregoing, the following order is entered:

ORDER OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that Respondent is **NOT ELIGIBLE** for cancellation of removal for certain nonpermanent residents under INA § 240A(b).

IT IS HEREBY ORDERED that the Respondent be **REMOVED** from the United States to **MEXICO.**

DATED this 12th day of July, 2017.



Sarah Mazzie
Immigration Judge

APPEAL DATE: August 11, 2017

[2] The Court recognizes the split among circuits as to who bears the burden of proof regarding eligibility for relief in the case of an inconclusive record of conviction. *See Sauceda v. Lynch*, 819 F.3d 526, 532 (1st Cir. 2016) (holding that irrespective of any "factual uncertainty," when the modified categorical approach cannot identify the prong of the divisible statute under which the immigrant was convicted, as a matter of law the immigrant has not been convicted of a disqualifying offense"); *Martinez v. Mukasey*, 551 F.3d 113, 121–22 (2d Cir. 2008); *but see Syblis v. U.S. Att'y Gen.*, 763 F.3d 348, 355–57 (3d Cir. 2014) (holding that an "inconclusive record is insufficient to satisfy a noncitizen's burden of proving eligibility for discretionary relief"); *Sanchez v. Holder*, 757 F.3d 712, 720 & n. 6 (7th Cir. 2014); *Young v. Holder*, 697 F.3d 976, 988–90 (9th Cir. 2012) (en banc); *Salem v. Holder*, 647 F.3d 111, 116–20 (4th Cir. 2011); *Garcia v. Holder*, 584 F.3d 1288, 1289–90 (10th Cir. 2009); *see also Gomez–Perez v. Lynch*, 829 F.3d 323, 328 (5th Cir. 2016) (noting that the circuit had not yet decided the issue but citing *Garcia v. Holder*, 756 F.3d 839, 847–48 (5th Cir. 2014) (Garza, J., specially concurring) ("arguing that the petitioner should bear the burden of proving his crime was not for a qualifying offense")). The Eleventh Circuit has not yet ruled on this issue. The Court agrees with the majority of circuits that an inconclusive record is not sufficient to meet a respondent's burden by preponderance of the evidence, and to decide differently would effectively nullify the statutorily prescribed burden of proof. *See Syblis*, 763 F.3d at 355–35; *Garcia*, 584 F.3d at 1289–90.