U.S. Customs and Border Protection

CBP Information Guide

Legalization of Marijuana in Canada

October 2018

FOR OFFICIAL USE ONLY – LAW ENFORCEMENT SENSITIVE

Introduction

- This has been developed in order to assist managers in the Field regarding Canada legalizing marijuana.

- This is meant to be a guide, and many decisions will be made on a case by case basis by port management based on case facts and operationsl needs.

INTRODUCTION

Purpose

This User Guide (UG) has been developed by Admissibility and Passenger Programs (APP) to assist the field with case law and scenarios to assist with the upcoming legalization of marijuana in Canada.

Subject

Impact on U.S. Customs and Border Protection (CBP) and the admissibility of Canadian Citizens after the legalization of recreational use of marijuana in Canada, which will occur on October 17, 2018.

Executive Summary

Canada's legalization of the recreational use of marijuana has the potential for an increase of secondary inspections related to controlled substance violations. The manner in which Customs and Border Protection Officers (CBPO) at United States (U.S.) Ports of Entry (POE) enforce federal law will not change when Canada legalizes marijuana. However, the practical implications of marijuana in Canada could lead to a potential increase of inadmissible aliens arriving from Canada.

Analysis

Every individual entering the U.S. is subject to examination by CBP. All aliens entering the U.S. are presumed to be intending immigrants until they satisfy during an inspection that they are otherwise admissible. Generally, an inspection is to determine the identity, alienage and admissibility of the individual and the goods in their possession. Further, the Immigration and Nationality Act (INA) (as amended) does not allow for the admission of any alien deemed inadmissible under §212. *See §212(a) and generally §214(b) & §235(b)(2)(A).* CBP has the discretion to issue, and approve, an I-193, "Application for Waiver of Passport and/or parole an individual into the United States, that may be otherwise inadmissible under Section 212 of the INA. See appendix C for further details to included statistics regarding the projected possible impact of legalizing marijuana in Canada at the border.

Determining Admissibility & Applicable Grounds of Inadmissibility

In the context of marijuana use, the relevant grounds of inadmissibility under 8 USC 1182 (Section 212 of the INA) are:

- Drug (controlled substance) abusers/addicts §212(a)(1)(A)(iv) – requires a panel physician determination from the United States Public Health Service (USPHS).
- Conviction or commission of a Crime Involving Morale Turpitude (CIMT) §212(a)(2)(A)(i)(I) – Trafficking in, but not simple possession of, a controlled substance, is a CIMT under §212(a)(2)(C).
- Controlled substance violation §212(a)(2)(A)(i)(II) – Based on a violation of any law or regulation of a State, the United States, or a foreign country relating (to include use) of a controlled substance. It is important to note that an inadmissibility would depend on whether the drug use occurs during a prohibitive period; recreational marijuana use post legalization in Canada would not be a basis under this charge.
    - In order to deem an alien inadmissible under §212(a)(2)(A)(i)(II) they must admit to the essential elements of possession of a controlled substance (see appendix A for further information)
- Controlled Substance Trafficker (reason to believe) §212(a)(2)(C)(i) – Alien who is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in [21 C.F.R. 802], or is, or has been, a knowing aider, abettor, assistor, conspirator, or colluder with others in the illicit trafficking, or endeavored to do so.

In order to have a formal order of removal under the aforementioned grounds, the alien must be served a Notice to Appear (NTA) before an Immigration Judge (IJ), who will make the final determination of admissibility and removal. Given the length of this process, and that an alien may have access to the U.S., if the alien is paroled, a non-immigrant alien is generally offered the opportunity to withdraw their application for admission instead of being referred to an IJ.

In establishing whether an alien is inadmissible for a violation of controlled substance laws, the action must be illegal where it was conducted in order to fall the grounds of inadmissibility. So, actions taken wholly within a foreign country where there is no intent or actual distribution to the United States or to engage in other unlawful activity would fall outside of this. In summary, it seems that an individual is only inadmissible if that individual's actions are illegal in the location in which those actions occurred, whether this is based on a conviction or the admissions of that individual.

If an alien is entering the United States to engage in the marijuana business, whether as an employee of a company or the owner of the company, would be inadmissible. The Immigration and Nationality Act ("INA") establishes that aliens may be denied entry into the United States if there is a reasonable ground to believe that they are or have been " a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking" of a controlled substance. INA §212(a)(2)(C)(i). If a business engages in "some sort of commercial dealing" in the United

States, admittedly production, sale, and distribution of marijuana to the public, the applicable legal standard is borad enough to render inadmissible aliens whom there is reason be believe will assist in the illicit trafficking of a controlled substance, as well as aliens who have more directly trafficked in a controlled substance.

If the alien is a sole proprietor in a marijuana business in the United States, then the alien is likely be inadmissible as a narcotics trafficker under INA §§ 212(a)(2)(C) and 212(a)(2)(A)(i)(II). If the alien is engaged in business in a marijuana business in Canada, where there is no commerce with the United States, that alone would likely not make an alien inadmissible. This is true whether the alien is the proprietor, the cashier, or involved in other areas of the business wholly within Canada. However, depending on the nature of the alien's employment, it may be appropriate to question the alien regarding the purpose and intent of their visit to the United States.

CBP has the authority to deny entry to an alien who is seeking admission for employment-based nonimmigrant status (i.e. TN, E-1, H-1B, L-1, B-1) if their stated intention is to work for an employer in the United States solely in what is considered an illegal activity under federal law, i.e. the production/sale of marijuana. For purposes of making an admissibility determination, there are not material distinctions between the various positions an individual may hold within a company engaged in the business of selling or producing marijuana. This includes those persons who hold support positions, such as accountants, who are not likely to be in physical content with the marijuana itself. Furthermore, if an alien is attempting to enter as a household employee of an employment-based nonimmigrant, i.e. B-1 nanny of a TN who is seeking to work in the marijuana business, this individual may also be inadmissible since the employing alien would be inadmissible.

CBP officers have broad authority per §214(b) and §291 of the INA as the burden of proof rests with the alien that they are entitled to enter the U. S. on a non-immigrant class of admission. Failure to satisfy the CBP officer at the time of inspection, of this burden, renders the alien inadmissible under §212(a)(7)(A)(i)(I) – Immigrant not in Possession of an Immigrant Visa. Further, CBP officers have the authority under §235(b) of the INA to immediately remove any alien inadmissible pursuant to §212(a)(6)(C)(i) – fraud or misrepresentation or §212(a)(7)(A)(i)(I). Removal under §235(b) carries a five (5) year bar for entry to the U.S., while a finding of inadmissibility under §212(a)(6)(C)(i) also results in a perpetual inadmissibility into the U.S. Any alien removed per §235(b) requires a waiver that is adjudicated by The Admissibility Review Office (ARO)

Waivers

ARO adjudicates all nonimmigrant discretionary requests for waivers under INA §212(d)(3)(A), to include Canadian citizens who are exempt the visa requirement. In FY17, ARO adjudicated 9,991 waiver applications, submitted by visa exempt nonimmigrants, with a 94% approval rate; Canadian citizens submitted approximately 96% of these waiver requests. ARO has already seen a marginal increase in the number of aliens seeking waivers for nonimmigrant purposes as they relate to drug use. This marginal increase stems from aliens refusing to answer questions at the POE relating to drug use or individuals, who have not been inspected, but nonetheless are

proactively applying for a waiver. While ARO cannot render a decision for these types of waiver requests, the operational impact of the legalization of marijuana may significantly increase the amount of waiver requests ARO must adjudicate, with a correlating effect on processing times being increased from the current average of 70 to 90 days.

ARO looks at a multitude of factors when determining the suitability of a waiver of inadmissibility. Further, each request is considered individually, and is based on the facts and circumstances which are presented and available to CBP.

Established through case law, each application is reviewed through a weighing of at least three factors:

1) The risk of harm to society if the applicant is admitted;
2) The seriousness of the underlying cause of the applicant's inadmissibility and,
3) The nature of the applicant's reason for wishing to enter the United States.

Additional factors evaluated by CBP are, (b) (7)(E)

(b) (7)(E)

Scenarios - Marijuana Legalization

SCENARIOS

In this section you will find multiple scenarios that may be used as a guide when processing travelers with marijuana. This is only to be used as a guide and not intended to cover all situations an officer may encounter.

These scenarios are real cases from the field that include the dispositions of the encounters.

Please use this at your discretion, all situations in the field will be reviewed on a case by case basis.

Secondary inspection referrals related to controlled substances can occur for a variety of reasons, to include, but not limited to:

a) (b) (7)(E)
b) a canine alert,
c) an alien admitting of possession during a primary inspection or
d) observations made by a CBPO.

These inspections can be resource intensive, thus affecting port operations. For all referrals related to controlled substances:

- The aliens will be subject to a personal search and all personal belongings will be searched.
- If applicable, the conveyance will be subject to a 7-point inspection, physical search of all luggage or items within the conveyance, to include cargo.
- Additional questioning will occur to determine if any grounds of inadmissibility apply.

Regardless to the outcome of the inspection, the potential increase in the number of aliens referred to secondary will lead to an increase in time and resources required to meet operational needs.

1. A CBPO refers a Canadian college student for a secondary inspection after he notices the (b) (7)(E)

A. (b) (7)(E)

B.

2. An alien admits to possession or past use of marijuana in secondary; however, the alien refuses to answer questions halfway through the sworn statement and the charge for §212(a)(2)(A)(i)(II) cannot be determined:

A. (b) (7)(E)

B.

3. An alien admits to routine marijuana use at the Blaine POE, which is documented on the Q&A, Form I-877, and the alien is found inadmissible to the U.S. without a valid waiver of inadmissibility. The alien reapplies for admission at Sumas POE and denies any prior use:

A. (b) (7)(E)

4. Alien admits to operating an illegal marijuana grow facility in Canada.

A. (b) (7)(E)

5. Alien admits to operating an authorized marijuana grow facility in Canada.

A. Alien would be admissible since the operation is approved by the Canadian Government.

6. A CBPO refers an alien for a secondary inspection because of (b) (7)(E) (b) (7)(E) Once in secondary the alien refuses to answer questions:

A.
B. (b) (7)(E)

7. A CBPO questions a Canadian citizen about prior/current drug use:

A.
B.
C. (b) (7)(E)

8. A CBPO asks an applicant for admission if they have any marijuana on their person when crossing the border. The applicant declare two marijuana cigarettes and hands them to the officer.

A.
B.
C. (b) (7)(E)

9. A Citizen of Canada is referred for an enforcement exam; in secondary, the subject gives a negative declaration. 4.8 grams of marijuana are discovered during the search.

A.
B.
C. (b) (7)(E)

10. An arriving Canadian citizen traveling with his Philippine national co-traveler were referred to secondary for immigration processing. During secondary inspection, undeclared marijuana. The Canadian citizen was in possession of a valid medical marijuana card.

A. (b) (7)(E)

B.

11. An arriving Canadian citizen bus passenger with native status (valid status card) declared marijuana and was referred to secondary. Secondary search resulted in the discovery of 12.6 grams of marijuana.

A. (b) (7)(E)

12. An arriving Canadian citizen was referred to secondary. Search of subject's vehicle resulted in the discovery of two undeclared cigarettes containing 1.6 grams of marijuana concealed under the trunk carpeting.

A.

B. (b) (7)(E)

13. A Canadian Citizen was referred for a Compliance exam (COMPEX) and gave a negative declaration in secondary. A vehicle inspection discovered one marijuana cigarette in the center console. Subject denied ownership and stated that his son had been recently driving the vehicle.

A. (b) (7)(E)

14. Officers found that a Canadian citizen was in possession of marijuana. During the vehicle inspection officers also found a used marijuana pipe and set of scales with marijuana residue.

A. (b) (7)(E)

15. During outbound operation, a Canadian citizen declared marijuana in their vehicle.

A. (b) (7)(E)

16. A search of a Canadian citizen's vehicle resulted in the discovery of less than one 1 gram of marijuana.

A. (b) (7)(E)
B.
C.

17. The K-9 alerted to the rear area of the commercial bus. 21.5 grams of marijuana in sealed containers was discovered. No passenger claimed responsibility/ownership of the marijuana products.

A. (b) (7)(E)

18. Following a secondary referral and vehicle search, 0.4 grams of marijuana were discovered in the glove box. The Canadian citizen was driving a friend's car and did not claim knowledge of the marijuana.

A. (b) (7)(E)
B.

19. 7.4 grams of marijuana were discovered during a search of Indonesian citizen's (CAN/LPR) vehicle. Subject admitted to possession of a controlled substance in a sworn statement.

A. (b) (7)(E)

20. One Canadian citizen attempted entry into the US via the bus terminal with an active lookout for previous narcotics seizure. The subject was referred to secondary for a bag search where 1.8 g of marijuana was discovered. The subject was extremely intoxicated and could not answer basic questions.

A. (b) (7)(E)

21. USC presented herself for inspection. Subject gave a positive declaration for marijuana. A seven point inspection produced a tube that contained 10.7 grams of marijuana.

A. (b) (7)(E)

22. A returning Citizen of Mexico/U.S. LPR and a USC were referred to secondary. While in secondary, following a Narcotics Detector Dog (NDD) K-9 alert, the U.S. LPR declared marijuana; 4.0 grams of marijuana was discovered

A. (b) (7)(E)

23. A citizen of Chile was refused entry into Canada and was referred to secondary for further inspection. The subject had a valid passport, and I-94W valid until January 14th, 2018. During the secondary vehicle inspection, 8 pairs of scissors with marijuana residue were discovered in a backpack. A sworn statement was completed, but was unable to substantiate that a violation of status had occurred.

A. (b) (7)(E)

24. A Canadian citizen made a wrong turn and ended up at the POE. The subject gave a negative declaration, then amended it to declare marijuana in the vehicle. A vehicle search revealed two cigarettes that field tested positive for marijuana.

A.
B.
C. (b) (7)(E)

25. Japanese citizen arrived as a passenger on a Greyhound Bus. Subject declared having marijuana and presented a clear bag with two marijuana joints, totaling 1.6 grams.

A. (b) (7)(E)

26. Citizen of Canada is an investor in a series of Marijuana dispensaries in Canada. The person is applying for admission at a U.S./Canada border port of entry. The person states the purpose of the trip is to invest in a marijuana dispensary in the United States.

A. (b) (7)(E)

27. Citizen of Canada is an investor in a series of Marijuana dispensaries in Canada (which have no association to any US-based entities). The person is applying for admission at a U.S./Canada border port of entry. The person states the purpose of the trip is to visit various amusement parks in Florida for the next two weeks.

A. The individual is <u>not</u> inadmissible based on the 212(a)(2) grounds based on this scenario but would need to otherwise demonstrate his or her admissibility.

28. Citizen of Canada works at a provincially-owned marijuana dispensary in Canada. The person is applying for admission at a U.S./Canada border port of entry. The person states the purpose of the trip is to go shopping at the local grocery store.

A. The individual is <u>not</u> inadmissible based on the 212(a)(2) grounds based on this scenario but would need to otherwise demonstrate his or her admissibility.

29. Citizen of Canada is a knowing investor in a Colorado (U.S.-based) marijuana marketing company. The person is applying for admission at a Preclearance location in Canada. The person states the purpose of the trip is for pleasure at an amusement park.

A. (b) (7)(E)

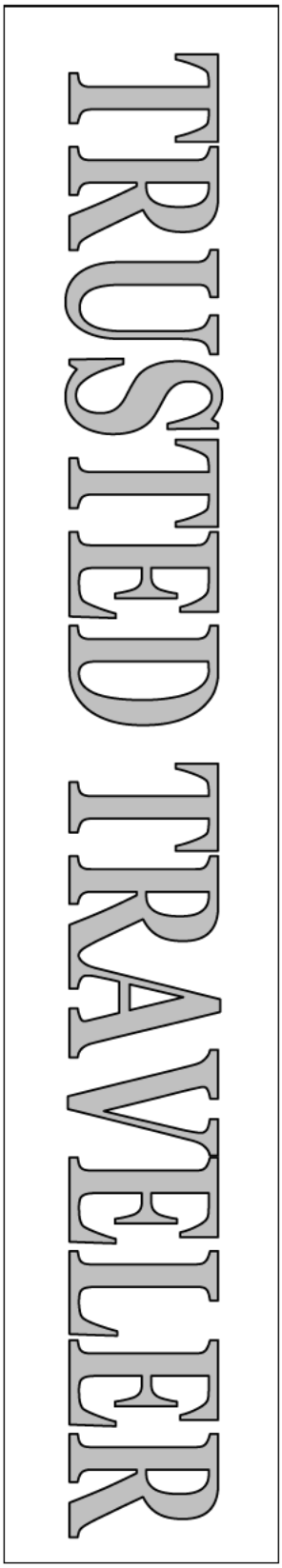
30. Citizen of Canada is applying for admission as a TN to be an accountant for a marijuana dispensary in Colorado. The person is meets all qualifications to be a TN accountant.

A. (b) (7)(E)

Trusted Traveler Programs

Currently there are no questions related to drug use during Trusted Traveler Program eligibility interviews. However, aliens who are found inadmissible due to a controlled substance violation, or admit to the use of controlled substance (i.e. marijuana, would not be eligible to participate in Trusted Traveler Programs, such as NEXUS, Global Entry, Free and Secure Trade (FAST) or secure Electronic Network for Travelers Rapid Inspection (SENTRI).

If an alien admits to the use of marijuana (post legalization) he or she is technically admissible to the U.S., but would not be eligible for a Trusted Traveler Program.



Talking Points

APP has cooridnated with the Office of Public Affairs (OPA) and the Office of Congressional Affairs (OCA) to craft the appropriate messaging for public and congressional outreach.

APP will provide support to DHS' outreach efforts. Additionally, APP will prepare the Agency call centers to engage in outreach assistance.

Currently OPA and OFO Communications Management Office (CMO) has been distributing the below approved statement when approached by the media:

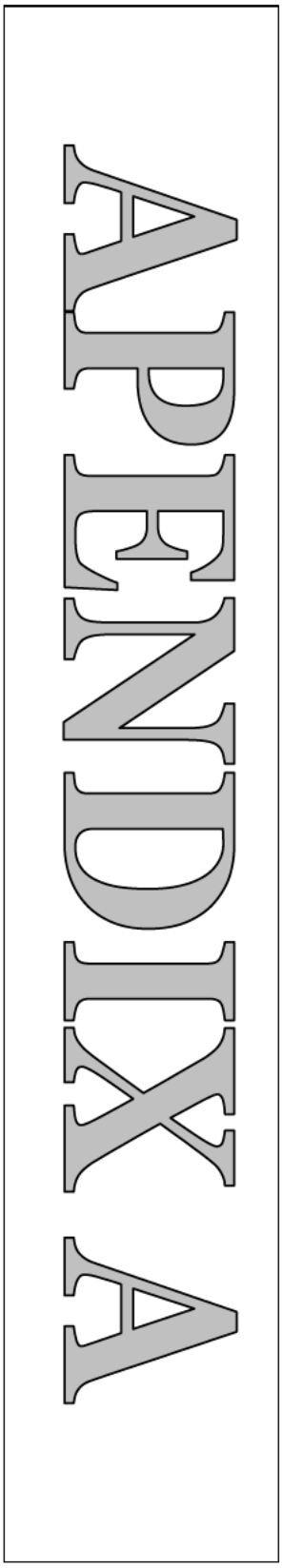
"Entry requirements for international travelers wishing to enter the United States are governed by and conducted in accordance with U.S. federal law, which supersedes state laws. Currently, marijuana possession is against U.S. federal law and U.S. Customs and Border Protection enforces those laws as appropriate.

APP will continue to engage with Canadian Border Services Agency (CBSA) on joint messaging regarding the marijuana being illegal to possess at border crossings.

TALKING POINTS

Appendix A

- Section 212(a) and how it applies to marijuana



Under section 212 of the INA below are a few sections that we will concentrate on regarding grounds of removal from the United States for Aliens using Marijuana in Canada once it becomes legal Canada wide.

Sec. 212. [8 U.S.C. 1182]

(a) Classes of Aliens Ineligible for Visas or Admission. - Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas, and ineligible to be admitted to the United States:

(1) Health-related grounds.-

(A) In general.-Any alien-

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)-

(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict, is inadmissible.

It is recommended that this ground of removal not be used due to being difficult to sustain. Addiction is defined as a chronic, relapsing brain disease that is characterized by compulsive drug seeking and use, despite harmful consequences. It is considered a brain disease because drugs change the brain; they change its structure and how it works. These brain changes can be long lasting and can lead to many harmful, often self-destructive, behaviors. Only U.S. Department of Public Health (USPH) can make the determination if someone is inadmissible under 1A grounds.

(2) (A) Conviction of certain crimes.-

(i) In general. - Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(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 (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

It is recommended that this ground of removal be used for personal use or possession of personal usage of marijuana if the officer is able to document in a sworn statement the Alien committed acts which constitute the essential elements of the crime. This will require a sworn statement and clear admission to all the essential elements of a crime. If the alien is using marijuana in Canada, once legal to do so, then no crime is being committed.

(C) CONTROLLED SUBSTANCE TRAFFICKERS- Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

This ground may be used if the officer is able to establish the alien falls within this ground of removal, due to trafficking for financial gain.

(6) Illegal entrants and immigration violators.-

(C) Misrepresentation.-

(i) In general. - Any alien who, by fraud, or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States, or other benefit provided under this Act, is inadmissible

This grounds should be used if the officer is able to document the alien willfully misrepresented a material fact to enter the United States.

Sec. 235. (a) Inspection.-

(1) Aliens treated as applicants for admission. - An alien present in the United States who has not been admitted, or who arrives in the United States (whether or not at a designated port of arrival, and including an alien who is brought to the United States after having been interdicted in international, or United States, waters) shall be deemed for purposes of this Act an applicant for admission.

(3) Inspection. - All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.

(4) Withdrawal of application for admission. - An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States.

(5) Statements. - An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States, including the applicant's intended length of stay, and whether the applicant intends to remain permanently, or become a United States citizen, and whether the applicant is inadmissible.

(b) Inspection of Applicants for Admission.-

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled.-

(A) Screening.-

(i) In general. - If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section **212(a)(6)(C)** or **212(a)(7)** , the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution.

(b) Inspection of Applicants for Admission.-

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled.-

(A) Screening.-

(i) In general.-If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section **212(a)(6)(C)** or **212(a)(7)** , the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution.

C) Treatment of aliens arriving from contiguous territory. - In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section **240.**

3) Administration of oath and consideration of evidence. - The Attorney General and any immigration officer shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service.

Aliens who are found to be removable from the United States under sections 212(a)(6)(C), are subject to removal under the Expedited Removal Provisions. All other Aliens arriving from contiguous territory could be allowed to withdraw their application for admission from the United States. An Alien who refuses to withdraw their application should be processed for a 240 removal hearing and returned to contiguous territory (if arriving by land) to await their proceedings under 240.

Appendix B

- Case laws regarding essential elements of a crime, and what a seizure constitutes.
- Counsel's decision stating that an administrative seizure penalty does not constitute a ground of inadmissibility under the INA.

APPENDIX B

Case Law and Elements of a Crime

The INA provides that arriving aliens are inadmissible to the United States if they have been convicted of a crime involving moral turpitude, an attempt or conspiracy to commit such a crime, or a violation of a controlled substance offense of any State, the United States, or a foreign country. These aliens are also inadmissible if they merely admit having committed one of those offenses, even where there was no criminal prosecution. Finally, these aliens need only admit the essential elements during a sworn statement of the criminal offense to be deemed inadmissible. *Matter of E-V-*, 5 I&N Dec. 194 (BIA 1953)) It is not necessary that they admit the legal conclusion that they in fact committed a specific crime.

In *Matter of K-*, the Board held that before an alien can be charged with inadmissibility due to admitting the elements of a crime involving moral turpitude, the alien must be given the following: 1) an adequate definition of the crime, including all essential elements, and 2) an explanation of the crime in understandable terms. The Board noted that these rules "were not based on any specific statutory requirement but appear to have been adopted for the purpose of insuring that the alien would receive fair play, and to preclude any possible later claim by him or her that they had been unwittingly entrapped into admitting the commission of a crime involving moral turpitude."

ADMISSIONS

An alien need only admit the elements of the crime, not the legal conclusion that they actually committed the crime. However, the admissions must be voluntary and unequivocal. The admissions must, by themselves, constitute full and complete admission of (or attempt or conspiracy to commit) a crime involving moral turpitude or a controlled substance offense. If an alien has received a pardon from Canada for an offense, subsequent admission to the offense will still render them inadmissible due to the United States not recognizing Canadian pardons. If the criminal offense was adjudicated, and resulted in dismissal, subsequent admissions by the alien will not establish inadmissibility, unless the dismissal by the criminal court was on purely technical grounds

Essential Elements of Possession of Controlled Substance

UNDER 21 U.S.C. 844 AND IMPORTATION OF CONTROLLED SUBSTANCE UNDER 21 U.S.C. 952

The essential elements of simple possession of marijuana, a controlled substance, under 21 U.S.C. Sec. 844(a) are as follows:

(a) That the defendant knew that the substance possessed was marijuana, a controlled substance; and

(b) That the defendant had control of the marijuana, by either actual or constructive possession. U.S. v. Schocket, 753 F.2d 336 (3rdCir. 1985); U.S. v. Holloway, 744 F.2d 527 (6thcir.1984); Amaya v. U.S., 373 F.2d 197 (9thCir. 1967); Bass v. U.S., 326 F.2d 884 (8thCir. 1964).

The essential elements of importation of a controlled substance under 21 U.S.C. Sec. 952 are as follows:

(a) That the defendant knew that the substance imported was marijuana, a controlled substance);

(b) That the defendant brought the marijuana into the United States from a place outside the United States; and

(c) That the defendant knowingly and willfully imported the marijuana into the United States.

U.S. v. Andrews, No. 92-7625, 1994 U.S. App. LEXIS 13422 (5thCir. June 7, 1994), U.S. v. Oiebode, 957 F.2d 1218 (5thCir. 1992); U.S. v. Londono-Villa, 930 F.2d 994 (2d Cir. 1991); U.S. v. Samad, 754 F.2d 1091 (3rdCir. 1984).

Definition of Controlled Substance: Means any substance included in Schedule I, II, III, IV, or V

Controlled drugs in the above mentioned Schedule includes but is not limited to the following: Opium, Codeine, Morphine, Dihydromorphinone, Cocaine, Methadone, Cannabis, Cannabis resin, Cannabis (marijuana), Amphetamines, LSD, Barbiturates.

Controled Substances, as prescribed in the Canadian Criminal Code 2003 (Marijuana will be removed once it is considered a legal substance in Canada)

1. Possession of substance: Except as authorized under regulations, no person shall possess a substance included in Schedule I II, and III.

2. Obtaining substance: No person shall seek or obtain a substance included in Schedule I, II, III, IV, or V.

3. Trafficking in substance: No person shall traffic in a substance including Schedule I, II, III, or IV.

4. Possession for purpose of trafficking: No person shall, for the purposes of trafficking, possess a substance included in Schedule I, II, III, or V.

5. Importing and exporting: Except as authorized under regulations, no person shall import into the U.S., or export from the U.S., a substance included in Schedule I, II, III, IV, V, VI.

6. Production of substance: Except as authorized under regulations, no person shall produce a substance included in Schedule I, II, III, or IV.

7. Produce*:* Means, in respect of a substance included in any of the schedules I to IV to obtain the substance by any method of process including, manufacturing, synthesizing, cultivating, propagating or harvesting the substance or any living thing from which the substance may be extracted or otherwise obtained.

Definitions within the Controlled Drugs and Substance Act.

l. Possession: Means possession within the meaning of subsection 4(3) of *the* criminal code. Criminal code.

2. Provide: Means to give, transfer or otherwise make available in any manner, whether directly or indirectly.

3. Sell: Includes offer for sale, expose for sale, and have in possession for sale and distribute.

4. Traffic: Means in respect of a substance included in any of Schedules I to IV, to sell, administer, give, transfer, transport, or send or deliver the substance.

June 30, 1998 DOJ Immigration Judge Memo regarding admission of crime

U.S. Department of Justice
Immigration and Naturalization Service

Office of the District Counsel

130 Delaware Avenue
Buffalo, NY 14202

June 30, 1998

MEMORANDUM FOR (b) (6), (b) (7)(C) Regional Counsel, Eastern

FROM: (b) (6), (b) (7)(C) District Counsel
Buffalo District

SUBJECT: Admission of Crime – Inadmissibility under INA Section 212(a)(2)(A)(i)(II).

The United States Customs Service recently implemented a program at selected preclearance sites in Canada, including Toronto, requiring random drug searches of aliens seeking admission to the United States in preclearance inspection in Canada. In some instances, the Customs search results in the discovery of small quantities of marijuana. Alien applicants found in possession of small quantities of marijuana in preclearance inspection are required to pay a monetary penalty to Customs.

A prior General Counsel Opinion, 95-4, entitled Excludability under Customs Zero-Tolerance Fines, dated January 20, 1995, (copy attached) concluded that an alien's execution of a Customs "Agreement to Pay a Monetary Penalty" form does not constitute an admission of the commission of acts which constitute the essential elements of a controlled substance law violation that would establish inadmissibility under INA § 212(a)(2)(A)(i)(II).

The Inspections Program is now seeking to establish what evidence is required, in addition to the execution of the aforesaid Customs form, to establish inadmissibility under the "admission of crime" provision in INA § 212(a)(2)(A)(i)(II). To this extent, the Office of the General Counsel may be requested by Inspections to provide a formal legal opinion addressing this inquiry.

For an admission of crime involving a controlled substance law to constitute a ground of inadmissibility under the statute in question, the alien must admit all the elements of the crime involved and must have been furnished a definition of the offense in understandable terms. See Matter of G-M-, 7 I&N Dec. 40 (Att'y Gen. 1956); Matter of K-, 7 I&N Dec. 594 (BIA 1957).

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Under the cited administrative decisions, it has been established that the alien must be clearly advised of the essential elements of the crime and the alien must admit all the acts constituting the essential elements of the crime. The alien must be given an adequate definition of the crime, explained in understandable terms, to obtain a valid admission of a crime establishing inadmissibility under the referenced statute.

An alien seeking admission to the United States in preclearance inspection who pays a Customs fine for failure to declare a small quantity of a controlled substance discovered during the inspection may have violated Title 21 USC §§ 952 and 963 by attempting or conspiring to import a controlled substance into the United States. See 21 USC §§ 952 and 963 (copies attached). The essential elements of these statutes are contained in jury instructions. (See Fifth and Seventh Circuit Federal Criminal Jury Instructions (copies attached).

To establish the "admission of crime" foundation in preclearance inspections involving Customs fines, immigration inspectors may be required to make specific reference to the attached statutes and jury instructions to sufficiently advise the alien applicants of all the essential elements of the controlled substance violation under 21 USC §§ 952 and 963 that may have been committed. The immigration inspector would be required to document his explanation to the alien of the essential elements of the crime involved. The immigration inspector would also be required to obtain a detailed written statement from the alien admitting commission of all the acts constituting the essential elements of the crime.

According to this memo the "Agreement to Pay a Monetary Penalty" does not constitute an admission of the commission of acts which constitute the essential elements of a controlled substance law violation that would establish inadmissibility under INA 212(a)(2)(A)(i)(II).