Admissibility and Marijuana

By W. Scott Railton*

Marijuana and its derivatives are listed as controlled substances in Schedule 1 of the federal Controlled Substances Act.[1] U.S. Customs and Border Protection enforces this federal law, even though many states, including Washington State, Oregon, and Alaska, have passed voter initiatives legalizing medical and recreational marijuana. Twenty-three states and the District of Columbia have presently legalized medical or recreational marijuana use.[2] Many tribes are taking steps to legalize marijuana related activities within their jurisdiction. Legalization typically includes regulation of agricultural production, retail distribution, and personal use.

The conflict between federal and state laws on marijuana is a historically recent event, creating legal issues in many contexts, including immigration. This article is offered as a practical review of the law and various marijuana situations that have arisen at the border in the past few years.

I. MARIJUANA AND THE IMMIGRATION AND NATURALIZATION ACT

The Immigration and Nationality Act includes multiple bases of inadmissibility, which attorneys should consider, when analyzing a marijuana fact pattern arising from a border encounter. These principally include:

A. Inadmissibility for Past Conviction Related to Marijuana

- ***Conviction for a violation*** (or a conspiracy or attempt to violate) 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)[3]

  U.S. immigration law takes a much broader view of the definition of a conviction than is typically thought of by the public or in law practice, whether it be in the United States, Canada, or elsewhere.

  Specifically, the U.S. Immigration and Nationality Act ("INA") defines a conviction as follows:[4]

  The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication has been withheld, where—

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[1] 21 U.S.C. ch. 13 § 801 et seq.
[2] *See* https://en.wikipedia.org/wiki/Legality_of_cannabis_by_U.S._jurisdiction. (link as of 2/3/2016).
[3] INA § 212(a)(2)(A).
[4] INA §101(a)(48)(A), 8 USC §1101(a)(48)(A).

(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.

Thus, for a conviction to exist under U.S. immigration law, all that is needed is (1) a finding of guilt or admission of sufficient facts to support such a finding, AND (2) some form of punishment, or restraint on liberty has been imposed, including suspended incarceratory sentences.[5] The law was purposely written broadly, so that if a conviction is later pardoned, expunged, or otherwise set aside, it will usually still persist for immigration purposes.

B. Inadmissibility Related to Marijuana Where Conviction is Not Required

- ***Admitting to acts which 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)[6]

The validity of an "admission to the essential elements" might be contested in immigration court, but this is a time consuming, potentially expensive, and possibly fruitless process. For controlled substance convictions, the admission must be to each statutory element of the offense. Partial or general admissions will not suffice.[7] Also, to be inadmissible, an admission must be "free and voluntary,"[8] related to conduct that is illegal in the alien's country,[9] and the Inspector must provide the alien with an understandable definition of the crime.[10]

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[5] *See Retuta v. Holder*, 591 F.3d 1181, 1186 (9th Cir. 2010).

[6] INA § 212(a)(2)(A). The Immigration Act of 1990 established the original basis for inadmissibility based on an admission to a controlled substance offense. *See* Immigration Act of 1990, §§ 601 and 602, Pub. L. No. 101-649, effective Nov. 29, 1990.

[7] *See Matter of B-M-*, 6 I&N Dec. 806 (BIA 1955); *Matter of A-*, 3 I&N Dec. 168 (BIA 1948); *Matter of Espinosa*, 10 I&N Dec. 98 (BIA, 1962). *Matter of G-M-*, 7 I. & N. Dec. 40 (Att'y Gen. 1956); *Matter of E-N-*, 7 I. & N. Dec. 153 (BIA 1956).

[8] *See Matter of E.V.*, 5 I&N 194 (BIA 1953) (P.C. §1203.4 expungement); *Matter of G*, 1 I&N 96 (BIA 1942) (Texas statute dismissal); *Matter of Winter*, 12 I&N 638 (BIA 1967, 1968) (case placed "on file" under Massachusetts statute); *Matter of Seda*, 17 I&N 550 (BIA 1980) (state counterpart of federal first provisions, no conviction). *But see also Matter of Ozkok*, Int. Dec. 3044 (BIA 1988), providing further definition for resolutions not amounting to a conviction.

[9] *See, e.g. Matter of R-*, 1 I. & N. Dec. 118 (BIA 1941) (fraud in itself not a crime); *Matter of M-*, 1 I. & N. Dec. 229 (BIA 1942) (remarriage not punishable as bigamy); *Matter of DeS-*, 1 I. & N. Dec. 553 (BIA 1943) (attempt to smuggle not a crime). However, in *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002), the 9th Circuit Court of Appeals held an admission is valid even if there was a possible defense.

[10] *Matter of K-*, 9 I&N Dec. 715 (BIA 1962); *but compare US ex rel. De La Fuente v. Swing*, 239 F. 2d 759 (5th Cir. 1956); *Matter of G-M-*, 7 I&N Dec. 40, 42 (AG 1956); *but see supra, Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002).

- ***Controlled Substance Trafficker***.[11] Any alien who the consular officer or the Attorney General ***knows or has reason to believe***

    (i) is or has been an illicit trafficker in any controlled substance….or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

    (ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has within the previous 5 years, obtained any financial or other benefit from the illicit activity, and knew or reasonably should have known the financial or other benefit was the product of such illicit activity.

- ***Drug Abuser or Addict.*** Anyone who is determined (under regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict.[12] Also, "anyone who is, or at any time after admission has been, a drug abuser or addict, is deportable."[13]

- ***Intention to Engage in Unlawful Activity.*** Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in—…(ii) any other unlawful activity,…[14] This would be a basis for denial of admissibility for the person who wishes to enter to purchase or smoke marijuana, even in tandem with other permissible visitor activities.

The Immigration and Nationality Act has many other statutes which can factor in as well, including the lifetime bars for misrepresentation,[15] convictions for crimes involving moral turpitude,[16] and U.S. export/import laws. In some cases, CBP may issue a Notice to Appear, to commence removal proceedings, and allege misconduct under the removal statutes of §237 of the INA.

The U.S. Department of Justice (DOJ) has circulated four memorandums on prosecuting state-legal marijuana activities, with an emphasis on discretion. The October 19, 2009 Ogden memo

[11] INA §212(a)(2)(C).
[12] INA § 212(a)(1)(A)(IV).
[13] INA § 237(a)(2)(B). U.S. Customs and Border Protection does issue Notices to Appear to Lawful Permanent Residents, which can lead to removal.
[14] INA § 212(a)(3)(ii).
[15] INA § 212(a)(6)(C). "Any alien who, by fraud or willfully misrepresenting a material fact (or has sought to procure or has procured) a visa, other documentation or admission into the United States or other benefit provided under this Act is inadmissible." Frequently, if there is a misrepresentation, CBP will place the person in expedited removal.
[16] INA § 212(a)(2)(A)(i)(I). Additionally, an admission to the essential elements of a crime involving moral turpitude, involving marijuana, would be an additional basis for inadmissibility. For this article, this category is countenanced under the prior category involving admissions to essential elements of any crime involving controlled substances.

addresses prosecutorial discretion with the medical use of marijuana.[17] The June 29, 2011 Cole memo clarifies this memo further..[18] The August 29, 2013 memo addresses states that have approved recreational use, and emphasizes discretion.[19] The October 28, 2014 Wilkinson memo says the DOJ will take the same approach for tribes which wish to legalize.[20]

C. Immigrant Waivers

It seems noteworthy that the Immigration and Nationality Act treats marijuana differently from all other controlled substances. Marijuana is the only controlled substance for which the Act specifies exceptions. For immigrants, INA §212(h) provides an immigrant waiver for "a single offense of simple possession of 30 grams or less of marijuana," under certain conditions.[21] Similarly, there is a marijuana removability exception for "a single offense involving marijuana for one's own use of 30 grams or less of marijuana."[22] The naturalization regulations also include a 30 gram single offense exception while determining good moral character.[23]

D. Nonimmigrant Waivers

The Immigration and Nationality Act specifies a nonimmigrant waiver, under §212(d)(3) for persons who are otherwise inadmissible.[24] Nonimmigrants either acquire this waiver as part of the visa application process at a Consulate, or via direct application to the CBP's Admissibility Review Office (ARO). Most forms of inadmissibility, with some national security exceptions, can be waived. Applications for nonimmigrant waivers are adjudicated by CBP's Admissibility

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[17] David W. Ogden, U.S. Department of Justice Memo, *re: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, published October 19, 2009, *available at* www.justice.gov.

[18] James M. Cole, U.S. Department of Justice Memo, *re: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use*, published June 29, 2011, *available at* www.justice.gov. ("The Ogden Memorandum was never intended to shield such activities [commercial cultivation, sale, 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.)

[19] James M. Cole, U.S. Department of Justice Memo, *re: Guidance Regarding Marijuana Enforcement*, published August 29, 2013, *available at* www.justice.gov. ("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 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."

[20] Monty Wilkinson, U.S. Department of Justice, *re: Policy Statement Regarding Marijuana Issues in Indian Country*, published October 28, 2014, *available at* www.justice.gov.

[21] INA§212(h).

[22] INA §237(a)(2)(B).

[23] 8 CFR § 316.10(b)(2)(iii).

[24] INA §212 (d)(3)(A)(ii) applies for Canadians seeking waivers. The statute states "(ii) who is inadmissible under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General."

Review Office, and typically take 4 to 6 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; subsequent TN or H-1B). Some issues are much slower to adjudicate, including some marijuana related matters and sex offender crimes. We had one waiver application sit at the ARO for over a year, where there was no marijuana conviction in place, but CBP found marijuana in the client's possession.

According to CBP, the exercise of authority to grant a waiver is discretionary and the granting of an application for advance permission to enter as a nonimmigrant pursuant to Section 212(d)(3) is considered on the merits which include the presence of extenuating or mitigating circumstances. The applicant bears the burden of establishing that the waiver should be granted in the exercise of discretion. Adjudicators are supposed to make a determination by balancing a.) the risk of harm to society if the applicant is admitted; b.) the seriousness of the underlying cause of the applicant's inadmissibility, and c.) the nature of the applicant's reason for wishing to enter the United States.[25] The ARO says that it also considers the following factors in exercising discretion (1) the nature of the offense; (2) the circumstances which 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.

Port parole is available in emergent circumstances. Port parole is a discretionary grant of entry (but not admission). The supervisors at the port will review all the facts of a situation and make case-by case decisions. Anecdotally, we understand the grant of port parole has gone down substantially in the past year. This was the case after 9/11 as well.

II. ADMISSIBILITY SCENARIOS INVOLVING MARIJUANA

We see a variety of situations involving marijuana at the border. Some officers look for issues relating to marijuana, while others seem to look the other way, and exercise discretion as much as possible. However, once an officer has started down the road of addressing a marijuana issue, they typically will have the full support of the agency.

With any marijuana admissibility case, it is important to obtain early as many facts as possible about the border encounter, and then try to consider the issues from the vantage point of CBP. I typically ask, prior to an initial consultation, for all paperwork provided by the border, a brief statement as to the events, and any court records available.

Hereafter follow some hypothetical scenarios, which touch on the various issues that typically come up.

Scenario 1

Client is stopped at the border and when asked, admits to having marijuana in their possession. The marijuana is volunteered and confiscated as contraband. Client's statement is taken under

[25] *Matter of Hranka*, 16 I&N Dec. 491 (BIA) 1978.

oath, where they admit to having used marijuana in the past, and having marijuana in their possession at time of seeking admission.

Practice Pointers

- Arriving at the border with marijuana is a bad idea. Let's just get that out of the way now. Possession of marijuana continues to be illegal under federal law. While this probably seems obvious, with legalization it is less obvious than it has been in recent history. Indeed, this may need to be explained to a client, and sometimes gently. For some, marijuana is almost a way of life, and involves personal identity. For others, it is simply medicine. Interestingly, CBP has posted on their website that marijuana has not always been banned at the border.[26] CBP notes that the full ban reaches back to only 1970, with regulatory laws preceding that dating back to 1937.[27] CBP acknowledges state legalization on its website, but says the ban continues under federal regulation.[28]

- Do you know how much marijuana was confiscated? This is something you want to identify specifically. We have seen cases where the Border has made no official record of the weight of the actual marijuana, but instead has weighed the marijuana and the jar it is in, collectively. One pound equals 453.6 grams, and so a jar which weighs a quarter of a pound weighs over one hundred grams. It may be necessary for the applicant to establish how much marijuana was confiscated, in relation to a 30 gram exception, and a collective weight measure is unhelpful in such circumstance.

- You have to ask for the statement, and review it carefully. The statements are printed on a Form I-831, and typically include 3 to 6 pages of Questions and Answers. Some officers are more experienced than others at taking sworn statements like this. Many seem to enjoy taking a deposition, as it were. It appears that CBP has templates prepared. Anecdotally, at NW Ports of Entry, the taking of statements is up, while the issuance of expedited removal orders is down. The recent trend in marijuana related statements is to read sections of U.S. and Canadian law related to controlled substances, in an attempt to extract voluntary, knowing admissions to acts which constitute the essential elements of a conviction, for purposes of establishing inadmissibility. However, many statements on the record do not appear to really fulfill this purpose.

- CBP does not refer simple possession cases for local prosecution. They cannot, now that marijuana is legalized. Typically, they collect a Customs violation fine, which is usually $500. Thereafter, they may take the sworn statement.

- The issue arises as to whether or not CBP has established an enduring basis of inadmissibility, in the absence of an actual conviction. Depending on the record, there are nonimmigrant waiver application cases where the Admissibility Review Office

[26] See http://www.cbp.gov/about/history/did-you-know/marijuana (link as of 2/3/2016).
[27] Id.
[28] Id. Specifically, the CBP posting says, "As of January 2012, 16 states and the District of Columbia have legalized marijuana for medical purposes, though this is still not permitted under federal regulations."

(ARO) issues a letter saying that a waiver is not required, because no formal basis of inadmissibility has been established.[29] However, recent experience has been that the ARO is not issuing "waiver of waiver" letters as frequently, but instead seem to be accepting the waiver application fee, and without further comment, are typically granting the waiver for a limited increment of time (e.g. six months if the violation was recent, and always one year on the initial application). As an alternative strategy, it may be possible to eventually raise the issue of admissibility, at no cost, via DHS's Traveler Redress Inquiry Program (DHS TRIP). This may or may not get somewhere.

- In the 1990s, U.S. Customs confiscated marijuana under a "Customs Zero Tolerance Fines" program. Convictions were not sought with this program. In 1991, INS General Counsel T. Alexander Aleinikoff authored a legal opinion on this, saying the fines did not create inadmissibility under INA §212(a)(2)(A)(i)(II). This memo has been used successfully in some cases to argue inadmissibility has not been established, and a waiver is not required.[30]

Scenario 2

Canadian B-1/B-2 Visitor Client has been traveling back and forth across the border for years, without incident. One day, Client is stopped and asked about long-past charges in Canada involving a grow operation, which were subsequently dismissed. Client is told they are inadmissible, after a statement is taken under oath.

Practice Pointers

- The long history of successful travel is immaterial to the legal question of admissibility.[31] One officer's decision may be challenged by another, pursuant to INA § 235(b)(3).

[29] A sample letter from the ARO in our files says:

> *"While the incident at the Vancouver International Airport on November X, 1996, is serious, it has been deemed that the act of signing the Agreement to Pay Monetary Penalty does not constitute a controlled substance violation. Therefore, there is no record of a conviction nor does the record contain a sworn statement or other evidence of an admission of any controlled substance law violations. It is the determination of this office [the ARO] that you are not inadmissible to the United States pursuant to Section 212(a)(2)(A)(i)(II) based on the above incident. It is the determination of this office that you are eligible to travel to the United States."*

[30] *Legal Opinion: Your CO 235-C Memorandum of October 25, 1991: Excludability Under Customs Zero Tolerance Fines*, T. Alexander Aleinikoff, to Michael D. Cronin and Donna Kay Barnes, published January 20, 1995.

[31] In general, *see* INA §235 regarding authority of CBP to conduct inspections. INA § 235(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 240."

- The U.S. and Canada share information in an increased manner as a consequence of the Beyond the Border agreement.[32] Sometimes information not in one database shows up in another database, if CBP takes the time to look.

- The charge(s) here was dismissed. Remaining issues include whether there is justifiable "reason to believe" the person is or was a trafficker in narcotics, as defined by the statute. Also, the question arises as to the adequacy of admission taken by CBP under oath, and whether it is amounts to the admission to the "essential elements" of an offence. If that appears to be the case, the question then is how to rehabilitate the matter, if possible, through communications with CBP Supervisors, local CBP leadership, the ARO, litigation, and/or the media. The focus of any such effort will likely remain on the fact that there is no charge, and while legally immaterial, perhaps the long history of cross-border travel. There is a place for client advocacy with CBP in such circumstance.

- Presumably, the client was not placed in expedited removal or noted to appear in immigration court. However, this is something to ascertain initially, as sometimes the client does not understand the adverse action taken by CBP.

- In recent years, supervisors have improved in responding to client matters, and will work with attorneys concerning issues related to marijuana. Usually it is best to make a full case to them via email, so that they have an opportunity to consider it. The fact that marijuana is involved in a situation does not mean that the situation as a whole won't get a fair and full review. If necessary, there may be times where it makes sense to ask that the matter be reviewed by CBP counsel. The officers at the border are not attorneys, and they are a police agency first.

Scenario 3

Client has a Canadian conviction from twenty years ago for marijuana possession, which he says was subsequently pardoned.

Practice Pointers

- Canadian pardons are typically not effective for U.S. immigration purposes. The reason for this is the broad definition of a conviction under the Immigration and Nationality Act. The Act defines "conviction" as a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt 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 to be imposed.[33]

[32] See http://www.dhs.gov/beyond-border.
[33] INA §101(a)(48)(A).

- In a case like this, it is important to verify whether the person may yet be admissible under the 9th Circuit's Federal First Offender Act exception, which allows that a person is admissible if their conviction was handled by the court in a manner analogous to the treatment it would've received if in the United States, in Federal Court, under the First Offender Act. The exception is only applicable to 9th Circuit states, and was actually eliminated by the 9th Circuit's decision in *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc). However, the 9th Circuit specifically made their decision not retroactive, and so legally, eligibility for the exception continues to exist for qualifying cases pre-dating July 14, 2011. Basically, if there is a national pardon, this will probably not work for these purposes, though court records have to be evaluated carefully in each case. The matter merits closer review if a guilty plea was given, but then the charge was subsequently dismissed upon successful rehabilitation related efforts. Even if this exception applies, it may take a great deal of effort to convince CBP. To this end, it may be advisable to seek to work directly with a CBP attorney on the matter.

Scenario 4

Client has a medical marijuana card.

Practice Pointers

- CBP on occasion will search a person's wallet. Do not travel internationally with a medical marijuana card. The issue could also come up at checkpoints, or if volunteered. The card itself is not proof of a controlled substance violation, but it may lead to questions which may establish inadmissibility. The point here is to identify this as a concern for clients with medical marijuana cards.

- All persons, including non-citizens and applicants for admission, have the Constitutional right to remain silent. 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 U.S. is authorized, at the discretion of the agency.[34] The burden of proof on admissibility continues to be on the applicant for admission.

- Reminder: the border search exception applies at the border.[35] 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

[34] INA 235(a)(4). "An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States.

[35] *United States v. Flores-Montano*, 541 U.S. 149 (2004) ("The government's interest in preventing entry of unwanted persons and effects is at its zenith at the international border."); *United States v. Teng Yang*, 286 F.3d 940, 944 n.1 (7th Cir. 2002); *Bradley v. United States*, 299 F.3d 197, 202 (3d Cir. 2002); *Chen Yun Gao v. Ashcroft*, 299 F.3d 266,281 (2002) (Greenberg, J., dissenting).

administrative search doctrine, which covers searches done pursuant to a regulatory scheme in furtherance of an administrative purpose.[36]

Scenario 5

Client is employed in a state-approved marijuana grow operation.

Practice Pointers

- We're starting to hear of these cases. Various scenarios we have heard of include persons working at the grow-operation, persons involved in design of greenhouses, scientists involved in the agricultural aspects of commercial grow operations, investors seeking to invest in enterprises, and persons working professionally in related industries. Each situation has to be looked at on a case by case basis, with reference to the INA bar on aiding and abetting trafficking, as well as the trafficking provision of the Controlled Substances Act. Permanent residents and applicants for permanent residence are best advised now to avoid such employment.

- DHS has the burden of proof to establish that the "reason to believe" ground of inadmissibility based on trafficking is based on "reasonable, substantial and probative evidence" that the noncitizen is or was knowingly engaged in trafficking related activities. There is a long line of cases examining whether or not the "reason to believe" standard is met, and these may be helpful in trying to rehabilitate a DHS determination of inadmissibility.[37] While some persons will clearly know they are directly engaged in the legalized industry, others may be only working on the periphery.[38]

- For immigration attorneys, it's important to also understand what you don't know. In many cases, it may be prudent to refer the client also to a criminal defense attorney, and if appropriate, make the referral in writing.

- Because this marijuana legalization is a fluid issue, it makes sense to survey AILA membership for any available information. Presuming no feedback, it may be worth noting that there seems to be a difference of opinion on how to proceed with marijuana related matters between CBP officers, supervisors, and other government officials. Identifying where discretion may be exercised in your client's favor is best, while educating the client on the law. There will be tactical decisions to be made in a dire situation.

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[36] *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973).

[37] *See, e.g., Chavez-Reyes v. Holder*, 741 F.3d 1 (9th Cir. 2014); *Lopez-Molina v. Ashcroft*, 368 F.3d 1206 (9th Cir. 2004); *Alacon-Serrano v. INS*, 220 F.3d 1116 (9th Cir. 2000); *Matter of Casillas-Topete*, 25 I. & N. Dec. 317 (B.I.A. 2010; *Argaw v. Ashcroft*, 395 F.3d 521 (4th Cir.2005)(controlled substance not listed on CSA schedule or scientifically tested).

[38] *See Matter of McDonald and Brewster*, 15 I. &. N. Dec. 203 (B.I.A. 1975)(need to proof intent to distribute).

- The Washington State Administrative code regulates persons acting as "consultants" in the marijuana field, and differentiates between a person who is a "consultant" and one who is a "true party of interest". WAC 314-55-010 says:

> *(5) "Consultant" means an expert who provides advice or services in a particular field, whether a fee is charged or not. A consultant who is in receipt of, or has the right to receive, a percentage of the gross or net profit from the licensed business during any full or partial calendar or fiscal year is a true party of interest and subject to the requirements of WAC 314-55-035. A consultant who exercises any control over an applicant's or licensee's business operations is also subject to the requirements of WAC 314-55-035(4).*

Similarly, Washington law has regulatory definitions for "Financiers"[39] and "Members"[40]. These regulations may be helpful as lines of demarcation for professionals regarding their scope of involvement in an enterprise. We have seen cases where established Canadian professionals are sought in the industry for their professional expertise in agriculture, architecture, and publishing.

- The Washington State Supreme Court, amongst others, has added a comment to RPC 1.2 on Scope of Representation, concerning Washington's State's legalization of marijuana. The comment says:

> [18] *At least until there is a change in federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and meaning of Washington Initiative 502 (Laws of 2013, ch. 3) and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders, and other state and local provisions implementing them.*

Scenario 6

Client is a U.S. citizen and has been denied NEXUS Trusted Traveler status, due to being found at the border with marijuana in their possession over a decade ago. Client was never convicted, and did not admit to the essential elements of a controlled substance offense.

[39] WAC 314-55-01 (8): *"Financier" means any person or entity, other than a banking institution, that has made or will make an investment in the licensed business. A financier can be a person or entity that provides money as a gift, loans money to the applicant/business and expects to be paid back the amount of the loan with or without interest, or expects any percentage of the profits from the business in exchange for a loan or expertise.*

[40] WAC 314-55-01(15): *"Member" means a principal or governing person of a given entity, including but not limited to: LLC member/manager, president, vice-president, secretary, treasurer, CEO, director, stockholder, partner, general partner, limited partner. This includes all spouses of all principals or governing persons named in this definition and referenced in WAC 314-55-035.*

Practice Pointers

- NEXUS is one of CBP's trusted traveler programs. NEXUS allows persons who have been vetted by the U.S. and Canada to travel through an expedited lane at the border and airports, for faster travel. Similar programs include Global Entry, SENTRI (Secure Electronic Network for Traveler's Rapid Inspection), and FAST (Free and Secure Trade for Commercial Vehicles).[41]

- NEXUS has a "no tolerance" policy with regard to controlled substance offenses. The program itself is opaque, with no published regulations or known adjudication guidelines. There are indications that discretion is exercised in cases where there are offenses on the record which are a decade or more old, but so far this does not appear to reach to controlled substance offenses.

- Local NEXUS questions can be routed to the Supervisor at the NEXUS office at: NEXUS Enrollment Center, CBP Office of Field Operations, Blaine, WA, 360-366-4342 Ext# 3.

- NEXUS appeals may be filed with CBP's Ombudsman, at: U/S Customs and Border Protection, P.O. Box 946, Williston, VT 05495, Attention CBP Ombudsman or via email CBP.cbpvc@dhs.gov.

Scenario 7

Client admits to a Panel Physician that they have used marijuana in the past year.

Practice Pointers

- The INA states that drug abusers and drug addicts are inadmissible to the United States, as persons with Class A medical conditions.[42] A Class A medical condition renders a visa applicant ineligible to receive a visa and, for mental health, include applicants who are determined by the panel physician to have (1) a current physical or mental disorder with associated harmful behavior; and/or (2) a past history of mental disorder with associated harmful behavior if the harmful behavior is likely to recur or to lead to other harmful behavior in the future.[43]

- We have seen cases where Ports of Entry or the ARO refer a person to a Panel Physician to deem whether they are inadmissible for a Class A medical condition (e.g. drug abuse, drug addict, habitual drunkard). Immigrants and K visa applicants must obtain a medical

[41] For CBP's website on Trusted Traveler programs, see http://www.cbp.gov/travel/trusted-traveler-programs. (Link valid as of 2/5/16).
[42] INA § 212(a)(1)(iv).
[43] 9 FAM 302.2-7(B)(7).

examination from a Panel Physician prior to obtaining a visa. There are reports that some Panel Physicians are very aggressive in eliciting admission to "drug abuse".[44]

- Panel Physicians receive their technical instructions from the Center for Disease Control and Prevention (CDC).[45] The 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.*

- The CDC updated its Technical Instructions in 2015.[46] The instructions call for random drug testing in the case of persons who've recently used marijuana, and require that the person show remission over the course of a full year.[47]

- The instructions specifically say, "Random screening is <u>not</u> part of the routine medical examination for applicants for U.S. admission."[48] There are anecdotal reports from all over the world of Panel Physicians who aggressively pursue the question of drug abuser or addiction based on marijuana use. Simple experimentation should not qualify as drug abuse. However, routine use of legalized marijuana would likely be deemed as much.

- There are limited strategies 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 Center for Disease Control, or ask for a re-examination based on 42 C.F.R. 34.8.[49]

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[44] *See Practice Alert on "Drug Abuser or Addict" Ground of Inadmissibility*, AILA Doc. No. 06020110, dated February 1, 2006.

[45] http://www.cdc.gov/immigrantrefugeehealth/exams/ti/civil/technical-instructions-civil-surgeons.html.

[46] *CDC Immigration Requirements: Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-Related Disorders*, U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, Division of Global Migration and Quarantine, published February 3, 2015.

[47] Id. at p. 15. 9 FAM 302.2-8(B)(2) states*: The current version of the DSM 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.*

[48] Id. at p. 12.

[49] *Practice Pointer: How To Contest A "Class A" Determination From A Panel Physician*, AILA Doc No. 09123063, dated December 30, 2009

CONCLUDING COMMENTS

Each case of inadmissibility involving marijuana will have its own set of facts to be analyzed and acted upon. Hopefully this article sketches out some of the considerations. The legal challenges can be interesting, albeit stressful for the client. It is necessary early on to be able to assess the basic facts of the situation, assess the point of view of the CBP officers involved, and then determine what remedial actions may be available.

Issues with marijuana and the border seem to be increasing, as well as evolving, based on administrative and court practices. Legalization of marijuana has created a "green rush", involving business owners, professionals, and customers. Many Canadians are interested in this sector. Naturally, inadmissibility questions should continue to arise at the border, due to the state-federal conflict of laws.