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PUBLICATION

How the Legalization of Marijuana Will Affect Your Ability to Travel to the United States

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On April 13, 2017, the Canadian Government introduced Bill C-45 (the "*Cannabis Act*") in the House of Commons. Once enacted, it will legalize marijuana and establish a framework to control its production, distribution, sale, and possession across Canada. The *Cannabis Act* is expected to become law sometime this summer.

The legalization of marijuana in Canada will have a significant impact on the ability of Canadians to enter the United States; Canadian permanent residents and foreign nationals who are temporarily in Canada will also be similarly affected. However, most of these individuals do not understand exactly what effect the *Cannabis Act* will have on the application of inadmissibility grounds contained in the U.S. *Immigration and Nationality Act*[1] ("INA"), in particular those relating to controlled substance violations.

The legalization of marijuana in several U.S. states has also created potential inadmissibility issues for Canadian citizens, Canadian permanent residents, and other foreign nationals. As of January 2018, twenty-nine states and the District of Columbia have legalized medical marijuana[2]. In addition, nine states and the District of Columbia have legalized recreational marijuana for adults.[3] Unfortunately, even marijuana use that is legal under state law continues to be a violation of U.S. federal law.

Given the confusion regarding the legalization of marijuana and its effect on United States immigration laws, several of the most frequently asked questions will be answered below.

Will I be barred for using/possessing marijuana in Canada after it becomes legal?

Under INA §212(a)(2)(A)(i)(II), individuals who have been convicted of, or who admit to having committed the essential elements of, a controlled substance offense are inadmissible. This ground of inadmissibility results in a permanent bar to the United States.

Once the *Cannabis Act* becomes law, marijuana use/possession (in accordance with the statute) will not be prosecuted as a criminal offence in Canada. However, even in the absence of a criminal conviction, making an admission to a United States Customs and Border Protection ("USCBP") officer (and certain other officials) can still result in finding of inadmissibility.

Of course, for an act to result in inadmissibility under INA §212(a)(2)(A)(i)(II), it must be considered a crime in the jurisdiction where it was committed. Once marijuana use becomes legal in Canada, it will no longer be considered a criminal offence. As a result, this conduct should no longer fall under the controlled substance ground of inadmissibility.

Unfortunately, even legal use/possession of marijuana in accordance with the *Cannabis Act* could still result in a bar under one of the following grounds:

- Under INA §212(a)(1)(A)(iii), an individual is inadmissible if they have been determined to have a physical or mental disorder and a history of behavior associated with the disorder that may pose (or has posed) a threat to the property, safety or welfare of themselves or others. They may also be barred if they previously had such a physical or mental disorder, which is likely to recur or lead to other harmful behavior. As alcoholism can result in a bar under this ground of inadmissibility, marijuana use could also result in a finding of inadmissibility, provided that associated harmful behavior also exists. For example, driving a vehicle while under the influence of marijuana could be considered evidence of associated harmful behavior.
- Under INA §212(a)(1)(A)(iv) a person is inadmissible if they are determined to be a drug abuser or drug addict. Harmful behavior is not a relevant factor in rendering a determination of ineligibility under this ground. There is also no requirement that the use of a particular controlled substance actually be illegal in the jurisdiction where it occurs. However, use of controlled substances for medical purposes is not considered substance abuse.

For the above grounds to apply, a USCBP officer will typically refer the individual to an approved Panel Physician, who will make a medical determination regarding whether that individual has a mental disorder (with associated harmful behavior) or is a drug abuser/addict.

Even where prior substance abuse has occurred, an individual would not be inadmissible under either of the above grounds if he or she is in full remission. Sustained, full remission is currently defined as a period of at least twelve months during which no substance use or mental disorder (with associated harmful behavior) has occurred.

Will I be barred for a marijuana possession conviction or an admission of prior use that occurred before the Cannabis Act came into force?

Although the *Cannabis Act* will legalize marijuana use/possession once it comes into force, it will not affect prior criminal convictions for marijuana possession. An individual who was convicted of marijuana possession in Canada prior to the enactment of the *Cannabis Act* will still have committed an act that was considered a criminal offense in Canada at the time that the act occurred. Therefore, such convictions should still result in a bar under INA §212(a)(2)(A)(i)(II).

Admitting to marijuana use prior to the enactment of the *Cannabis Act* should also result in a bar under INA §212(a)(2)(A)(i)(II). This is true even if the admission of prior use is made to a USCBP officer after the date that the *Cannabis Act* becomes law.

Prior marijuana convictions or admissions of prior marijuana use could also potentially result in a bar under INA §212(a)(1)(A)(iii) or INA §212(a)(1)(A)(iv), for the reasons described above. However, USCBP officers are more likely to apply INA §212(a)(2)(A)(i)(II) because it would not require a referral to a Panel Physician.

Of course, INA §212(a)(2)(A)(i)(II) would not apply to individuals who legally used/possessed marijuana for medical purposes, in accordance with prior Canadian laws.[4] INA §212(a)(1)(A)(iv) would also not apply since medical marijuana use is not considered substance abuse. In addition, INA §212(a)(1)(A)(iii) would not apply in the absence of associated harmful behavior.

I am employed in the marijuana industry in Canada. Can I be denied admission to the United States because of my occupation?

Under INA §212(a)(2)(C), an individual is inadmissible if a consular or immigration officer has "reason to believe" that they are or have been an illicit trafficker in a controlled substance (a knowing assister, abettor, conspirator, or colluder). The spouse, son, or daughter of such a person is also inadmissible under this ground of inadmissibility.

An individual who is employed in the marijuana industry in Canada could theoretically be denied admission based on "reasonable belief" that they are an illicit trafficker (or a knowing aider, abettor, assister, conspirator, or colluder) of a controlled substance. Of course, if the individual's marijuana-related activities take place solely in a jurisdiction where they are legal (Canada), it is certainly arguable that they do not fall under this ground of inadmissibility. However, due to the very low threshold of proof required and the lack of formal guidance, it is still possible that some USCBP officers might choose to apply the controlled substance trafficker ground in such cases.

It becomes more likely that such an individual will be denied admission as a controlled substance trafficker if he or she is travelling to the United States on business, as a representative of the Canadian employer. In such cases, at least a part of that individual's marijuana-related activities will take place in the United States. This is true even if the individual is entering the United States for the purpose of doing business with a U.S.-based company located in one of the U.S. states that has legalized marijuana.

Will I be barred if I smoked marijuana during my trip to Colorado?

Recreational marijuana use is legal in the State of Colorado. However, such conduct continues to be a violation of U.S. federal law even in states where it has been legalized.

Although this fact may not be relevant to a United States citizen, the implications for a non-citizen can be quite devastating. Canadian citizens, Canadian permanent residents, and other

foreign nationals who admit to marijuana use in a U.S. state that has legalized it will still be barred from the United States under INA §212(a)(2)(A)(i)(II).

I am a Canadian citizen who has been hired by a U.S.-based company involved in the marijuana industry, to work in a U.S. state that has legalized it. Will I have problems when I apply for my work permit?

Canadian citizens are eligible to seek a Trade NAFTA ("TN") work permit under the *North American Free Trade Agreement* ("NAFTA"); many of the eligible TN professions could easily find employment in the marijuana industry. For example, TN status is available to agriculturalists, plant breeders, chemists, and pharmacists, among others.

Nevertheless, a Canadian citizen (and any other foreign national) who intends to work for a U.S.-based company involved in the marijuana industry, even in a U.S. state that has legalized it, is likely to be denied entry as a controlled substance trafficker. This can result in a permanent bar to the United States.

A foreign national could be accused of trafficking whether or not he or she will have any direct contact with the company's marijuana operations. For example, a Canadian citizen seeking TN status to work as an accountant for a U.S. employer involved in a state-licensed marijuana business could still be denied admission as a trafficker.

Conclusion

Clearly, the legalization of marijuana (both in Canada and in some U.S. states) has created considerable uncertainty for Canadian citizens, Canadian permanent residents, and other foreign nationals. Until detailed guidelines are provided by USCBP (and/or other U.S. government agencies), precautions should be taken in order to avoid a permanent bar from the United States.

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[1] Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101–1524).

[2] Medical marijuana is now legal in Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and West Virginia, and the District of Columbia.

[3] Recreational marijuana is now legal for adults in Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Vermont, and Washington, and the District of Columbia.

[4] This would include the *Access to Cannabis for Medical Purposes Regulations* (SOR/2016-230), the *Marihuana for Medical Purposes Regulations* (SOR/2013-119), the *Marihuana Medical Access Regulations* (SOR/2001-227), and the section 56 exemptions under the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19).