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PUBLICATION

Employees of Canadian Cannabis Companies – Use Caution When Travelling to the USA for Business

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There is still a great deal of uncertainty regarding whether employees of Canadian cannabis companies will be permitted to enter the United States for business purposes. Although United States Customs and Border Protection ("USCBP") has now clarified that these employees may enter for tourism, it is still not clear what business activities will be permitted. To make matters worse, a recent email from a senior USCBP official appears to have raised the risk level even higher.

On October 9, 2018, United States Customs and Border Protection ("USCBP") revised its Policy Statement on Canada's Legalization of Marijuana and Crossing the Border (the "Revised Statement). Prior to this date, USCBP had taken the position that merely being an employee (or an investor) of a legal cannabis business in Canada could result in inadmissibility under INA §212(a)(2)(C).

INA §212(a)(2)(C) permanently bars an individual if a USCBP officer has reason to believe that he or she is an illicit trafficker in a controlled substance, or a knowing assister, abettor, conspirator, or colluder in illicit trafficking. This is the same ground of inadmissibility that would be used to bar individuals such as Pablo Escobar or El Chapo.

Prior to the Revised Statement, there were already reported cases of employees of Canadian cannabis businesses receiving lifetime bans under INA §212(a)(2)(C). Also, in at least one case, an investor in a Canadian cannabis company also received a lifetime ban under INA §212(a)(2)(C). Although these cases appeared to be limited to ports of entry on the West Coast, they demonstrated that employees and investors of Canadian cannabis companies might actually be banned as illicit traffickers.

The risk became even greater when Politico interviewed Todd Owen, Executive Assistant Commissioner for USCBP's Office of Field Operations. During this interview, he specifically told Politico that working in the Canadian cannabis industry would be grounds for inadmissibility.

The Revised Statement was considered welcome news for employees and investors of Canadian cannabis companies. The current position taken by USCBP is as follows:

A Canadian citizen working in or facilitating the proliferation of the legal marijuana industry in Canada, coming to the U.S. for reasons unrelated to the marijuana industry will generally be admissible to the U.S. However, if a traveler is found to be coming to the U.S. for reason related to the marijuana industry, they may be deemed inadmissible.

The Revised Statement was significant because it confirms that employees of Canadian cannabis companies should be admissible if their reasons for coming to the United States are "unrelated to the marijuana industry." This clearly includes travelling purely for tourism (for example, going to Disneyland) and even business visitor activities that were completely unrelated to the marijuana industry (for example, representing a different company that is not involved in the cannabis industry).

Although the Revised Statement does not specifically refer to investors in the Canadian cannabis industry, it clearly includes passive investors who merely purchase a small number of shares in a Canadian cannabis company, since they typically will not be entering the United States in furtherance of the marijuana industry. It may even apply to large investors in Canadian cannabis companies, as long as they are not entering the United States as a representative of that cannabis company (i.e. officer, board member, etc.).

As a result, any employees or investors of cannabis companies who were previously banned under INA §212(a)(2)(C) prior to the Revised Statement might wish to consider contacting the port of entry where the denial occurred (through legal counsel) to request that their enforcement flag be removed from the USCBP system. This of course assumes that the employer or investor was travelling to the United States for tourism when he or she was banned.

Although the Revised Statement was a step in the right direction, it clearly did not state what activities would be considered "unrelated to the marijuana industry." As I have repeatedly stated, this left open the possibility that someone could be barred merely for attending a marijuana conference in the United States or visiting a U.S. investor in his or her Canadian cannabis company. It would now appear as though my concerns were well founded.

On October 25, 2018, the Canadian Press reported that they had received an email from Stephanie Malin, USCBP Branch Chief for Northern/Coastal Regions, which stated the following:

If the purpose of travel is unrelated to the marijuana industry such as a vacation, shopping trip, visit to relatives, they will generally be admissible to the U.S. However, if they are coming for reasons related to the industry, *such as the conference*… they may be found inadmissible.

Chief Malin clearly referred to a cannabis industry conference in the United States as an example of a reason that could result in a finding of inadmissibility under INA §212(a)(2)(C).

This latest comment from USCBP creates further uncertainty for employees and investors of Canadian cannabis companies, many of who are still required to travel to the United States as business visitors in connection with the Canadian cannabis industry. For example, the Canadian Press article mentioned that several employees and investors of Canadian cannabis companies would be attending the MJBizCon Conference in Las Vegas next month; MJBizCon is the largest cannabis industry conference in the World.

One unnamed executive of a licenced cannabis producer in Canada reportedly told the Canadian Press that his company had received legal guidance saying that there was no legal basis for barring individuals that operate law-abiding businesses in their respective jurisdictions. Although this is not necessarily an incorrect interpretation of INA §212(a)(2)(C), it fails to consider what might happen if a representative of that foreign-based cannabis company enters the United States on behalf of those foreign-based marijuana activities. In such cases, these activities could now be deemed to extend into United States territory, where cannabis-related activities are considered a federal criminal offence. This is exactly why the Revised Statement still cautions employees of Canadian cannabis companies against entering the United States for a purpose that is related to the marijuana industry.

The Canadian Press also quoted Nick Pateras, Vice President of Strategy for Lift & Co., who said that he did not intend to change his travel plans, and if need be, he would claim his right to withdraw his application for entry. It should be mentioned that there is no right to withdraw an application for admission at a land port of entry, at least not without the consent of USCBP. In addition, although it is still possible to withdraw an application for admission at a Canadian Airport, this right will soon be limited as well, as a result of the *Preclearance Act, 2016* (the "Preclearance Act").

As I have previously warned Canadians, under the *Preclearance Act*, travelers who choose to withdraw their application for admission to the United States will have a continuing obligation to truthfully answer any question asked by a USCBP, for the purpose of *determining their reason for withdrawing*. In other words, travelers will be required to explain why they are withdrawing (which again requires a discussion of the issues that prompted the traveler to withdraw in the first place). USCBP can theoretically detain travelers until they provide a satisfactory response to this question, even on Canadian soil.

Although the *Preclearance Act*, has already received Royal Assent, the Federal Government is waiting until enabling regulations are in place. Soon after, the Governor in Council will set the date on which the *Preclearance Act* comes into force. So for now, travelers have the unrestricted right to withdraw their applications for admission at Canadian Airports but this right will be severely restricted in the near future.

In conclusion, the risk that employees and investors of Canadian cannabis companies will receive permanent bars under INA §212(a)(2)(C) remains significant, if they intend to enter the United States for reasons related to the marijuana industry. If the latest comments from Chief Malin are to be believed, this could include merely attending a marijuana conference in the United States.