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US IMMIGRATION & NATIONALITY LAW

IMMIGRATION INADMISSIBILITY, LEGAL ETHICS AND MARIJUANA

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Although medical and recreational marijuana activities are illegal under federal law, at least 25 states have legalized marijuana for medical use. Colorado, Washington, Oregon and Alaska have gone even further by legalizing some forms of recreational marijuana, including its production and sale.

This conflict between federal and state law creates a curious anomaly for the foreign national who wishes to enter the United States either as a temporary visitor or as a temporary resident. If a foreign national wishes to invest in a marijuana business in a state where it is legal, and even endeavor to obtain an E-2 investor visa, this person would likely be rendered inadmissible under federal statutory immigration provisions.

Under 212(a)(3)(A)(ii) of the Immigration and Nationality Act (INA), foreign nationals can be found inadmissible if the authorities know, or have reasonable ground to believe, that they seek to enter the United States to engage in any unlawful activity. Also, under INA 212(a)(2)(C), a foreign national can also be deemed inadmissible if the authorities know or have reason to believe that the person is or has been an illicit trafficker in any controlled substance as defined under 21 U.S.C. 802, which includes marijuana.

If the foreign national has actually used marijuana in a state where it is legal, or undertaken other legal business activities involving marijuana in that state, this person can be found inadmissible for admitting to committing acts which constitute the essential elements of a law relating to a controlled substance pursuant to INA 212(a)(2)(A)(i)(II).

The Department of Justice has set forth guidance in a Memorandum by Deputy Attorney General James M. Cole ("Cole Memorandum") explaining

circumstances where it will exercise prosecutorial discretion and not enforce the law. Specifically, the Cole Memorandum states that it will defer to state law enforcement concerning state laws with respect to marijuana activities, although such discretion will not be applied relating to the following eight circumstances:

1. Distribution to minors;
2. Money flows to criminal enterprises;
3. Prohibition diversion of marijuana from states where marijuana is legal to other states;
4. Use of legal marijuana as a pretext for trafficking other illegal drugs or activity;
5. Preventing violence or the use of firearms in connection with marijuana collection or distribution;
6. Preventing drugged driving or other public health issues;
7. Preventing marijuana growth on public lands; and
8. Preventing marijuana possession on federal property.

Although the Cole Memorandum makes clear that it will not enforce marijuana activities that do not implicate its eight priorities in states where it is legal, it still considers manufacture, possession and distribution of marijuana as a federal crime. Thus, it may be difficult for a non-citizen who has been denied a visa to invoke the Cole Memorandum as a defense in demonstrating that the proposed marijuana activities will not be considered as an unlawful activity. Until there is a federal law that legalizes specific marijuana activities, the foreign national will find it extremely difficult to be admitted into the United States to pursue such activities even in states where it is legal.

It is also likely that a consul may question one who wishes to enter to undertake marijuana activities whether he or she has personally used marijuana, which could then potentially count as an admission to a violation of a law involving a controlled substance. However, in order to count as an admission, 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). If

this strict protocol is not adhered to, then a non-citizen should arguably not be considered to be have admitted to committing acts which constitute the essential elements of a law relating to a controlled substance pursuant to INA 212(a)(2)(A)(i)(II).

If the foreign national wishes to directly set up or be involved in a marijuana business in a state where it is legal, which includes its sale or distribution, this would most likely be problematic under federal immigration law. The question is whether activities that are more remote, such as a foreign national seeking to enter the United States on an H-1B visa to join an advertising firm as a creative director where one of its clients is a marijuana business in Colorado, would be considered equally problematic under federal immigration law. The H-1B worker will direct the advertising strategy for this client among several other clients, who are not in the marijuana business. Such a person seeking admission under the H-1B visa who is remotely connected to the marijuana business in another capacity should not be found inadmissible under the immigration laws.

The same reasoning should apply to a foreign national lawyer who will be employed in a New York law firm that specialized in health law. The law firm requires its lawyers to advise hospital clients in complying with New York's Compassionate Care Act ("CCA") – a law permitting the use of medical marijuana in tightly controlled circumstances. Under the CCA, health care providers and other entities may apply to be selected as Registered Organizations authorized to manufacture and dispense medical marijuana. The lawyer will assist clients, among other things, in applying to be selected as a Registered Organization, and would also advise thereafter with respect to compliance.

New York Rule of Professional Responsibility 1.2(d) provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client

Rule 1.2(d), variations of which are incorporated in most state bar rules of professional responsibility, is one of the most important ethical rules. It point-blank prohibits a lawyer from advising a client to engage in illegal or fraudulent conduct. Rule 1.2(d), however, provides an exception for the lawyer to discuss

the consequences of the proposed illegal conduct even though it does not allow the lawyer to assist the client with respect to the illegal conduct. It would be difficult for a New York lawyer to comply with Rule 1.2(d) with respect to advising a client under the CCA, as it would require the lawyer to counsel the health care client about medical marijuana activities that the lawyer knows is illegal under federal law although it is legal under the New York law. Under the CCA, the lawyer would not be able to competently represent the client by resorting to the exception under Rule 1.2(d), which is to "discuss the legal consequences of any proposed course of conduct with a client." Such a Registered Organization client would require active advice regarding the manufacture and distribute medical marijuana in compliance with the CCA.

New York State Bar Ethics Opinion 1024 endeavors to resolve this conundrum for the New York lawyer by permitting him or her to "assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana." N.Y. State 1024 took into consideration the Cole Memorandum's potential non-enforcement of federal law in states where marijuana activities have been rendered legal. While lack of rigorous enforcement of a law does not ordinarily provide a green light for the lawyer to advise a client to engage in activities that violate the law, N.Y. State 1024 took into consideration that New York state had explicitly authorized and regulated medical marijuana, and the federal government had indicated in the Cole Memorandum that it would not take measures to prevent the implementation of state law. Accordingly, pursuant to N.Y. State 1024, a lawyer may give legal assistance to a client regarding the CCA that goes beyond "a mere discussion of the legality of the client's proposed conduct." Consistent with similar opinions from ethics committees in Arizona and Kings County, Washington where recreational marijuana activities have been legalized, N.Y. State 1024 held that "state professional conduct rules should be interpreted to promote state law, not to impede its effective implementation." This is not to say that all ethics opinions are in concert with N.Y. State 1024. A recently issued Ohio ethics opinion goes the other way by limiting the lawyer's advice to determining the scope and consequences of medical marijuana activity, which is legal in Ohio. It also goes on to state that a lawyer who personally uses medical marijuana, even if legal in Ohio, may adversely reflect on a lawyer's honesty, trustworthiness, and overall fitness to practice law. Just as lawyers are

caught in a state of flux due to the conflict between state and federal law, so are other professionals, such as Certified Public Accountants. Businesses engaging in legal marijuana activities in states where it is legal are not allowed to take business expense deductions for federal income tax purposes for activities illegal under federal law, although they have to declare income from both legal and illegal activities, but may be allowed to deduct expenses under state law.

Keeping this framework in mind, if a foreign lawyer applies for an H-1B visa to join a New York law firm that has among its clients Registered Organizations that need advice regarding compliance under New York's CCA, would that lawyer be found inadmissible when applying for the H-1B visa at an overseas US Consulate? She should not, but if found inadmissible, this lawyer should forcefully make the case that her conduct would be found ethical pursuant to N.Y. State 1024, and thus should not be considered to be coming to the United States to engage in unlawful activity pursuant to INA 212(a)(3)(A)(ii). It is more likely that visa applicants will be denied entry if they are entering the United States to directly invest in a marijuana business, but probably less likely to be denied if they are performing activities that are more attenuated such as the New York lawyer advising compliance under the CCA or a computer professional who will be designing a social networking site for marijuana consumers. Just as some state bar ethics committees are finding ways to justify a lawyer's conduct with respect to advising on marijuana activities deemed legal in many states, but illegal under federal law (although not always enforced if the state considers the activity legal), lawyers who represent visa applicants should also be advancing similar arguments with the immigration agencies. Until such time that there is a change in the federal law that legalizes marijuana activities, lawyers should be pushing the envelope on behalf of clients who seek visas relating to lawful marijuana-based activities in certain states, while at the same time strongly cautioning them of the risks of adverse immigration consequences. Finally, lawyers advising such clients must carefully consult with ethics opinions in their states to determine what they can and cannot do under Rule 1.2(d).