

**Immigration Court: BIA****Case:** *Matter of Jorge Gonzalez Lemus*, 27 I&N Dec. 612 (BIA 2019)**Date:** September 25, 2019**Adjudicated by:** Guendelsberger, Grant, Kendall Clark**Opinion:** Grant**Tags:** Immigration, removal, drug possession, identity of drug, divisible statute, modified categorical approach, controlled substance**Question Presented:** Is a conviction under section 124.401(5) of the Iowa Code a “violation of . . . any law or regulation of a State . . . relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)” within the meaning of section 237(a)(2)(B)(i) of the Act?

- Is the State required to prove the identity of a controlled substance? (see disc. at 615)

**Holdings:** Respondent’s conviction was a violation of Controlled Substances Act; the identity of the controlled substance is an element of the crime under the Iowa statute.**Rationale:** Identity of controlled substance is an element of section 124.401(5) of Iowa Code; therefore, the statute is divisible and the modified categorical approach could be applied. (613)**Facts:** Mexican citizen adjusted to LPR in 2009. Charged as removable based on two convictions for possession of a controlled substance in violation of Iowa Code: methamphetamine and marijuana.**Appeals to Statute & Precedent:**

- *Matter of Chairez*, 26 I&N Dec. 819, 822 (BIA 2016): a statute is not “divisible unless each statutory alternative defines an independent ‘element’ of the offense, as opposed to a mere ‘brute fact’ describing various means” of breaking that law.
- *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016): element of offense or brute fact?

**Discussion:**

- To apply categorical approach: Government must point to a connection between an element of the alien’s conviction and a drug defined in 21 U.S.C. §802. (613)
- If the state crime is not a categorical match, see if the statute is divisible, made up of multiple alternative elements.

- If it's divisible, **look at the relevant conviction records** ("modified categorical approach") to determine "what crime, with what elements, [the respondent] was convicted of." *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) (citation omitted)
- Iowa statute:
  - Includes at least one substance not on federal schedule
  - **Removability "depends on whether the identity of the controlled substance is an 'element' of section 124.401(5) of the Iowa Code. If it is, the State statute is divisible. If, instead, the identity of the controlled substance is a 'brute fact' or a means by which a crime may be committed, then the statute is not divisible and is overbroad."** 27 I&N Dec. 612 at 613
  - For example, different penalties for possession of different substances indicate that the statute is divisible. (at 614) See *Martinez v. Sessions*, 893 F.3d 1067, 1071 (8<sup>th</sup> Cir. 2018)
  - "The respondent argues that if the specific reference to marijuana renders the statute divisible, then the statute is divisible only to the binary question whether the controlled substance was marijuana or not. However, as noted above, the statute also includes specific references to methamphetamines and amphetamine." 27 I&N Dec. 612 at 614
  - Iowa precedent: prosecute separate offenses for SAME factual situation because multiple substances were involved (IOW, separate convictions for each substance didn't constitute double punishment because statute is divisible.) (at 614-15)
    - This is because each element of an offense is not necessarily a part of each other element.

**Commentary:**

- This wasn't discussed in the opinion, but it's implied (at 615-16) that the IJ used the modified categorical approach to determine the identity of the drugs involved in the respondent's conviction from the "relevant conviction records," which is what the respondent was protesting.