



USCIS POLICY MANUAL PENALIZES LEGALIZED MARIJUANA

By Kathy Brady

USCIS Amendment to *Policy Manual*. See amended USCIS *Policy Manual*, Volume 12, Chapter 5, Part C.2, “Conditional GMC Bar Applies Regardless of State Law Decriminalizing Marijuana” at <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-5> and at the end of this *Alert*.

ILRC Practice Advisory, Flyers, and Other Materials on Marijuana. For advocacy materials including community alert flyers in English, Spanish, and Chinese, a comprehensive legal memo titled *Practice Advisory: Immigration Risks of Legalized Marijuana* (January 2018), and other materials, go to <https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana>.

- I. The Problem
- II. What Can Advocates Do?
- III. Text of updated USCIS Policy Manual

I. The Problem

As of June 2019, over 30 states have legalized some use of medical and/or recreational marijuana.¹ Despite the many legal benefits of this trend, it has one legal downside: it can be a trap for uninformed immigrants.

Regardless of state law, marijuana remains a *federal* Schedule I controlled substance. As such it can cause heavy penalties for immigrants. Just admitting to DHS that one possessed marijuana, or just being employed in the legitimate cannabis industry, can make a noncitizen inadmissible and conditionally (for a certain time period²) barred from establishing good moral character – *even if that conduct was permitted under state law*.

Example: Carol uses medical marijuana according to her doctor’s instructions, in her own home. This is all legal in her state. But if she admits to DHS that she has done this, she can be found inadmissible and/or conditionally barred from establishing good moral character for admitting a federal controlled substance offense. This is true despite the fact that she never was convicted, she did not use marijuana on federal property, and she used it in accordance with the law of her state.

Example: Silvia used to work in the accounting department of Cannabis, Inc., a major corporation that is legal and duly licensed in her state. She pays state and federal income taxes like any lawful worker. She has never tried marijuana. If she provides her place of employment (for example, she lists it on her I-485 or N-400), DHS will say that it has “reason to believe” she is a drug trafficker. Or, they may ask her questions about the employment and have her “admit” to a federal offense. She can be found inadmissible and/or conditionally barred from establishing good moral character.

Example: Martin is an LPR who uses recreational marijuana legally in his home in Colorado. If he admits to DHS that he has used marijuana more than once, he could be conditionally barred from establishing good moral character required for naturalization, but he would not be deportable. As an LPR remaining within the United States, the only penalty for legal use of marijuana is that he must stop using it for some years before he can naturalize.

But say Martin visits his father in Mexico for a few days, and upon return a border officer finds a photo on his phone showing him in a marijuana shop. She carefully questions Martin, who admits that he uses marijuana sometimes “because it’s legal.” Now Martin is subject to the grounds of inadmissibility, and he is inadmissible.³ Unless he qualifies for and is granted some relief, like LPR cancellation, he will lose his green card and be permanently barred from the U.S. Or, if Martin had simply re-entered the U.S. after his with no problem, but years later immigration authorities discovered that he was using marijuana before that trip, they might claim that he is deportable for having been inadmissible at last entry (although Martin may have a defense).⁴ See further legal discussion at the ILRC *Practice Advisory*, cited above.

Until recently, USCIS harshly enforced penalties based on legalized marijuana only in certain regions. For example, USCIS in Washington state has enforced this more aggressively than USCIS in California. But the situation will likely change. On April 19, 2019, USCIS published a *Policy Alert*⁵ to announce that it was amending its national *Policy Manual* to provide that possession of marijuana, or employment in the industry, can be a bar to establishing the good moral character required for naturalization, even if the conduct or employment is permitted under state law. See the new section of the *Policy Manual* in Part III of this advisory, and online at the above link.

While USCIS only amended the section in its manual relating to good moral character and naturalization, under the same reasoning the person also would be found inadmissible under the crimes grounds. That can cause severe, permanent immigration damage that goes beyond delaying naturalization. In some areas, USCIS is questioning applicants for adjustment of status about “lawful” marijuana use, and border officials have asked these questions for some time. The admission would be a bar to non-LPR cancellation. In these situations, a finding of inadmissibility can result in removal.

II. What Can Advocates Do to Help Their Clients and Community?

Information and Education. Tell your clients, and tell the community, that permanent residents, undocumented people, and other noncitizens should not possess or use marijuana, work in the industry, and *should not discuss any conduct involving marijuana with DHS or border officers*. Silence is golden. If nothing else, the person should simply stop the conversation with the officer and ask to talk with an attorney.

Tell people that if they have had any involvement with marijuana, they should not travel outside the United States or submit any immigration application without first talking with a legal expert. If they require medical marijuana, they should discuss this with a legal expert. Other legal self-defense tips are to not have anything about marijuana on one's cell phone or social media, to not carry a medical marijuana card, and to be prepared to be questioned aggressively and have one's phone searched at any border.

To help warn the community, try to discuss the risk with other immigration services providers or outreach workers. Download free community alert flyers in English, Spanish, and Chinese from the ILRC link cited above. They provide all of these warnings. Providing the flyers to local agencies, clinics, schools, and churches, can help get the warning out, as can discussing the issue on foreign-language radio. See if your local marijuana dispensaries will post flyers, and if employers in the cannabis industry, or the state or local government agencies that license them, will post these warnings. As an example, the ILRC web page cited above includes a notice by an office of the California Employment Development Department, warning that employment in this industry can cause legal problems for noncitizens.

Expert Legal Advice. Legal service providers should make sure they understand the several issues involved with legalized marijuana – or if they don't, they should refer cases to other experts as needed.

Providers should explain all the risks of admitting to conduct involving marijuana to a client *before* interviewing the person about their history. For a legal memo that goes into detail about the various risks and defense strategies, see the ILRC *Practice Advisory* at the link cited above.

If a person is found inadmissible under controlled substance grounds (for example, because they admit to possessing marijuana, or because they have worked in the industry), they could face serious penalties in a range of situations. This is especially dangerous in any application for a green card, whether through adjustment of status or consular processing; any admission at the border, including admission by a lawful permanent resident who is returning from a short trip outside the country; and applications for most forms of relief, for example non-LPR cancellation of removal.

An applicant for naturalization might be denied naturalization, lose any fee they paid, and have to reapply after accruing a new year of good moral character. However, a naturalization applicant should not be held deportable for this, *unless* they traveled outside the U.S. after committing the conduct involving marijuana. In that case they might be charged with being deportable, although there are defenses to this.

The law governing this area is complex, but there are defenses. Get expert help and consult legal guides, including ILRC, *Practice Advisory: Immigration Risk of Legalized Marijuana*, cited above.

III. Text of the Amended Policy Manual

As amended on April 19, 2019, the USCIS *Policy Manual*, Volume 12, Chapter 5, Part C.2 states:

2. Conditional GMC Bar Applies Regardless of State Law Decriminalizing Marijuana

A number of states and the District of Columbia (D.C.) have enacted laws permitting “medical” ^[19] or “recreational” ^[20] use of marijuana. ^[21] Marijuana, however, remains classified as a “Schedule I” controlled substance under the federal CSA. ^[22] Schedule I substances have no accepted medical use pursuant to the CSA. ^[23] Classification of marijuana as a Schedule I controlled substance under federal law means that certain conduct involving marijuana, which is in violation of the CSA, continues to constitute a conditional bar to GMC for naturalization eligibility, even where such activity is not a criminal offense under state law. ^[24]

Such an offense under federal law may include, but is not limited to, possession, manufacture or production, or distribution or dispensing of marijuana. ^[25] For example, possession of marijuana for recreational or medical purposes or employment in the marijuana industry may constitute conduct that violates federal controlled substance laws. Depending on the specific facts of the case, these activities, whether established by a conviction or an admission by the applicant, may preclude a finding of GMC for the applicant during the statutory period. An admission must meet the long held requirements for a valid “admission” of an offense. ^[26] Note that even if an applicant does not have a conviction or make a valid admission to a marijuana-related offense, he or she may be unable to meet the burden of proof to show that he or she has not committed such an offense.

Endnotes to the Policy Manual:

19. ^[^] See, for example, Cal. Health & Safety Code section 11362.5; Colo. Rev. Stat. 44-11-101, *et. seq.*; Haw. Rev. Stat. sections 329-121 to 329-128; Me. Rev. Stat. Ann., Tit. 22, 2383-B(5); Nev. Rev. Stat. sections 453A.010-453A.810; Ore. Rev. Stat. sections 475.300-475.346.

20. ^[^] See, for example, Washington Initiative 502 at section 20, amending RCW 69.50.4013 and 2003 c 53 s 334; Colorado Amendment 64, Amending Colo. Const. Art. XVIII 16(3), Colo Rev. State. Sections 44-12-101, *et. seq.* These laws are commonly known as permitting certain “recreational use” of marijuana and may include conduct such as use, possession, purchase, transport, and consumption. See, for example, Washington Initiative 502 at section 20, amending RCW 69.50.4013 and 2003 c 53 s 334; Colorado Amendment 64, Amending Colo. Const. Art. XVIII 16(3).

21. ^[^] “Marihuana” is defined by the Controlled Substances Act (21 U.S.C. 802(16)):

(A) Subject to subparagraph (B), the term “marihuana” means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.

(B) The term “marihuana” does not include –

(i) hemp, as defined in section 297A of the Agricultural Marketing Act of 1946; or

(ii) the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

22. ^[^] See [21 U.S.C. 812\(c\)](#).

23. ^[^] See [21 U.S.C. 812\(b\)\(1\)\(B\)](#).

24. ^[^] See [21 U.S.C. 812\(b\)\(1\)\(B\)](#). See [21 U.S.C. 844\(a\)](#).

25. ^[^] See [21 U.S.C. 841\(a\)](#) (“unlawful for any person knowingly or intentionally...to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”). See [21 U.S.C. 844](#) (simple possession). See [21 U.S.C. 802\(15\)](#) (defining manufacture) and [8 U.S.C. 802\(22\)](#) (defining production).

26. ^[^] See Chapter 2, Adjudicative Factors, Section E, Admission of Certain Criminal Acts [[12 USCIS-PM F.2\(E\)](#)]. See [Matter of K- \(PDF\)](#), 7 I&N Dec. 594 (BIA 1957) (establishing requirements for a valid “admission” of an offense).

Endnotes to the Practice Alert

¹ Recreational and medical marijuana is legal for adults in 10 states: Alaska, California, Colorado, Illinois, Maine, Massachusetts, Nevada, Oregon, Vermont, and Washington, and in the District of Columbia. Some form of medical marijuana, but not recreational marijuana, is legal in an additional 19 states: Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Maryland, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, and West Virginia. An additional 16 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.

² Conditionally” barred from good moral character (GMC) refers to the fact that one only needs to prove GMC for a specific period of time, e.g., the preceding five years. Once this amount of time has elapsed since the person stopped use of marijuana, or since DHS first gained “reason to believe” the person participated in “trafficking” (employment in the industry), the person is no longer legally barred from establishing GMC, although USCIS still can make a discretionary finding regarding their moral character. See INA § 101(f), 8 USC § 1101(f) and see the updated *Policy Manual* at Part III, above.

³ Usually LPRs have a unique legal benefit: they can travel outside the United States without being subject to the grounds of inadmissibility upon their return. But there are exceptions to this, and one of them is that if border officials can establish that the person is inadmissible for crimes, then the returning LPR is subject to the grounds of inadmissibility. See INA § 101(a)(13)(C), 8 USC § 1101(a)(13)(C). If the LPR admits to ever having used marijuana, they can be excluded like any other noncitizen, unless they are eligible for some form of relief to waive the inadmissibility ground.

⁴ A permanent resident who is “mistakenly” let in at the border can be charged with being deportable for inadmissibility at last entry. INA § 237(a)(1), 8 USC § 1227(a)(2). Martin might have a defense that he is not deportable, because he was not inadmissible: at that time, he had not yet formally admitted to using marijuana.

⁵ See USCIS, *Policy Alert: Controlled Substance-Related Activity and Good Moral Character Determinations* (April 19, 2019) at <https://www.uscis.gov/sites/default/files/policymanual/updates/20190419-ControlledSubstanceViolations.pdf>.



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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC’s mission is to protect and defend the fundamental rights of immigrant families and communities.