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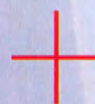
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GAM(BL)ING 2.0

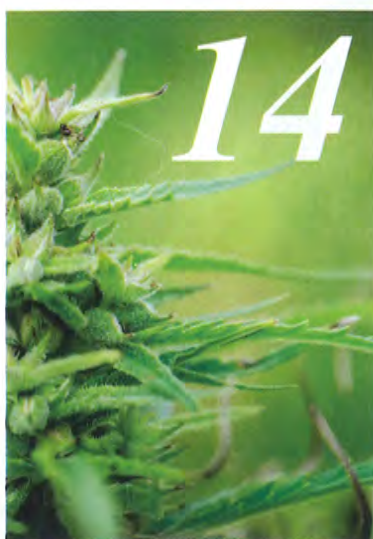
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EDITOR'S NOTE: It has come to our attention that the article "The U.S. Bureau of Prisons' Pre-release Program: Getting Out Early" by Alan Ellis and J. Michael Henderson, which appeared in the Winter 2017 issue of *Criminal Justice* magazine, contained content without citation from another work: Todd Bussert, Peter Goldberger, and Mary Price, "New Time Limits on Federal Halfway Houses: Why and How Lawyers Challenge the Bureau of Prisons Shift in Correctional Policy—and the Courts' Response," *Criminal Justice* 21:1 (Spring 2006). Had we been aware of these circumstances, the authors of the 2006 article would have been credited as co-authors and the content clearly cited.

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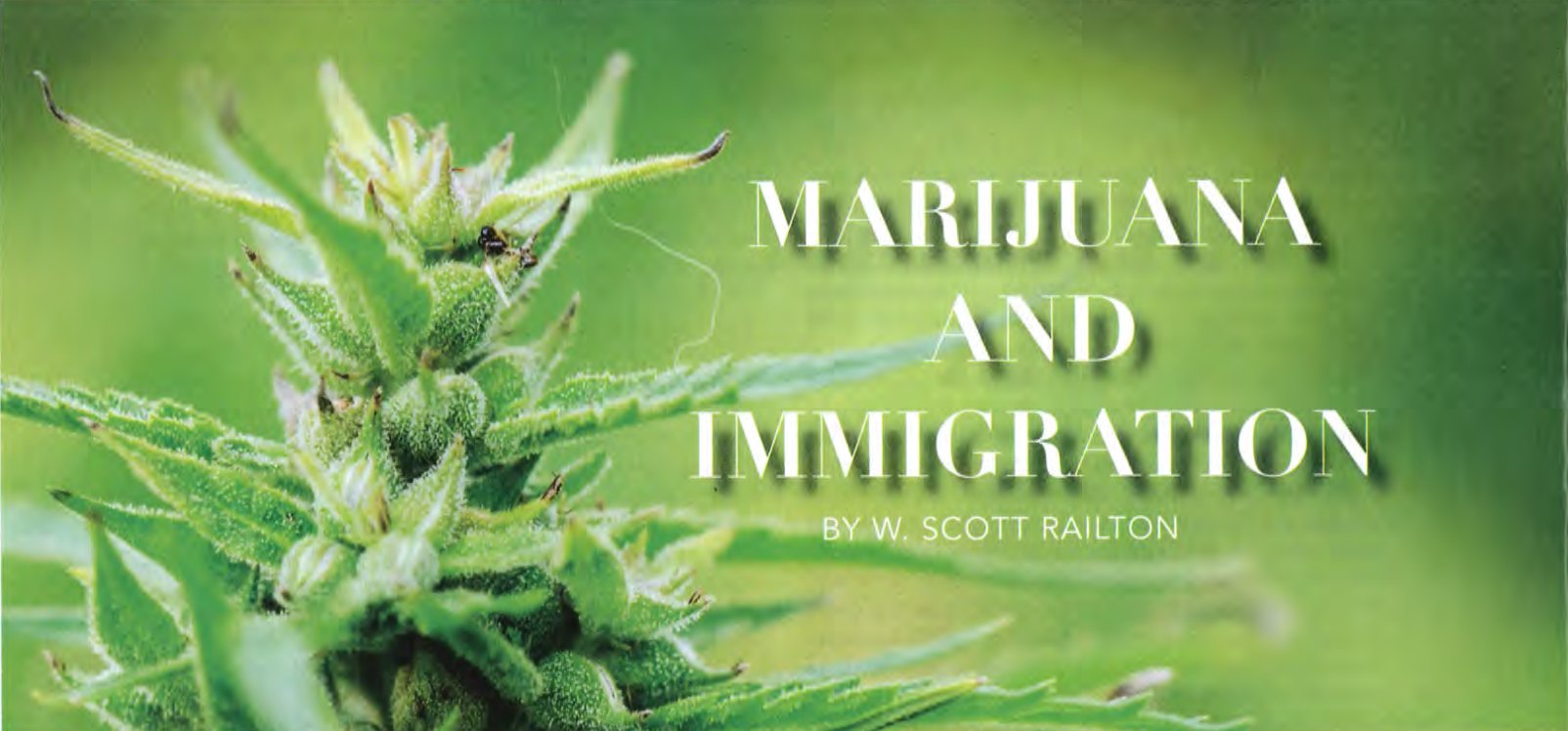
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MARIJUANA AND IMMIGRATION

BY W. SCOTT RAILTON

immigration and marijuana are frequently in the news these days, usually as separate topics. Generally, they don't mix well. Use of legalized marijuana presents several challenges to a noncitizen's desire to enter or stay in the United States. Legalization and decriminalization, however, limit exposure to convictions related to marijuana, which actually can be a good thing for some noncitizens, because of the reduced risk of deportation for minor convictions related to marijuana.

State legalization of marijuana increases with every voting cycle. A majority of the states now have some form of legalized or decriminalized marijuana, if medical marijuana is counted. California, Nevada, Massachusetts, and Maine voted to legalize recreational marijuana in 2016, joining Washington, Colorado, Oregon, Alaska, and the District of Columbia. Florida, Arkansas, North Dakota, and Montana enacted medical marijuana laws this past year. Some tribes are taking steps toward legalization on tribal lands. Marijuana remains illegal on federal lands.

The basic issue for noncitizens with legalized marijuana is the apparent conflict between the Immigration and Nationality Act, the Controlled Substances Act, and state legalization statutes and regulations. Marijuana and its derivatives continue to be listed as Schedule I substances under the Controlled Substances Act, despite calls for their removal. The Obama administration allowed states to experiment with implementing recreational marijuana laws, and previous administrations tolerated the use of medical marijuana. The Trump administration may continue this pattern, based on his statements to media, but this is uncertain. It is possible the federal government, if opposed to state legalization, may sue state governments under a theory of preemption, or attempt to escalate enforcement, or approach the issue collaterally by affecting state funding. The issues are fluid, with constantly changing state laws and federal enforcement priorities. Meanwhile, the legal marijuana industry is growing, literally.

Criminal defense attorneys have an obligation to advise clients regarding immigration consequences of a plea, based on the Supreme Court's 2010 landmark decision of *Padilla v. Kentucky*, 559 U.S. 356 (2010). The presence of marijuana or any controlled substance in a noncitizen's case should trigger *Padilla*-obligation concerns. Accordingly, criminal defense attorneys have developed resources to seek advice for their clients regarding plea deals. Analysis of the immigration consequences of a criminal charge can be a minefield, as the specialization of crimmigration grows increasingly complicated. If controlled substances are involved in a noncitizen case, it's best to assume the worst, and advise with great care.

MARIJUANA USE CAN BE GROUNDS FOR BARRING U.S. ADMISSION

Even where there is no charge or conviction, legalized marijuana can create issues for some noncitizens. A noncitizen who admits to the essential elements of a controlled substance offense, without actually being convicted, may still have a "conviction" for immigration purposes, based on the statutory definition. Providing a government officer with a "reason to believe" that a noncitizen is associated with drug trafficking, which could include a normal association with state-legal marijuana businesses, is enough to make the noncitizen and even his or her family members inadmissible. A noncitizen is also inadmissible or removable for being deemed a "drug abuser" or a "drug addict." An intention to violate the federal Controlled Substances Act creates yet another basis for inadmissibility, even if no state statute is violated.

MARIJUANA LEGALIZATION EFFORTS

Legalization refers loosely to the full range of state marijuana laws, which vary widely state to state. State recreational marijuana laws typically include rules for agricultural production, retail distribution, and personal use. States with maturing industries resolve issues

involving a wide range of legal issues, such as zoning, banking, taxation, and criminality. There is a great deal of difference, state to state, in regulation. As many deportations are based on convictions for relatively minor violations related to marijuana, legalization laws have the potential to greatly limit the universe of deportation possibilities for noncitizens.

For example, in 2016, California passed Proposition 64: The Control, Regulate and Tax Adult Use of Marijuana Act. California's law decriminalizes minor marijuana offenses for persons age 21 and older, and creates infractions for persons 18 to 20 years old. It also reduces criminal penalties for other marijuana activities, and allows for postconviction relief. The law creates a regulated commercial system for recreational marijuana, similar to those systems already in place in Washington, Oregon, and Colorado. California's law goes further, though, in providing the possibility of postconviction relief for persons with certain marijuana convictions.

The U.S. Department of Justice (DOJ) has circulated four memorandums on prosecuting state-legal marijuana activities. Discretion is emphasized. The first memo, from Deputy Attorney General (DAG) David Ogden in 2009, addressed the exercise of prosecutorial discretion regarding the medical use of marijuana. (Memorandum from David W. Ogden, Deputy Attorney Gen., to Selected U.S. Attorneys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), *available at* <http://tinyurl.com/zbgq8jy>.) The 2011 DAG Cole memo clarifies the 2009 memo, stating "The Ogden Memorandum was never intended to shield such activities [commercial cultivation, sale, and distribution] from federal enforcement action and prosecution, even where those activities purport to comply with state law. . . . State laws or local ordinances are not a defense to civil or criminal enforcement of federal law" (Memorandum from James M. Cole, Deputy Attorney Gen., to U.S. Attorneys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), *available at* <http://tinyurl.com/jm29hk4>.)

In a 2013 memo, DAG Cole addressed state legalization of recreational marijuana. This memo allowed for discretion, where states have "robust system[s]" of regulation:

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated

system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for.

(Memorandum from James M. Cole, Deputy Attorney Gen., to All U.S. Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), *available at* <http://tinyurl.com/zukglx4>.)

The 2013 memo also highlights eight priorities for marijuana enforcement by the DOJ: (1) preventing distribution to minors; (2) preventing revenue from going to criminal enterprises; (3) preventing distribution from legal states to nonlegal states; (4) preventing state legalization to act as a pretext for trafficking in other controlled substances; (5) preventing violence and the use of firearms related to cultivation and distribution; (6) preventing drugged driving and other related public health concerns; (7) preventing the growing of marijuana on public lands and associated hazards; and (8) preventing marijuana possession or use on federal property.

Building on the Cole memo, the 2014 Wilkinson memo says the DOJ will take the same approach for tribes that wish to legalize. (Memorandum from Monty Wilkinson, Dir., Exec. Office for U.S. Attorneys, to All U.S. Attorneys et al., Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014), *available at* <http://tinyurl.com/jn6d79a>.)

In 2014, Congress approved a provision in its spending bill prohibiting the DOJ and the Drug Enforcement Agency from spending funds for raids and prosecutions of state-legal medical marijuana businesses. Marijuana advocates celebrated. The Rohrabacher-Farr Amendment, so named after the California Representative sponsors, was renewed in 2016. Still, raids and prosecutions in medical-legal states have not completely stopped, due in part to interpretations of the amendment and state laws.

GOVERNMENT IMMIGRATION AGENCIES

The U.S. immigration system epitomizes bureaucracy. The U.S. Department of State (DOS) runs the consulates around the world where a person may obtain a visa to enter the United States. U.S. Customs and Border Protection (CBP) operates the border, preclearance, and airport clearance operations for admission to the United States. U.S. Citizenship and Immigration Services (USCIS) manages immigration benefits, including permanent residence and naturalization applications. U.S. Immigration and Customs Enforcement (ICE) handles interior enforcement of immigration law, and initiates most deportation actions. CBP, USCIS, and ICE are all bureaus of the U.S. Department of Homeland Security (DHS). The Executive Office for Immigration Review (EOIR), a branch of the U.S. Attorney General's office, operates the administrative trial court level of the immigration court system. Appeals of EOIR decisions are typically handled by the U.S. Courts of Appeals.

IMMIGRATION STATUS MATTERS

Marijuana is not "legal" for noncitizens. Status is very important when evaluating immigration cases. "Noncitizens" can fall into many different categories. They include "lawful permanent residents"—those noncitizen immigrants who hold "green cards." Noncitizens also include nonimmigrants—those who

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are in the United States for shorter durations, such as tourists, students, and professionals. Persons without documentation, and those who have overstayed their period of authorized stay are also noncitizens. Each status has different legal implications. For example, green card holders have greater defenses against deportation than do non-green card holders. Similarly, waivers are available in some cases; and expedited removal—a fast-tracked deportation without an EOIR hearing—occurs in others. Marijuana involvement can present immigration challenges for any noncitizen, including green card holders.

The Immigration and Nationality Act (INA), the key federal statute for immigration, applies different standards depending on if a noncitizen is (1) seeking admission, (2) facing deportation, or (3) seeking to naturalize. Basically, the law favors persons already here over persons outside the country. The law also favors persons with legal status over persons without such status, and persons here longer over persons here shorter. A noncitizen's rights and recourse are at their lowest when interviewing at a consulate or when seeking entry. Even after being in the United States for decades, and despite having any number of U.S. citizen relatives, a noncitizen may still be subject to removal.

IMMIGRATION CONSEQUENCES OF MARIJUANA-RELATED CONVICTIONS

"Conviction" defined. Convictions are defined broadly by the INA, disallowing many forms of postconviction relief, and including certain admissions of fact. The INA makes inadmissible anyone with a conviction for a violation (or a conspiracy or attempt to violate) of any law or regulation of a state, the United States, or a foreign country related to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802). (See INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A).) INA section 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), defines a "conviction," with respect to an alien, as:

- [A] formal judgment of guilt of the alien entered by a court or, if adjudication has been withheld, where—
- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
 - (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty be imposed.

Under U.S. immigration law, all that is needed for a conviction is (1) a finding of guilt or admission of enough facts to support such a finding, and (2) punishment, or restraint on liberty has been imposed, including suspended incarceratory sentences. (See *Retuta v. Holder*, 591 F.3d 1181, 1186 (9th Cir. 2010).)

The definition is purposely broad, so that if a conviction is later pardoned, expunged, or otherwise set aside, it usually persists for immigration. (See 9 FOREIGN AFFAIRS MANUAL (FAM) 302.4-2(B) (3) (formerly 9 FAM 40.21(b) N4.1-6).) However, other forms of postconviction relief may be effective, such as when it is determined later that a judgment lacks legal validity. Examples include vacated convictions by the court of original jurisdiction, a granted writ of error coram nobis, or a dismissal of cause nolle prosequi. (*Id.*) Most

interestingly, California's Proposition 64 includes provisions allowing in certain cases for persons to apply to recall or dismiss a prior sentence, based on legal invalidity. Time will tell how immigration courts handle this issue.

The INA requires mandatory detention for certain convictions. These include controlled substance convictions, multiple crimes involving moral turpitude, and aggravated felonies. (See INA § 236(c), 8 U.S.C. § 1226(c).) Even if a marijuana conviction carries no prison time, ICE may take custody of the offender, until removing proceedings. There is currently a backlog of removal proceedings for roughly half a million cases. A diversion without a plea may avoid this consequence, based on the statutory definition of a conviction, which requires the finding of guilt.

Convictions for any controlled substance violation raise the possibility of inadmissibility and deportation. This includes attempt and conspiracy convictions. Paraphernalia convictions are also not safe. A plea agreement that involves a marijuana conviction may not be an immigration-safe resolution for a noncitizen. As per *Padilla*, counsel has an obligation to advise on the immigration consequences of a plea. Resources are available for crafting immigration-safe preplea deferrals.

Juvenile delinquency. Acts of juvenile delinquency are not crimes for immigration purposes. (See *Matter of Ramirez-Rivero*, 18 I. & N. Dec. 135 (B.I.A. 1981).) The Federal Juvenile Delinquency Act determines whether an offense is a crime or delinquency.

Foreign convictions. On the other hand, foreign convictions usually are recognized as convictions for immigration purposes. Perhaps the most famous case is *Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975), where John Lennon of the Beatles fought a protracted fight against deportation for a 1968 conviction in Great Britain for possession of cannabis resin.

Civil fines. A civil fine is not a conviction, and standing alone should not be a basis for inadmissibility. There is some precedent for this. In the 1990s, CBP confiscated marijuana under a "Customs Zero Tolerance Fines" program. Convictions were not sought with this program, but persons had to pay fines. In 1991, Legacy INS General Counsel authored a legal opinion saying the fines did not create inadmissibility under INA section 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II). This memo has been used successfully with CBP to argue that inadmissibility has not been established and a waiver is not required where only a fine was paid. (Legal Opinion No. HQ 235-P from T. Alexander Aleinikoff, Gen. Counsel, to Michael D. Cronin, Assistant Comm'r, INS, Excludability under "Zero Tolerance Program" (Jan. 20, 1995).)

Aggravated felonies. Noncitizens, including lawful permanent residents, are deportable if convicted of an aggravated felony at any time after admission. (*Matter of Rosas*, 22 I. & N. Dec. 616 (B.I.A. 1999).) Aggravated felonies include a long list of specific classes of convictions in the INA, which may or may not be felonies under state or federal law. (See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).) The conviction need not be aggravated or a felony to qualify as an aggravated felony. Illicit trafficking in a controlled substance is an aggravated felony. (INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).) The conviction must be a trafficking offense under federal law to qualify as an aggravated felony, as per *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). In *Moncrieffe*, the Supreme Court held in a 7–2 decision, penned by Justice Sotomayor, that social sharing of marijuana among friends does not qualify as illicit trafficking as an

aggravated felony, if the offense involved a small amount of marijuana and no remuneration.

Crimes involving moral turpitude. Convictions for crimes involving moral turpitude are a separate basis for inadmissibility than controlled substance offenses. (See INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I).) Convictions for crimes involving moral turpitude can also form the basis for some deportations. (See INA § 237(a)(2)(A)(i), (ii), 8 U.S.C. § 1227(a)(2)(A)(i), (ii).) Waivers may be available, and whether the conviction meets the definition of a crime involving moral turpitude requires careful analysis. Further, naturalization applicants must establish good moral character, typically for a period of three to five years preceding their applications. (INA § 316(d), (e), 8 U.S.C. § 1427(d), (e).) Aggravated DUIs and some reckless conduct offenses can involve legalized marijuana and be deemed crimes involving moral turpitude. (See, e.g., *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009).)

IMMIGRATION CONSEQUENCES OF MARIJUANA USE OR POSSESSION IN ABSENCE OF CONVICTION

Admitting to marijuana use or possession. Even if there is not a conviction, a connection to legalized marijuana can create all sorts of immigration problems for noncitizens. For example, the controlled substance inadmissibility bar includes admissions to acts that constitute the essential elements of any law or regulation of a state, the United States, or a foreign country related to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802). (INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A).)

This sort of thing comes up sometimes when a noncitizen seeks admission to the United States. CBP officers have been known to extract admissions of past marijuana use from a person, and bar their admission. The stories are somewhat random and frightening. Even if a person has been coming and going for years, an officer may arrive at an adverse determination of admissibility. INA section 235(b)(3), 8 U.S.C. § 1225(b)(3), states: “The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privilege to be admitted is so challenged, before an immigration judge for a proceeding under section 1229a.” One officer’s decision may be challenged by another at any other time. Practically, this means if an officer notices something marijuana related—maybe a lighter, maybe a marijuana sticker—he or she may start a line of inquiry that ultimately results in a lifetime bar to the United States, despite the absence of any conviction.

Occasionally, CBP officers will search a person’s wallet. They may check a laptop or review a phone. Traveling internationally with a medical marijuana card is a bad idea, as the card can prompt further questioning. A medical marijuana card is not proof of a controlled substance violation, but may lead to questions that may establish inadmissibility. The marijuana issue can also come up at internal checkpoints, which are common around the southern border. Curiously, the Transportation Security Administration (TSA) reportedly is less concerned about legalized marijuana, and there are stories of its agents ignoring marijuana while scanning luggage.

Right to remain silent. All persons, including noncitizens applying for admission, have the constitutional right to remain silent. Sometimes it is a good idea to exercise this right, and if need be, give up on seeking admission. Exercising this right may lead to further

searches. Applicants for admission may be allowed to withdraw their application for entry, rather than be coerced into a statement. Withdrawal of an application for admission to the United States is authorized at the discretion of the agency. (INA § 235(a)(4), 8 U.S.C. § 1225(a)(4).) The burden of proof for admissibility continues to be on the applicant for admission. Sometimes the best application for immigration benefits is the one that is never submitted.

Border search exception. The border search exception, allowing search and seizure without probable cause, applies at the border and its functional equivalents. “The government’s interest in preventing entry of unwanted persons and effects is at its zenith at the international border.” (*United States v. Flores-Montano*, 541 U.S. 149 (2004).) The government’s ability to operate immigration checkpoints extends 100 miles from the border. Personal interests in being free of unwarranted search and seizure are at their lowest at the border. Most searches have been upheld, if based on a reasonable suspicion, including personal, vehicle, and electronic searches. Systematic questioning of travelers is justified by the INA and the administrative search doctrine, which covers searches done under a regulatory scheme to further an administrative purpose. (*United States v. Davis*, 482 F.2d 893 (9th Cir. 1973).)

Validity of admission. The validity of an “admission to the essential elements” might be contested in immigration court, but this is likely to be time consuming, potentially expensive, and possibly fruitless. Legally, the admission must be a formal one, offered free and voluntarily, addressing each statutory element of the offense. Partial or general admissions will not suffice. (See *Matter of E.V.*, 5 I. & N. Dec. 194 (B.I.A. 1953) (free and voluntary); *Matter of Espinosa*, 10 I. & N. Dec. 98 (B.I.A. 1962) (admissions).) In *Pazcoguín v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002), the court held that an admission is valid even if there was a possible defense, and the inspector must provide the alien with an understandable definition of the crime.

Government information sharing. Information sharing between governments, domestically and internationally, is on the rise. For example, the United States and Canada share more information now than ever, due to the Beyond the Border agreement. (See *Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness*, HOMELAND SECURITY, www.dhs.gov/beyond-border (last updated Jan. 19, 2017).) Sometimes information not in one database shows up in another if a government agent takes the time to look. Often, an officer may not have complete information in the database and will therefore ask the client questions and potentially solicit admissions to marijuana use.

CONSEQUENCES OF “REASON TO BELIEVE” NONCITIZEN HAS CONNECTION TO MARIJUANA

The INA’s admissibility bar on drug trafficking requires no conviction. (INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C).) A noncitizen is inadmissible if the government knows, or merely has reason to believe, that the person is or has been an illicit trafficker in any controlled substance. The same applies if that noncitizen is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in illicit trafficking, or has endeavored to do so. (*Id.*) Also, immediate family members can be found inadmissible for this as well if they received financial or other benefit from drug trafficking in the previous five years.

Thus, persons either employed with state-approved marijuana grow operations or contracted for services relative to the operation may be

deemed to be a knowing aider, abettor, assister, etc. Persons are being denied entry, and sometimes required to obtain waivers, for marijuana industry activities such as providing accounting services for a legal marijuana operation, providing high-level scientific services related to growing marijuana, and designing marijuana greenhouses. Each situation is different, but the agencies seem to take a very conservative view regarding legalization and immigration.

Technically, the government must establish that the “reason to believe” is based on “reasonable, substantial and probative evidence,” and that the noncitizen is (or was) knowingly engaged in trafficking-related activities. A long line of cases examines whether the “reason to believe” standard is met. (*See, e.g., Chavez-Reyes v. Holder*, 741 F.3d 1 (9th Cir. 2014); *Argaw v. Ashcroft*, 395 F.3d 521 (4th Cir. 2005); *Lopez-Molina v. Ashcroft*, 368 F.3d 1206 (9th Cir. 2004); *Alarcon-Serrano v. INS*, 220 F.3d 1116 (9th Cir. 2000); *Matter of Casillas-Topete*, 25 I. & N. Dec. 317 (B.I.A. 2010).) While some persons will clearly know they are directly engaged in the legalized industry, others may be only working on the periphery. (*See Matter of McDonald*, 15 I. & N. Dec. 203 (B.I.A. 1975) (need to prove intent to distribute).)

These cases are of limited value when dealing with a consular interview or a border inspection, where the right of appeal is basically nonexistent. In *Kerry v. Din*, 135 S. Ct. 2128 (2015), the Supreme Court held by plurality that noncitizen spouses do not have a constitutional right to live in the United States with their spouse, and are not afforded the Fifth Amendment due process rights with their visa application. It can be very challenging to change the decision of a consular officer or border inspector, once made.

Perhaps it is helpful to cite state law if there is a possible “reason to believe” issue. Washington and Colorado were the first two states to approve recreational marijuana. They have developed sophisticated regulatory systems. For example, the Washington Administrative Code differentiates between a person who is a “consultant” and one who is a “true party of interest.” (WASH. ADMIN. CODE § 314-55-010.) A true party of interest may receive a percentage of the gross or net profits of the operation. Consultants advise. Washington law similarly distinguishes between “financiers” and “members.” (*Id.*) State regulations may therefore be helpful in determining noncitizens’ scope of involvement in an enterprise.

State law may also act a shield, perhaps depending on preemption arguments. California’s new law allows persons to possess, plant, and harvest up to six plants. Such activity is an aggravated felony under immigration law, but will now be legal in California. That such actions will be permissible will at least limit one source of deportable convictions. Courts have yet to resolve the panorama of preemption and treaty arguments related to state legalization. (*See* TODD GARVEY & BRIAN T. YEH, CONG. RESEARCH SERV., R43034, STATE LEGALIZATION OF RECREATIONAL MARIJUANA: SELECT LEGAL ISSUES (2014).)

OTHER GROUNDS OF INADMISSIBILITY

Health-related grounds. One of the oldest bases for inadmissibility to the United States is health-related grounds. This may be a significant concern for noncitizens who use marijuana in legalized states, or with a history of use. “Drug abusers” and “drug addicts” are inadmissible to the United States, even if there is no record of conviction. (INA § 212(a)(1)(A)(iv), 8 U.S.C. § 1182(a)(1)(A)(iv).) Further, the INA says any alien who has been a drug abuser or drug addict after admission is deportable. (INA § 237(a)(2)

(B), 8 U.S.C. § 1227(a)(2)(B).) This issue may arise when filling out immigration forms, when seeking readmission, or during interviews for immigration benefits (e.g., permanent residence or naturalization). Recall, marijuana is grouped with other Schedule I substances, such as heroin, cocaine, and meth. Any noncitizen who is or may be determined (under regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict has cause for concern.

Drug abusers and drug addicts, for immigration purposes, are persons deemed to have a “Class A” medical condition. (INA § 212(a)(1)(A)(iv), 8 U.S.C. § 1182(a)(1)(A)(iv).) A Class A medical condition renders a visa applicant ineligible to receive a visa and, for mental health conditions, includes applicants determined by government-authorized physicians to have (1) a current physical or mental disorder with associated harmful behavior, and/or (2) a history of mental disorder with associated harmful behavior if the harmful behavior is likely to recur or to lead to other harmful behavior. (9 FAM 302.2-7(B)(7).)

The government, whether it be CBP, DOS, or another agency, will sometimes refer a person to a “civil surgeon” or “panel physician” to determine whether the person is inadmissible for a Class A medical condition (e.g., drug abuse, drug addict, or habitual drunkard). These are physicians approved by the government to conduct medical examinations for immigration. Civil surgeons practice inside the United States; panel physicians practice overseas. Medical examinations are a routine part of immigration.

Civil surgeons and panel physicians receive their technical instructions from the Centers for Disease Control and Prevention (CDC). Physician-patient confidentiality does not apply, as the physicians are acting on behalf of the government. The CDC instructions define their role as:

Civil surgeons must follow procedures prescribed by the DHS. Civil surgeons must ensure that the person appearing for the medical examination is the person who is actually applying for immigration benefits. The civil surgeon is responsible for reporting the results of the medical examination and all required tests on the prescribed forms. The civil surgeon is not responsible for determining whether an alien is actually eligible for adjustment of status; that determination is made by the INS officer after reviewing all records, including the report of the medical examination.

(*Technical Instructions for the Medical Examination of Aliens in the United States*, CDC (1991), <http://tinyurl.com/jmhkb4q>.)

Generally, the physicians are searching for communicable diseases. However, they are also responsible for making sure the noncitizen is not a drug abuser or addict. Some examining physicians are very aggressive in eliciting admission to “drug abuse.” These admissions can lead to the denial of a visa and the subsequent need to demonstrate rehabilitation. It typically takes at least a year to demonstrate rehabilitation.

The CDC updated its Technical Instructions in 2015. (*See Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-Related Disorders for Panel Physicians*, CDC, <http://tinyurl.com/hfk83rt> (last updated

Feb. 3, 2015).) The instructions call for random drug testing of persons who have recently used marijuana and require that the person show remission during a full year. (*Id.*) The *Foreign Affairs Manual* states:

The current version of the DSM [*Diagnostic and Statistical Manual of Mental Disorders*] defines sustained, full remission as a period of at least 12 months during which no substance use or mental disorder-associated harmful behavior have occurred. The panel physician has discretion to use their clinical judgment to determine if 12 months is an acceptable period of time for an individual applicant to demonstrate sustained, full remission. Remission must be considered in two contexts: (a) mental disorders and (b) substance-related disorders. For substance-related disorders for those substances listed in Schedule I though V of Section 202 of the Controlled Substances Act, the determination of remission must be made based on the applicants use and DSM criteria.

(9 FAM 302.2-8(B)(2).)

The Technical Instructions specifically say, "Random screening for drugs is *not* part of the routine medical examination for applicants for U.S. admission." But there are anecdotal reports from immigration attorneys of panel physicians who aggressively pursue the question of drug abuse or addiction based on marijuana use. (*See, e.g.*, Questions and Answers, USCIS International Operations Division in Ciudad Juarez Meeting with American Immigration Lawyers Association (AILA) (May 17, 2016), <http://tinyurl.com/j6s87kv>; AILA Doc. Nos. 16062934, 12121343, 06020110.) Simple experimentation should not qualify as drug abuse. However, routine use of legalized marijuana would likely be deemed as such. The strategies are very limited for challenging a Class A medical determination based on marijuana abuse or addiction. A person can ask the consular officer to seek an advisory opinion from the CDC, or ask for a reexamination based on 42 C.F.R. section 34.8, but these are likely long shots. The recourse then is to demonstrate rehabilitation over the course of at least a year.

Intent to engage in unlawful activity. "Intention to engage in an unlawful activity" also presents an immigration issue. A noncitizen will not be admitted if he or she expresses an intention to engage in an unlawful activity, such as purchasing marijuana, or working directly in the industry. Specifically, the INA requires denial of admission if the government officer has a "reasonable ground to believe" that the noncitizen is seeking to enter the United States to engage solely, principally, or incidentally in any other unlawful activity. (INA § 212(a)(3)(A)(ii), 8 U.S.C. § 1182(a)(3)(A)(ii).) Seeking to enter the United States to visit in relation to state-legal activities could be deemed a basis for inadmissibility.

Misrepresentation, crimes involving moral turpitude, and violations of export/import laws. The INA includes other sections that impact admissibility or removal related to marijuana. These include lifetime bars for misrepresentation, convictions for crimes involving moral turpitude, and violations of U.S. export/import laws. For example, INA section 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C), states, "Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United

States or other benefit provided under this chapter is inadmissible." Additionally, an admission to the essential elements of a crime involving moral turpitude, including marijuana, would be a basis for inadmissibility. If there is a misrepresentation in the process of inspection, or in an application for benefits, the government may deny the application and take other actions, such as noting the applicant to appear in immigration court, or effect an expedited removal at the border.

EXCEPTIONS, WAIVERS, AND OTHER CONSIDERATIONS

Possession of 30 grams or less. Marijuana differs from other controlled substances in the INA, albeit slightly. It is the only Schedule I controlled substance for which the INA makes specific exceptions. For immigrants, INA section 212(h), 8 U.S.C. § 1182(h), provides an immigrant waiver for "a single offense of simple possession of 30 grams or less of marijuana" under certain conditions. Similarly, INA section 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B), creates a marijuana removability exception for "a single offense involving possession for one's own use of 30 grams or less of marijuana." The naturalization regulations also include a 30-gram single-offense exception in determining good moral character. (*See* 8 C.F.R. § 316.10(b)(2)(iii).)

Temporary visitor waivers. Most forms of inadmissibility, with some national security exceptions, can be waived for temporary visitors, under INA section 212(d)(3), 8 U.S.C. § 1182(d)(3). Generally, temporary visitor waivers are much easier to obtain than permanent residence waivers. Applications for nonimmigrant waivers are adjudicated by CBP's Admissibility Review Office (ARO), and can take months to adjudicate. Waivers are issued specific to the class of admission sought, and must be sought anew for a different class (e.g., B-1/B-2; later TN or H-1B). The process differs between Canadians, who are visa exempt, and other nationalities, who have to interview first for visas at consulates. The filing fee for Canadians is \$585, and attorney fees and related expenses can run the overall cost up much higher.

Waivers are granted on a discretionary basis. Adjudicators are supposed to make a determination by balancing (1) the risk of harm to society if the applicant is admitted, (2) the seriousness of the underlying cause of the applicant's inadmissibility, and (3) the nature of the applicant's reason for wishing to enter the United States. (*Matter of Hranka*, 16 I. & N. Dec. 491 (B.I.A. 1978).) The ARO says that it also considers these factors in exercising discretion: (1) the nature of the offense, (2) the circumstances that led to the offense, (3) how recently the offense occurred, (4) whether it was an isolated incident or part of a pattern of misconduct, and (5) evidence of reformation and rehabilitation.

It is best to argue a waiver is not needed, if appropriate, as the ARO can issue a determination as such. Waivers are granted for temporary periods of time (six months to five years), and so establishing admissibility, instead of waiving inadmissibility, can save costs eventually. For example, CBP will fine a person for possession of marijuana, but this is a civil fine. The fine alone should not create a basis for inadmissibility, but admissions made during the inspection process could make a person inadmissible.

Port parole. "Port parole" is available in truly emergency circumstances, where there is not enough time to obtain a waiver. Port parole is a discretionary grant of entry, usually for a limited

purpose and time frame. It is technically not a grant of admission. The supervisors at the port will review all the facts of a situation and make case-by-case decisions. Port parole is used sparingly, such as in the case where there is a health-related emergency with an immediate family member.

DUIs. DUIs present their own set of issues. Recently, DOS began to “prudentially revoke” visas for persons arrested with DUIs, if the arrest happened in the last five years. Revocation is unnecessary if the DUI was already accounted for with the visa application. The revocation is based on the possibility of a Class A medical condition. Driving impaired while using legalized marijuana could lead to such a revocation. Anyone with a visa and a recent DUI arrest should seek counsel before exiting the United States, and anticipate a lengthy time abroad before obtaining a new visa. Individuals with such arrests can expect to be referred to a panel physician, prior to reissuance of the visa. Revocations will occur even if the individual is in the United States. However, the person may stay if he or she is in a period of authorized stay. The person cannot exit and reenter until he or she reapplies for a visa. The visas of dependents may also be prudentially revoked. (See U.S. Dep’t of State, Guidance Directive 2016-03 (Sept. 2, 2016), available at <http://tinyurl.com/zxmrbfq>; 9 FAM 403.11-3.)

Trusted traveler status. Another consideration with legalized marijuana is trusted traveler status. Trusted traveler programs allow persons to process faster at international airports and land ports of entry. NEXUS is CBP’s trusted traveler program with Canada. NEXUS allows persons vetted by the United States and Canada to travel through an expedited lane at the border and airports. NEXUS has a “no tolerance” policy regarding controlled substance offenses. The program itself is opaque, with no published regulations or known adjudication guidelines. There are indications that discretion is exercised where offenses on the record are a decade or more old, but so far this does not appear to extend to controlled substance offenses. Similar programs include Global Entry, SENTRI (Secure Electronic Network for Travelers Rapid Inspection), and FAST (Free and Secure Trade for Commercial Vehicles).

ETHICAL CONSIDERATIONS

Legalized marijuana also presents several ethics issues for attorneys. Some states are amending their rules of professional conduct regarding advising on legalized marijuana. Washington, a recreation-legal state, added a comment to Rule of Professional Conduct 1.2 on scope of representation, stating that lawyers may counsel clients regarding the validity, scope, and meaning of Washington Initiative 502 and may assist a client as the lawyer reasonably believes is permitted by the statute. (See WASH. RULE OF PROF’L CONDUCT 1.2 cmt. 18.) Similarly, Oregon adopted Rule of Professional Conduct 1.2(d), which requires lawyers to advise on the conflicts between federal, state, and tribal law and policy. Other states that have adopted similar amendments, or have them under consideration, include Alaska, Colorado, Hawaii, Illinois, and Nevada.

This raises the question of counsel’s duty to advise noncitizens regarding marijuana, legalized or not. Risk assessment requires the recognition of known and unknown risks for clients. The known and the unknown must account for the state of the law, the state of enforcement, and questions that are beyond one’s expertise.

To adequately represent a noncitizen defendant, counsel should consider the ways marijuana, legal or otherwise, may create deportation, inadmissibility, and naturalization risks for a client. This requires recognizing the client’s status in the first place, criminal history, and any other immigration-related factors. For criminal defendants, it is important to avoid admissions to the essential elements of a conviction in the record of conviction. Keeping the record clean of anything that later may give an officer a “reason to believe” that a noncitizen was engaged in drug trafficking, or was a drug abuser or drug addict, is ideal.

“The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” (Strickland v. Washington, 466 U.S. 668, 688 (1984).) These norms may be changing—or perhaps need to change—if deportations become a higher priority for the government. ■

CRIMINAL JUSTICE EDITORIAL POLICY STATEMENT

Criminal Justice is a magazine for everyone who cares about the quality of our justice system. Its focus is on practice and policy. Our readers are private and public defense attorneys, prosecutors, judges, law professors, and others who recognize that society is itself ultimately judged by its system for judging others. The magazine is published by the Section of Criminal Justice of the American Bar Association with the assistance of ABA Publishing.

The membership of the Section is diverse. Some members preside over or practice in state courts, others primarily in federal courts. Some specialize in white collar crimes, others prosecute or defend street crimes, and still others specialize in juvenile cases. Articles in *Criminal Justice* thus cover a wide variety of subjects, addressing areas of importance to all segments of the Section.

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