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Federal Immigration Controlled Substance Considerations in the Age of State Marijuana Laws

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Roger¹ is a native and citizen of Canada. His entire family resides in the United States and is in the process of adjusting to lawful permanent resident status. Roger also suffers from severe anxiety, and as a result, he received a doctor-prescribed medical marijuana card. Occasionally, he uses marijuana to alleviate complications from this medical condition. Despite having a medical marijuana card, Roger has never been arrested or convicted on drug charges or any other crimes. About one year ago, Roger was returning to the United States from Canada. When he applied for a pre-flight clearance, the subject of his medical marijuana card came up. Subsequently, Customs and Border Patrol determined that he was inadmissible and denied Roger admission into the United States. As a result, he is separated from his family in the United States, and the only support he has in Canada is his biological father, who was verbally abusive to his mother. Roger's story is becoming more common as foreign nationals develop deeper roots in this country and various states continue to relax their marijuana laws.

State Versus Federal Laws

Currently, marijuana is listed as a Schedule I controlled substance in the Controlled Substances Act (CSA). Therefore, under federal law, it is unlawful to manufacture, distribute, dispense or possess marijuana.² However,

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many states have taken a different approach. At the moment, 23 states and the District of Columbia have laws that decriminalize or, in certain situations, legalize marijuana usage.³ As a result of passing these state laws, certain federal government entities have reexamined their approach for federal law enforcement of minor marijuana possession. Since October 2009, the United States Department of Justice issued a number memoranda instructing federal law enforcement agents to use prosecutorial discretion when determining whether to prosecute marijuana possession or for personal use.⁴ The thrust of this guidance strongly suggests that it would not be a good use of federal law enforcement funding to prosecute people who possess small amounts of marijuana for personal usage and use marijuana in compliance within the terms of state laws that legalize marijuana. Additionally, Department of Justice suggested that federal law enforcement agents should apply a similar set of prosecutorial discretion considerations when determining whether to prosecute financial institutions that hold funds for marijuana-related businesses, but are operating in compliance with state laws. At no point in issuing this guidance has the Department of Justice suggested that it believed marijuana possession was now legal, nor would the guidance and compliance with state law serve as a legal defense in a federal prosecution. Nonetheless, the guidance recognizes that overzealous enforcement of minor marijuana possession will (1) be a poor use of the federal agency's limited resources and (2) ultimately be harmful to public safety in states where marijuana possession and usage for personal reasons is legal.

The Department of Homeland Security has largely resisted the Department of Justice's approach in prosecuting possession of marijuana for personal use. A noncitizen who has possessed or sold marijuana could face challenges in acquiring valid immigrant or nonimmigrant status. Under federal immigration law, applicants who seek to enter the United States on a temporary or permanent basis must establish they are eligible to enter the country. A foreign national with a history of marijuana use who is applying for admission to the United States could be prevented from entering the country for four reasons. First, if the foreign national has a conviction for marijuana usage or possession, the applicant could be inadmissible on criminal grounds for a conviction "relating to a controlled substance (as defined by the CSA)."⁵ Second, depending on the facts, the inspecting immigration officer could deny admission because there is reason to believe the foreign national is a drug trafficker.⁶ Third, even if the applicant has never been convicted of a controlled substance violation, the foreign national could nevertheless be inadmissible as a "drug abuser or addict."⁷ Unfortunately for the noncitizen, even a single admission of marijuana use could lead to inadmissibility under this ground. Finally, even though there was no conviction and there are no facts suggesting involvement in drug trafficking, and the level of past usage does not rise to the level of "addiction," a foreign national could be denied admission into the United States if the immigration officer believes the noncitizen will engage in conduct that is inconsistent with the purpose for entry into the country.

The Department of Homeland Security's hard-line position has prompted immigration practitioners to question the agency's continued stance, considering the fact that the Department of Justice and nearly the majority of states have adopted a more lax approach to marijuana possession for personal use. Recently, practitioners from the American Immigration Lawyers Association inquired whether the United States Citizenship and

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Immigration Services, an organization under the Department of Homeland Security, would adopt the Department of Justice's Guidance.⁸ Citizenship and Immigration Services indicated it had drafted guidance that is being circulated throughout the agency for concurrence; however, it has yet to be issued. Thus, at the moment, foreign nationals should expect to receive no favorable discretionary considerations if the applicant engaged in lawful use of marijuana (according to state law), even despite the tenor of federal law enforcement suggesting prosecution for minor marijuana possession is not a wise use of institutional resources.

Advice for Noncitizens

At this point, noncitizens who engage in marijuana use that is permitted by state law have no recourse or avenue to challenge an immigration official's decision to deny admission into the country. It is unlikely a class of noncitizens could succeed in a lawsuit demanding that they be treated with the same consideration by the federal government as their citizen counterparts. True, in some cases, noncitizens have received an intermediate level of scrutiny in a federal civil rights suit;⁹ however, a suit of this nature would be nearly impossible because marijuana usage is still illegal under federal law. Essentially, the suit would be a nonstarter because a federal court would hold that noncitizens are not harmed by a government entity's failure to permit them to break the law. Similarly, while immigration law is civil law, in the criminal context the Supreme Court held that so long as there is probable cause to investigate wrongdoing, a law enforcement officer is justified in stopping an individual, even though there may be other pretextual reasons for the stop.¹⁰ Thus, even if foreign nationals are the only group that is singled out for civil or criminal marijuana enforcement, any legal challenges will likely be unavailing because federal immigration officers have a right to enforce the laws, despite any pretextual reasons for doing so.

At a particular interview, the noncitizen should challenge all the grounds of inadmissibility and offer an argument why no grounds apply in this particular situation. For example, if a foreign national has legally used marijuana under state law it is unlikely the individual will have been "convicted of" an offense relating to a controlled substance. Similarly, admitting to marijuana usage will unlikely constitute an "admission to the essential elements" of a controlled substance violation. Additionally, simple usage of marijuana for personal use should not incur any suspicion that the foreign national is inadmissible because there is reason to believe the applicant is a drug trafficker. Finally, foreign nationals should argue that they are not inadmissible as a drug addict or abuser because that conclusion can only be reached after consulting with the civil surgeon.¹¹ Unfortunately, in many situations, especially at a United

States Consulate abroad, the immigration official can revoke a visa for almost any reason, including behavior (although legal under state law) that is inconsistent with the purpose for the visa.¹² Numerous people, like Roger, have been refused admission to the country on this ground, despite not having a criminal record, no history of substance abuse, and no indication the noncitizen will break any other laws than personal use of marijuana.

Thus, even if a foreign national can overcome the conviction and health-related grounds of inadmissibility, the applicant may still be denied admission as a matter of discretion. Consequently, the only way to avoid being denied entry into the United States for using marijuana is to advise the noncitizen not to use marijuana and not to apply for a medical marijuana card because even after overcoming all inadmissibility grounds, the noncitizen can nonetheless be denied admission.

Proposed Resolution

Immigration advocates should encourage the Department of Homeland Security to develop internal policies consistent with the Department of Justice's directives. While the Department of Justice makes it clear that using marijuana is not legal, nor is compliance with state marijuana laws a defense to federal prosecution, the guidance recognizes some key considerations important to furthering the public good. First, prosecuting persons who demonstrate "clear and unambiguous compliance with existing state laws" is not likely to be a good use of limited federal resources. Essentially, the Department of Justice recognized that prosecuting people who closely follow state law will likely not lead to prosecutions of people who engage in dangerous behavior, like illicit drug trafficking.

Second, the Department of Justice recognized that by federally prosecuting individuals who are breaking federal drug laws but following state drug laws, there is a risk it will lead to public safety issues. Implicit in this rationale is that prosecuting people who are following state law will cause those compliant people to be less willing to report themselves as victims of crimes or participate in a criminal investigation. Indeed, the Department of Homeland Security has numerous programs that seek to promote public safety and even go so far as to forgive past unlawful behavior. For example, Congress authorized immigration officials to approve temporary visas for persons who are victims of crimes. One of the express purposes was to encourage communities with unauthorized immigrants to report crimes and participate in criminal investigations.¹³ Surely, Congress wanted to encourage noncitizens to work with law enforcement agencies because it authorizes immigration officials to waive nearly every ground of inadmissibility, including making a false claim of citizenship – an act for which there is no other waiver. Additionally, like the Department of Justice, the Department of Homeland

Security has come to the realization that its federal resources are limited, so it needs to set priorities for deporting people who are truly bad for society. Consequently, the Department of Homeland Security has developed removal priorities.¹⁴ Persons who use marijuana in compliance with state law are not listed as a removal priority.¹⁵ Further, if the Department of Homeland Security developed a personal use of marijuana policy consistent with the Department of Justice, it would not prevent immigration officials from keeping foreign nationals from entering or remaining in the country when there are serious threats to public safety. Moreover, by exercising prosecutorial discretion in cases where the applicant is in strict compliance with state marijuana laws, immigration officials are not acknowledging marijuana is legal, nor are they creating a substantive right. Rather, encouraging prosecutorial discretion will allow immigration officials to focus on using limited government funds on more compelling needs.

Finally, a policy that encourages prosecutorial discretion could also be an avenue that could reunite Roger with the rest of his family.

1. Roger is a real client, but his name has been changed to protect his identity.

2. See Controlled Substance Act, 21 U.S.C. § 801, 812, 841(a).

3. See State Medical Marijuana Laws, National Conference of State Legislatures, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (last accessed Nov. 13, 2014).

4. See James M. Cole, Guidance Regarding Marijuana Enforcement, U.S. Dept. of State, Office of Deputy Attn. Gen., Aug. 29, 2013, available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (last accessed Dec. 14, 2014) and James M. Cole, Guidance Regarding Marijuana Related Financial Crimes, U.S. Dept. of State, Office of Deputy Attn. Gen., Feb. 14, 2014, available at <http://www.justice.gov/usao/waw/press/newsblog%20pdfs/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202014%202014%2020282%29.pdf> (last accessed Dec. 14, 2014).

5. See 8 U.S.C. § 1182(a)(2)(A)(i)(I), (II).

6. See 8 U.S.C. § 1182(a)(2)(C). It is important to note that this ground of inadmissibility does not require a conviction.

7. See 8 U.S.C. § 1182(a)(1)(A)(iv).

8. See USCIS Meeting with the American Immigration Lawyers Association (AILA), "Questions and Answers," Apr. 10, 2014, available at <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED-AILA-QA-ExecComm-041014.pdf> (last accessed Dec. 14, 2014).

9. See *Plyler v. Doe*, 457 U.S. 202 (1982).

10. *Whren v. United States*, 517 U.S. 806 (1996).

11. See e.g. 9 FAM 40.11 N7.3 *Basis of Medical Report in Determining Eligibility Under INA 212(a)(1)*

12. See 22 CFR § 41.122.

13. "Victims of Trafficking and Violence Protection Act of 2000" Pub. L. No. 106-386 (Oct. 28, 2000). Codified at INA §§ 101(a)(15)(T), 101(a)(15)(U), 214(n), 214(p), 245(l), and 245(m).

14. See Jeh Johnson, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," U.S. Department of Homeland Security, Office of the Secretary, Nov. 20, 2014, available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (last accessed Dec. 14, 2014).

15. *Id.*