

Chippewa Indians, 989 F.2d at 1000). The *parens patriae* presumption of adequate representation is triggered only “to the extent [the proposed intervenor’s] interests coincide with the public interest.” *Chiglo v. City of Preston*, 104 F.3d 185, 187–88 (8th Cir.1997).

Here, NSP’s interests in its Sherco facility diverge from the EPA’s general interests in assuring that the proper regulatory procedures are followed. Both NSP and the EPA argue that the Environmental Groups cannot bypass the proper steps required to impose RAVI BART on Sherco. But NSP’s interest in the litigation is more than mere procedural formality. NSP owns the target power plant; it “is seeking to protect a more narrow and ‘parochial’ financial interest not shared by [the general public].” *Mille Lacs Band of Chippewa Indians*, 989 F.2d at 1000 (quoting *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C.Cir.1986)). The EPA is ultimately tasked with the much broader responsibility of executing the CAA’s goal of preventing and remedying visibility impairments in mandatory class I Federal areas. In carrying out this responsibility, the EPA would “shirk its duty were it to advance the narrower interest of a private entity.” *See Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir.1992). Moreover, speaking to practical concerns, NSP can provide expertise to the issues in this dispute, *see Utahns for Better Transp.*, 295 F.3d at 1117, and NSP cannot be assured that the EPA’s current position “will remain static or unaffected by unanticipated policy shifts,” *Kleissler*, 157 F.3d at 974. With these considerations in mind, we are satisfied that NSP’s interests are not adequately represented by the existing parties, and thus, NSP is entitled to intervene as of right under Rule 24(a).

III.

For the reasons stated, we reverse the district court’s order denying NSP’s motion to intervene and remand with instruction to enter an order granting NSP’s motion for leave to intervene as of right.



Raul Quijada CORONADO, Petitioner,

v.

**Eric H. HOLDER, Jr., Attorney
General, Respondent.**

No. 11–72121.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 8, 2013.

Filed March 14, 2014.

Amended July 18, 2014.

Background: Alien, citizen of Mexico, applied for cancellation of removal. Immigration Judge (IJ) denied that application. Alien appealed. Board of Immigration Appeals (BIA) affirmed. Alien petitioned for judicial review.

Holdings: The Court of Appeals, Nguyen, Circuit Judge, held that:

- (1) Court of Appeals had jurisdiction to consider issue of whether alien’s prior state law drug convictions rendered him inadmissible;
- (2) prior convictions of alien under California prohibited substances statute were not categorically removable offenses, and thus modified categorical approach could be used;
- (3) modified categorical approach applied in elements-based inquiry to ascertain portion of California prohibited substances statute to which alien, citizen of Mexico, actually had pleaded guilty to violating;

- (4) prior convictions of alien under California prohibited substances statute were for possession of methamphetamine, as controlled substance listed in Controlled Substances Act (CSA), and therefore alien was inadmissible based on his prior convictions;
- (5) certified electronic docket and court minutes for prior state methamphetamine convictions of alien were "equally reliable," and thus could be used under modified categorical analysis to determine whether those convictions qualified as predicate offenses, such as to render alien inadmissible;
- (6) pro se complaints made by alien about his counsel's deficient performance were sufficient to put BIA on notice of his due process claim for ineffective assistance of counsel;
- (7) remand was required for BIA to consider due process claim of alien; and
- (8) Court of Appeals did not have jurisdiction to review weight that BIA assigned to sobriety of alien.

Petition denied in part, dismissed in part, and granted in part and remanded.

1. Aliens, Immigration, and Citizenship ⇌385

Court of Appeals had jurisdiction to hear petition for judicial review that had been brought by alien, citizen of Mexico, on denial of his application for cancellation of removal, that raised issue of whether his prior state law drug convictions rendered him inadmissible, since that issue raised question of law. Immigration and Nationality Act, § 242(a)(2)(D), 8 U.S.C.A. § 1252(a)(2)(D).

2. Aliens, Immigration, and Citizenship ⇌402, 404

In an immigration case, questions of law and constitutional claims are reviewed de novo.

3. Aliens, Immigration, and Citizenship ⇌234, 274

Prior convictions of alien, citizen of Mexico, under California prohibited substances statute were not categorically removable offenses, and thus modified categorical approach could be used to determine whether alien was inadmissible, since "full range of conduct" covered by California statute did not fall within federal Controlled Substances Act (CSA) schedules. Immigration and Nationality Act, § 212(a)(2)(A)(i)(II), 8 U.S.C.A. § 1182(a)(2)(A)(i)(II); Controlled Substances Act, § 102, 21 U.S.C.A. § 802; West's Ann.Cal.Health & Safety Code § 11377(a).

4. Aliens, Immigration, and Citizenship ⇌274

On petition for judicial review of denial of application for cancellation of removal, modified categorical approach applied in elements-based inquiry to ascertain portion of California prohibited substances statute to which alien, citizen of Mexico, actually had pleaded guilty to violating, since California statute listed potential offense elements in the alternative, some of which were contained in Controlled Substances Act (CSA) and some of which were not. Immigration and Nationality Act, § 212(a)(2)(A)(i)(II), 8 U.S.C.A. § 1182(a)(2)(A)(i)(II); Controlled Substances Act, § 102, 21 U.S.C.A. § 802; West's Ann.Cal.Health & Safety Code § 11377(a).

5. Aliens, Immigration, and Citizenship ⇌234

Under modified categorical approach, prior convictions of alien, citizen of Mexico, under California prohibited substances statute were for possession of methamphetamine, as controlled substance listed

in Controlled Substances Act (CSA), and therefore alien was inadmissible based on his prior convictions, where criminal complaints, read in conjunction with certified electronic docket sheet and minute order or court minutes, established that alien twice had pleaded guilty to possession of methamphetamine. Immigration and Nationality Act, § 212(a)(2)(A)(i)(II), 8 U.S.C.A. § 1182(a)(2)(A)(i)(II); Controlled Substances Act, § 102, 21 U.S.C.A. § 802; West's Ann.Cal.Health & Safety Code § 11377(a).

6. Aliens, Immigration, and Citizenship
⇌232

When conducting a modified categorical analysis to determine whether a prior state conviction qualifies as a predicate offense, such as to render an alien inadmissible, the government may rely on other “equally reliable” documents to show that he pleaded to the facts alleged in each criminal complaint; the court may consider the charging document, the terms of a plea agreement, the transcript of colloquy between the judge and the defendant in which the factual basis for the plea was confirmed by the defendant, and comparable judicial records.

7. Aliens, Immigration, and Citizenship
⇌234

Certified electronic docket and court minutes for prior state methamphetamine convictions of alien, citizen of Mexico, were “equally reliable,” and thus could be used under modified categorical analysis to determine whether those convictions qualified as predicate offenses, such as to render alien inadmissible; certified electronic docket permitted clerk to “keep a docket[] instead of minutes” in misdemeanor cases, and where “an entry of any judgment, order or other proceeding in the minutes is required, an entry thereof in the docket shall be made and shall be deemed a sufficient entry in the minutes for all purposes.” Immigration and Nationality Act,

§ 212(a)(2)(A)(i)(II), 8 U.S.C.A. § 1182(a)(2)(A)(i)(II); Controlled Substances Act, § 102, 21 U.S.C.A. § 802; West's Ann.Cal.Health & Safety Code § 11377(a); West's Ann.Cal.Penal Code § 1428.

8. Aliens, Immigration, and Citizenship
⇌232

Where the minute order or other equally reliable document specifies that a defendant pleaded guilty to a particular count of a criminal complaint, the court may consider the facts alleged in the complaint when conducting a modified categorical analysis to determine whether a prior state conviction qualifies as a predicate offense, such as to render an alien inadmissible.

9. Aliens, Immigration, and Citizenship
⇌411

Pro se complaints made by alien, citizen of Mexico, about his counsel's deficient performance, on appeal of denial of his application for cancellation of removal, were sufficient to put Board of Immigration Appeals (BIA) on notice of his due process claim for ineffective assistance of counsel, and thus remand was warranted for BIA to consider due process claim, where alien explicitly stated in his brief to BIA that he had an “ineffective assistance claim,” he criticized his counsel for failing to “research[] the law and the facts as pertained to his case and present [the case] properly,” and he also argued that his former counsel “showed incompetence by failing to object to many of the questions and negative facts comments” made by immigration judge (IJ). U.S.C.A. Const.Amends. 5, 6; Immigration and Nationality Act, § 212(a)(2)(A)(i)(II), 8 U.S.C.A. § 1182(a)(2)(A)(i)(II).

10. Aliens, Immigration, and Citizenship
⇌411

Remand was required for Board of Immigration Appeals (BIA) to consider

due process claim of alien, citizen of Mexico, which alleged bias by immigration judge (IJ), where BIA inexplicably ignored alien's arguments on appeal of denial of his application for cancellation of removal. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 212(a)(2)(A)(i)(II), 8 U.S.C.A. § 1182(a)(2)(A)(i)(II).

11. Aliens, Immigration, and Citizenship ⊞411

Although the Board of Immigration Appeals (BIA) is not free to ignore arguments raised by a petitioner, the Court of Appeals is not permitted under the ordinary remand rule to decide a claim that the immigration court has not considered in the first instance.

12. Aliens, Immigration, and Citizenship ⊞385

Court of Appeals did not have jurisdiction on petition for judicial review of denial of cancellation of removal to review discretionary determination, such as weight that Board of Immigration Appeals (BIA) assigned to sobriety of alien, citizen of Mexico, while in detention, which was one of many factors that BIA considered in deciding whether to grant him cancellation of removal; in concluding that alien did not establish meaningful rehabilitation, BIA did not rely solely on the fact that his current sobriety in detention was enforced, but also on the fact that he had failed at prior rehabilitation programs. Immigration and Nationality Act, § 242(a)(2)(B)(i), 8 U.S.C.A. § 1252(a)(2)(B)(i).

Bradley J. Hamburger (argued), Theane Evangelis Kapur, and Brandon S. Dimond,

* The Honorable Fortunato P. Benavides, Senior Circuit Judge for the U.S. Court of Ap-

Gibson, Dunn & Crutcher LLP, Los Angeles, CA, for Petitioner.

Jessica R.C. Malloy (argued), Trial Attorney; Stuart F. Delery, Acting Assistant Attorney General; Paul Fiorino, Senior Litigation Counsel; and Katherine A. Smith, Trial Attorney, United States Department of Justice, Civil Division, Washington, D.C., for Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A012-632-641.

Before: FORTUNATO P. BENAVIDES,* JAY S. BYBEE, and JACQUELINE H. NGUYEN, Circuit Judges.

ORDER AND AMENDED OPINION

ORDER

The opinion filed on March 14, 2014, and appearing at 747 F.3d 662, is amended. The superseding amended opinion is filed concurrently with this order.

With these amendments, the panel has voted to deny the petition for panel rehearing. Judge Bybee and Judge Nguyen have voted to deny the petition for rehearing en banc, and Judge Benavides has so recommended. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R.App. P. 35(f).

The petition for panel rehearing and rehearing en banc is **DENIED**. No further petitions for rehearing or rehearing en banc will be entertained.

OPINION

NGUYEN, Circuit Judge:

Raul Quijada Coronado petitions for review of the Board of Immigration Appeals'

peals for the Fifth Circuit, sitting by designation.

(“BIA”) decision finding him inadmissible and denying his application for cancellation of removal. Coronado argues that the BIA erred in concluding that he had suffered two prior convictions for possession of a controlled substance prohibited under the Federal Controlled Substances Act (“CSA”), 21 U.S.C. § 802. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II). Coronado further argues that the BIA erred in failing to address his constitutional claims.

We hold that the statute under which Coronado was convicted, California Health & Safety Code § 11377(a), is a divisible statute, and thus, we apply the modified categorical approach in analyzing Coronado’s prior convictions. *See Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 2281, 186 L.Ed.2d 438 (2013) (stating that the modified categorical approach applies only to prior convictions under a “divisible” statute, one that “sets out one or more elements of the offense in the alternative”). Under that approach, the government satisfied its burden of proving that Coronado was twice convicted of possessing methamphetamine, a controlled substance listed in the CSA. Therefore, the BIA did not err in finding Coronado inadmissible based on his prior convictions.

However, because the BIA failed to address Coronado’s due process claims, which allege ineffective assistance of counsel and bias by the immigration judge (“IJ”), we remand to the BIA for consideration of these claims in the first instance. We dismiss Coronado’s unexhausted equal protection claim for lack of jurisdiction.

Background

I

Coronado, a native and citizen of Mexico, became a legal permanent resident of

the United States in 1961. In 1998, he was charged in state court with possession of methamphetamine in violation of California Health & Safety Code § 11377(a). According to the state court’s certified electronic docket in Case No. 8LC01036, he pleaded guilty to “Count (01),” the only charge in the criminal complaint. In December 2006, the court entered judgment against Coronado “as to Count (01)” (the “2006 Conviction”).

On September 15, 2008, Coronado applied for admission to the United States after making a trip to Mexico. Upon checking his criminal records, Border Patrol officers learned of the 2006 Conviction. On that same day, Coronado was paroled into the United States, and the Department of Homeland Security (“DHS”) served him with a Notice to Appear. In May 2009, DHS served him with a Form I-261, which alleged, among other things, that Coronado was subject to removal due to his conviction in 2006 for possession of methamphetamine.

In December 2009, while in removal proceedings, Coronado was again charged in state court with possession of methamphetamine in violation of California Health & Safety Code § 11377(a). According to the court minutes in Case No. JCF24680, on March 23, 2010, Coronado pleaded guilty to “Count 1: HS11377(A),” the only charge in the criminal complaint (the “2010 Conviction”).

II

A

During his removal proceedings, Coronado denied having been convicted of methamphetamine possession. To prove the 2006 Conviction, the government submitted the criminal complaint and the certified electronic docket of that case. Further, to prove the 2010 Conviction, the

government submitted documents that included the criminal complaint and the court minutes of that case.

The IJ found Coronado inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(II) due to his convictions for possession of a controlled substance listed in the CSA. Further, after weighing the relevant factors, the IJ denied Coronado's application for cancellation of removal.

Appearing pro se, Coronado appealed to the BIA, which affirmed the IJ's finding that Coronado was inadmissible based on his prior drug convictions. The BIA also affirmed the IJ's denial of cancellation of removal on the ground that Coronado's "undesirability as a permanent resident" outweighed the positive equities. Coronado timely petitioned for review.

B

In his opening brief to this court, Coronado did not challenge the use of the modified categorical approach with regard to his prior convictions. Instead, he argued that the BIA erred because the charging papers alone were insufficient to prove that he was convicted of possessing a controlled substance listed in the CSA.

While Coronado's petition for review was pending, the Supreme Court issued a decision in *Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 186 L.Ed.2d 438, which clarified the circumstances in which the modified categorical approach may be applied. The parties filed letters pursuant to Federal Rule of Appellate Procedure 28(j), taking contrary positions as to the applicability of the modified categorical approach to Coronado's state court convictions. The government argued that § 11377(a) is a divisible statute, whereas Coronado contended that the statute is not necessarily divisible.

Jurisdiction and Standard of Review

[1] We have jurisdiction to review "constitutional claims or questions of law raised upon a petition for review." 8 U.S.C. § 1252(a)(2)(D); see also *Cheuk Fung S-Yong v. Holder*, 600 F.3d 1028, 1033 (9th Cir.2010) (applying 8 U.S.C. § 1252(a)(2)(D)). Whether Coronado's drug convictions render him inadmissible is a question of law. See *Pagayon v. Holder*, 675 F.3d 1182, 1189 (9th Cir.2011) (per curiam); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 909 (9th Cir.2004). Further, Coronado raised several constitutional claims. Accordingly, we have jurisdiction to hear Coronado's petition.

[2] We review questions of law and constitutional claims de novo. *Khan v. Holder*, 584 F.3d 773, 776 (9th Cir.2009).

Discussion

I

[3] Under 8 U.S.C. § 1182(a)(2)(A)(i)(II), "any alien convicted of, or who admits to having committed . . . (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State . . . relating to a controlled substance (as defined in section 802 of title 21), is inadmissible." Here, Coronado challenges the BIA's finding of inadmissibility based on his two prior convictions for possessing methamphetamine, in violation of California Health & Safety Code § 11377(a). Thus, pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(II), the government had the burden of proving that Coronado's criminal conviction was for possession of a substance that is listed under California law and the CSA schedules. See *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1077-78 (9th Cir.2007). If the "full range of conduct" covered by § 11377(a) falls within the CSA schedules, then Coronado's conviction is "categorically a removable of-

fense” and our inquiry is over. *Alanis-Alvarado v. Holder*, 558 F.3d 833, 836 (9th Cir.2009).

A

California Health & Safety Code § 11377(a) provides:

Except as authorized by law . . . every person who possesses any controlled substance which is (1) classified in Schedule III, IV, or V, and which is not a narcotic drug, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), and (20) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d), (e), or (f) of Section 11055 . . . shall be punished by imprisonment in a county jail for a period of not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code.

By comparison, the CSA defines a “controlled substance” as “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.” 21 U.S.C. § 802(6). In turn, the schedules are codified in 21 U.S.C. § 812 and revised annually in 21 C.F.R. § 1308.01 *et seq.* See 21 U.S.C. §§ 802(6), 812(a).

The text of the relevant statutes is not particularly helpful here because both § 11377(a) and the CSA define offenses by reference to other statutes. Nevertheless, as laid out in Appendix 1, the substances barred by § 11377(a) and the CSA are nearly identical. Indeed, khat (*Catha Ed-*

ulis) is one of the only substances that violates § 11377(a) but not the CSA.¹ See Cal. Health & Safety Code § 11377(a)(5) (prohibiting substances specified in California Health & Safety Code § 11055(d), (e), or (f)); Cal. Health & Safety Code § 11055(d)(7) (prohibiting “[k]hat, which includes all parts of the plant classified botanically as *Catha Edulis*”); see also, e.g., *United States v. Hassan*, 578 F.3d 108, 114 (2d Cir.2008) (“Khat itself is not a controlled substance under United States law.”); *United States v. Caseer*, 399 F.3d 828, 833 (6th Cir.2005) (“[N]either the U.S.Code nor the Code of Federal Regulations . . . refers to . . . *Catha edulis*, commonly known as ‘khat.’”).

This one difference is sufficient because the “full range of conduct” covered by California Health & Safety Code § 11377(a) does not fall within the CSA schedules, and as such, Coronado’s conviction is not a categorically removable offense.² Accordingly, we must consider whether we may use the “modified categorical” approach to determine whether Coronado was convicted of a removable offense under 8 U.S.C. § 1182(a)(2)(A)(i)(II). *Cheuk Fung S-Yong*, 600 F.3d at 1029.

B

In *Descamps*, the Supreme Court resolved a circuit split regarding whether the modified categorical approach is appropriate when the indivisible elements of a statute target a broader swath of conduct than a corresponding generic offense. 133 S.Ct. at 2283. The Supreme Court answered in

1. Chorionic gonadotropin (HGC) (Cal. Health & Safety Code § 11056(f)(32)) is also not listed in the federal schedules. See 21 C.F.R. § 1308.13 (Schedule III of the CSA).

2. We previously determined that California law regulates the possession of several substances that are not similarly regulated by the

CSA. *Ruiz-Vidal*, 473 F.3d at 1078. Although *Ruiz-Vidal* reinforces our decision here, we are not bound by that opinion because there, we analyzed California Health & Safety Code §§ 11055(b)(1)(G) and 11033—statutes that are not referenced in California Health & Safety Code § 11377(a). *Id.*

the negative, clarifying that the modified categorical approach only “serves a limited function.” *Id.* Specifically, the modified categorical approach “helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant’s conviction.” *Id.* Thus, properly viewed, the modified categorical approach merely enables a court to ascertain the specific element that a defendant was convicted of violating when a statute contains multiple, alternative elements. *See id.* at 2285 (describing the modified categorical approach as a “tool” that permits a court “to find out which [offense] the defendant was convicted of” when a statute contains alternative elements that “effectively create[] ‘several different . . . crimes’” (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009))). Divisibility is therefore an “elements-based” inquiry and not a “facts-based” one. *Descamps*, 133 S.Ct. at 2293.

Applying this “elements-based” inquiry to California Penal Code § 459, the burglary statute that was at issue, the *Descamps* Court held that the modified categorical approach could not be used because § 459 was not divisible. *Id.* at 2283. Rather, § 459 merely applied “more broadly than the generic offense.” *Id.* While the generic offense required “an unlawful entry along the lines of breaking and entering,” the California statute did not. *Id.* at 2285. Having thus drawn a distinction between divisible statutes versus overbroad statutes, the Court held that the modified categorical approach “ha[d] no role to play” in analyzing *Descamps*’s prior conviction. *Id.*

3. We have treated a similar provision of the California Health & Safety Code as “sufficiently divisible” for purposes of applying the modified categorical approach. *See Cheuk Fung S-Yong*, 600 F.3d at 1034 n. 5 (noting that California Health & Safety Code § 11379

Therefore, as a threshold matter, we must confront the question of whether § 11377(a) is a divisible statute such that the modified categorical approach applies.

C

[4] Section 11377(a) identifies a number of California drug schedules and statutes and organizes them into five separate groups, which are listed in the disjunctive. Cal. Health & Safety Code § 11377(a). Section 11377(a) criminalizes the possession of any one of the controlled substances identified by reference. *Id.* Unlike the California burglary statute at issue in *Descamps*, § 11377(a) is not merely an indivisible, overbroad statute that lacks an element contained in the corresponding generic federal offense. Rather, by its very terms, § 11377(a) “list[s] potential offense elements in the alternative,” *Descamps*, 133 S.Ct. at 2284, some of which are contained in the CSA and some of which are not. Use of the modified categorical approach is therefore appropriate “to determine which alternative element . . . formed the basis of the defendant’s conviction.” *Id.* at 2284, 2293. Put differently, the modified categorical approach may be used here as part of an elements-based inquiry to ascertain which portion of § 11377(a) Coronado actually pleaded guilty to violating.³

Coronado argues that § 11377(a) is not necessarily divisible because statutes can list “alternative means” of satisfying an indivisible set of elements. *See id.* at 2285 n. 2, 2290–91. While this may be true as to some statutes, it is not the case with regard to § 11377(a). Section 11377(a)

is divisible); *see also Cabantac v. Holder*, 736 F.3d 787, 789 n. 2 (9th Cir.2013) (Murguía, J., dissenting) (although undecided, “[i]t appears that § 11377(a) is a divisible statute that permits the application of the modified categorical approach”).

identifies a number of controlled substances by referencing various California drug schedules and statutes and criminalizes the possession of any one of those substances. The statute thus “effectively creates ‘several different . . . crimes,’” *id.* at 2285 (quoting *Nijhawan*, 557 U.S. at 41, 129 S.Ct. 2294), and not separate “means of commission,” *id.* at 2291 (internal quotation marks omitted). Indeed, the *Descamps* Court’s discussion of a hypothetical state statute criminalizing assault with “any of eight specified weapons” supports such a conclusion because the Court suggested that the listing of *alternative weapons* by such a statute would not render it indivisible. *Id.* at 2290. To the contrary, in such a circumstance, a court could apply the modified categorical approach and “check the charging documents and instructions” to determine which element formed the predicate offense for the conviction. *Id.* The same rationale applies here with § 11377(a) and its listing of alternative controlled substances.⁴

D

[5] In applying the modified categorical approach to Coronado’s prior convictions, we find that the government met its burden of proving that he was twice convicted of possessing methamphetamine.

[6] Coronado claims that under the modified categorical approach, the only relevant document in each case was the criminal complaint, which alone is insufficient to establish that the controlled substance he possessed was methamphet-

amine as opposed to a substance not covered by the CSA. However, Coronado ignores the fact that the government may also rely on other “equally reliable” documents to show that he pleaded to the facts alleged in each criminal complaint. In conducting a modified categorical analysis, the court may consider the charging document, the terms of a plea agreement, the transcript of colloquy between the judge and the defendant in which the factual basis for the plea was confirmed by the defendant, and comparable judicial records. *Shepard v. United States*, 544 U.S. 13, 26, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). The list of documents in *Shepard* is merely illustrative, and “documents of equal reliability may also be considered.” *United States v. Snellenberger*, 548 F.3d 699, 701 (9th Cir.2008) (en banc) (per curiam). For example, in *Snellenberger*, we decided that a California state court clerk’s minute order was “equally reliable” and could be used in applying the modified categorical approach. *Id.* at 701–02.

[7] Similarly here, the certified electronic docket in the 2006 Conviction and the court minutes in the 2010 Conviction are equally reliable to the documents approved in *Shepard*. With regard to the certified electronic docket, California Penal Code § 1428 permits the clerk to “keep a docket[] instead of minutes” in misdemeanor cases, and where “an entry of any judgment, order or other proceeding in the minutes . . . is required, an entry thereof

4. Coronado further argues that “the precise controlled substance possessed is not an essential element” of § 11377(a). Neither case he cites supports this contention. See *People v. Palaschak*, 9 Cal.4th 1236, 40 Cal.Rptr.2d 722, 893 P.2d 717, 720–21 (1995) (holding that an offender may be convicted of the offense of possessing drugs despite having ingested those drugs); *People v. Martin*, 169 Cal.App.4th 822, 86 Cal.Rptr.3d 858, 861–862

(2008) (finding no error where the defense failed to object to the specificity of the pleadings and the defendant was not prejudiced by the conflicting references to “cocaine” and “cocaine base” because the penalty of the offense was the same). The jury instructions applicable to this offense also undermine Coronado’s argument. See CALCRIM No. 2304 (2013); CALJIC 12.00 (2013).

in the docket shall be made and shall be deemed a sufficient entry in the minutes . . . for all purposes.” Because docket sheets may be kept in lieu of minute orders, they qualify as documents of “equal reliability.” See *Snellenberger*, 548 F.3d at 701; *United States v. Strickland*, 601 F.3d 963, 968 (9th Cir.2010) (permitting the use of an uncertified docket sheet from a Maryland court). Likewise, under *Snellenberger*, the court minutes in the 2010 Conviction are equally reliable.

[8] Where the minute order or other equally reliable document specifies that a defendant pleaded guilty to a particular count of a criminal complaint, the court may consider the facts alleged in the complaint. *Cabantac v. Holder*, 736 F.3d 787, 793–94 (9th Cir.2013) (per curiam). Applying *Cabantac*, the criminal complaints here, read in conjunction with the docket sheet and minute order, establish that Coronado twice pleaded guilty to possession of methamphetamine. In the 2006 Conviction, the certified electronic docket shows that Coronado pleaded guilty to count one. The criminal complaint listed one count and referenced only one controlled substance, namely, methamphetamine. Likewise, in the 2010 Conviction, the court minutes indicate that Coronado pleaded guilty to count one. In turn, the criminal complaint described only one count for possession of methamphetamine.

Therefore, the BIA did not err in finding Coronado inadmissible based on two prior convictions for possession of a controlled substance prohibited by California law and the CSA.

II

[9] We next consider Coronado’s argument that the BIA erred in ignoring his constitutional due process claims. Specifically, Coronado argues that his due process rights were violated because of (1) his former counsel’s ineffective assistance and

(2) the IJ’s bias during the removal proceedings. The BIA addressed neither claim.

In his pro se brief to the BIA, Coronado explicitly stated that he had an “ineffective assistance claim.” In addition, he criticized his counsel for failing to “research[] the law and the facts as pertained to his case and present [the case] properly.” Coronado also argued that his former counsel “showed incompetence by failing to object to many of the questions and negative facts comments” made by the IJ. Although his pro se brief was inartful, we find that Coronado’s complaints about his counsel’s deficient performance were sufficient to put the BIA on notice of his claim for ineffective assistance of counsel. See *Figueroa v. Mukasey*, 543 F.3d 487, 492 (9th Cir.2008) (explaining that the exhaustion doctrine is not applied “in a formalistic manner” and requires only that the petitioner put the BIA on notice as to the specific issues so that it has an opportunity to pass on those issues); *Agyeman v. INS*, 296 F.3d 871, 878 (9th Cir.2002) (holding that pro se claims should be construed liberally).

[10] Coronado next argues that the BIA erred in ignoring his claim that the IJ failed to act as a neutral fact-finder and Coronado was prejudiced because he was prevented from fully presenting his case. In his pro se brief to the BIA, Coronado criticized the IJ, claiming that the IJ “personally attack[ed]” him; appeared to have a “personal vendetta” against him; and took the role of both “the prosecutor and executioner” by showing that Coronado was “a bad person with a bad moral character.” Yet, the BIA inexplicably ignored Coronado’s arguments.

The government contends that Coronado failed to exhaust the claim that his former counsel was ineffective. The government does not contend that Coronado’s claim

that the IJ failed to act as a neutral factfinder was unexhausted but instead argues that we lack jurisdiction to review the claim because the BIA independently weighed the discretionary factors. We disagree with both of the government's contentions.

[11] The BIA is “not free to ignore arguments raised by a petitioner.” *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir.2005). However, under the ordinary remand rule, “we are not permitted to decide a claim that the immigration court has not considered in the first instance.” *Montes-Lopez v. Gonzales*, 486 F.3d 1163, 1165 (9th Cir.2007) (citing *INS v. Ventura*, 537 U.S. 12, 16, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002) (per curiam)); see also *Barroso v. Gonzales*, 429 F.3d 1195, 1209 (9th Cir. 2005) (“Although it appears that [the petitioner] may well have been denied his statutory right to counsel, it is not for us to determine this question in the first instance.” (citing *Ventura*, 537 U.S. at 16, 123 S.Ct. 353)). Accordingly, we remand both claims to the BIA to consider them in the first instance.

III

[12] Finally, we turn to Coronado's claim that the BIA violated his right to equal protection in denying his application for cancellation of removal.

The IJ denied Coronado's application for cancellation of removal after weighing multiple factors in favor of, and against, the grant of relief. Reviewing the denial of relief de novo, the BIA affirmed. The BIA balanced the positive factors, including Coronado's family ties, long employment history, and long residence in the United States, against the negative factors, including Coronado's long history of drug use, his failure at rehabilitation programs, and the fact that his sobriety in detention was enforced. The BIA concluded that “[g]iven the number and recency of his convic-

tions, his admitted addiction, and his lack of rehabilitation over many years, . . . [the positive factors] do not outweigh the adverse factors evidencing his undesirability as a permanent resident.”

On appeal, Coronado argues that the BIA violated his right to equal protection because detained aliens like himself—unlike non-detained aliens—are barred from establishing their genuine rehabilitation, which is ordinarily a prerequisite to the granting of cancellation of removal.

Coronado mischaracterizes the BIA's analysis. In concluding that he failed to establish meaningful rehabilitation, the BIA did not rely solely on the fact that his current sobriety in detention was enforced, but also on the fact that he had failed at prior rehabilitation programs. Thus, although Coronado claims an “equal protection violation,” his challenge to the BIA's denial of relief is not in fact a colorable constitutional claim or question of law over which we could exercise jurisdiction. See 8 U.S.C. § 1252(a)(2)(D) (providing this court with jurisdiction over “constitutional claims or questions of law raised upon a petition for review”); see also *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir.2001) (“[A] petitioner may not create the jurisdiction that Congress chose to remove simply by cloaking an abuse of discretion argument in constitutional garb.”). Rather, Coronado's argument, properly considered, is merely an attempt to contest the weight the BIA assigned to his sobriety while in detention, which was one of the many factors the BIA considered in deciding whether to grant him cancellation of removal. We have no jurisdiction to review such discretionary determinations under 8 U.S.C. § 1252(a)(2)(B)(i). See *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir.2005) (recognizing that we lack jurisdiction to review the agency's

discretionary determination regarding the granting of cancellation of removal).

Conclusion

The petition for review is **DENIED** in part as to the BIA's determination that Coronado is inadmissible due to his convic-

tions for possession of methamphetamine; **GRANTED** in part and **REMANDED** as to Coronado's due process claims; and **DISMISSED** in part as to Coronado's equal protection claim.

The parties shall bear their own costs on appeal.

Appendix 1

California Health and Safety

Code § 11377(a)(1)

Appendix 1—Continued

CALIFORNIA	FEDERAL
Schedule III (§ 11056)	generally * 21 C.F.R. § 1308.13
Schedule IV (§ 11057)	generally 21 C.F.R. § 1308.14
Schedule V (§ 11058)	generally 21 C.F.R. § 1308.15

* California Schedules III–V are nearly identical to the federal Schedules III–V.⁵ However, there are five substances that

are enumerated in a different portion of California's schedules than their federal counterpart:

Appendix 1—Continued

CALIFORNIA	FEDERAL
§ 11056(b)(5)	21 C.F.R. § 1308.14(f)(5)
§ 11056(e)(11)	21 C.F.R. § 1308.11(e)(1)
§ 11056(d)(1)	21 C.F.R. § 1308.13(f)(1)
§ 11057(b)(c)(3)	21 C.F.R. § 1308.14(g)(2)
§ 11058(d)	21 C.F.R. § 1308.13(e)(2)(i)

California Health and Safety

Code § 11377(a)(2)

Appendix 1—Continued

CALIFORNIA	FEDERAL
§ 11054(d)(1)	21 C.F.R. § 1308.11(d)(2)
§ 11054(d)(2)	21 C.F.R. § 1308.11(d)(4)
§ 11054(d)(3)	21 C.F.R. § 1308.11(d)(7)
§ 11054(d)(4)	21 C.F.R. § 1308.11(d)(8)
§ 11054(d)(5)	21 C.F.R. § 1308.11(d)(9)
§ 11054(d)(6)	21 C.F.R. § 1308.11(d)(10)
§ 11054(d)(7)	21 C.F.R. § 1308.11(d)(14)
§ 11054(d)(8)	21 C.F.R. § 1308.11(d)(17)
§ 11054(d)(9)	21 C.F.R. § 1308.11(d)(18)
§ 11054(d)(10)	21 C.F.R. § 1308.11(d)(19)
§ 11054(d)(11)	21 C.F.R. § 1308.11(d)(21)
§ 11054(d)(12)	21 C.F.R. § 1308.11(d)(22)
§ 11054(d)(16)	21 C.F.R. § 1308.11(d)(27)

5. As previously noted, chorionic gonadotropin (HGC), which is listed in California Schedule

III, Cal. Health & Safety Code § 11056(f)(32), is not listed in the federal schedules.

Appendix 1—Continued

§ 11054(d)(17)	21 C.F.R. § 1308.11(d)(28)
§ 11054(d)(18)	21 C.F.R. § 1308.11(d)(29)
§ 11054(d)(19)	21 C.F.R. § 1308.11(d)(30)
§ 11054(d)(21)	21 C.F.R. § 1308.11(d)(32)
§ 11054(d)(22)	21 C.F.R. § 1308.11(d)(33)
§ 11054(d)(23)	21 C.F.R. § 1308.11(d)(34)

California Health and Safety
Code § 11377(a)(3)

Appendix 1—Continued

CALIFORNIA	FEDERAL
§ 11056(c)(11)	21 C.F.R. § 1308.11(e)(3)

California Health and Safety
Code § 11377(a)(4)

Appendix 1—Continued

CALIFORNIA	FEDERAL
§ 11054(f)(2)	21 C.F.R. § 1308.11(f)(4)
§ 11054(f)(3)	21 C.F.R. § 1308.11(f)(7)

California Health and Safety
Code § 11377(a)(5)

Appendix 1—Continued

CALIFORNIA	FEDERAL
§ 11055(d)(1)	21 C.F.R. § 1308.12(d)(1)
§ 11055(d)(2)	21 C.F.R. § 1308.12(d)(2)
§ 11055(d)(3)	21 C.F.R. § 1308.11(f)(8)
§ 11055(d)(4)	NONE
§ 11055(d)(5)	21 C.F.R. § 1308.12(d)(3)
§ 11055(d)(6)	21 C.F.R. § 1308.12(d)(4)
§ 11055(d)(7)	NONE
§ 11055(d)(8)	21 C.F.R. § 1308.11(f)(3)
§ 11055(e)(1)	21 C.F.R. § 1308.13(c)(2)(i)
§ 11055(e)(2)	21 C.F.R. § 1308.13(c)(2)(iii)
§ 11055(e)(3)	21 C.F.R. § 1308.12(e)(4)
§ 11055(e)(3)(A)	21 C.F.R. § 1308.11(d)(33)
§ 11055(e)(3)(B)	NONE
§ 11055(e)(3)(C)	21 C.F.R. § 1308.12(e)(4) ⁶
§ 11055(e)(4)	21 C.F.R. § 1308.12(e)(5)
§ 11055(e)(5)	21 C.F.R. § 1308.12(e)(2)
§ 11055(f)(1)	21 C.F.R. § 1308.12(g)(1)
§ 11055(f)(1)(A)	21 C.F.R. § 1308.12(g)(1)(i)
§ 11055(f)(2)	21 C.F.R. § 1308.12(g)(2)
§ 11055(f)(2)(A)	21 C.F.R. § 1308.12(g)(2)(i)

6. The CSA does not cover additional forms of add.
phencyclidine that the Attorney General may

§ 11055(f)(2)(B)

21 C.F.R. § 1308.12(g)(2)(ii)



SMITHKLINE BEECHAM CORPORATION, dba GlaxoSmithKline,
Plaintiff–Appellee,

v.

ABBOTT LABORATORIES,
Defendant–Appellant.

**Smithkline Beecham Corporation, dba
GlaxoSmithKline, Plaintiff–
Appellant,**

v.

**Abbott Laboratories, Defendant–
Appellee.**

Nos. 11–17357, 11–17373.

United States Court of Appeals,
Ninth Circuit.

Filed June 24, 2014.

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D.C. No. 4:07–cv–05702–CW.

Before: MARY M. SCHROEDER,
STEPHEN REINHARDT, and MARSHA
S. BERZON, Circuit Judges.

Judges GRABER, McKEOWN,
WARDLAW, M. SMITH, WATFORD,
OWENS and FRIEDLAND were recused.

Judge O’SANNLAIN’S dissent from
denial of rehearing en banc is filed
concurrently with this Order.

ORDER

A *sua sponte* call for a vote on rehearing this case en banc was made by an active judge of this court. The call failed to receive a majority of the votes of the non-recused active judges. Fed. R.App. P. 35. The *sua sponte* en banc call is rejected.

O’SANNLAIN, Circuit Judge, joined by BYBEE and BEA, Circuit Judges, dissenting from the denial of rehearing en banc:

This case started out as an antitrust dispute between drug manufacturers and came to our court in the posture of an appeal from a simple juror selection ruling during trial. Sadly, it has morphed into a constitutional essay about equal protection and sexual orientation sweeping far beyond mere administration of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The opinion’s unprecedented application of heightened scrutiny to a peremptory strike of a juror who was