



PRACTICE ADVISORY¹

IMMIGRATION RISKS OF LEGALIZED MARIJUANA

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I. Overview: Immigrants and Legalized Marijuana

Across America, states are moving to legalize some use of marijuana. As of January 2018, 29 states³ and the District of Columbia have legalized medical marijuana. Nine states⁴ and the District of Columbia have legalized recreational marijuana for adults.

Noncitizens residing in these states may reasonably think that using marijuana in accordance with state law will not hurt their immigration status, or their prospects for getting lawful status. Unfortunately, that is wrong. For immigration purposes, it is federal law that controls, and it remains a federal offense to possess marijuana.

In particular, ***a noncitizen who admits to an immigration official that she possessed marijuana can be found inadmissible, denied entry into the United States, or have her application for lawful status or even naturalization denied. Depending on the circumstances, it can make a lawful permanent resident deportable. This is true even if the conduct was permitted under state law, the person never was convicted of a crime, and the conduct took place in her own home.***

State laws legalizing marijuana provide important benefits, but, unfortunately, they also are a trap for unwary immigrants. Believing that they have done nothing wrong, immigrants may readily admit to officials that they possessed marijuana. In some states, such as Washington State, ICE, CIS, and CBP agents are aggressively asking noncitizens if they ever have possessed marijuana, in

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³ Medical marijuana is 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 in the District of Columbia. An additional 15 states have legalized medical use of cannabidiol (CBD), only. CBD is a non-psychoactive ingredient found in marijuana, often used for the treatment of serious seizures in children. Medical use is legal in Alabama, Georgia, Indiana, Iowa, Kentucky, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming. In 2017 the Department of Justice reaffirmed that CBD, like other parts of marijuana, is a federal controlled substance.

⁴ Recreational marijuana is legal for adults in Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Vermont, and Washington, and in the District of Columbia.

an attempt to hold people inadmissible. In other states, such as California, CIS does not appear to be doing this, although CBP officials at border and internal checkpoints are.

This Advisory will review the laws and key defense strategies. The very best strategy is to educate noncitizens ahead of time. Advocates can distribute community flyers (download community flyers on this in English, Spanish, and Chinese⁵), talk to local groups, share information through ethnic media including newspapers, radio and television, reach out to past clients, and employ other strategies. The message is simple: Immigration law treats any marijuana-related activity as a crime, with harsh penalties, even if it is permitted under state law.

The advice is:

- Stay away from marijuana until you are a U.S. citizen.
- If you truly need medical marijuana and there is not a good substitute, get a legal consult.
- Do not carry marijuana, a medical marijuana card, or marijuana stickers, t-shirts, etc. Remove any text or photos relating to marijuana from your social media and phone.
- If you have used marijuana or worked in the industry, get a legal consult before leaving the United States or applying for naturalization or immigration status.
- Never discuss conduct involving marijuana with immigration, border, consular, or law enforcement authorities – unless your immigration attorney has advised that this is safe.

II. Federal and State Criminal Laws Relating to Marijuana

State laws that legalize marijuana fall into two categories. State **medical** marijuana laws typically require the person to have a doctor's letter. They permit buying, owning, using, and often growing a small amount of marijuana, but do not permit giving away, selling (without a license), or other conduct. State **recreational** marijuana laws typically don't require a doctor's letter, but do require the person to be an adult. With some restrictions, they may permit buying, owning, using, growing, and giving away a small amount of marijuana, but not selling (without a license) or other conduct. States may also license businesses and other entities, and their employees, to engage in regulated commerce involving marijuana.

In contrast, federal law has no marijuana exceptions for medical or other use. It is a federal offense to possess, give away, sell, cultivate, import or export marijuana. This includes any activity, commercial or otherwise, involving any part or derivative of the plant. However, using or being under the influence of a controlled substance, and possessing paraphernalia, are not federal offenses.

One does not need to be on federal property or travel between states to be guilty of a federal drug crime. The Supreme Court held that even growing and using a marijuana plant at home for medical purposes, in accordance with state law, is an activity that is regulated by federal law because it may affect interstate commerce.⁶ This is why even conduct like lawfully (under state law) possessing a small amount of marijuana within one's own home is a federal drug offense, and therefore can be so dangerous to immigrants.

Despite the fact that sale or possession of marijuana is a federal crime, there have not been recent federal criminal prosecutions for such conduct when it is permitted by state law. There are two reasons for this, and both could change.

⁵ Go to <https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana>

⁶ *Gonzales v. Raich*, 545 U.S. 1 (2005)

First, since 2014 Congress has passed appropriations riders that bar the Department of Justice from using any federal funds to bring criminal prosecutions based on conduct that is permitted by state *medical* marijuana laws. This funding prohibition effectively bars federal prosecution in medical marijuana cases. See discussion in *U.S. v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). This rider must continually be renewed in various budget bills, and it was renewed as part of stop-gap measures to keep the U.S. government funded until January 18, 2018. It is not clear whether it will continue to be renewed in 2018. Attorney General Jefferson B. Sessions would like to end the rider, but some in Congress strongly support it.

(Significantly, the appropriations rider has not prohibited Department of Homeland Security from imposing *civil immigration law's draconian penalties* on those who have used medical (or recreational) marijuana in accordance with state law. Noncitizens who formally admit to using medical or recreational marijuana in accordance with state law can be found "inadmissible" under immigration laws. See next section.)

Second, the Department of Justice in the Obama Administration issued memoranda encouraging U.S. Attorneys General to refrain from prosecuting conduct that was lawful under state **recreational and medical** marijuana laws, as long as the state implemented certain guidelines to prevent harm. But on January 4, 2018, Attorney General Sessions rescinded these memoranda. He stated that each U.S. Attorney (federal chief prosecutor in the region) has discretion as to whether to prosecute marijuana conduct that is permitted under state laws. At this point we do not know if this actually will result in federal criminal prosecutions of state-sanctioned marijuana businesses or consumers.

III. Removal Grounds Triggered by Marijuana

Criminal convictions almost always carry immigration consequences, but in the case of controlled substances such as marijuana, so can merely admitting that one has engaged in some prohibited conduct, and sometimes even evidence of the conduct without any admission. This section outlines the various ways relating to marijuana by which a noncitizen might become deportable (subject to removal from the United States) and/or inadmissible (barred from entering or returning to the country). Part IV will focus on defenses against one ground: inadmissibility based on admitting to admitted conduct involving marijuana.

A. Deportable and Inadmissible for Conviction of a State or Federal Drug Offense

A criminal conviction of an offense relating to a federally-defined controlled substance, including marijuana, can make a noncitizen both deportable and inadmissible.⁷ There is an automatic exception to the deportation ground, and the possibility of obtaining a discretionary waiver of the inadmissibility ground, for one or more convictions arising from a single incident that involved possession of 30 grams or less of marijuana, or being under the influence, or possessing paraphernalia for personal, of marijuana. This also is not an bar to establishing good moral character.⁸

The fact that a state subsequently legalizes the conduct that was the subject of the conviction does not automatically erase the conviction. Some state marijuana legalization laws provide ways to eliminate a prior conviction for conduct that now is lawful, but immigration authorities might not

⁷ See inadmissibility and deportability grounds at INA §§ 212(a)(2)(I)(ii), 237(a)(2)(B)(i) [8 USC §§ 1182, 1227] and see generally § N.8 *Controlled Substances* at www.ilrc.org/chart.

⁸ See deportation ground waiver at INA 237(a)(2)(B)(i); inadmissibility ground waiver at INA 212(h), 8 USC 1182(h), and exception to bar to establishing good moral character at INA § 101(f)(3), 8 USC § 1101(f)(3), and see N.8 *Controlled Substances*, *supra*.

accept these as eliminating the conviction for immigration purposes. Immigration law provides that a conviction exists unless it was vacated due to legal error in the proceeding.

A conviction relating to trafficking or cultivating marijuana, or a second possession conviction with a sentence enhancement based on recidivism, is a potential drug trafficking **aggravated felony**.⁹ This brings the harshest penalties possible in immigration law: it acts as a ground of deportation, a bar to most forms of relief from removal, and brings other serious penalties.¹⁰

B. Inadmissible for Admitting Commission of a State or Federal Drug Offense

Unlike the deportation ground, the controlled substance inadmissibility ground is triggered by either a conviction or an **admission** of conduct, without a conviction.¹¹ A real danger posed by state-legalized marijuana is that immigrants will wrongly believe that it is “safe” to disclose apparently lawful conduct to federal officials, when in fact this can result in catastrophic immigration consequences. Part IV of this Advisory will discuss how to defend against this. The person’s verbal statement will not cause inadmissibility as an “admission” unless it meets certain requirements – for example, the person must have voluntarily admitted all of the elements of the federal marijuana offense, after they were explained to her. See Part IV, Part C. If the admission relates to just a single incident involving 30 grams or less of marijuana, the person will be inadmissible but a discretionary waiver may be available. See Part IV, Part D.

C. Inadmissible if immigration authorities gain “reason to believe” the person participated in trafficking; Warning for persons who have worked in the legitimate marijuana industry.

A noncitizen is inadmissible and barred from establishing good moral character (e.g., for naturalization) if he or she has participated, aided, abetted, etc. in the trafficking of a federally-defined controlled substance such as marijuana. Here, trafficking means for some commercial purpose, as opposed to sharing for free. A noncitizen also is inadmissible if within the last five years, he or she has benefitted from such trafficking by an inadmissible spouse or parent.

Some CIS officials have charged that working in a state-licensed marijuana industry constitutes “trafficking,” whether or not the individual came in contact with any marijuana itself.

Example: A Colorado permanent resident was denied naturalization based on the fact that his list of past employers on the N-400 included a lawful state marijuana business. The CIS officer found that the N-400 information provided reason to believe that the person participated with the business in trafficking, and therefore he was statutorily ineligible to establish the required period of good moral character. The person was told to wait an additional five years and apply to naturalize again. (In this scenario, the permanent resident must be very careful not to travel outside the United States following submission of the N-400, or she could be refused entry at the border. See Part IV.F, below.)

D. Inadmissible or deportable for being an addict or abuser

Even without a conviction, a finding of **addiction to or abuse of** any federally-defined controlled substance, including marijuana, is a basis for inadmissibility if the condition is current, which is often applied to mean any use in the past year. Addiction or abuse is also a ground of deportability if it

⁹ INA § 101(a)(43)(B), 8 USC § 1101(a)(43)(B). There is an exception for conviction of giving away a small amount of marijuana.

¹⁰ See § N.6 *Aggravated Felonies* at www.ilrc.org/chart.

¹¹ INA § 212(a)(2)(A)(i)(II), 8 USC § 1182(a)(2)(A)(i)(II).

occurred at any time since admission, although this is so rarely used that there are no guidelines or legal interpretations of what it means.

IV. Strategies to Defend Immigrants from Becoming Inadmissible for Admitting to Marijuana-Related Conduct

Legal admissions can occur in many circumstances: at the border, before CIS at an interview or in a written application, when confronted by ICE or the police, at a consular or visa medical interview, in removal proceedings – in all of these contexts, immigrants must be knowledgeable and prepared for questions about marijuana use. This section will review some key risks and defenses.

- A. Warn the Client about the Law**
- B. Instruct the Client Not to Answer**
- C. Argue that It Was Not a Qualifying “Admission”**
- D. Adjustment of Status and Consular Processing**
- E. Naturalization**
- F. At the Border: Returning LPRs and Other Immigrants**
- G. LPR cancellation**

A. Warn the Client about the Law

Education is the very best defense. Noncitizens should be warned that possessing marijuana is treated as a federal crime, as described above, even if it is permitted under the law of their state. People who have a medical need for marijuana should be referred for legal and medical assistance, to see what options are available to provide for their health and their immigration status. For example, permanent residents are not harmed by admitting use of medical marijuana, unless they plan to travel outside the United States or to apply for naturalization. (This is assuming that federal authorities continue to not criminally prosecute persons who use medical marijuana in compliance with state law. See Part II, above.)

Noncitizens must be warned about what will happen if they have used marijuana (or worked in the industry) and they discuss this with any DHS employee, or possibly with a police officer or doctor at a medical visa interview. In private office consultations, group-processing contexts, and other “know-your-rights” contexts, **advocates should carefully explain the immigration penalties that could apply if the persons admit to having possessed/used/worked with marijuana**, *before* they go on to ask the clients to respond to marijuana-related questions.

B. Instruct the Client Not to Answer the Question

Each case requires an individual analysis, but there are very few instances when it is advisable to admit to having possessed or committed other conduct relating to marijuana. If a noncitizen is applying for admission at the border, adjustment of status, or other relief for which she must affirmatively show her eligibility, and she refuses to answer a question or submit requested relevant evidence, it is very likely that the authorities will deny the application for failure to cooperate or prosecute. However, this generally is better than admitting to the conduct and thereby being found permanently inadmissible under the controlled substance grounds.

Warn noncitizens that if any DHS employee or officer asks about marijuana possession or other conduct, it is best to simply decline to answer and say that you wish to speak with an attorney before answering any such questions, even if it means a denial of the benefit sought.

C. Argue That There Was No Qualifying “Admission”

If the person already admitted possessing marijuana to the authorities, get a transcript of the encounter, through a FOIA request if necessary, and carefully review possible defenses. The statement must meet the following requirements in order to be considered a qualifying admission:¹²

- The person must admit to commission of facts that constitute the elements of the offense.¹³
- The official must provide the noncitizen with an understandable definition of the elements of the offense.¹⁴ *But* in a questionable case, the Ninth Circuit upheld the use of an admission to a doctor at a consular medical appointment for a visa, despite the fact that the doctor did not provide this information.¹⁵
- The admission must be free and voluntary.¹⁶
- The conduct must be a crime under the laws of the place where it was committed. The government will argue that possession of marijuana is a federal offense if committed anywhere within the United States.¹⁷ See below regarding “use” versus “possession.”
- If a criminal court heard charges relating to the incident and the result was less than a conviction, the person cannot be found inadmissible based on admitting the incident. Admission of conduct that occurred while a minor also should not trigger inadmissibility. See below.

Exception if criminal court already heard charges. If a criminal court judge has heard charges relating to an incident involving a controlled substance, and the final disposition is something less than a conviction, the person cannot be found inadmissible for admitting the conduct. The BIA has declined to find inadmissibility if a conviction was eliminated by effective post-conviction relief, or if no conviction occurred in the first place because the person completed pre-guilty plea diversion, or charges were dismissed without a guilty plea for any reason. This is true even if the person later admits the crime before an immigration officer or judge.¹⁸

Admitting conduct as a minor. An admission made by a minor, or by an adult about a crime committed when the person was a minor, should not trigger inadmissibility under this ground, because the admission was of committing juvenile delinquency, not a crime.¹⁹ Note, however, that

¹² See further discussion in Kesselbrenner and Rosenberg, *Immigration Law and Crimes*, §§ 3.2-3.6

¹³ *Matter of B-M-*, 6 I&N Dec. 806 (BIA 1955); *Matter of A-*, 3 I&N Dec. 168 (BIA 1948); *Matter of Espinosa*, 10 I&N Dec. 98 (BIA, 1962). *Matter of G-M-*, 7 I&N Dec. 40 (Att’y Gen. 1956); *Matter of E-N-*, 7 I&N Dec. 153 (BIA 1956).

¹⁴ *Matter of K-*, 7 I&N Dec. 594 (BIA 1957). *Matter of K-*, 9 I&N Dec. 715 (BIA 1962); *Matter of G-M-*, 7 I&N Dec. 40 (AG 1956).

¹⁵ *Pazcoguín v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002).

¹⁶ *Matter of G-*, 6 I&N Dec. 9 (BIA 1953); *Matter of G-*, 1 I&N Dec. 225 (BIA 1942); *Matter of M-C-*, 3 I&N Dec. 76 (BIA 1947).

¹⁷ *Matter of D-S-*, 1 I&N Dec. 553 (BIA 1943) (attempt to smuggle not a crime); 22 CFR § 40.21(a).

¹⁸ See, e.g., *Matter of E.V.*, 5 I&N Dec. 194 (BIA 1953); *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968), *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980). The BIA has held that, depending on the constitutional protections provided, some state “infractions” or “offenses” do not amount to a conviction for immigration purposes. See *Matter of Cuellar*, 25 I&N Dec. 850 (BIA 2012) and Advisory on infractions at www.ilrc.org/crimes. Counsel can investigate arguments that the person cannot be found inadmissible based on a guilty plea or subsequent admission in this context, because charges resulted in a disposition less than a conviction.

¹⁹ *Matter of MU*, 2 I&N Dec. 92 (BIA 1944) (juvenile admission does not cause inadmissibility as a crime involving moral turpitude). This is in keeping with the BIA’s consistent holdings “that acts of juvenile delinquency are not crimes ... for immigration purposes. *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000) (*en banc*).

if the person admits participating in any way in drug *trafficking* as a minor, that may trigger inadmissibility under a separate ground, because it will provide DHS with “reason to believe” the person is a trafficker. The same is true if the person admitted to having benefitted within the last five years from an inadmissible parent or spouse’s trafficking.²⁰ In some cases DHS has asserted that even conduct while a juvenile can constitute trafficking and trigger this ground.

Use versus possession. What if the person only admitted to using, rather than possessing, marijuana? For example, a person might admit to experimentation, or being at a party where marijuana that they did not “own” was passed to them. This is a dangerous admission that could cause the person to be charged under this inadmissibility ground, and people should not admit to this without careful consultation with an expert. However, if the person has admitted this already, counsel can argue that this was not a qualifying admission of a federal crime. To be inadmissible under this ground, one must admit the essential elements of a federal offense, which in this case is possession (since there is no federal offense based on use). Using a drug or being under the influence does not contain the essential elements of the federal offense of possession; therefore admission of such use is not admission of a federal offense.²¹ Neither should admission of use shift the burden to the person to prove that he or she did not possess the marijuana.²² Possessing drug paraphernalia also is not a federal offense, so if it is also lawful under state law, admitting to such possession is not an admission of a “crime” under the controlling jurisdiction and does not trigger inadmissibility.

D. Adjustment of Status and Consular Processing

An applicant for permanent resident status must prove that she is admissible. If the government asks questions such as, “have you ever used or possessed marijuana” or “have you ever committed a drug offense,” then a person who has possessed, used, shared, grown, worked in the legitimate marijuana industry, etc. has no good choices.

Option 1: If she admits to having possessed, etc., marijuana in the United States, then she will be found inadmissible based on having made an admission to a federal crime.

Option 2: If she declines to answer the question, then she will not be held inadmissible based on the answer, but the application likely will be denied for failure to prosecute (and in some circumstances, a negative inference could be made).

Option 3: If she responds falsely to the question by saying “no”, there are potential serious consequences. For example, a *knowing* false answer to a material question such as this would cause the government to find that she is also subject to the fraud ground of inadmissibility, either at that moment, or later (should the facts become known). An *unknowing* false statement (such as one made by an applicant who honestly believed he had not committed a crime due to state law provisions) might not trigger the fraud inadmissibility but still might cause the government to later charge the individual with having obtained his residency improperly.

²⁰ See INA § 212(a)(2)(C), 8 USC § 1182(a)(2)(C).

²¹ See, e.g., *Rice v. Holder*, 597 F.3d 952, 956 (9th Cir. 2010) (use, under the influence are not federal offenses), overturned on other grounds by *Nunez-Reyes v. Holder*, 646 F.3d 684, 695 (9th Cir. 2011) (which noted that being under the influence is not a possession offense or a lesser included offense to possession). See the on-point discussion in *Hernandez-Munoz v. Sessions*, No. 14-72542 (9th Cir. Nov. 6, 2017) (unpublished), where the court held that an applicant for adjustment who admitted to having used marijuana on several occasions was not inadmissible for having admitted the elements of the federal offense of possession, citing cases holding that use of a drug is at most circumstantial evidence of possession.

²² See *Hernandez-Munoz*, *supra*, where, based on the language of the inadmissibility ground, the court dismissed the government’s argument that the admission imposed a burden on the applicant to prove that he had not possessed marijuana.

In some cases, a waiver for the admission may be available. If the person admits only to a one-time incident involving possession of 30 grams or less marijuana, then she may apply for an INA § 212(h) waiver of inadmissibility in a family visa petition. Other adjustment applications, for example as an asylee or refugee, have other waivers that would cover this ground.

In at least one questionable decision, a statement to the doctor at a visa medical exam was held to be an “admission” of committing a controlled substance offense.²³ (Of course, also warn the client that statements to a visa medical doctor could result in the doctor finding that the person is inadmissible as a drug abuser, or as someone who ever participated in drug trafficking.²⁴)

E. Naturalization

Eligibility for naturalization requires the person to establish that she has had good moral character for a certain period of time. A person who committed conduct described in INA § 212(a)(2) during the period for which good moral character must be proved, is statutorily barred from establishing good moral character. INA § 101(f)(3).

In Washington State, where recreational marijuana has been legal since 2012, CIS has aggressively questioned naturalization applicants about marijuana use. Some applicants readily admit to engaging in what they believe is perfectly lawful conduct. The CIS officers have held the applicants to be statutorily barred from establishing good moral character as of the date of the last admitted conduct. Some advocates report that CIS is preparing protocols to make sure that it captures a qualifying admission from naturalization and adjustment applicants.

Example: At her 2017 naturalization hearing, Marta admitted that she last possessed marijuana on February 2, 2015. The officer denied her application and found that she is statutorily barred from establishing her required 5 years of good moral character until at least February 2, 2020.

A qualifying admission of possessing marijuana²⁵ will make an LPR inadmissible and barred from establishing good moral character, but by itself it will not make an LPR deportable. The LPR can simply stop possessing marijuana and re-apply for naturalization after amassing a new period of good moral character. (In cases where stopping use of medical marijuana, or where delay in adjudicating the application, would cause great hardship, and it is clear that naturalization officers are asking all applicants about marijuana, counsel can consider trying to intervene with the official and to persuade him or her not to inquire.)

Warning: A naturalization applicant who has admitted possessing marijuana to CIS must not travel outside the United States. The person may now be found inadmissible. She could be found to be seeking a new admission upon return from a trip. See next section. Or if she were permitted to re-enter, she could be charged with being deportable for having been inadmissible at last entry.²⁶

Warning: Some CIS officials have held that employment in a state-sanctioned marijuana enterprise is “trafficking,” and that the person is inadmissible and barred from establishing good moral character under that ground. Some applicants who have listed such employment on the N-400 have been denied naturalization for lack of good moral character. Applicants who have worked

²³ *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002).

²⁴ See INA §§ 212(a)(1), 237(a)(2)(B)(2) (current drug addict or abuser); INA § 212(a)(2)(C) (DHS has “reason to believe” the person participated in, supported, or benefited from drug trafficking).

²⁵ Or similar admissions involving marijuana-related offenses that could arise in the context of a naturalization application, such as employment at a dispensary or membership in a collective. Admitting to a single incident that involved possessing of 30 grams or less of marijuana is not a statutory bar to establishing good moral character. See INA 101(f)(3) and discussion of this exception in Part III, A and B, above.

²⁶ See INA § 237(a)(1), 8 USC § 1227(a)(1).

in the legitimate marijuana industry should consult counsel. They must not travel outside the U.S. after submitting the N-400.

F. At the Border

Persons who are not permanent residents. Generally, a noncitizen applying for admission to the United States must prove that she is admissible. This includes individuals with valid visas (or on the visa waiver program) who can be subjected to questioning at the consular interview and/or again at the border. If the person declines to respond to a question about marijuana, border officials can (and likely will) simply deny her admission.

The best practice for noncitizens who have possessed marijuana (or engaged in other marijuana related offenses) is to not travel outside the United States until they become citizens. If people do intend to travel, advise them not to bring a medical marijuana card (backpacks are searched), or have anything on their person, phone, or social media relating to marijuana (border officials increasingly are demanding access to smartphones and passwords to Facebook), because these factors can lead to aggressive questioning. If questioned about marijuana, the best course is to decline to answer, even if it means the person will be refused admission. Then they should contact an attorney – and hope for the best. This is why the safest advice is to not travel.

Returning permanent residents. Even for permanent residents, the safest practice is to not travel if you've possessed or used marijuana or worked in the industry. However, a permanent resident returning from a trip abroad has some important legal advantages. She is deemed *not* to be seeking a new legal admission to the United States, unless she comes within one of the six exceptions listed at INA § 101(A)(13)(C). However, being inadmissible under the crimes grounds is one of these exceptions. Therefore, *if* the returning LPR makes a qualifying admission to a border official that she possessed, etc., marijuana, she will be found to come within INA § 101(a)(13)(C), and she can be denied admission. However, the government has the burden of *proving* that a returning LPR comes within INA § 101(a)(13)(C).²⁷ It would appear that if the LPR declines to either answer questions or admit conduct, then the government cannot prove that INA § 101(a)(13)(C) applies, and eventually they must let her re-enter. (Compare this to other immigrants at the border, discussed above, who may be denied admission if they decline to answer a question.)

G. LPR Cancellation of Removal

Related to the issue of having to answer questions in affirmative applications for benefits, is the issue of having to answer questions in defensive applications for relief from removal. This can be a complex topic that is only briefly addressed here. Advocates should be aware that for individuals in removal proceedings who are required to respond to questioning, ICE may argue that certain admissions that do not cause deportability themselves may affect eligibility for relief. Specifically, admitting to having possessed marijuana (or any other controlled substance) in the past (or having a past conviction for possession of 30 grams or less of marijuana) could affect eligibility for LPR cancellation of removal under INA § 240A(a), even though the event did not make the person deportable. While this appears to be an incorrect view, ICE has argued this in some cases.

An applicant for LPR cancellation of removal must have accrued seven years of continuous residence in the United States after admission in any status. Under INA § 240A(d)(1)(B), the seven-year period ceases to accrue when the person commits an offense that meets two requirements: it is “referred to” in INA § 212(a)(2), and it “renders” the person inadmissible or deportable under the

²⁷ *Matter of Rivens*, 25 I&N Dec. 623, 626 (BIA 2011).

crimes grounds. In some cases, ICE has alleged that where an LPR admitted to having possessed marijuana in the past, the seven-year clock stopped as of the date of the admitted conduct.

Example: Li was admitted to the United States as a permanent resident in 2005 and has not left the United States since then. In 2015 he was convicted of possession of heroin. He was charged with being deportable for the heroin conviction, and he applied before the Immigration Court for LPR cancellation of removal. At his merits hearing, in response to ICE questions he admitted that he had possessed marijuana in 2008. ICE asserted that his admission of that conduct stopped his seven-year clock, as of the date of the conduct in 2008, because it was an offense “referred to” in INA § 212(a)(2) that “rendered” him inadmissible under § 212(a)(2). Because that was only three years after his admission, ICE asserted that Li was ineligible for cancellation of removal.

In Washington State, at least one immigration judge has agreed with this argument and found the person to be ineligible for cancellation. The BIA affirmed this decision in a nonprecedential order. That case is now before the Ninth Circuit.

In Illinois, an immigration judge adopted the better analysis, which is that under the terms of INA § 240A(d)(1)(B), if a permanent resident is charged with being deportable in removal proceedings, the seven-year clock stops only upon commission of an offense referred to in INA § 212(a)(2) that renders the person *deportable*, not merely inadmissible. This is because an LPR within the United States is subject to the grounds of deportability, not inadmissibility, and thus never can be rendered inadmissible (unless she or he travels abroad and seeks reentry).²⁸ Admitting to committing a controlled substance offense involves an offense “referred to” in INA § 212(a)(2), but it does not render an LPR deportable, because that requires a conviction. Using this analysis, in a case like Li’s, the seven-year clock would not stop in 2008. In fact, the clock would not stop even if Li had been *convicted* of possessing 30 grams or less of marijuana in 2008. Because the controlled substance deportation ground contains an automatic exception for conviction arising out of a single incident involving possession of 30 grams of marijuana,²⁹ that conviction would not render Li deportable. The result might be different if Li was charged in removal proceedings with being *inadmissible*, because upon his return from a trip abroad he was found to be seeking a new admission under INA § 101(a)(13)(C). See Part F, above. In that case, Li would be subject to the grounds of inadmissibility, and could be “rendered” inadmissible by formally admitting such conduct.

²⁸ This reading is supported by basic rules of statutory construction. If one does not give this meaning to the phrase “renders admissible” as a separate element of the stop-time rule at INA § 240A(d)(1)(B), then every offense that is referred to in INA § 212(a)(2) would render the person inadmissible, and the language regarding deportation grounds would be meaningless surplusage. The same distinction is in the bars to non-LPR cancellation at INA 240A(b). The bar to eligibility for “10-year” non-LPR cancellation applies to persons who have been “convicted of an offense under” INA §§ 212(a)(2) or 237(a)(2). This is different from the bar to VAWA non-LPR cancellation, which applies to persons who are “inadmissible” or “deportable” under those sections. See INA § 240A(b) and see, e.g., *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649, 652-653 and n. 3 (9th Cir. 2004). For further discussion of this argument see § 4.4, *Remedies and Strategies for Permanent Resident Clients* (www.ilrc.org) (2017). Thanks to Matt Adams in Washington and Maria Baldini-Potermin in Illinois for information and analysis.

²⁹ See INA § 237(a)(2)(B)(i), 8 USC § 1229(a)(2)(B)(i).