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US IMMIGRATION & NATIONALITY LAW

DRUGS AND INADMISSIBILITY

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From the Comedy Central Show "South Park"(Season 2, Episode 204). The scene: Chef, an adult, is speaking with 4th graders Stan, Kyle, Kenny, and Cartman:

> *Chef: I just want to tell you that drugs are bad.*
> *Stan: We know, we know, that's what everybody says.*
> *Chef: Right, but do you know why they're bad?*
> *Kyle: Because they're an addictive solution to a greater problem, causing disease of both body and mind with consequences far outweighing their supposed benefits.*
> *Chef: And do you have any idea what that means?*
> *Kyle: No.*
> *Cartman: I know. Drugs are bad because if you do drugs you're a hippy, and hippies suck.*
> *Chef: Look children: this is all I'm gonna say about drugs. Stay away from them. There's a time and a place for everything and it's called college. Do you understand?*
> *Children: Yes!*

If Chef had been speaking to non-U.S.-citizens, he should have stopped at "Stay away from them," given the draconian state of our immigration laws relating to any type of drugs, including marijuana, despite the fact that it has been decriminalized in many jurisdictions in the United States.

We learn in various contexts that drugs are bad, and we should just say no. The exchange above references some of the documented problems with drugs – their use or overuse can result in disease of both body and mind and other serious consequences. Nevertheless, many people identify with the statement

Chef makes above. The assumption or joke being that many Americans will have or have had experiences with alcohol and/or drugs, such as marijuana, in college. This assumption may be good for a laugh, but for non-US citizens drugs (meaning controlled substances, for non-medical use) are not only bad, using drugs can lead to inadmissibility on various grounds including public health, criminal, and misrepresentation.

The ground of inadmissibility that comes to mind immediately is the criminal ground under INA INA 212(a)(2)(A)(II). If someone has a criminal conviction relating to a controlled substance, or even admitted to committing the crime, he or she is inadmissible and there is no waiver, although, in certain circumstances, enumerated in INA 212(h)(1), it may be possible to obtain a waiver where the crime “relates to a single offense of simple possession of 30 grams or less of marijuana.” Please note that convictions involving controlled substances (other than a single offense involving less than 30 grams of marijuana for personal use) and having been or being a drug addict or abuser are treated similarly harshly after admission into lawful permanent resident status has been granted. These are both grounds of deportability under INA 237 INA 237(a)(2)(B). This blog addresses issues prior to being admitted as a lawful permanent resident.

What if someone used drugs but was never arrested for it? For example, what if Stan, who is not a US citizen, now lives in New York and went to college in New York on an F-1 visa. In college, during his freshman year, Stan made friends with a group of people that smoked pot a couple of times a week. After freshman year, he stopped smoking pot. After he completes his studies, he is sponsored by a company for an H-1B visa and is working in New York. A few years later, he meets and falls in love with Wendy, a UScitizen. They get married and she wants to sponsor him for a green card. Stan goes to a Civil Surgeon to get the required medical exam done on Form I-693. In the course of providing his medical history, Stan tells the Civil Surgeon, without being asked, that he smoked pot twice a week during his freshman year in college. He doesn't think it is a big deal -- as Chef implied, a lot of people use marijuana in college.

The Civil Surgeon’s role is to perform a medical exam to determine whether a person who is applying for adjustment of status within the United Statesmay be inadmissible to the United States on public health grounds. (Outside the United States, a similar role is performed by a “panel physician”.) They request a medical history and conduct a physical exam to ensure that a person does not

have tuberculosis, syphilis and other sexually transmitted diseases, leprosy and other communicable diseases noted in 42 CFR 34.2(b)(4) – (9). They also inquire about physical health and medications a person may be taking to ensure that any vaccines the individual might need are not contraindicated.

According to the Center for Disease Control Immigration Requirements: Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-Related Disorders (hereinafter"CDC TI"), drug screening is not a routine part of the medical exam. *See* CDC TI at p.11. However, there is a section on the Form I-693 addressing Drug Abuse/Drug Addiction (*see* Form I-693 at p.3). In order to complete this section, Civil Surgeons are instructed to "evaluate the applicant's history, behavior and physical appearance when determining if drug screening should be performed." CDC TI at p.11. If a Civil Surgeon reviews an applicant's medical history with them and in the course of doing so sees no tell-tale signs of drug use or abuse, they may not ever inquire about recreational drug use. If they do inquire, however, and an individual lies and the truth is later discovered, the individual could potentially, based on the certification on the Form I-693, be subject to civil or criminal penalties, be found inadmissible for fraud under INA 212(a)(6)(C)(i), be at risk of having any immigration benefit derived from the medical exam revoked, and could be subject to removal from the United States.

Many Civil Surgeons do not inquire, but some do. The CDC TI for Civil Surgeons provides a table (at page 12) of indicators that drug screening might be necessary. Among the indicators provided is the following: "history of any substance abuse or dependence." The terms "drug abuse" and "drug addiction"(aka dependence) are defined in the regulations of the Department of Health and Human Services (HHS) as follows:

> *Drug abuse.* The non-medical use of a substance listed in section 202 of the Controlled Substances Act, as amended (21 U.S.C. 802) which has not necessarily resulted in physical or psychological dependence.
>
> *Drug addiction.* The non-medical use of a substance listed in section 202 of the Controlled Substances Act, as amended (21 U.S.C. 802) which has resulted in physical or psychological dependence.

42 CFR 34.4(g) & (h). These terms are further elucidated in the CDC TI, which draws information from the DSM and states as follows:

> the DSM criteria for substance dependence, either on alcohol or other psychoactive substances are characterized by compulsive long-term use of the substance despite significant substance-related physical, psychological, social, occupational, or behavioral problems. Tolerance and withdrawal are often associated with substance dependence.
>
> Substance abuse is characterized by a pattern of recurrent substance use despite adverse consequences and impairment. To establish any substance-related diagnosis, the examining physician must document the pattern of use and behavioral, physical, and psychological effects associated with the use or cessation of use of that substance.

CDC TI at p.6. In our hypothetical, the Civil Surgeon conducting the medical exam for Stan might see Stan's use of marijuana throughout his freshman year in college as drug abuse, drug addiction, or neither. If she determines that Stan's behavior actually does not fall within either category, she will indicate "No Class A or B Substance (Drug) Abuse/Addiction" on the I-693.

If the Civil Surgeon determines that Stan's circumstances do indicate he is either an abuser or addict, there are various options the Civil Surgeon might pursue. She might collect evidence from Stan to determine whether Stan is in"full remission." "Full remission" is another term taken from the DSM and it is defined as a period of at least 12 months during which no substance use has occurred. CDC TI at p.14. If she determines that Stan was either a drug abuser or drug addict but has been through full remission, she could classify Stan as Class B and mark the appropriate box on the I-693. A Class B finding does not make a person inadmissible under the public health grounds but could trigger an inquiry as to whether Stan's condition might make him inadmissible under INA 212(a)(4) as likely to become a public charge. Health is one of the factors that statute requires adjudicators to take into consideration in determining whether someone might be inadmissible as a public charge. Thus USCIS would look into whether Stan's past problems make it likely that Stan might become a public charge. According to the Foreign Affairs Manual (the Adjudicator's Field Manual does not currently contain guidance on the issue of public charge, as the section for that topic is "reserved"),someone is likely to become a "public charge" if they are likely to become primarily dependent on the U.S. Government for subsistence either through cash assistance for income maintenance or institutionalization for long-term care at U.S. Government

expense. *See* 9 FAM 40.41 N.2.

What else might the Civil Surgeon do? If the Civil Surgeon determines that Stan has a Class A issue, Stan will be inadmissible on public health grounds unless and until a finding of remission is made that can move him to Class B. If the Civil Surgeon decides she wants more information before reaching a diagnosis, she could also defer her diagnosis to a later date. If the Civil Surgeon decides to defer diagnosis, she would provide Stan with instructions on what steps he would need to take, what information he would need to provide, and the time frame for providing the information to her. If the Civil Surgeon feels that she will not be able to reach a conclusion regarding Stan's condition, she can also refer Stan to a specialist consultant for further analysis on the drug issue. The specialist consultant's findings would then be reflected on the I-693.

Could the information Stan provided to the Civil Surgeon about his past drug use trigger any other issues for him with regard to inadmissibility? Depending on exactly what Stan said and what the Civil Surgeon explained in response about the illegality of Stan's freshman year marijuana habit, Stan might be inadmissible under INA 212(a)(2)(A)(i)(II) if he is found to have admitted "committing acts which constitute the essential elements of . . . a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."

How could this happen? How could a visit to the doctor turn into a trigger of a criminal ground of inadmissibility? It could happen if certain criteria established by the Board of Immigration Appeals (BIA) are met (or even if they are not and the person lives in the Ninth Circuit, as noted below). The BIA set forth the following requirements for a validly obtained admission: (1) the admitted conduct must constitute the essential elements of a crime in the jurisdiction in which it occurred; (2) the applicant must have been provided with the definition and essential elements of the crime in understandable terms prior to making the admission; and (3) the admission must have been made voluntarily. *See Matter of K-,* 7 I&N Dec. 594 (BIA 1957). These requirements have been strictly followed in published BIA cases, and only in the Ninth Circuit have some of the *Matter of K-* factors been effectively ignored, arguably without a sufficient justification. *See Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002).

In Stan's case, whether or not his discussion with the Civil Surgeon would make

him inadmissible under this section of the law would depend on exactly what he said he did, what the elements of the crime in that specific jurisdiction are, whether the Civil Surgeon provided him with the definition and essential elements of the crime in understandable terms, and whether his admission was voluntary.

Does the analysis change if the Civil Surgeon never asked about drug use? If the Civil Surgeon had not asked Stan and Stan had not offered the information there should be no issue. The Civil Surgeon made a determination based on her medical knowledge and observation of Stan that there was no reason to pursue any drug testing or line of questioning. Stan has not technically misrepresented anything because he was never asked about drug use and therefore did not misrepresent his past.

However, there is a question on the adjustment of status application (Form I-485) that Stan may have trouble answering: "Have you knowingly committed any crime of moral turpitude or drug related offense for which you have not been arrested?" The question on the Form I-485 (and the question regarding inadmissibility on the DS-260, for consular processing of an immigration visa, which is presented differently but raises the same issues) contains many legal terms Stan may not understand. In addition, because the question is on a form with which there can be no discussion and no interaction, clearly the requirements for an admission under *Matter of K* have not been satisfied. Furthermore, it would be very difficult for applicants to know that they have committed a crime for which they have not been charged or arrested, because one would have to figure out the applicable law, the elements of the crime or crimes, and whether all the elements of any crime have been satisfied. We have a complex penal law system in the United States. It requires the charging authority to determine the applicable law in each particular case and then demonstrate beyond a reasonable doubt that all the elements of that law were satisfied in order for a person to be convicted. This cannot happen on a form.

If Stan had ever been arrested for possession, he could only be convicted if the prosecution established all of the elements of the crime beyond a reasonable doubt, including proving that the substance was in fact marijuana by doing a lab test. For all Stan knows, he may have been smoking oregano during his freshman year. Then there is the question of whether Stan's use of marijuana is equivalent to"possession" of marijuana in a manner that, under New York law, is prohibited. All of these issues must be pondered before the question can be

answered.

The outcome might be different depending on the circumstances – if Stan had mentioned it to the Civil Surgeon, if the Civil Surgeon had pursued the line of questioning, the answer might be different. If Stan had gone to rehab for an addiction issue and his drug use had been confirmed, the result of the analysis might be different, impacting the appropriate answer to the question on Form I-485. The question can only be answered after an in-depth analysis on a case-by-case basis.

Even in the scenarios discussed here– where Stan had revealed his drug use to the Civil Surgeon or to the rehab program – and a determination was made that he was not inadmissible under the public health ground, can it be argued that he should not then face a sort of"double jeopardy" by being implicated under the criminal ground of inadmissibility? Disclosure was made and Stan legitimately cleared the issue of inadmissibility on a public health ground. It seems reasonable that clearing the public health ground should not leave an individual subject to the criminal ground. If Congress wanted one potentially subject to the public health ground of inadmissibility to remain inadmissible under the criminal ground, then Congress would not have provided a way to overcome the public health ground of inadmissibility. Congress would have collapsed drug use or abuse under one ground of inadmissibility. How to answer the question on the forms and the issue of the interplay between the various grounds of inadmissibility are issues that could be the focus of another article, and we raise the issue here to provide a glimpse of its complexity.

The upshot here is that the humorous, somewhat cavalier attitude about drugs displayed in U.S. pop culture by no means reflects the reality faced by those present in the United States who are not citizens. For non-citizens the "Just Say No" slogan developed in the 1980s has greater meaning given the stunning consequences non-citizens face if they do engage in use of controlled substances.