

IMMIGRATION IMPACT: THE ADULT USE OF MARIJUANA ACT

ANALYSIS OF CALIFORNIA'S PROPOSITION 64

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This report is dedicated to the hundreds of thousands of immigrants who have unjustly faced disproportionate punishments due to drug convictions.

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INTRODUCTION

Proposition 64, The Control, Regulate and Tax Adult Use of Marijuana Act or the Adult Use of Marijuana Act (hereafter “Prop. 64”) will decriminalize (1) minor marijuana offenses (2) for adults 21 and older in California and reduce criminal penalties for most other marijuana offenses (3), while establishing a tightly regulated system for commercial activity. Within the immigration context, Prop. 64 provisions that decriminalize certain minor marijuana offenses will provide crucial benefits to noncitizens, because the immigration consequences for minor possessory drug offenses can be severe and often without any recourse.

California is home to more than 10 million immigrants, or a quarter of the total foreign-born population in the U.S (5). One out of every four persons living in the state was born in a foreign country (6). Nearly half of California immigrants (47%) are naturalized U.S. citizens and another 26% have some sort of legal status including legal permanent resident status and visas (7). It is estimated that 2.67 million of the 11 million undocumented immigrants in the U.S. live in California (8).

The vast majority of California’s immigrants were born in Latin America (53%) and Asia (37%) (9). Because the majority of immigrants are non-white, they are harmed by well-documented racial inequalities in drug law enforcement nationally and across California (10). Between 2001 and 2010, there were more than 8 million arrests for marijuana related offenses across the U.S. (11), 88% of which were for possession offenses (12). In 2014, marijuana possession arrests made up nearly half of all drug arrests in the U.S. (13) Despite comparable rates of use across racial groups (14), racial discrimination in marijuana arrests have been found across the country (15). As with the rest of the country, marijuana offenses are unequally enforced in California, and black and Latino communities are disproportionately targeted and harmed (16). In California—where there were 465,873 marijuana arrests between 2006 and 2015—Latinos alone make up more than one-third or 38.4% of the state’s population (17).

In recent years, the federal government has moved away from harsh drug sentences and is working to ease prison-overcrowding. Despite these reforms, immigrants are being left behind, and they are still subject to extreme and permanent penalties in the immigration context for even very minor possession offenses. In October of 2015, the Department of Justice released 6,000 inmates early from prison as a result of changes to the federal sentencing guidelines for nonviolent drug offenses (18). However, one-third of those inmates were foreign-born and were deported (19). This demonstrates that, even as criminal justice system reforms ease penalties for persons convicted of minor drug offenses, the consequences for immigrants remain severe.

Deportations destroy California families and fracture whole communities, particularly in California where one out of every two children lives in a household headed by at least one foreign-born person (20) (and the vast majority of children are U.S. citizens) (21). In a recent six-month period, it is estimated that more than 46,000 mothers and fathers of U.S. citizen children were deported nationally (22). In California, it is estimated that 6.2% of children in Los Angeles and 5.9% of children in San Diego currently in the foster care system have parents who are detained or have been deported (23). Because an estimated 13% of California’s children have an undocumented parent (24), drug convictions—even those for minor possessory conduct—have ripped apart numerous California families and communities.

INTRODUCTION

Prop. 64 will help to protect a significant number of individuals and families from severe immigration penalties based on minor marijuana offenses.

This is because:

- **Prop. 64 decriminalizes minor marijuana offenses for persons age 21 and older**, and thus will prevent noncitizens in this age group from suffering severe immigration consequences based on this conduct. Specifically, because of Prop. 64 some noncitizens will avoid becoming deportable (which is when a permanent resident or other person with lawful status loses that status and can be permanently deported from the U.S.) or inadmissible (which is when a noncitizen who otherwise is entitled to apply for lawful immigration status or admission to the U.S. becomes barred from eligibility, and is deported from the U.S.) for having engaged in minor marijuana offenses.
- **Prop. 64 reduces minor marijuana offenses to infractions for persons 18 to 20 years of age.** Although the law is unclear, an infraction might not be a “conviction” for immigration purposes (4). Even if it is held a conviction, it will not be a bar to a few key forms of immigration relief. Thus, to some extent, Prop. 64 will reduce the number of persons 18 to 20 years of age who face severe immigration consequences as a result of convictions for a minor marijuana offenses.
- **Prop. 64 provides for post-conviction relief** that can eliminate some or all of the immigration consequences that flow from a prior conviction for a minor marijuana offense. This will further reduce the number of people subject to deportation for marijuana-related conduct, while opening up opportunities and providing family security for noncitizens with past marijuana convictions.

By decriminalizing minor marijuana offenses in California, Prop. 64 is expected to decrease the number of immigrants subject to deportation and detention, as well as prevent the destruction of thousands of California families and communities.

By preventing California residents from being deported, or from being permanently barred from obtaining lawful immigration status, Prop. 64 helps California families remain united and helps local communities, especially Latino and other immigrant communities, remain stable and functional.



In *Padilla v. Kentucky*, the Supreme Court recognized that, although the criminal justice system and civil immigration law are two distinct legal systems, "*deportation is nevertheless intimately related to the criminal process.*"

When these two structures interact, the consequences can be very severe.

THE INTERSECTION OF IMMIGRATION AND CRIMINAL LAW

The Supreme Court recognized that although the criminal justice system and civil immigration law are two distinct legal systems, “deportation is nevertheless intimately related to the criminal process.” (25) When these two structures interact, the consequences can be very severe.

The U.S. Immigration system is a complex set of laws, regulations, policies, and executive actions that determine who can enter the country, who can remain in the country, and what rights and benefits are afforded to those individuals. Aside from a few exceptions that are not relevant to this discussion, immigration law is civil in nature.

Immigration laws are made by Congress and enforced by administrative agencies in the executive branch of the Federal Government, primarily by the Department of Homeland Security (hereinafter “DHS”). The Immigration and Nationality Act of 1952, as amended, (hereafter “INA”) is the federal immigration statute (26). Congress has amended the INA multiple times, starting in 1988, to impose increasingly drastic immigration consequences for criminal acts and convictions, and for disabilities such as substance use disorders (27).

Within DHS, there are several sub-agencies responsible for the implementation of immigration laws: United States Citizenship and Immigration Services (USCIS), United States Customs and Border Protection (CBP), and United States Immigration and Customs Enforcement (ICE) (28). Removals of unauthorized immigrants peaked at just over a record 409,000 individuals in 2012 (29). In order to prioritize and utilize funding, DHS has enforcement priorities and programs in place that utilize local law enforcement to help with immigration enforcement efforts, namely detection and arrest of immigrants. This growing entanglement of ICE and local law enforcement means that individuals who have come under the criminal justice system for a minor offense, such as simple possession of marijuana, are now under the scrutiny of ICE at the same time.

OVERVIEW OF PROPOSITION 64

What is Prop. 64?

Prop. 64 creates a “comprehensive system to legalize, control and regulate the cultivation, processing, manufacture, distribution, testing, and sale of nonmedical marijuana, including marijuana products, for use by adults 21 years and older, and to tax the commercial growth and retail sale of marijuana” (30) in California.

Relevant to this analysis, Prop. 64 will decriminalize minor marijuana offenses.

In particular, a person who is 21 years and older can:

- Possess, process, transport, purchase, obtain, or give away up to 28.5 grams of marijuana and up to 8 grams of concentrated cannabis to persons 21 years and older without any compensation whatsoever;
- Possess, plant, cultivate, harvest, dry, or process up to six living marijuana plants and possess the marijuana produced by the plants;
- Smoke or ingest marijuana or marijuana products; and
- Possess, transport, purchase, obtain, use, manufacture or give away marijuana accessories to persons 21 years or older without any compensation whatsoever (31).

These actions are still punishable as infractions for individuals who are between the ages of 18 and 20 when they commit the offense.

Potential Impact

Individuals who currently are serving a sentence for a conviction and who would not have been guilty, or would have been guilty of a lesser offense, under Prop. 64 can petition for a recall or dismissal of sentence because it is legally invalid (32).

If the sentence has been completed, an individual can file to have his case dismissed and sealed because the prior conviction is legally invalid, or have the offense re-designated as a misdemeanor or infraction (33).

Because criminal convictions can be a basis for deportation, eliminating or reducing the conviction, for example from a felony to a misdemeanor, can significantly impact a person's ability to remain in the U.S.

Part I

THE IMPACT OF MARIJUANA OFFENSES ON IMMIGRANTS:

- WHAT IS A "CONVICTION" FOR IMMIGRATION PURPOSES?
- MARIJUANA OFFENSES & DEPORTATION
- MARIJUANA OFFENSES & "AGGRAVATED FELONIES"
- MARIJUANA OFFENSES & INADMISSIBILITY
- IMMIGRATION IMPACT OF PROP. 64 ON 18 TO 20 YEAR OLDS
- IMMIGRATION IMPACT OF PROP. 64 ON DACA, TPS & ENFORCEMENT PRIORITIES
- IMMIGRATION IMPACT OF PROP. 64 ON INDIVIDUAL OFFENSES

THE IMPACT OF MARIJUANA OFFENSES ON IMMIGRANTS

Deportations in California have shattered families and devastated communities. Nationally, minor drug convictions are by far the most common crimes for which people are deported (34). In 2013 6,770 persons were deported for marijuana possession (35). From 2007 through 2012, more than 260,000 people were deported for a drug offense; while statistics are incomplete, in at least 38% of the cases the offense involved possession of drugs for personal use (36). In 2012, nearly 20,000 persons were deported for drug possession (37). Deportations based on drug possession increased 43% from 2007 through 2012 (38).

A marijuana conviction can cause a variety of immigration penalties for a noncitizen. For instance, a green card holder (lawful permanent resident) could lose his or her green card and be placed into deportation proceedings. Immigration proceedings differ from criminal proceedings in that they do not provide the same due process protections, such as a right to government-appointed counsel, and can result in mandatory detention for an undetermined amount of time.

There are three main ways that a marijuana conviction can harm a non-citizen. A conviction can make the person 1) deportable; 2) an aggravated felon (deportable with additional penalties); and 3) inadmissible. This section will provide an overview of each of these immigration categories and how Prop. 64 will affect immigrants.

IMPACT OF MARIJUANA OFFENSES ON IMMIGRANTS

There are three main ways that a marijuana conviction can harm a non-citizen. A conviction can make the person:

DEPORTABLE

A person who is deportable is subject to arrest and detention by federal immigration authorities.

**AN
AGGRAVATED
FELON**

In federal immigration law, certain convictions are considered "aggravated felonies." Although titled a felony, an aggravated felony is a legal term of art that can include misdemeanors as well as felonies and reaches several relatively minor offenses.

INADMISSIBLE

A noncitizen must be "admissible" to gain lawful entry at the U.S. border, or to qualify for lawful immigration status. A noncitizen becomes "inadmissible" if she falls within certain categories, one of which includes conviction of any offense that relates to any controlled substance.

THE IMPACT OF MARIJUANA OFFENSES ON IMMIGRANTS

A. What is a “Conviction” for Immigration Purposes?

Federal immigration law has its own definition of when a state disposition amounts to a “conviction” that triggers immigration consequences. Rather than accepting at face value what each state deems to be a conviction, federal law endeavors to apply a uniform federal standard to evaluate all state offenses consistently. This presents two questions relating to the effect of Prop. 64 on immigrants. Will federal law determine that a California infraction amounts to a “conviction” that triggers immigration consequences? And, will federal law accept Prop. 64 post-conviction relief as a true elimination of a conviction?

1. Does a California Infraction Amount to a “Conviction” for Immigration Purposes?

Some “infractions” (state offenses that are less than a misdemeanor) are held to be less than a criminal “conviction” for immigration purposes, and thus are held not to trigger immigration penalties. The Board of Immigration Appeals has not provided a set definition for when this occurs, but it has held that generally an infraction should not be considered a conviction where (a) the applicable criminal procedure does not provide the minimum constitutional protections required for a genuine conviction (e.g., it does not provide for a right to a jury trial, or does not require proof of guilt beyond a reasonable doubt) and/or (b) the state does not treat the disposition like a criminal conviction (for example, the infraction cannot serve as a prior conviction to enhance a sentence in a subsequent prosecution, or it carries no possible jail sentence).

To date, there is no legal precedent as to whether an infraction in California amounts to an immigration “conviction.” While there is a strong argument that it does not (39), advocates report that in at least some instances immigration authorities have treated California infractions such as the current marijuana possession statute, Cal H&S C § 11357(b), as a conviction.

This question will be even more important if Prop. 64 passes because it will reduce several common offenses to infractions. Going forward, persons 18 to 20 years of age who commit minor marijuana offenses may be convicted of an infraction under Prop. 64. See Part IV.E, below. (In addition, persons who already have qualifying prior misdemeanor or felony convictions for minor marijuana offenses will be able to reduce these convictions to infractions under Prop. 64 (see Part V.B, below). They too may argue that the offense is not a “conviction,” although that is a weaker case (40). Immigration advocates will continue to seek a clear ruling on the issue of whether a California infraction is a conviction for immigration purposes.

THE IMPACT OF MARIJUANA OFFENSES ON IMMIGRANTS

A. What is a “Conviction” for Immigration Purposes?

2. Will Immigration Authorities Recognize Prop. 64’s Post-Conviction Relief that Dismisses and Seals a Prior Conviction?

Note that Prop. 64 may give persons with prior qualifying convictions two possible means of eliminating a conviction. First, if the offense is reduced to an infraction, advocates at least can argue that it does not amount to a conviction. See Part IV.A.1. Second, if the offense is eliminated by post-conviction relief, it might cease to be a conviction as long as it is vacated on a legal ground of invalidity, meaning it was eliminated based on some legal error in the process. Immigrants will be advised to take both courses where possible: reduce and eliminate.

Federal immigration authorities do not honor all state orders that provide that a conviction has been eliminated by post-conviction relief.

However, they will give effect to a state order to vacate a conviction due to “legal invalidity,” meaning due to some legal error. Prop. 64 post-conviction provisions provide that qualifying prior marijuana convictions can be eliminated due to legal invalidity, but immigration authorities might assert that this is not sufficient. See discussion in Part V.

B. Marijuana Offenses and Deportation

Any immigrant who has lawful immigration status can lose that status if she becomes “deportable.” She can be placed in deportation proceedings (officially called removal proceedings), and ordered deported (removed). A lawful permanent resident, refugee, or other person with lawful status becomes deportable if convicted of almost any offense related to a controlled substance (41).

The most common example is a lawful permanent resident. A lawful permanent resident (“green card” holder) is an immigrant granted the right to live and work in the U.S. permanently, and who after a period of time will have the right to apply to become a U.S. citizen. Other examples of lawful immigration status include refugees, asylees, and persons with non-immigrant (temporary) visas such as students, employees, and investors. While they do not have all the rights that legal permanent residents do, they too can remain in the United States according to the rules governing their status.

THE IMPACT OF MARIJUANA OFFENSES ON IMMIGRANTS

B. Marijuana Offenses and Deportation

A person who is deportable is subject to arrest and detention by federal immigration authorities. The person can be detained during the duration of the removal proceedings, which could last for weeks, months, or years.

Depending on the circumstances, some individuals who are deportable can at least request a discretionary waiver (pardon) of removal from the immigration judge. Other individuals cannot even request relief, and they will automatically be deported regardless of hardship to family, rehabilitation, length of stay in the U.S., service in the U.S. military, or other factors.

Any conviction of a controlled substance offense will make an immigrant deportable and subject to mandatory detention, with one key exception: a person is not deportable based solely on a first conviction relating to possession of 30 grams of marijuana or less (42). This exception reaches possession, possession of paraphernalia, or being under the influence, if the offense is related only to 30 grams or less of marijuana (43). This exception can help many lawful permanent residents (44). But if the amount of marijuana is over 30 grams, or involves conduct beyond these offenses such as giving away or transporting a small amount of marijuana, or possessing marijuana in a school zone, or if the person ever receives a second marijuana or other drug conviction in her lifetime, she will be deportable (45). And if she ever takes a trip outside the U.S., she can be refused admission back into the country (46).

Unfortunately there is no precedent establishing whether a California infraction is a “conviction” for immigration purposes. See discussion at Part IV.A.1, above. If it is held as a conviction, then two infractions for possession of less than 28.5 grams of marijuana pursuant to current Cal Health & Safety Code § 11357(b) will make a permanent resident deportable.

IN SUMMARY

The Effect of Prop. 64 on Drug Conviction Deportations

- Prop. 64 protects immigrants with lawful status from being deported by decriminalizing qualifying conduct by adults 21 and older, such as possession, possession of paraphernalia, giving away, or transporting small amounts of marijuana or marijuana products, or cultivating up to six marijuana plants.
- Prop. 64 also reduces this conduct to an infraction for persons age 18 to 20. A permanent resident who is convicted of a single infraction for possessing, possessing paraphernalia, or being under the influence of this amount of marijuana will not be deportable because the conduct comes within this exception.
- (In addition the person can argue that a California infraction is not a “conviction” for immigration purposes; see Part IV.A.1, above).

THE IMPACT OF MARIJUANA OFFENSES ON IMMIGRANTS

C. Marijuana Offenses and “Aggravated Felonies”

In federal immigration law, certain convictions are considered “aggravated felonies.” (47) An aggravated felony is an offense that not only makes the person deportable, but also destroys almost any possibility that an immigration judge could permit the person to stay in the U.S.

Although titled a felony, an aggravated felony is a legal term of art that can include misdemeanors as well as felonies and reaches several relatively minor offenses. In California, cultivation of a small amount of marijuana for personal use (48), which Prop. 64 would decriminalize, is an automatic aggravated felony.

With a drug aggravated felony the following individuals are almost guaranteed to be deported without any possibility of being permitted to return:

- A legal permanent resident (green card holder), regardless of any mitigating factors. The fact that the individual came to the U.S. at a young age, has lived lawfully in the U.S. for thirty years, runs a business that employs U.S. citizens, cares for fragile dependents, is him or herself elderly or frail, owns a home, or has made other contributions to the community are all factors that may not be considered;
- An honorably discharged veteran of the U.S. military service; and
- A person who has proved that upon being deported, she is likely to be persecuted in the home country on account of her race, religious beliefs, or other reasons.

PERSPECTIVES

Howard's Story



Howard came to the U.S. from Jamaica when he was 17 years old with his green card. After high school, he enlisted in the Navy and after he was honorably discharged he started his own small business. Howard was married to a U.S. citizen and has two U.S. citizen children. In 2010, after he had applied for citizenship, he was placed in immigration detention for two years until he was deported to Jamaica at the age of 41 as a result of a guilty plea for a drug offense from almost ten years before that was characterized as an aggravated felony.

Howard had let a friend from the Navy have a few packages shipped to his house. The packages were full of marijuana, and Howard at the advice of his lawyer eventually pled to felony possession of marijuana with intent to distribute. Since being deported, Howard has struggled to survive in Jamaica where he has no friends or family, while his family in the U.S. also struggles to adapt to life without him (49).

THE IMPACT OF MARIJUANA OFFENSES ON IMMIGRANTS

C. Marijuana Offenses and “Aggravated Felonies”

CALIFORNIA EXAMPLE

In California in 2016, an elderly long-time permanent resident narrowly avoided being deported as an aggravated felon. Years earlier she had been convicted of growing a marijuana plant so that she could create a poultice to apply to her elbow to relieve arthritis pain.

This offense, cultivation of marijuana for personal use, is an aggravated felony. A pro bono project managed to stop the otherwise automatic deportation by going back to criminal court to vacate the conviction.

IN SUMMARY

The Effect of Prop. 64 on Aggravated Felonies

- By decriminalizing conduct such as cultivation of a small amount of marijuana for personal use for adults 21 and older, Prop. 64 eliminates this offense as an aggravated felony and protects all non-citizens from the draconian consequences of such a conviction.
- By making this conduct an infraction for persons age 18 to 20, Prop. 64 may or may not protect this age group from deportation.
- There remains the possibility that the infraction could be held an “aggravated felony.”

THE IMPACT OF MARIJUANA OFFENSES ON IMMIGRANTS

D. Marijuana Offenses and Inadmissibility

A noncitizen must be “admissible” to gain lawful entry at the U.S. border, or to qualify for lawful immigration status. A noncitizen becomes “inadmissible” (50) if she falls within certain categories, one of which includes conviction of any offense that relates to any controlled substance.

Many individuals who do not have permanent lawful immigration status currently, including undocumented individuals, are eligible to apply for status or will become eligible in the future.

This might include a person who is married to a U.S. citizen or permanent resident or has an adult U.S. citizen child; or a person who has lived in the U.S. for many years and who supports a U.S. citizen or permanent resident relative who would face severe hardship if the person were deported.

None of these people can obtain lawful status if they are considered inadmissible due to a controlled substance conviction.

1. Inadmissible for Conviction of an Offense

A conviction of any controlled substance offense, including a minor marijuana offense, will make a noncitizen permanently inadmissible (51).

In some but not all cases, a person who has been convicted of just one drug offense in their lifetime, which involved simple possession of 30 grams of marijuana or less, can apply for a discretionary waiver of inadmissibility (52).

If the person is permitted to submit the waiver application, she will have to show that a qualifying relative (a U.S. citizen or legal permanent resident spouse, parent, or child) will suffer “extreme” hardship if the waiver is denied.

Extreme hardship requires hardship greater than the common consequences of deportation and separation, meaning that it must be greater than “normal” consequences such as financial loss, loss of educational opportunities, and the emotional pain that a family will feel as a result of being permanently separated. If the waiver is granted, the person will be admissible and can proceed despite the conviction. However, in practice the extreme hardship standard is difficult to meet (53) and many applications are denied. If the judge declines to grant the waiver, the person will remain inadmissible.

There are other immigration applications where no waiver is possible, including for simple possession of 30 grams or less marijuana. In that case, the single marijuana misdemeanor (or infraction) will mean that the person never can obtain lawful status through close family.

No waiver exists for conduct other than possession, use, or possession of paraphernalia relating to 30 grams or less. It is not possible to waive minor marijuana offenses such as transporting or giving away 30 grams or less of marijuana, or cultivating a small amount. A person with that conviction is inadmissible with no possible recourse.

THE IMPACT OF MARIJUANA OFFENSES ON IMMIGRANTS

D. Marijuana Offenses and Inadmissibility

Marta's Story

Marta was convicted of possession of less than 28.5 grams of marijuana, an infraction, which is her only conviction. She is married to a U.S. citizen and is the primary caregiver for their two young U.S. citizen children. Without the conviction, she could apply for a family visa through her husband in order to obtain her green card. But, because of her infraction, she is inadmissible. Fortunately, she can apply for an extreme hardship waiver. Unfortunately, these waivers are hard to get.

Peter's Story

Peter was convicted of giving away a small amount of marijuana, a misdemeanor and his only conviction. He has lived in the U.S. for more than 10 years, and he is the only person who cares for his four-year old U.S. citizen son who suffers from a chronic illness. Without the conviction, Peter could apply for cancellation of removal even though he does not have a green card (54). Cancellation of removal is a form of relief that stops a person from being deported. To qualify, a person must have lived in the U.S. for more than 10 years, and have a citizen or legal permanent resident relative would suffer extraordinary hardship if the caregiver were deported. But Peter is barred from applying because the infraction makes him inadmissible. Moreover, he is not even permitted to apply for the waiver for low-level marijuana offenses.

IN SUMMARY

The Effect of Prop. 64 on the Drug Conviction Inadmissibility

- By decriminalizing conduct such as possession, possession of paraphernalia, giving away, or transporting 28.5 grams or less of marijuana, or cultivating up to six marijuana plants by adults 21 and older, Prop. 64 protects immigrants from being inadmissible based on the conviction.
- By making such conduct an infraction for persons age 18-20, Prop. 64 might protect those persons from being inadmissible (if a California infraction is held not to be a conviction for immigration purposes; see Part IV.A.1, above).

THE IMPACT OF MARIJUANA OFFENSES ON IMMIGRANTS

D. Marijuana Offenses and Inadmissibility

2. Inadmissible for Making a Formal Admission of Committing an Offense

A noncitizen is inadmissible if she formally admits to immigration officials that she committed a drug crime, even without a conviction (55). In practice, immigration officials rarely use this inadmissibility ground, but it is used sometimes; see below story of Camilla.

To be inadmissible, the individual must formally admit to conduct that is considered a crime in the jurisdiction where the act was committed or under federal law. If a state, such as California, legalizes possession of marijuana, the conduct is not a crime under state jurisdiction but remains crime under federal law even if the conduct took place on state land or in a private home (56).

Camilla's Story

In 2015, a graduate student at a Colorado university was refused admission or entry at the U.S. border because immigration officials saw she had a photo on her phone of herself in a legal, Colorado marijuana dispensary. She admitted to immigration officials that she had legally used marijuana in Colorado. Immigration officials found that she had admitted to committing a federal drug offense, and turned her away at the border despite her valid visa to enter the U.S (57).

In Camilla's case, she was not inadmissible because she committed a drug offense. She was inadmissible based on formally admitting to an immigration official that she committed the offense.

IN SUMMARY

The Effect of Prop. 64 on Drug Offense Admission Inadmissibility

- As long as the federal drug laws remain in place, noncitizens and immigration advocates will need to be aware of this potential issue.
- Immigration advocates will have to warn clients not to formally admit lawful state conduct to immigration officials. Many immigrants are unrepresented and may make a formal admission if questioned. Advocates will need to work with immigration officials to stop eliciting admissions.

THE IMPACT OF MARIJUANA OFFENSES ON IMMIGRANTS

E. The Immigration Impact of Prop. 64 on 18 to 20 Year Olds

Prop. 64 legalizes the possession and personal use of marijuana for people who are 21 years of age and older. It also reduces the consequences for individuals who are under 21 years, creating two tiers of penalties: one tier is for people under 18 years of age, and one is for people 18, 19 or 20-to 20 years of age.

People under 18 years of age can be found responsible for an infraction in delinquency proceedings for marijuana related conduct. Because a delinquency finding is not considered a “conviction” for immigration purposes (61), this has few consequences.

People 18 to 20 years of age can also be found guilty of an infraction such as marijuana possession or use. While there are no published cases and there is a strong argument against this, advocates report incidents where DHS or U.S. consulates have treated a California infraction as a “conviction” for immigration purposes. See discussion at Part IV.A.1, above. If an infraction is a conviction, then this group of individuals will continue to be subject to same immigration consequences after the passage of Prop. 64. In fact, if an infraction is treated as a “conviction,” then an “infraction” for the planting and cultivation of marijuana plants for personal use could still be an aggravated felony for 18 to 20 year olds, because a conviction of that offense is classified as aggravated felony for immigration purposes.

One exception is that a few immigration benefits are barred only by conviction of two or three (depending on the relief) misdemeanors or a felony, and not by conviction of an infraction. In such cases, a conviction for any of the infractions identified in Prop. 64 will not create a bar to relief. These include the Deferred Action for Childhood Arrivals program (DACA), briefly described in Part IV.F.



In California, over 340,000 people are potentially eligible for Deferred Action for Childhood Arrivals. Of these, about 213,000 people have applied and about 130,000 potentially eligible Californians have not applied.

By decriminalizing minor marijuana offenses, Prop. 64 will help to ensure that people who are 21 years or older **are not disqualified** from relief programs such as Deferred Action for Childhood Arrivals or Temporary Protected Status.

THE IMPACT OF MARIJUANA OFFENSES ON IMMIGRANTS

F. The Immigration Impact of Prop. 64 on DACA and TPS

Some key humanitarian programs are available only if the person has not been convicted of two or three (depending on the program) misdemeanors or one felony. These programs include DACA and TPS, which are described briefly below.

By decriminalizing minor marijuana offenses, Prop. 64 will help to ensure that people who are 21 years or older are not disqualified from these humanitarian programs by a drug conviction. Prop. 64 also may help persons age 18 to 20 because it will make these offenses infractions. An infraction will not trigger the felony/misdemeanors bar to DACA and TPS, and it might not make the person inadmissible, which is a bar to TPS but not to DACA.

Deferred Action for Childhood Arrivals.

In June 2012, DHS announced a form of administrative relief called Deferred Action for Childhood Arrivals (hereafter “DACA”), which benefits some people who were brought to the U.S. as children and who have attended high school or served in the military in the U.S (62).

DACA provides temporary protection against deportation. When a person is accepted for DACA, they may apply for a work permit, social security number, Medi-Cal, a California driver’s license, and permission to travel outside of and return to the U.S (63).

A marijuana conviction can bar eligibility for DACA relief if it is accompanied by: 1) any three misdemeanors convictions from three different incidents; 2) a conviction of a “significant” misdemeanor (90 days or more jail sentence, or any distribution or trafficking conviction); or 3) a conviction of any felony (64).

Prop. 64 would open eligibility for DACA because it would: decriminalize certain marijuana-related offenses committed by adults 21 and older that are currently classified as misdemeanor or felony offenses; reduce these offenses to infractions for persons age 18 to 20 years (and infractions are not a bar to DACA (65)); provide a way to reduce most prior marijuana convictions to a misdemeanor or infraction; provide a way to reduce prior sentences for these convictions (important because a sentence of 91 days or more is a bar to DACA); and provide a form of post-conviction relief that will eliminate prior convictions for purposes of DACA (regardless of whether it eliminates the conviction for other immigration purposes) (66).

In California, over 340,000 people are potentially eligible for DACA (67). Of these, about 213,000 people have applied for DACA and about 130,000 potentially eligible Californians have not yet applied (68). By removing criminal conviction bars, Prop. 64 will increase the number of individuals eligible for DACA.

THE IMPACT OF MARIJUANA OFFENSES ON IMMIGRANTS

F. The Immigration Impact of Prop. 64 on DACA and TPS

Temporary Protected Status.

The Secretary of Homeland Security may designate Temporary Protected Status (hereinafter “TPS”) for any country encountering catastrophic events such as ongoing armed conflict, earthquake, flood, drought, or other extraordinary and temporary conditions. Under this humanitarian program, nationals of that country who are granted TPS will be permitted to remain legally in the U.S. for a designated period of time, and will receive employment authorization (69). TPS is usually granted for about a year, but it can be renewed multiple times. TPS helps nationals of countries suffering the most devastating conditions; currently countries such as Somalia, Syria, Haiti, Sudan, and North Sudan are designated for TPS (70).

A marijuana conviction will bar eligibility for TPS if it is accompanied by: 1) any two misdemeanor convictions; 2) any felony conviction; and 3) conviction of a drug offense that causes inadmissibility. Prop. 64 will preserve eligibility for TPS because it will decriminalize minor marijuana offenses committed by adults 21 and older that are currently classified as misdemeanor or felony offenses and reduce these offenses to infractions for persons 18 to 20 years of age (infractions are not a bar to TPS as a misdemeanor and might not be an inadmissible drug conviction).

THE IMPACT OF MARIJUANA OFFENSES ON IMMIGRANTS

G. The Immigration Impact of Prop. 64 on Individual Offenses

1. Effect on Persons Over 21 Years of Age When They Commit the Offense

The following chart summarizes how Prop. 64 will impact the penalties associated with certain marijuana related offenses, if committed by a person age 21 or over.

Offense for Persons Age 21 and Older	Will Prop. 64 Eliminate this Deportable Conviction?	Will Prop. 64 Eliminate this Inadmissible Conviction?	Will Prop. 64 Eliminate this Aggravated Felony Conviction?	Might a Family Visa Waiver be Available for a Conviction?
Possession of up to 28.5 grams marijuana or 8 grams of concentrated cannabis	Yes	Yes	N/A	Limited discretionary waiver available
Give away or transport for personal use	Yes	Yes	N/A	No Family Visa Waiver
Plant, cultivate, and process up to 6 plants for personal use	Yes	Yes	Yes	No Family Visa Waiver

2. Effect on Persons 18 to 20 Years of Age When They Commit the Offense

While Prop. 64 decriminalizes the above conduct if the person is at least 21 years old, the conduct remains punishable as an infraction for persons age 18 to 20, 19 or 20 to 20. As discussed above, there is no precedent establishing whether California infractions are “convictions” for immigration purposes, but advocates have observed that some immigration authorities do treat them as convictions.

If immigration authorities treat infractions as a “conviction,” then offenses that have been reduced to infractions for 18 to 20 year olds under Prop. 64 will continue to be damaging drug convictions, and each “Yes” in the chart above for adults 21 and older becomes a “No,” for persons age 18 to 20. But if an infraction is not considered a “conviction” for immigration purposes, these young people will be protected.

Part II

THE EFFECT OF PROP. 64 ON POST-CONVICTION RELIEF FOR IMMIGRANTS

- PROP. 64 PROVISIONS THAT CAN
CHANGE A SENTENCE
- PROP. 64 THAT REDUCE A
CONVICTION TO A
MISDEMEANOR OR INFRACTION
- PROP. 64 PROVISIONS THAT
ELIMINATE A CONVICTION OR
ARREST RECORD

THE EFFECT OF PROP. 64 ON POST-CONVICTION RELIEF FOR IMMIGRANTS

Prop. 64 provides for post-conviction relief for qualifying marijuana convictions and sentences that take place before November 9th 2016 (71). Prop. 64 post-conviction relief can be divided into three categories: reduction of sentence; reduction of offense level (e.g., from misdemeanor to infraction); and elimination, dismissal, purging, and/or sealing of a conviction and arrest record.

Immigration authorities will give effect to some but not all types of state post-conviction relief. Generally, immigration authorities will honor a state order that reduces a sentence or that reduces an offense to a misdemeanor or infraction. Thus, these Prop. 64 provisions should be given effect in immigration proceedings. Immigration authorities will also honor a state order that eliminates a prior conviction if it is based on a ground of legal invalidity, as opposed to having a mere rehabilitative or humanitarian purpose. It is not clear whether Prop. 64 provisions dismissing the conviction will be given effect in immigration proceedings.

A. Prop. 64 Provisions that Change a Sentence

Pursuant to Cal. Health & Safety Code Section 11361.8, subdivisions (b), (c), added by Prop. 64, a person who is convicted and serving a sentence who would not have been guilty of an offense or would have been guilty of a lesser offense under Prop. 64 can apply to recall or dismiss the sentence “because it is legally invalid.”

Generally immigration authorities give effect to a state action that changes a sentence even if the change is not based on legal invalidity (72), and they should in this instance. However, when it comes to controlled substance offenses, the immigration penalties generally flow from the conviction itself and not from the length of sentence. Here, because the conviction would stand and only the sentence would be reduced or eliminated, the sentence reduction has little effect on the immigration penalties. There are a few exceptions, one of which is the DACA administrative program, where a misdemeanor can act as a bar to eligibility if a sentence of 90 days or more is imposed and a reduction below that level can remove the bar. See discussion of DACA at Part IV.F.

THE EFFECT OF PROP. 64 ON POST-CONVICTION RELIEF FOR IMMIGRANTS

B. Prop. 64 Provisions that Reduce a Conviction to a Misdemeanor or Infraction

Pursuant to Cal. Health & Safety Code Section 11361.8, subdivisions (e)-(h), as added by Prop. 64, a person who has completed her sentence can file an application “to have the conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as a misdemeanor or infraction” in accordance with the various new offense sections.

Generally immigration authorities will accept any state action, such as this one, that reduces an offense to a misdemeanor or infraction (73). This would have great effect if immigration authorities were to find that an infraction reduced from a felony or misdemeanor is not a “conviction.” That would mean that the person no longer has a deportable or inadmissible drug conviction for immigration purposes. However, this is not a guaranteed outcome as discussed at Part IV.A.1.

Otherwise, when it comes to controlled substance offenses the immigration penalties generally flow from the conviction itself and not from its classification as a felony or misdemeanor. There are a few exceptions, however. For the DACA administrative program, one felony conviction, or three misdemeanor convictions, act as a bar. One felony or two misdemeanor convictions is a bar to the TPS humanitarian program (74). Reducing a felony to a misdemeanor, a misdemeanor to an infraction, or removing criminal penalties entirely can remove these bars to eligibility.

THE EFFECT OF PROP. 64 ON POST-CONVICTION RELIEF FOR IMMIGRANTS

C. Prop. 64 Provisions that Eliminate a Conviction or Arrest Record

I. Dismissed or Sealed Conviction and Arrest Record

Pursuant to Pursuant to Cal. Health & Safety Code Section 11361.8, subdivisions (e)-(h), as added by Prop. 64, a person who has completed her sentence can file an application “to have the conviction dismissed and sealed because the prior conviction is now legally invalid” in accordance with the various new offense sections.

Federal immigration law does not give effect to all types of state post-conviction relief. In general, the federal rule is that state “rehabilitative” relief to eliminate a conviction will not be given effect in immigration proceedings. State “rehabilitative” relief refers to statutes that eliminate a prior conviction for humanitarian or rehabilitative reasons. For example, a defendant will not qualify for relief for successfully completing probation (75). In that case, even though California considers the offense to have been partly or wholly eliminated, the disposition remains a conviction for immigration purposes.

Immigration authorities will give effect to a vacation of judgment based on “a procedural or substantive defect in the underlying criminal proceedings,” (76) such as a ground of legal invalidity such as a constitutional error or other problem. This means, in order for post-conviction relief to have an effect for immigration purposes, the conviction must be eliminated for a legal defect. Immigration authorities will give full faith and credit to a judgment that states that the offense was vacated for legal invalidity without going behind the judgment (77).

Prop. 64 specifically provides that an applicant may ask a judge to dismiss and seal a qualifying prior conviction as being “legally invalid.”

Arguably immigration authorities must accept the judge’s order vacating the conviction for legal invalidity. Immigration judges routinely respect criminal court orders vacating convictions on general grounds of “legal invalidity.” It is possible, however, that despite the explicit language of Prop. 64 immigration authorities may refuse to honor the court order on the premise that the ground of legal invalidity was not in existence at the time the conviction first arose or that the statute does not identify any specific legal defect (78). To further support their case, when requesting relief under Health & Safety Code § 11361.8(e)-(h), immigrant advocates may decide to ask the criminal court to include additional grounds of legal invalidity in the judgment. One possible ground of invalidity is that the immigrant defendant was not informed, or did not understand, that pleading guilty to a minor marijuana offense would result in terrible immigration consequences. Thus, the defendant did not make a knowing waiver of the right to trial (79).

Even if immigration courts hold that the disposition remains a conviction, it is possible that in some cases the sealing of the records will make it impossible for immigration authorities to produce sufficient proof of the conviction’s existence as discussed more fully below.

THE EFFECT OF PROP. 64 ON POST-CONVICTION RELIEF FOR IMMIGRANTS

C. Prop. 64 Provisions that Eliminate a Conviction or Arrest Record

2. Destruction and Purging of a Record of Arrest and Conviction After Two Years

Pursuant to Cal. Health & Safety Code Section 11361.5 subdivision (a), arrest and conviction records for adults 18 and older for possessing, transporting or giving away small amounts of marijuana will be destroyed from criminal records after two years (80). In this case, the conviction is not eliminated for legal invalidity and appears to continue as a conviction for immigration purposes. Immigrants who can vacate the conviction – meaning dismissing and sealing the conviction – pursuant to Health & Safety Code Section 11361.8(e)-(h), discussed in Part V.C.1 above, should do so to obtain possible additional protection. It is possible that if the arrest and conviction are truly sealed as well as removed from all law enforcement databases, immigration authorities will not be able to establish that it exists sufficiently to bring immigration consequences. However, authorities may be able to locate other probative evidence of the existence of the conviction, so immigrants will be advised not to rely on this possibility.

This section of Prop. 64 provides similar protection for persons who committed the offense while under the age of 18, although because these are delinquency dispositions they are not considered a conviction for almost any immigration purpose.



While it is impossible to quantify the impact Prop. 64 will have on California's immigrant community, it is clear that **Prop. 64 will significantly mitigate the immigration consequences of some marijuana-related drug offenses.**

CONCLUSION

While it is impossible to quantify the impact that Prop. 64 will have on the immigrant community in California, it is clear that Prop. 64 will significantly mitigate the immigration consequences of some marijuana related drug offenses. In looking at the impact Prop. 64 would have on immigrants in California, one significant obstacle we encountered was the lack of available data on marijuana arrests for immigrants. While both state and federal law enforcement track arrests statistics based on race, age, and gender, information about immigration status is not simultaneously collected. In addition, data on race is inconsistently gathered. As some agencies, like the FBI, do not use Hispanic or Latino as its own distinct race (81). As a result, Latinos are categorized as white or another racial identification further skewing the data collected (82).

After consulting with researchers at both Human Rights Watch and The Drug Policy Alliance, reviewing data available from the California Department of Justice and the California Office of the Attorney General, we were unable to locate statistics on the arrests of non-citizens for marijuana related offenses. We currently have an outstanding Freedom of Information Act request pending with Immigration and Customs Enforcement (ICE) that may be able to provide some additional insights.

By decriminalizing certain activities and de-emphasizing law enforcement's focus on marijuana, Prop. 64 can play a substantial role in reducing deportations in California and keep families and communities intact. With immigrants making up more than 25% of the 38.8 million people living in California, Prop. 64 will impact a large number of lives.

FOOTNOTES

(1) For persons 21 and older, Prop 36 removes all criminal prohibitions on the possession, transport, and sharing of up to 28.5 grams of marijuana or 8 grams of concentrated marijuana as well as the cultivation of and harvest of up to 6 plants at home. For persons 18 to 20 year of age, the AUMA reduces the penalties for these same activities to an infraction offenses punishable only by a fine (and associated fees)

(2) For the purposes of this report, “minor marijuana offenses” refer to the possession, transport, and sharing of up to 28.5 grams of marijuana or 8 grams of concentrated cannabis, as well as the cultivation, harvest, and storage of up to 6 plants at home.

(3) Under Prop. 64 most marijuana related felonies have been reduced to misdemeanors or wobblers (activities which may be charged as misdemeanors or felonies).

(4) Federal immigration law employs its own definition of when a state criminal court disposition constitutes a “conviction.” Some state infractions have been held not to be a conviction for immigration purposes because they lack procedural protections such as access to a jury trial or the right to appeal. It is unclear whether a California infraction will be held a conviction for this purpose. See discussion at xxx.

(5) Marisol Cuellar Mejia & Hans Johnson, *Immigrants in California*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (May 2013), http://www.ppic.org/main/publication_show.asp?i=258.

(6) Anna Brown & Renee Stepler, *Statistical Portrait of the Foreign-Born Population in the United States*, PEW RESEARCH CENTER, HISPANIC TRENDS (Apr. 19, 2016), <http://www.pewhispanic.org/2016/04/19/statistical-portrait-of-the-foreign-born-population-in-the-united-states-key-charts/#2013-fb-authorized-pie>.

(7) Marisol Cuellar Mejia & Hans Johnson, *Immigrants in California*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (May 2013), http://www.ppic.org/main/publication_show.asp?i=258.

(8) *Id.*

(9) Cuellar Mejia and Johnson, *supra*.

(10) See, e.g., American Civil Liberties Union, *The War on Marijuana in Black and White, Billions of Dollars Wasted on Racially Biased Arrests*, 4 (June 2013), <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>; THE GROWTH OF INCARCERATION IN THE UNITED STATES 60-63, 97 (Jeremy Travis ed., The National Academy Press 2014); Drug Policy Alliance & American Civil Liberties Union of California, *Marijuana Enforcement Disparities in California: A Racial Injustice*, (May 2016), http://www.drugpolicy.org/sites/default/files/CA_Marijuana_Infractions.pdf.

(11) American Civil Liberties Union, *The War on Marijuana in Black and White, Billions of Dollars Wasted on Racially Biased Arrests*, 4 (June 2013), <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.

(12) *Id.*

(13) Federal Bureau of Investigation, *Uniform Crime Reports, 2014 Crime in the United States, Arrests Table, Arrests for Drug Abuse Violations, Percent Distribution by Region, 2014* (2015), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/persons-arrested/main>

FOOTNOTES, CONT.

(14) Substance Abuse and Mental Health Services Administration, "Results from the 2013 National Survey on Drug Use and Health," 26-7 (Rockville, MD: Substance Abuse and Mental Health Services Administration, 2014).

(15) American Civil Liberties Union, *The War on Marijuana in Black and White, Billions of Dollars Wasted on Racially Biased Arrests* (June 2013), <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>; Jamie Fellner, *Decades of disparity: drug arrests and race in the United States* (Human Rights Watch, 2009); Meghana Kakade et al., "Adolescent Substance Use and Other Illegal Behaviors and Racial Disparities in Criminal Justice System Involvement: Findings From a U.S. National Survey," *American Journal of Public Health* 102, no. 7 (2012). While national arrest data by ethnicity are not systematically collected and are therefore incomplete, state-level data show that Latinos are disproportionately arrested for marijuana offenses. See, e.g., Drug Policy Alliance and Marijuana Arrest Research Project, "Race, Class and Marijuana Arrests in Mayor de Blasio's Two New Yorks: the N.Y.P.D.'s Marijuana Arrest Crusade Continues in 2014," (2014) <http://www.drugpolicy.org/resource/race-class-and-marijuana-arrests-mayor-de-blasios-two-new-yorks-nypds-marijuana-arrest-crus>; California Department of Justice, "Crime in California 2013," (2014); Drug Policy Alliance & American Civil Liberties Union of California, *Marijuana Enforcement Disparities in California: A Racial Injustice*, (May 2016), http://www.drugpolicy.org/sites/default/files/CA_Marijuana_Infractions.pdf.

(16) See Drug Policy Alliance & American Civil Liberties Union of California, *Marijuana Enforcement Disparities in California: A Racial Injustice*, (May 2016),

http://www.drugpolicy.org/sites/default/files/CA_Marijuana_Infractions.pdf.

(17) 10 Year Arrest Data 2006-2015, Open Justice, California Department of Justice (2016),

<http://openjustice.doj.ca.gov/data>; New Americans in California: The Economic Power of Immigrants, Latinos, and Asians in the Golden State, AMERICAN IMMIGRATION COUNCIL,

http://www.immigrationpolicy.org/sites/default/files/docs/new_americans_in_california_2015.pdf.

(18) Sari Horwitz, Justice Department set to free 6,000 prisoners, largest one-time release, *THE WASHINGTON POST* (Oct. 6, 2015), https://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699_story.html.

(19) *Id.*

(20) Marisol Cuellar Mejia & Hans Johnson, *Immigrants in California*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (May 2013), http://www.ppic.org/main/publication_show.asp?i=258.

(21) See e.g., *The Foreign-Born Population in the United States: 2010*, American Community Survey Reports, U.S. CENSUS (May 2012), <https://www.census.gov/prod/2012pubs/acs-19.pdf>.

(22) RACE FORWARD, *THE CENTER FOR RACIAL JUSTICE INNOVATION, Shattered Families* (Nov. 11, 2011), 3, <https://www.raceforward.org/research/reports/shattered-families?arc=1>.

(23) *Id.* at 24.

(24) Laura Hill & Joseph Hayes, *Undocumented Immigrants*, PUBLIC POLICY INSTITUTE OF CALIFORNIA, (June 2015), http://www.ppic.org/main/publication_show.asp?i=818.

(25) *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

(26) 8 U.S.C. §§ 1101-1503. Corresponding regulations are contained in 8 C.F.R. § 1.1 et seq.

FOOTNOTES, CONT.

(27) See, Anti-Drug Abuse Act of 1988 (ADAA, November 18, 1988) (created aggravated felony category); the Immigration Act of 1990 (IA 90, November 29, 1990) (eliminated the Judicial Recommendation Against Deportation, added new aggravated felonies and new penalties for conviction); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA, December 12, 1991) (penalties for aggravated felons); Violent Crime Control and Law Enforcement Act of 1994 (September 13, 1994) and Immigration and Nationality Technical Corrections Act of 1994 (INTCA Oct. 24, 1994)(added dozens of new aggravated felonies, created “administrative” deportation with no hearing before an immigration judge, judicial deportation, “Snitch” visas); and the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA, April 24, 1996) (creates new category we term “deportable for specified grounds,” which purports to bar eligibility for section 212(c), release from detention, and judicial review of deportation order, adds several new aggravated felonies, creates ‘special exclusion’ proceedings); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA, September 30, 1996). While the Immigration and Nationality Act refers to “drug addiction” (see, e.g., 8 USC 1182(a)(1)(iv)), as do many courts, medical and mental health experts use the term “substance use disorders” to describe the conditions in which “the recurrent use of alcohol and/or drugs causes clinically and functionally significant impairment, such as health problems, disability, and failure to meet major responsibilities at work, school, or home.” Substance Abuse and Mental Health Services Administration, Substance Abuse Disorders (updated Oct. 27, 2015), <http://www.samhsa.gov/disorders/substance-use>; DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 5th ed., (American Psychiatric Association, 2013). See also *Ledesma-Cosino v. Lynch*, 819 F.3d 1070 (9th Cir. 2016), finding that the bar to establishing good moral character based upon being an “habitual drunkard” violates equal protection, because the medical disability of chronic alcoholism lacks any rational relation to moral character.

(28) Operational and Support Components, THE DEPARTMENT OF HOMELAND SECURITY, <https://www.dhs.gov/operational-and-support-components>.

(29) FY2015 ICE Immigration Removals, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/removal-statistics>.

(30) Proposition 64, Control, Regulate and Tax Adult Use of Marijuana Act (hereafter “Prop. 64”), California Statewide Initiative 15-0103, Section 3 (Dec. 7, 2015), https://oag.ca.gov/system/files/initiatives/pdfs/15-0103%20%28Marijuana%29_1.pdf?.

(31) *Id.* at Section 4.

(32) *Id.* at Section 8.

(33) *Id.*

(34) Grace Meng, A Price Too High, US Families Torn Apart by Deportations for Drug Offenses, HUMAN RIGHTS WATCH (Jun. 16, 2015), <https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses>; Secure Communities and ICE Deportations: A Failed Program?, TRAC IMMIGRATION (Apr. 8, 2014), <http://trac.syr.edu/immigration/reports/349/#f3>.

(35) For these deported individuals, marijuana possession was the most serious offense on their records. Alissa Scheller, How Marijuana Gets People Deported, in 5 Simple Charts, THE HUFFINGTON POST (Apr. 18, 2014), http://www.huffingtonpost.com/2014/04/17/marijuana-possession-deportations_n_5168742.html; Secure Communities and ICE Deportations: A Failed Program?, TRAC IMMIGRATION (Apr. 8, 2014), <http://trac.syr.edu/immigration/reports/349/#f3>.

FOOTNOTES, CONT.

(36) Thirty-eight percent of cases involved possession for personal use thirty-one percent of cases contained no information about the nature of the drug offense; and the remainder of the cases involved trafficking, including trafficking of very small amounts of drugs. See Grace Meng, *A Price Too High, US Families Torn Apart by Deportations for Drug Offenses*, HUMAN RIGHTS WATCH (Jun. 16, 2015), Figure 2, at <https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses>.

(37) See Meng, Figure 3a.

(38) See Meng, Figure 3b.

(39) Under Board of Immigration Appeals precedent, a California infraction should not be considered a “conviction.” This is because a defendant does not have a right to a jury trial at any stage of the proceedings; an infraction is a “noncriminal offense” for which imprisonment may not be imposed; and a prior infraction cannot be the basis of a sentence enhancement for a subsequent misdemeanor or felony offense. See further discussion at *Arguing that a California Infraction is Not a Conviction*, IMMIGRANT LEGAL RESOURCE CENTER, available at <http://www.ilrc.org/resources/arguing-that-a-california-infraction-is-not-a-conviction-test-for-non-misdemeanor-offenses>.

(40) A person who originally was convicted of a misdemeanor or felony did receive constitutional protections during the proceeding. Thus, it meets the definition of conviction based on those factors. However, once the conviction becomes an infraction “for all legal purposes” under Prop. 64, it cannot be used as a prior conviction to enhance a sentence in a future prosecution, and it carries no possible jail sentence (and any sentence that was imposed will be eliminated for all purposes, including immigration). It is possible that based on these separate factors, the disposition would not be a “conviction.” See further discussion at Part V.B.

(41) 8 U.S.C. § 1227(a)(2)(B).

(42) 8 U.S.C. § 1227(a)(2)(B)(i).

(43) See, e.g., *Matter of Martinez-Espinoza*, 25 I&N Dec. 118, 125-126 (BIA 2009) (possession of paraphernalia relating to use of a small amount of marijuana comes within the exception).

(44) Going forward, a lawful permanent resident age 18 to 20 who is convicted of an infraction for possessing, possessing paraphernalia, or being under the influence of this amount of marijuana will not be deportable because it will come within this exception. (In addition, the person may argue that an infraction is not a “conviction” for immigration purposes; see Part IV.A.1, above).

(45) See, e.g., *Matter of Martinez-Espinoza*, supra at 125 (possessing marijuana in a school zone does not come within the exception).

(46) See Part IV.C, discussing inadmissibility. A permanent resident who travels outside the U.S. will be held inadmissible upon her return. She may or may not qualify to submit an application for a highly discretionary waiver of inadmissibility.

(47) 8 U.S.C. § 1101(a)(43).

(48) *United States v. Reveles-Espinoza*, 522 F.3d 1044 (9th Cir. 2008) (holding that CAL HEALTH & SAFETY CODE § 11358(a) is automatically a controlled substance aggravated felony).

(49) Howard Dean Bailey, *I Served My Country. Then It Kicked Me Out*, POLITICO (Apr. 10, 2014),

http://www.politico.com/magazine/story/2014/04/howard-dean-bailey-deported-i-served-my-country-and-then-it-kicked-me-out-105606_full.html?print#.V0fFFpMrJE4.

(50) Noncitizens who are “inadmissible” can be held “ineligible to receive visas and ineligible to be admitted to the United States.” 8 USC 1182(a). They are barred from applying for several types of immigration applications. See discussion of immigration applications and the criminal bars at *Immigration Relief Toolkit* (ILRC 2016) at http://www.ilrc.org/files/documents/17_questionnaire_jan_2016_final.pdf.

FOOTNOTES, CONT.

(51) 8 U.S.C. § 1187(a)(2)(i)(II).

(52) 8 U.S.C. § 1182(h)(B).

(53) See, e.g., *Shoostary v. INS*, 39 F.3d 1049, 1051 (9th Cir. Cal. 1994) (extreme hardship requires a showing of great actual or prospective injury beyond the family separation and economic dislocation normally suffered in deportation);

(54) INA §240A(b).

(55) 8 U.S.C. § 1187(a)(2)(i)(II).

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

(57) Meredith Hoffman, *When Immigrants Are Deported for Smoking Weed*, VICE (May 3, 2016),

http://www.vice.com/en_ca/read/when-immigrants-are-deported-for-smoking-weed.

(61) *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000); *Matter of C.M.*, 5 I&N Dec. 327 (BIA 1953); *Matter of Ramirez-Rivero*, 18 I&N 135 (BIA 1981).

(62) Executive Actions on Immigration, U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

<https://www.uscis.gov/immigrationaction>.

(63) President Obama's New Immigration Programs: Deferred Action for Childhood Arrivals and Parents, IMMIGRANT LEGAL RESOURCE CENTER, www.ilrc.org/files/documents/daca_dapa_flyer.pdf.

(64) Crimes-Related Bars to DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents) and DACA (Deferred Action for Childhood Arrivals), IMMIGRANT LEGAL RESOURCE CENTER & NATIONAL IMMIGRATION PROJECT, www.ilrc.org/files/documents/chart_dapa_daca_bars_jan.2015.pdf.

(65) A California infraction is not a bar to DACA because it does not meet the definition of misdemeanor for that purpose, which requires a potential sentence of five days. See DACA FAQs, Question # 63, at <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions>

(66) For purposes of DACA, almost any form of post-conviction relief – even so-called rehabilitative or humanitarian relief – will be held to eliminate a conviction as an absolute bar. See discussion at Part V.C. The post-conviction relief provided by Prop. 64 qualifies as humanitarian or rehabilitative relief. (This relief might or might not also qualify as a vacation of judgment for cause, which would eliminate the conviction for all immigration purposes. See Part V.C.)

(67) National and County Estimates of Populations Eligible for DACA and DAPA Programs, 2009-2013, THE MIGRATION POLICY INSTITUTE, <http://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles>.

(69) See 18 USC § 1254a.

(70) For a complete list of countries, and other information about TPS, go to www.uscis.gov and click on “Humanitarian” and then “Temporary Protected Status.”

FOOTNOTES, CONT.

(71) The date in which AUMA goes into effect.

(72) See, e.g., *Matter of Song*, 23 I & N Dec. 173 (BIA 2001).

(73) See, e.g., *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843 (9th Cir. 2003), reversed on other grounds in *Ceron v. Holder*, 747 F.3d 773 (9th Cir. 2014) (en banc).

(74) A conviction of one felony or two misdemeanors is a bar to Temporary Protected Status for persons from countries that are establishing catastrophic events (see 8 U.S.C. § 1254a(c)(2)(B)) and to Family Unity for relatives of persons who participated in the legalization programs (see 8 C.F.R. §§ 236.13, 236.18).

(75) See, e.g., Cal Penal Code §§ 1203.4(a) or 1000.3. Specifically because federal immigration law considers a conviction to exist despite dismissal of charges under Cal Penal Code § 1000.3, California passed Penal Code § 1203.43 (effective January 1, 2016) to assist immigrants to eliminate this “conviction” for cause. But new § 1203.43 only works for deferred entry of judgment cases, pursuant to Cal Penal Code § 1000 et seq.

(76) See, e.g., *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

(77) See, e.g., *Matter of Pickering*; *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000).

(78) See, e.g., *Matter of Adamiak*, 23 I. & N. Dec. 878 879–990 (BIA 2009) (vacatur based on a violation of a state advisal statute is effective at eliminating the immigration consequences of a conviction).

(79) See, e.g., *People v. Giron*, 11 Cal. 3d 794 (1974) (permitting a defendant to withdraw his plea of guilty because he was unaware of the immigration consequences of a guilty plea).

(80) Prop. 64 expands this rule to include arrest and conviction records for the possession of small amounts of concentrated cannabis. Arrests and conviction records for possession of marijuana or concentrated cannabis on school grounds are excluded from destruction.

(81) American Civil Liberties Union, *The War on Marijuana in Black and White, Billions of Dollars Wasted on Racially Biased Arrests*, 4 (June 2013), <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.

(82) *Id.*