But, I Didn't Inhale – Immigration and State Legalization of Marijuana

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Legal marijuana use in the United States is on the rise. Twenty-three states have legalized medical marijuana use.[1] Washington State, Colorado, Alaska, and Oregon have passed voter initiatives to legalize recreational marijuana growth, distribution, sale, and use. Tribal lands are open to marijuana markets.[2] Each state has different laws, different regulations, and different implementation plans for state-legal marijuana activities. Historically, marijuana and U.S. immigration law have not mixed well. The United States once tried very hard to deport John Lennon of the Beatles for a past U.K. conviction for marijuana possession.[3] Some of the most important immigration cases in recent years have concerned marijuana.[4] This article discusses several considerations for noncitizens and their attorneys related to state legalization of marijuana.

MARIJUANA AND THE IMMIGRATION AND NATIONALITY ACT

Schedule A of The Controlled Substances Act, 21 USC §§801 *et seq.*, defines marijuana and its derivatives as controlled substances.[5] The Immigration and Nationality Act (INA)[6] and immigration case-law explicitly and by implication include many marijuana related provisions concerning admissibility, removability, and naturalization. The INA also treats marijuana separate from other controlled substances in some instances (*e.g.* §212(h).

Admissibility

[1] *Legality of Cannabis by State, available at* http://en.wikipedia.org/wiki/Legality_of_cannabis.
[2] See M. Wilkinson, U.S. Department of Justice, *re: Policy Statement Regarding Marijuana Issues in Indian Country*, (Oct. 28, 2014).
[3] *Lennon v. INS*, 527 F.2d 187 (2nd Circ. 1975). This story is told at length in the 2006 film, *The U.S. v. John Lennon*.
[4] E.g. *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013)(Moncrieffe was found with 1.3 grams of marijuana, and plead guilty in Georgia to possession with intent to distribute, which the government alleged was an aggravated felony).
[5] "For purposes of 21 USCS §§801 *et seq.*, marijuana is 'controlled substance.'" *United States v One 1977 36 Foot Cigarette Ocean Racer* (1985, SD Fla) 624 F Supp 290.
[6] Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*).

Any involvement with marijuana in the United States or elsewhere might make a noncitizen inadmissible. Immigrant visas have been denied where noncitizens admit to using marijuana, with no criminal proceeding or conviction. Similarly, applicants have been denied admission based on an admission to use. Some applicable INA statutes to consider include:

- INA §212(a)(1)(A)(IV) – Anyone who is determined (under regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict.
- INA §212(a)(2)(A)(i)(I)—Admission to elements of crimes of moral turpitude, which includes violations or conspiracies to violate state, federal or foreign laws relating to controlled substances.
- INA §212(a)(2)(A)(i)(II)—Admission to elements of violations or conspiracies to violate state, federal or foreign laws relating to controlled substances.
- INA §212(a)(2)(C)—Actual or suspected drug traffickers and spouse, son, daughter of actual or suspected drug traffickers (AG only must have 'reason to believe.')
- INA §212(a)(3)(ii)—A person who the consular officer knows or suspects to enter the United States to "engage solely, principally, or incidentally in...any other unlawful activity.

Removability

The INA also provides several bases for removability for noncitizens involved in state-legal marijuana use and businesses. These could be users, owners, or investors in the industry. Some applicable INA statutes to consider include:

- INA §237(a)(1)(A)—Inadmissible at time of entry.
- INA §237(a)(1)(B)—Present in violation of any law of the United States.
- INA §237(a)(2)—Deportability under 237(a)(2) require a conviction **except for** INA §237(a)(2)(B)(ii) **"drug abuser or addict."**
- INA §237(a)(2)(A)(i)—Conviction for "a crime involving moral turpitude committed within five years or 10 years in the case of an alien provided lawful permanent resident status" and where "a sentence of one year or longer may be imposed."
- INA §237(a)(2)(A)(ii)—Multiple criminal convictions.
- INA §237(a)(2)(A)(iii)—Aggravated felony conviction. INA §101(a)(43)(B) defines aggravated felony to include "illicit trafficking of a controlled substance."
- INA §237(a)(2)(B)(i)—Convictions for controlled substances violations "other than a single offense involving possession for one's own use of 30 grams or less of marijuana."
- INA §237(a)(2)(B)(ii)—"Any alien who is, or at any time after admission has been, a drug abuser or addict."
- INA §237(a)(4)—"Any alien who has engaged or is engaged in "any other criminal activity which endangers public safety or national security."

Eligibility for Citizenship

Lawful permanent residents (LPR) can face negative good moral character findings based on legal marijuana use or involvement in the legal marijuana industry. Applicable INA provisions include:

- 8 CFR §316.10(b)(2)(iii)—Finding of no good moral character for violations (not conviction!) of "any law of the United States, any State, or any foreign country relating to a controlled substance, provided that the violation was not a single offense for simple possession of 30 grams or less or marijuana."
- 8 CFR §316.10(b)(2)(iv)—Finding of no good moral character for admission to committing (not conviction!) crime of moral turpitude.

INA CATEGORICAL CONSIDERATIONS

Drug Abuser/Addict

Abuser/addict matters come up at the consulate, after the Panel Physician conducts the medical exam. Panel Physicians have deemed even one-time marijuana users to be abusers/addicts.[7] There is no waiver for this provision; most times the Panel Physician will assign a date certain when the individual can reapply.[8] Panel Physicians use the DSM (Diagnostic and Statistical Manual of Mental Disorders) definition of at least 12 months during which no substance use has occurred.[9] The Panel Physician may use their clinical judgment to determine if 12 months is an acceptable period of time for an individual applicant to demonstrate sustained, full remission. U.S. Customs and Border Protection's (CBP) Admissibility Review Office (ARO) may require that a §212(d)(3) waiver applicant get an examination from a Panel Physician, based on an admission or conviction.

Admissions

Technically, the disqualifying admission must be voluntary, unequivocal, and meet the essential elements of the crime in jurisdiction where it occurred, for it to be legally effective.[10] Practically, officers and adjudicators often apply a "reason to believe" standard.

Waivers and 30 Grams

INA §212(h) provides a waiver of inadmissibility for a single offense of simple possession of 30 grams or less of marijuana with certain conditions. State legalization laws vary substantially, and this can impact the noncitizen applicant. For example, it is still illegal to possess more than one

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[7] 9 FAM 40.11 N12.7 Inadmissibility Under INA 212(a)(1)(A)(iv) Drug Abuse or Addiction (CT:VISA-2251; 02-06-2015) There is no waiver relief for an immigrant visa (IV) applicant who is admissible under INA 212(a)(1)(A)(iv). Do not issue an immigrant visa (IV) to an alien that the panel physician identifies as a drug abuser or addicted to a drug described in section 202 of the Controlled Substances Act. *See also* 9 FAM 40.23 Exhibit I.

[8] 9 FAM 40.11 N7.1 Role of Panel Physician.

[9] 9 FAM 40.11 N11.1 Key Concepts of Mental Health at (b)(4)(B).

[10] *Matter of J*, 2 I&N 285 (BIA 1945); *Matter of E-V-*, 5 I&N 194 (BIA 1953); *Matter of G–M–*, 7 I&N 40 (BIA 1955, A.G. 1956); *Matter of K*, 7 I&N 594 (BIA 1957). *See also Pazcoguin v. Radcliff*, 292 F.3 1209, 1215–16 (9th Cir. 2002).

ounce of marijuana (without proper license) in Washington State. One ounce is actually less than 30 grams (28.5 grams roughly). However, in Colorado the amount is over two ounces.[11]

Legislative Vacate/Expungement

The Washington State Legislature is considering legislation which would vacate past convictions for simple possession of marijuana.

THESE MARIJUANA LAWS ARE PRE-EMPTED, RIGHT?

Which marijuana law controls—state or federal? The Controlled Substances Act states:

> No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, **UNLESS** there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.[12] (emphasis added).

The U.S. Supreme Court says this provision "explicitly contemplates a role for the states in regulating controlled substances."[13] Courts have differed, however, in determining whether a positive conflict exists, but usually have found that a state law is preempted if it is (1) "physically impossible" to comply, or (2) if the state law stands as an obstacle to the accomplishment of full purposes and objectives of Congress.[14] States have passed and implemented various medical marijuana laws for nearly twenty years now. Nebraska and Oklahoma recently petitioned the Supreme Court concerning Colorado's recreational marijuana law.[15] Preemption issues will continue to sort themselves out in the courts, until Congress gets further involved.

FEDERAL AGENCY RESPONSES TO MARIJUANA LEGALIZATION

The U.S. Department of Justice (DOJ) has issued four agency-wide memoranda on how to exercise prosecutorial discretion for state-legal marijuana activities. These memos may be useful in requesting discretion in an immigration matter. The October 19, 2009 David Ogden memorandum (Ogden Memo) addresses prosecutorial discretion in medical use of marijuana.[16]

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[11] Note *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012)("a single offense involving possession for one's own use of thirty grams or less of marijuana" calls for a circumstance-specific inquiry into the character of the alien's unlawful conduct on a single occasion, not a categorical inquiry into the elements of a single statutory crime.)

[12] 21 USCS §903.

[13] *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006).

[14] *See* Todd Garvey and Brian T. Yeh, "State Legalization of Recreational Marijuana: Select Legal Issues," (Jan. 13, 2014) Congressional Research Service, *available at* www.crs.gov (excellent discussion on preemption).

[15] The states of Nebraska and Oklahoma petitioned the Supreme Court to hear their complaint against Colorado, which alleges that the manufacture, possession and distribution of marijuana are all in conflict with federal law. See *Nebraska and Oklahoma v. Colorado*, filed in the U.S. Supreme Court. For a copy of the complaint, visit http://d1vmz9r13e2j4x.cloudfront.net/NET/misc/40171059.pdf/.

[16] DOJ Memorandum, D. Ogden, "Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana," (Oct. 19, 2009), *available at* www.justice.gov.

The June 29, 2011 James Cole memorandum (Cole Memo) provides guidance on the Ogden Memo, again regarding medical use.[17] The August 29, 2013 addresses states that have approved recreational use, articulating a soft, hands-off-for-now approach.[18] The October 28, 2014 Wilkinson memorandum (Wilkinson Memo) builds on the August 29, 2013, saying the DOJ will take the same approach in Indian Country, should a tribe decide to legalize.[19]

U.S. Citizenship and Immigration Services (USCIS) noted in its Spring 2014 AILA National liaison meeting that it has consulted with DOJ and the U.S. Department of Homeland Security (DHS) concerning state legalization of marijuana, and the subject is under review within the agency.[20] AILA has not been notified further on the matter, as of this writing.

CBP officials have stated that state legalization does not change how they handle marijuana questions.[21] CBP does not consider marijuana tourism a legitimate B-2 entry purpose. There are reports of some officers at the border denying admission after asking an applicant for an admission whether they have ever used marijuana.[22] This is not typical, but it happens. Any disqualifying "admission" or inadmissibility issue can be reviewed by a CBP Supervisor or Port Director. CBP Traveler Redress Inquiry Program (TRIP) is another means of redress. The Admissibility Review Office (ARO) will review admissibility matters too, at greater cost. If successful, a letter saying a person is not inadmissible may be procured.

CBP's ARO has taken over a year to adjudicate §212(d)(3) waivers involving marijuana where persons have been found to have marijuana but are not convicted. The latest trend is that they issue the waiver (rather than determine admissibility), and grant it for only six months. The filing cost is currently $585, and processing times range widely (*e.g.*, 5 to18 months).

The Drug Enforcement Agency (DEA) has clearly stated its intent to continue investigation and prosecution of criminal cartels as "marijuana remains a top revenue source for the Mexican drug cartels that are wreaking havoc in Mexico and along the Southwest Border. DEA will continue to disrupt and dismantle these drug trafficking organizations."[23] Prosecutions have occurred in Colorado based on these statements. As early as April of 2014 some Colorado stores were shut down for connections with Colombian cartels.[24]

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[17] DOJ Memorandum, J. Cole, "Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use," (June 29, 2011), *available at* www.justice.gov.

[18] DOJ Memorandum, J. Cole, *re: Guidance Regarding Marijuana Enforcement*, published August 29, 2013, *available at* www.justice.gov.

[19] DOJ Memorandum, M. Wilkinson, "Policy Statement Regarding Marijuana Issues in Indian Country," (Oct. 28, 2014), *available at* www.justice.gov.

[20] The query was, "Has DOJ issued guidance to USCIS on how applicants should be treated if they have received medical marijuana in a state where it is legal to ingest, purchase, use or sell medical marijuana?" See AILA/USCIS HQ Liaison Q&As (April 10, 2014) *at page 7, AILA Doc No. 14050243 (posted 5/2/2014).*

[21] *See* "Pot Law Creates A Hazy Border" *The Seattle Times* (Mar. 18, 2013) ("The state initiative did not change federal law," CBP Border Chief Thomas Schreiber said.)

[22] A. Judd, "B.C. Woman Who Told U.S. Border Guards She Smoked Pot Must Pay $600 To Cross Border Again," *Global News* (Mar. 1, 2014), *available at* http://globalnews.ca/news/1180369/b-c-woman-who-told-u-s-border-guards-she-smoked-pot-must-pay-600-to-cross-again/.

[23] "DEA Statement on New DOJ Marijuana Guidelines," 2009 WL 3391655 D.O.J. (Oct. 22, 2009).

[24] *See* www.huffingtonpost.com/2014/04/15/raided-colorado-pot-shops_n_5154525.html.

The White House has indicated that it respects states' rights to be "laboratories of democracy,"[25] and largely has not interfered with the state initiatives.[26]

MARIJUANA-RELATED QUESTIONS ON IMMIGRATION APPLICATIONS

Immigration application forms contain troublesome questions, which must be signed under oath by the applicants, with attestations by the preparers. For example, the I-485 asks "Have you EVER, in or outside the United States, a.) knowingly committed any crime of moral turpitude or drug-related offense for which you have not been arrested?"[27] The Form I-485 also asks, "Have you EVER illegally trafficked in any controlled substance, or knowingly assisted, abetted, or colluded in the illicit trafficking of any controlled substance."[28] Similarly, the N-400 Application for Naturalization asks, "Have you ever committed, assisted in committing, or attempted to commit, a crime or offense for which you were not arrested?"[29]

Each question must be read word for word, and answered truthfully. If necessary, a comment or explanation can be provided. Prepare your clients for these questions. USCIS will ask clients to answer the same under oath during an interview. Confront these sticky issues before an application is submitted (or not). With the above examples, there may be an issue of whether the person *knowingly committed* such a crime, particularly when the State says it is not a crime. Similarly, in the second I-485 example, there is a reasonable *question of law* whether an activity is illicit trafficking in a legalized environment, or whether, for example, a supporting professional (*e.g.*, accountant, lawyer) is assisting, abetting, or colluding.

Consider recommending a criminal defense attorney before applying, even when the clients has not been arrested, charged, or otherwise criminally prosecuted. For example, if a client works for a marijuana distributor in a legalized state, it may be best to advise the client to consult with criminal counsel before making an application for immigration benefits. It may also be best to obtain a signed informed consent before disclosing such facts to an agency.

While clients have the right to not self-incriminate themselves for criminal activity, immigration agencies have enormous discretion, which often is informed by how much a client does or does not preemptively confess to questionable conduct. It is typically the immigrant's burden to prove eligibility, which may require them to divulge information she would never divulge were she interested in avoiding self-incrimination. In some cases, the DOJ's Ogden and Cole Memos may be used either as a sword or a shield to obtain favorable prosecutorial discretion.

NON-USE MARIJUANA ACTIVITIES

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[25] Justice Brandeis once famously opined, "a state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

[26] *See* www.whitehouse.gov/ondcp/state-laws-related-to-marijuana.

[27] *See* Form I-485, Application to Register Permanent Residence or Adjust Status, Part 3, C, 1 a., *available at* www.uscis.gov.

[28] *Id.* at 3(d).

[29] *See* Form N-400, Application for Naturalization, OMB No. 1615-0052 Expires 09/30/2015, Part 11, Question 22, at page 15, *available at* www.uscis.gov.

Marijuana legalization has opened a new industry, and some, including noncitizens, see it as a "Green Rush." Individuals involved in the marijuana industry may be far removed from using, producing, touching, transporting, or selling. They may be interested in associated products and services. Anecdotally, we are aware of persons denied entry for wishing to sell greenhouses for the industry. Also consider related supporting services, such as investing, lawyering, accounting, banking, security, publishing, conferences, marketing, etc. in association with INA provisions on aiding, abetting, trafficking, and conspiracy. How will the federal government deal with noncitizens who are heavily invested or associated in these related activities? Will the federal government entertain I-129 Petitions for noncitizens to work, for example, at lending institutions that cater to marijuana businesses? Will a person with Temporary Protected Status (TPS) be at risk of losing status if he works in a state-legal marijuana production facility? These are the types of immigration issues which are increasingly common as more states legalize marijuana.

ETHICAL ISSUES IN ADVISING ON MARIJUANA LEGALIZATION

State legalization creates a host of ethical issues, which ethics experts are still exploring. As the matter is a hot topic of ethics discussion, it is best to consult with your state bar and AILA experts if there are any related ethics questions. Immigration attorneys also must be mindful of the professional conduct and disciplinary rules of the Executive Office for Immigration Review (EOIR) and USCIS.[30]

Two types of issues have received a fair amount of analysis from several state bar associations. The first is Rules of Professional Conduct (RPC) 1.2 and scope of representation, which has to do with if and how attorneys may assist clients in marijuana related matters. The second is RPC 8.4, which addresses misconduct by attorneys themselves, such as personal use.

Arizona (2011), Colorado (2012), Connecticut (2013) and Maine (2010) have issued ethics advisory opinions concerning medical marijuana.[31] Colorado and Washington State have published opinions on providing advice on recreational marijuana. Colorado is revising its opinion, as the 2012 Bar Association Ethics Committee focused on medical marijuana, prior to the Colorado constitutional amendment legalizing recreational marijuana. There are actually some significant differences between each state's ethics opinion. Each report concludes that it does not violate RPC 1.2 to advise clients concerning applying federal and state law. However, they differ on the degree to which counsel can assist. Arizona has referenced the AG memos.

In Washington State, RPC 1.2(d) indicates that lawyers may advise clients on the legal consequences of conduct, but are prohibited from assisting clients in committing a crime. Colorado's – and most other states – rules mirror that of 1.2(d). The issue may be become whether assisting a client in a venture is legal in your state, but not legal on a Federal level. Washington State has approved a new Comment 18 to RPC 1.2 (Scope of Representation):

> [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

[30] 73 Fed. Reg. 76914 (Dec. 18, 2008) (effective date Jan. 20, 2009); 8 CFR §1003.102(a)–(u).

[31] *See* Proposed Advisory Opinion, WSBA Committee on Professional Ethics, (1/8/2014), *available at* www.wsba.org.

> 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.[32]

The Colorado Bar Association's Ethics Committee opinion is limited to the narrow issue of whether personal use of marijuana by a lawyer violates Colo. RPC 8.4(b). The opinion does not address whether a lawyer violates Rule 8.4(b) by counseling or assisting clients in legal matters related to the cultivation, possession, or use by third parties of marijuana under Colorado law. This non-discussion can leave many attorneys in a quandary whether they can advise clients in the business legalities of the marijuana industry (*e.g.* L-1, E-2 visa) for things such as grow operations, distribution, investment, etc. If in doubt, consult with your ethics experts in your Bar Association and AILA.

CONCLUSION

State-legal marijuana activities present serious immigration concerns for noncitizens. As long as marijuana is a federally-controlled substance, attorneys will find it difficult to advise clients on the consequences of engaging in state legal marijuana use, business and/or tourism. Is the only good answer, "Just say no?" For now, for the noncitizen, this will usually be the case. As the federal laws and policies develop and change, practitioners may provide more nuanced—and informed—answers to challenging questions about how, or whether, noncitizens can engage in state-legal marijuana activities.

[32] Adopted by the Washington State Supreme Court on December, 9, 2014. See www.courts.wa.gov/court_rules/ at RPC 1.2.

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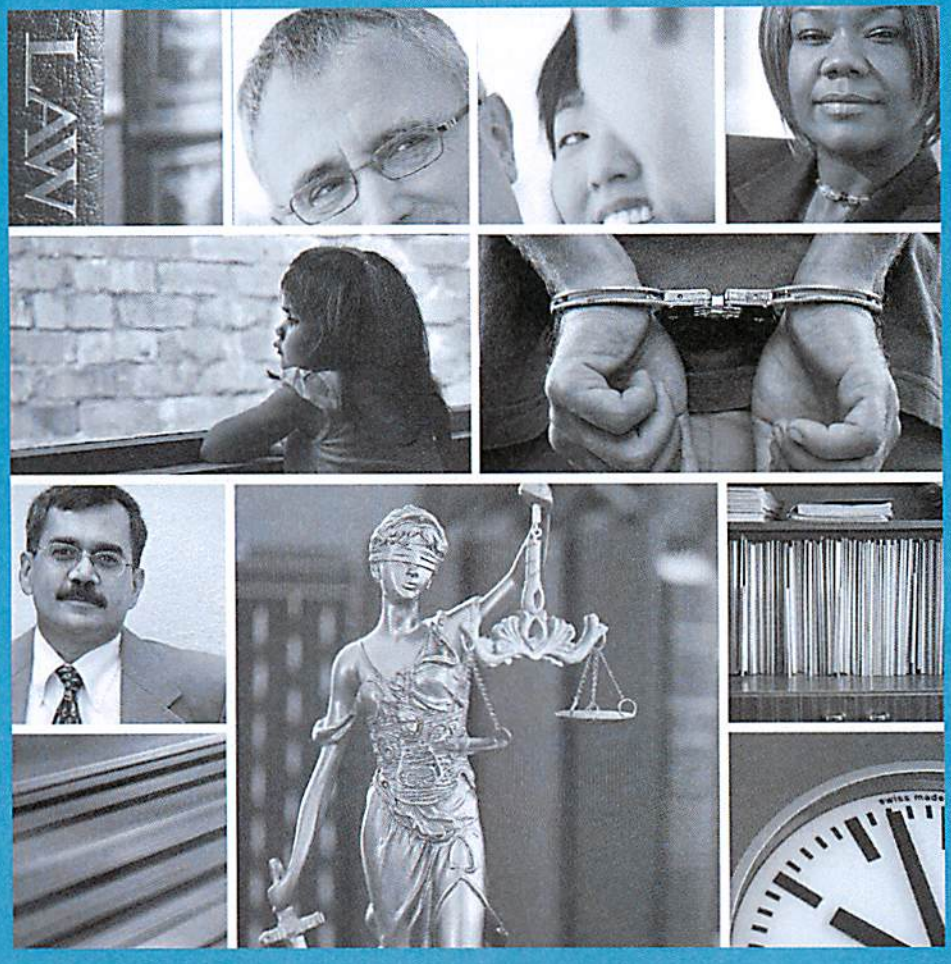

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