HARRIS BEACH PLLC
ATTORNEYS AT LAW
Discover True Engagement®

Legal Alert

With Marijuana Still Illegal in U.S., Personal Use or Involvement in Cannabis Industry Can Affect Entry at Border

September 20, 2018

As the legal landscape of marijuana use shifts in both the United States and Canada, new questions arise as to the impact of drug use on admission to the United States. Currently, under both U.S. and Canadian federal law, marijuana remains a controlled substance. However, medicinal marijuana use is legal in 29 U.S. states and the District of Columbia; recreational use of marijuana is currently legal in nine U.S. states; and recreational use of marijuana will be legal in Canada as of October 17, 2018—giving rise to a thriving legal marijuana industry on both sides of the border. As this legal landscape changes, U.S. Customs and Border Protection ("CBP") officers at the ports of entry to must determine whether individuals who admit to prior use of the drug, or who work in the legal marijuana industry, are admissible to the United States.

First, it should be noted that U.S. citizens cannot be refused readmission to the country. Therefore, a U.S. citizen who admits to a CBP officer upon reentry that he has used marijuana while in Canada, or that he works or has invested in the legal marijuana industry, cannot be refused entry to on that basis. Second, as a general rule, CBP officers at the borders and airports do not routinely ask foreign national applicants for admission to the United States whether they have ever used marijuana before, though in theory they could. The line of inquiry is instead typically triggered by something such as a marijuana bumper sticker, a pot smell, or the person providing information that would lead a reasonable person to ask related questions. CBP officers also sometimes review people's social media profiles while questioning them. Information about involvement in the industry may appear on a LinkedIn profile or other platform and may lead to the issue being raised.

The consequences of foreign nationals' admission to past or current use of marijuana are severe. The Immigration and Nationality Act makes anyone inadmissible if he or she has been convicted of any crime related to a controlled substance, or if he or she admits to the essential elements of a crime related to a controlled substance. Thus, it is clear that any foreign national who is convicted under U.S. federal law for marijuana use in this country, even if the use was legal under the state law where the person was charged, is inadmissible for life on this ground. However, it is not clear whether a foreign national who was previously convicted of marijuana use in Canada would be inadmissible following legalization of marijuana in Canada, because the conduct giving

rise to the conviction would no longer be illegal in Canada. This is an open legal question. It should be noted that such an "admission" need not occur in the context of a legal proceeding; it would be possible for a CBP officer simply to ask a foreign national at the port of entry, "Have you ever used marijuana?" If the applicant were to respond in the affirmative, then there could be sufficient grounds to find the person inadmissible for having admitted to committing the essential elements of a controlled substance violation, depending upon where and when the drug use occurred. Once such a finding has been made, it can be very difficult to overcome, as there is no way to appeal a finding of inadmissibility.

It should also be noted that people who are found to be drug abusers or addicts may also be found inadmissible to the U.S., but this determination can only be made by a physician under Department of Health and Human Services guidelines. If CBP were to apply this ground of inadmissibility, it would need to refer the applicant to a government-approved physician outside of the U.S. to perform a medical examination, which can include a drug test.

Working in the Cannabis industry

Possible consequences for working or investing in the legal cannabis industry are similarly severe. Some professions in the legal cannabis growing industry are technically eligible for the nonimmigrant NAFTA professional (TN) status, meaning Canadian citizens could apply for TN status to come to the United States to work as engineers or engineering technicians for growers for the U.S. medical marijuana industry. However, it is extremely improbable that CBP would approve a TN or any other nonimmigrant status for the purpose of working in this industry. Even though such growing operations are legal under many state laws, they remain illegal under federal law. Immigration laws are federal laws and will be enforced in a manner consistent with the Department of Justice's policies on marijuana.

Filing a TN or other employment-based immigration application or petition on behalf of a foreign national opens up that foreign national to a finding of inadmissibility as well. In the course of the inspection process, the applicant may be asked about personal use of marijuana; and the above-noted findings of inadmissibility may apply. In addition, he or she may be found inadmissible as a drug trafficker. The Immigration and Nationality Act makes people inadmissible if the officer "knows or has reason to believe" that the person is involved in the trafficking of a controlled substance or has aided, abetted, assisted, conspired or colluded with others in trafficking controlled substances. Since marijuana remains a controlled substance, and those involved in the growing industry, at the very least, "aid" in the sale of the drug, their involvement can be viewed as falling within the scope of this inadmissibility ground, even if the person has never been convicted of a crime. The officer need only have "reason to believe" that the person is involved in the industry, and by submitting the application for admission in TN or similar nonimmigrant status, the applicant has given the CBP officer all the information needed for this ground to apply.

The trafficking ground of inadmissibility may also be applied to others who are involved in the marijuana industry, even if they do not apply for work-related status in the United States. A distinction should be made, however, between those who are working in the legal cannabis industry solely in Canada versus those who are working or investing in the U.S. cannabis industry. In the U.S., cannabis and its trafficking are still illegal. But in Canada, after Oct. 17, the production and sale of the drug for recreational purposes will be legal, so that this ground of inadmissibility would only apply to people engaged in the Canadian industry if there were some cross-border element to operations, such as sale of the Canadian-grown product to U.S. businesses or individuals. It is difficult to say how far this concept could be stretched, however, as one could imagine that even equipment sold by Canadian manufacturers to U.S. growers for use in growing operations could be viewed as aiding or abetting a trafficker by providing the means of production. In addition, Canadians who invest in the U.S. industry may also be found inadmissible as traffickers because they are funding illegal drug operations. Because these

inadmissibility determinations are not made pursuant to any established national policy, but are left to individual ports of entry to make case-by-case determinations, there is no telling how any individual situation will be handled by a CBP officer.

It is also important to note that lying to a CBP officer can result in a lifetime bar from the United States. An applicant who is found to have misrepresented himself for the purpose of gaining entry to the United States is guilty of immigration fraud and inadmissible on that basis.

Non-immigrant Waiver Process

If someone is found inadmissible to the U.S. either for personal use or for trafficking of a controlled substance, there is a general nonimmigrant waiver available. The waiver is discretionary and is issued by CBP's Admissibility Review Office. If granted, the waiver is valid for up to five years at a time and must be renewed regularly. It is currently taking four to six months, on average, for this type of waiver to be adjudicated. The waivers require clean drug tests as well as evidence of rehabilitation (for personal use cases). When deciding whether a waiver should be granted, CBP considers the risk of harm to society if the applicant is admitted; the seriousness of the applicant's prior immigration law, or criminal law, violations, if any; and the nature of the applicant's reasons for wishing to enter the United States. These factors are balanced to determine whether to grant the waiver as an act of favorable discretion.

However, even if applicants are granted the nonimmigrant waiver, they may never be able to enter the United States as permanent residents due to the inadmissibility finding. Immigrant waivers, which are required for permanent residency to be granted, are far more limited and typically require a qualifying U.S. citizen or permanent resident spouse, parent or child who would suffer hardship without approval of the waiver.

In short, until marijuana becomes legal under U.S. federal law, foreign nationals who are involved in the use, growing, or sale of marijuana—and possibly even those who have merely invested in the industry—may be subject to a lifetime bar from the United States, for which only a temporary and discretionary waiver is available.

If you have any questions about the matters in this Legal Alert or any other legal issues, contact Danielle Rizzo at (716) 200-5149 or drizzo@harrisbeach.com, or the Harris Beach attorney with whom you usually work.

This alert does not purport to be a substitute for advice of counsel on specific matters.

Harris Beach has offices throughout New York State, including Albany, Buffalo, Ithaca, Melville, New York City, Rochester, Saratoga Springs, Syracuse, Uniondale and White Plains, as well as New Haven, Connecticut and Newark, New Jersey.

Danielle M. Rizzo

Senior Counsel

RELATED CAPABILITIES

Immigration Law
Labor and Employment Law

VIEW ALL FIRM NEWS

VIEW ALL INSIGHTS

VIEW ALL EVENTS