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PUBLICATION

Admissions May Result in Inadmissibility to the United States

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Introduction

The media recently reported on an incident involving a British Columbia woman who admitted to a United States Customs and Border Protection ("USCBP") officer that she had recently smoked marijuana. Although she had never been convicted of any criminal offense, this admission alone was sufficient grounds to ban her from entering the United States. The incident raised some interesting legal points, many of which will apply equally to business travellers. A more detailed discussion of these issues appears below.

Applicable Law

The *Immigration and Nationality Act of 1952*[1] ("INA") contains several distinct grounds of inadmissibility, which relate to criminal conduct; many of these grounds of inadmissibility apply even where no conviction occurs. For example, INA §212(a)(2)(A)(i) states that any alien (i.e. foreign national) who is convicted of, or *who admits having committed*, or *who admits to having committing acts which constitute the essential elements* of:

I. A crime involving moral turpitude[2] (other than a purely political offense) or an attempt or conspiracy to commit such a crime; or

II. A violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance;

is inadmissible. The majority of criminal offenses that result in inadmissibility to the United States will fall under INA §212(a)(2)(A)(i).

Once a foreign national is found to be inadmissible based on an admission, they are treated in the same manner as someone who has actually been convicted of the crime. In other words, the foreign national will require a non-immigrant waiver of inadmissibility under INA §212(d)(3) before they may enter the United States again.

Of course, not all admissions legally result in inadmissibility to the United States. In the precedent decision of *Matter of J*[3], the Board of Immigration Appeals ("BIA") concluded that the following rules needed to be observed in admission cases involving moral turpitude offenses:

a. It must first be established that under the law where the act was alleged to have been committed that it is a crime.

b. An adequate definition of the crime, including all essential elements, must first be given to the alien. This must conform to the law of the jurisdiction where the offense is alleged to have been committed, and it must be explained in understandable terms.

c. The alien must then admit all the factual elements, which constitute the crime.

d. The alien must thereafter admit the fact that he has committed the crime – in other words, the legal conclusion.[4]

e. The admission by the alien of the crime must be explicit, unequivocal, and unqualified.

f. It must also appear from the statute and statements of the alien that the crime which he has admitted committing involves moral turpitude. It is not necessary that the alien admit that the crime involves moral turpitude.

In the subsequent precedent decision of *Matter of K*, the BIA again confirmed that a valid admission of a crime for immigration purposes requires that the alien be given an adequate definition of the crime, including all essential elements, and that it be explained in understandable terms. The BIA affirmed the rules described in *Matter of J*, except it clarified that under the current statute it was no longer necessary for the alien to admit the legal conclusion that he had committed the particular crime. As the alien in that case was not given any definition of the crime and was not advised of the essential elements of that offense, the BIA held that he had not made an admission that would result in his inadmissibility.

The above rules were considered in relation to controlled substance violations in *Matter of Amar Kumar Pani*[5]. In that case, the alien was a citizen of India and a landed immigrant of Canada who held J-1 status. Upon returning to the United States, he was detained after U.S. Customs officials found 32 grams of marijuana in his possession. However, no criminal charges were ever filed. The BIA affirmed the principles described in *Matter of K*. The former Immigration and Naturalization Service had attempted to distinguish this line of cases on the basis that they related to crimes involving moral turpitude rather than controlled substance offenses. However, the BIA disagreed. A similar conclusion was reached in *Matter of Luis Fernando Estrada-Gonzales*[6], where the alien was found to be in possession of 4 grams of marijuana and 0.5 grams of cocaine at the time of his application for admission. Clearly, the principles described *Matter of J*, as modified by *Matter of K*, are equally applicable to controlled substance violations.

Notwithstanding the above decisions, in practice, USCBP officers at ports of entry tend to ignore the technical requirements described in the above decisions. If a foreign national admits to a

USCBP officer that they have committed an offense involving moral turpitude or a controlled substance, they can expect to be barred from the United States.

Although it may be possible to argue the technical requirements of the above BIA decisions during a removal hearing (if available), even if the foreign national successfully argues that his or her initial admission did not result in inadmissibility, USCBP will still know that the offense was committed. Nothing prevents USCBP from asking about the offense again during the foreign national's next trip to the United States. At that time, USCBP officers can take appropriate steps to ensure that they comply with the requirements of the above BIA decisions. Once the foreign national admits to the offense under those circumstances, it will fall under INA §212(a)(2)(A)(i) and they will require a non-immigrant waiver of inadmissibility at that time.

Responding to USCBP Questions

Silence or failure to volunteer information does not constitute a material misrepresentation under INA §212(a)(6)(C)(i). However, a truthful but incomplete answer can constitute a material misrepresentation if it "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he or she be inadmissible."[7] In light of the above, it is not advisable to falsely deny the prior commission of an offense or to conceal it by providing truthful, but incomplete, responses to USCBP's questions.

If a foreign national is asked if they have ever committed an offense (whether or not it resulted in a conviction), where there is clearly no rational basis for the question being asked, they may wish to consider the option of politely telling the USCBP officer that the question is inappropriate and that they do not wish to answer it. Although USCBP officers have considerable discretion regarding what questions they may ask when determining the admissibility of arriving travellers, those travellers are not legally compelled to answer questions.

A foreign national who refuses to answer USCBP's questions will almost certainly be denied admission to the United States; they will also encounter problems if they attempt to enter the United States in the future. However, the foreign national will at least have the opportunity to seek advice from legal counsel before applying for admission to the United States again. Although legal counsel may ultimately recommend that the foreign national admit to the offense and seek a non-immigrant waiver of inadmissibility, at least the decision to do so will be based on sound legal advice.

Of course, a distinction should be made between USCBP officers based at Canadian Airports and USCBP officers located along the Canada-U.S. border. USCBP officers at Canadian Airports do not have the right to detain foreign nationals; the most that they can do is deny that person's admission to the United States. However, USCBP officers along the Canada-U.S. land border have greater powers because they are located within United States territory. For example, USCBP officers along the Canada-U.S. border have the ability detain arriving travellers during inspection and the ability to impose a five-year expedited removal order under INA §235(b)(1).

That said, a foreign national's mere refusal to respond to a question that they claim is inappropriate, without further evidence, should not ordinarily result in an expedited removal order; it is more likely that the foreign national will simply be denied entry and returned to Canada. Of course, if faced with an expedited removal bar, it may be preferable to just admit to the offense and undertake to apply for a non-immigrant waiver.

Conclusion

In summary, foreign nationals who are arbitrarily asked if they have every committed a criminal offense may wish to consider the option of refusing to answer the question and requesting permission to withdraw their application for admission. Once the foreign national has returned to Canada, they can seek legal advice and, if necessary, apply for a non-immigrant waiver before requesting admission to the United States again.

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[1] Pub. L. 82-414, 66 Stat. 163.
[2] The term "moral turpitude" generally refers to inherently immoral acts of theft, fraud, etc.
[3] I. & N. Dec. 285 (BIA 1945).
[4] This particular requirement was later eliminated as a result of *Matter of K*, 7 I. & N. Dec. 594 (1957).
[5] 19 *Immig. Rptr.* B1-142 (BIA 1998).
[6] 24 *Immig. Rptr.* B1-249 (BIA 2002).
[7] *Matter of S-* and *B-C*, 9 I. & N. 436.