PRACTICE ALERT FOR IMMIGRATION ATTORNEYS AND ADVOCATES
MARIJUANA LEGALIZATION & CONSIDERATIONS FOR IMMIGRANT NEW YORKERS

For years, immigrants in New York have been dragged into the arrest-to-deportation pipeline for marijuana related activity. After years of organizing by immigrant advocates, criminal legal system advocates, and others, on March 30, 2021 the New York State legislature passed the Marihuana Regulation and Taxation Act ("MRTA) which will go into effect upon the governor's signature.

New York's marijuana legalization means that the possession of small amounts of marijuana will be legal for people who are 21 years of age and older. New York State will license people and businesses to cultivate, process, and sell marijuana. In addition, the legalization bill will expand access to medical marijuana for many New Yorkers.

With all the exciting changes, it is important for immigration attorneys and accredited representatives to remember that **marijuana remains a controlled substance under federal law.** Marijuana-related activity, including possession, use, and involvement in a marijuana business, even if legal in the state in which it occurs[1] could impact affirmative and defensive immigration applications as well as create new consideration for international travel.

Because federal laws treat marijuana differently from state legalization laws, legalization presents new hurdles for navigating immigration processes. This resource is intended to help advocates identify some common issues the legalization may raise for clients when interacting with the federal immigration agencies, such as U.S. Citizenship and Immigration Services ("USCIS"), Customs and Border Protection ("CBP"), Immigration and Customs Enforcement ("ICE"), and the Department of State abroad.

1. Marijuana-related convictions.

Even after a state enacts legalization legislation, marijuana continues to be a controlled substance under federal laws.[2] As a result, any marijuana-related conviction is a controlled substance-related conviction under federal law.

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[1] As of the time of this advisory, the following states have legalized recreational marijuana: Alaska, Arizona, California, Colorado, Washington D.C., Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, Oregon, South Dakota, Vermont, Washington. See National Conference of State Legislatures, *State Medical Marijuana Laws* (March 1, 2021), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last visited Mar. 23, 2021).

[2] See 21 U.S.C. §§ 802(16)(A) (defining "marihuana"), 812(c) (listing marihuana as a schedule I controlled substance).

Although New York decriminalized possession of small amounts of marijuana in 2019, under the prior law, it was still punishable as a violation and could result in negative immigration consequences.[3] Any prior convictions for New York marijuana offenses may still be used by the Department of Homeland Security ("DHS") to charge an individual as inadmissible or deportable for Controlled Substance Offense (CSO) conviction under INA §§ 212(a)(2)(A)(i)(II) and 237(a)(2)(B)(i) or for a Drug Trafficking Aggravated Felony under INA § 237(a)(2)(A)(iii)/101(a)(43)(B). These convictions could also be used as a basis for finding that the client is inadmissible under INA § 212(a)(2)(C), where the officer decides there is reason to believe ("RTB") the client is a controlled substance trafficker.[4] This could happen even if NYS automatically seals, vacates, or expunges the conviction.[5]

- ➔ Removability: A marijuana-related conviction will trigger a number of grounds of inadmissibility and deportability. A conviction related to possession of marijuana can trigger the ground of inadmissibility at INA 212(a)(2)(A)(i)(II),[6] and can trigger a ground of deportability if it is other than a single offense involving possession for one's own use of 30 grams or less of marijuana. A conviction for sale or distribution of marijuana will trigger inadmissibility under INA § 212(a)(2)(A)(i)(II) (CSO) or INA § 212(a)(2)(C) (RTB controlled substance trafficker). A sale conviction is also a drug trafficking aggravated felony that can trigger deportability at INA § 237(a)(2)(A)(iii)/INA § 101(a)(43)(B).

- ➔ Good Moral Character: The definition of good moral character at INA 101(f) bars a person from showing good moral character if, during the statutory period, they have been convicted of a violation of a controlled substance offense, unless the conviction related to a single offense of simple possession of 30 grams or less of marijuana.[7] A prior conviction at any time that is categorically an aggravated felony for illicit trafficking in a controlled substance will also indefinitely bar a person from showing good moral character. Thus, a prior conviction for marijuana-related activity could bar a person from establishing good moral character, which is necessary to naturalize and for certain forms of relief such as non-LPR and VAWA cancellation, VAWA self-petitions, and T status.[8]

- ➔ Other consequences: It is important to flag other consequences of a conviction related to marijuana distribution. For example, a conviction for an aggravated felony related to illicit trafficking of a

[3] For more information about the decriminalization of certain marijuana offenses in 2019, see Immigrant Defense Project, *Practice Advisory: New York Marihuana Decriminalization, Vacatur, and Expungement Legislation* (Aug. 28, 2019), https://www.immigrantdefenseproject.org/wp-content/uploads/Practice-Advisory-2019-MJ-Decrim.pdf.
[4] See section 3 below for more information about this ground of inadmissibility.
[5] Note that resources detailing the expungement and vacatur provisions of the legalization law will be released in the coming weeks.
[6] Note that a waiver of inadmissibility is available for a conviction for possession of 30 grams or less of marijuana. INA § 212(h).
[7] INA § 101(f)(3) (citing INA § 212(a)(2)).
[8] Note that T nonimmigrant status has a waiver available if a conviction bars an applicant from establishing eligibility for this relief. *See* INA § 212(d)(13).

controlled substance may subject a person to mandatory detention,[9] bar them from seeking certain forms of relief such as asylum or cancellation of removal, or trigger other penalties, including being used as evidence to support a finding that the client is inadmissible under the RTB controlled substance trafficker ground.[10] This type of conviction is also a significant misdemeanor that will bar an applicant from receiving DACA.

Immigration advocates will need to consider the effect of a client's marijuana related conviction in the context of the client's current status and future goals. In order to screen for these consequences, it will be important for advocates to ask about prior marijuana-related summons, tickets, arrests and convictions, explaining that the laws have changed in New York but that prior criminal legal system contacts could still have an impact immigration applications. Not all marijuana-related arrests will appear on a criminal history report or RAP sheet.

REMEMBER: It is important to screen for prior marijuana-related convictions particularly when a lawful permanent resident (LPR) plans to travel outside of the United States. Upon reentry to the US, CBP will fingerprint the person and have access to information about the person's criminal history, including sealed or dismissed cases. The person might be put in deferred inspection and subject to detention, in some situations mandatory detention, in addition to removal proceedings.

Attorneys representing clients with marijuana convictions should explore options for vacating those convictions in state court. It is important to keep in mind the requirements of the application or relief being sought.[11] Advocates should connect with practitioners in the field to develop arguments about why vacated and expunged convictions are no longer valid for immigration purposes. If post-conviction relief might be necessary in a client's case, advocates should connect with appellate practitioners to explore this possibility in New York.

2. Making Admissions

Even after marijuana becomes legal in New York State, because it remains a controlled substance under federal law, clients need to understand that there continue to be risks when disclosing marijuana-related activity to immigration officers. Immigration officials may determine that the client has made an "admission" to committing acts that constitute a controlled substance offense if the client discloses engaging in

[9] INA § 236(c).
[10] See section 3 below for more information about this ground of inadmissibility.
[11] For example, expunged convictions are not an automatic bar to receiving DACA. *See* U.S. Citizenship & Immigration Servs., *Consideration of Deferred Action for Childhood Arrivals (DACA): Frequently Asked Questions*, available at https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#criminal_convictions (last visited Mar. 29, 2021).

marijuana-related activity under specific conditions during interviews with immigration officials (including when applying for benefits or when entering the United States) or while giving testimony in removal proceedings. An officer must take specific steps during an interview or other questioning in order for a client's statement to be deemed an admission.[12] Practitioners should be familiar with these requirements and be prepared to advocate during an interview if an officer attempts to elicit an admission from a client.

Immigration officials might rely on any of the following to try to elicit an admission to marijuana-related activity:

- **Expunged or vacated marijuana convictions:** Officials may attempt to elicit an admission from a client where a past conviction for marijuana-related activity has been vacated based on a substantive or procedural defect, the case has been dismissed by the criminal court, or the conviction has been expunged under a decriminalization law. Advocates should remember that, where a client's conviction has been properly vacated, DHS cannot use the original conviction to marijuana-related activity as an "admission" to a CSO.[13] Additionally, if the client was charged with marijuana-related activity but the case was dismissed by the criminal court, DHS cannot elicit admissions from the client based on the activity alleged in the case. However, USCIS or ICE could try to elicit admissions about other marijuana-related activity that was not charged in the criminal court case.

- **Posts related to marijuana-related activity or support on social media:** Clients should be aware that DHS and Department of State officials can see any public-facing posts from their social media accounts[14] and may rely on such posts as a basis for questions about marijuana-related activity. This includes photos depicting marijuana-related activity, liking posts for marijuana-related activity or products, LinkedIn profiles indicating current or past employment by entities related to the marijuana industry, or public statements supporting the legalization of marijuana. Advocates should ask their clients about their online activity and help them prepare for any questions that may come up in an interview.

- **Residence or employment in a state where adult marijuana is legalized:** In 2019, USCIS updated the Policy Manual to indicate that it would treat an admission to certain marijuana-related activity as an "admission" that "may constitute conduct that violates federal controlled substance laws,"[15] even if the

[12] *See Matter of K-*, 7 I&N Dec. 594 (BIA 1957) (establishing requirements for a valid "admission" of an offense); *see also* U.S. Citizenship & Immigration Servs., 12 USCIS Policy Manual Pt. F, Ch. 2, available at https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-2#S-E.

[13] *Matter of Winter*, 12 I&N Dec. 638, 642 (BIA 1967, 1968).

[14] Note that some immigration application forms request an applicant's social media handles for this purpose.

[15] https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20190419-ControlledSubstanceViolations.pdf, see also https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-5

marijuana-related activity is lawful in the state where it occurred. The new policy clarifies that such an admission would bar the applicant from establishing good moral character, even if the client has no convictions in connection to such activity. Advocates should prepare clients for questions from immigration officers about possession or use of marijuana, as questioning related to "possession of marijuana for recreational or medical purposes or employment in the marijuana industry."[16]

➔ **Evidence that the applicant has a medical marijuana prescription or has helped a loved one apply for a medical marijuana prescription:** If an applicant admits that they have a medical marijuana prescription or presents a medical marijuana prescription card to an immigration officer—either voluntarily in an interview or a medical exam or during an inspection upon entering the United States—or DHS otherwise obtains evidence of a marijuana prescription, this evidence may be used to solicit and admission to a CSO.

Additionally, in some states, a caretaker can apply for a medical marijuana prescription for another person (such as for a child under 18 or an incapacitated family member). Applying for this prescription would allow the client legally to buy and transport marijuana for another under state law, which can create additional immigration risks. Immigration officials may view statements about this activity as an admission to a CSO, or as a controlled substances trafficker as facilitating marijuana use by another person.

Admissions to marijuana-related activity may negatively impact a client's immigration case in any of the following ways:

➔ Inadmissibility determinations: Applicants for a visa or adjustment of status may be found inadmissible based on an admission to a CSO under INA § 212(a)(2)(i)(II) and may be denied such status if no waiver is available for this ground of inadmissibility.[17]

> **Special considerations for travel by LPRs:** LPRs who travel abroad and make an admission to a CSO to a CBP officer upon return may be found inadmissible. They may also be subject to mandatory detention, and placed in removal proceedings as an applicant for admission under INA § 101(a)(13)(C). Because of this, it is important for advocates to advise LPRs about the possibility that they will be questioned about marijuana possession or use upon reentering the United States, even if they have never had contact with the criminal system for marijuana use.

[16] *Id.*

[17] Remember that an admission cannot trigger a ground of deportability under INA § 237(a)(2) that requires a conviction.

- ➔ Good moral character determinations: An admission to a CSO during the relevant statutory period will bar an application from establishing good moral character under INA § 101(f) for purposes of naturalization, cancellation of removal, relief under VAWA, and T nonimmigrant status.

- ➔ Stopping the continuous-presence clock: An admission to a CSO will stop the clock of continuous presence for purposes of all forms of cancellation of removal under INA § 240A.[18] ICE may try to elicit an admission to marijuana-related activity from a client during testimony in immigration court in order to stop the client's accrual of time towards continuous physical presence and pretermit the client's application for cancellation of removal.

It is important for advocates to prepare clients about how to respond to questions on applications and during interviews regarding to marijuana-related activity, especially past convictions that were expunged or vacated. Counsel should plan on accompanying clients to interviews with USCIS, to advocate on their behalf if an officer tries to elicit an admission from them. As explained above, advocates should argue that the client cannot make an admission for conduct that was the subject of a vacated or dismissed criminal court case.

3. Inadmissibility based on a reason to believe the client is an illicit trafficker in controlled substances

In addition to the risk of admissions explained above, immigration officials may use prior convictions (including vacated convictions) as evidence to support a finding that the client is inadmissible based on the officer's reason to believe that the client is an illicit trafficker in a controlled substance.[19] The standard to establish a "reason to believe" is less than the preponderance of the evidence standard, and an officer may find that there is sufficient reason to believe that an applicant is inadmissible under INA § 212(a)(2)(C)(i) "even though criminal charges have been dismissed, or even if an [applicant] has never been arrested."[20] Because this standard of evidence required is much lower than other grounds of inadmissibility, a finding that this ground applies is very hard to overcome. Advocates should keep in mind the risk of immigration officials making this finding when analyzing whether a client is admissible and when advising clients about the risks of traveling abroad and returning to the United States.

Participation in the legal marijuana market, without any related arrests or criminal convictions, can also expose a client to a charge that they are inadmissible under INA § 212(a)(2)(C)(i).[21] This includes all forms of

[18] INA § 240A(d)(1).
[19] INA § 212(a)(2)(C)(i).
[20] 9 FAM 302.4-3(B)(1)(b).
[21] 9 FAM 302.4-3(B)(1)(a) (explaining that a person is a "trafficker" if the person "acts knowingly and consciously as a conduit between supplier and customer").

participation in any part of the supply chain, from cultivation to sale and marketing. This may also include home cultivation of marijuana plants for personal use, in states where this is authorized. Therefore, it is important for advocates to screen clients for participation in marijuana cultivation or other areas of the industry, to determine whether immigration officials might make such a finding in the client's case.

Finally, remember that, if a client is found to be inadmissible under this ground, it cannot be waived. Additionally, the impact of a RTB charge could affect a client's spouse, son, or daughter. These relatives can be barred under these grounds if they have obtained any benefit from the "illicit activity" within the previous five years and knew or reasonably should have known that the benefit was the product of this activity.[22]

4. Inadmissibility or deportability based on being a drug "addict or abuser"

A person who is deemed a "drug addict or drug abuser" is inadmissible[23] or deportable.[24] To date, these grounds have rarely been used, but immigration attorneys should be aware that they could be implicated in a client's case. In the context of inadmissibility, an immigration official may rely on the presence of marijuana in a client's blood test during a medical exam to refer the applicant to a civil surgeon or panel physician to investigate further whether a client is inadmissible for being a "drug addict or abuser." However, it is important to remember that a civil surgeon or panel physician must make a specific finding based on the requirements set forth in the Code of Federal Regulations and technical instructions set out by the CDC.[25] Therefore, a finding of drug abuse or addition cannot be based solely on speculation or opinion of an immigration official. Note that the officer may ask questions about the client's use or possession of marijuana in an attempt to elicit an admission. See section 2 above for more information about admissions.

5. General considerations around intakes and representation

Advocates should consider how marijuana legalization may change their intake and screening process. Specifically, advocates need to understand the ethical challenges of client disclosures during privileged communications and conversations, including responses to questions on immigration applications or questions that may be raised during an interview. It will be important to provide warnings to clients who wish to participate in lawful marijuna-related activities to make clear the ethical duties binding the immigration attorney

[22] INA § 212(a)(2)(C)(ii).
[23] INA § 212(a)(1)(A)(iv).
[24] INA § 237(a)(2)(B)(ii).
[25] *See* 42 CFR § 34.2(h), (i) (2010) (defining "drug abuse" and "drug addiction"); Centers for Disease Control, *Immigrant, Refugee, and Migrant Health: Mental Health*, https://www.cdc.gov/immigrantrefugeehealth/civil-surgeons/mental-health.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fimmigrantrefugeehealth%2Fexams%2Fti%2Fcivil%2Fmental-civil-technical-instructions.html (last visited Mar. 24, 2021); U.S. Citizenship & Immigration Servs., 8 USCIS Policy Manual Pt. B, Ch. 8, available at https://www.uscis.gov/policy-manual/volume-8-part-b-chapter-8.

and the potential for marijuana-related activities to be discovered and/or used as the basis for denials of immigration benefits, the initiation of removal proceedings, and/or relief from removal.