



IMMIGRANTS AND SUBSTANCE AND ALCOHOL USE DISORDER: A LEGAL AND MEDICAL PERSPECTIVE

Part I: Immigration Law Penalties for Substance and Alcohol Use Disorders

By Kathy Brady & Ann Block, Immigrant Legal Resource Center; Michelle Lough, MD, MPH; Triveni DeFries, MD, MPH

Table of Contents

- Introduction: Substance Use Disorder is a Public Health Issue 2**
- Part I. Immigration Law Penalties for Substance and Alcohol Use Disorders 3**
 - A. Overview of applicable immigration penalties 3
 - B. Inadmissible (or deportable) for being a “drug abuser or addict” 4
 - The DSM-5 criteria 6
 - C. Avoid “criminal” inadmissibility grounds relating to controlled substances 12
 - 1. Inadmissible for “admitting” having possessed or used a controlled substance 12
 - 2. Inadmissible if immigration authorities have “reason to believe” the person participated in, or in some cases benefitted from, drug trafficking 15
 - 3. Inadmissible for legally working in the legitimate cannabis industry, or planning to do so 15
 - D. Alcohol use disorder, driving under the influence 16
 - 1. “Habitual drunkards” and good moral character 16
 - 2. Inadmissible due to a mental or physical disorder and related behavior that poses a danger to self or others 17
 - 3. Arrest and conviction for driving under the influence 18
 - E. Discretion and hardship 19

This Advisory is a collaboration between legal and medical experts, published in two parts.

Part I (this Part), is entitled *Immigration Law Penalties for Substance and Alcohol Use Disorders*. It reviews the several immigration law penalties associated with substance use disorder and alcohol use disorder (SUD and AUD, respectively), the role of scientific standards in these determinations, and possible legal defenses.

Part II (the next Part) is entitled *Applying Medical Evidence and Expertise on SUDs to Immigration Cases*. It reviews current medical information about these disorders and how this information addresses questions that arise in different types of immigration applications. For example, what established risk factors, such as past exposure to traumatic events, put individuals more at-risk for developing substance use disorders?

Parts I and II of this Advisory both appear at <https://www.ilrc.org/resources/immigrants-and-substance-use-disorders-legal-and-medical-perspective-0>.

Introduction: Substance Use Disorder is a Public Health Issue

Substance use disorder (SUD) is a growing health condition that affects millions of people in the United States yearly, and impacts individuals, families, communities, and societies. In a 2019 National Survey on Drug Use and Health conducted by the United States Substance Abuse and Mental Health Services Administration (SAMHSA), 20.4 million people aged 12 or older surveyed had a substance use disorder.¹ According to the Centers for Disease Control's National Center for Health Statistics, an estimated 107,622 deaths from drug overdoses were recorded in 2021, an increase of almost 15% from 2020.² Substance use disorder can also lead to significant morbidity in the form of infections, heart disease, mental health conditions, and more.

Compared to their U.S.-born counterparts, immigrants report lower rates of alcohol and drug use and meeting criteria for substance use disorders.³ However, those who suffer from any level of SUD face severe immigration penalties. Noncitizens with SUD face increased “exposure to uncertainty, immigration-related barriers to evidence-based addiction treatment, and an increased risk of deportation for substance use.”⁴ The language and tradition of immigration law treats this medical condition as a moral failing. Per the Immigration and Nationality Act (INA) of 1952, being a “drug abuser or addict” or a “habitual drunkard” can preclude non-citizens from obtaining permanent residency in the U.S., and prevent permanent

¹ Han, B. Substance Abuse and Mental Health Services Administration. (2020). Key substance use and mental health indicators in the United States: Results from the 2019 National Survey on Drug Use and Health (HHS Publication No. PEP20-07-01-001, NSDUH Series H-55). Rockville, MD: Center for Behavioral Health Statistics and Quality, Substance Abuse and Mental Health Services Administration. Retrieved from <https://www.samhsa.gov/data/>.

² Center for Disease Control and Prevention. “U.S. Overdose Deaths in 2021 Increased Half as Much as in 2020—But Are Still Up 15%.” Published 11 May 2022. Retrieved from https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/202205.htm on 30 May 2022.

³ Salas-Wright, Christopher P et al. “Substance use disorders among immigrants in the United States: A research update.” *Addictive behaviors* vol. 76 (2018): 169-173. doi:10.1016/j.addbeh.2017.08.014

⁴ DeFries, Triveni, et al. “Immigration Status Matters: The Intersectional Risk of Immigration Vulnerability and Substance Use Disorder.” *Addiction* (Abingdon, England), 2022, <https://doi.org/10.1111/add.15800>.

residents from becoming U.S. citizens, further exacerbating the disparity in this population for accessing SUD treatment, continuing family separation, and hinder the non-citizen from securing social stability.

Part I of this Advisory will discuss immigration penalties relating to substance use disorder.

Part II will provide current medical information about the disorder. The goal is that with more information about the medical nature of substance use disorder:

- Advocates can insist that officials employ the correct medical criteria, as required by the CDC, in determining whether a person is inadmissible under the health grounds relating to SUD;
- Advocates can better prepare their clients for immigration-related medical and other interviews where they may be questioned about SUD. This preparation is especially important if the client will attend interviews outside the United States, without counsel, in the context of consular processing;
- Advocates can educate immigration judges and officials that, despite the pejorative language used in the INA, suffering from a substance use disorder is a treatable medical condition that studies show is a common response to extreme trauma. A medical condition is not a moral failing and it should not be considered a negative factor in a discretionary decision; and
- Advocates can help their clients avoid the more dangerous crimes-based inadmissibility grounds, for example, to avoid making a qualifying “admission” that one has used a controlled substance.

Part I. Immigration Law Penalties for Substance and Alcohol Use Disorders

A. Overview of applicable immigration penalties

Part I of this advisory reviews immigration penalties associated with substance use disorders (SUDs) and/or related conduct and provides practice tips. It will cover:

1. Inadmissibility under the health grounds for being a current “drug abuser or addict,” which is more accurately described as suffering from a SUD relating to a controlled substance and not in sustained remission. See INA § 212(a)(1)(A)(iv), discussed at **Part B**.
2. Inadmissibility under related crimes-based grounds, if the person makes a qualifying admission that they committed a controlled substance offense, or because immigration authorities have “reason to believe” the person ever participated in any drug “trafficking.” Note that marijuana is a controlled substance for federal immigration purposes, including for people who live in states that have legalized its medical or recreational use. Further, even working legally in the legitimate cannabis industry could cause the person to be found inadmissible under the crimes grounds and/or barred from establishing good moral character. See INA §§ 212(a)(2)(A)(i), (C), discussed at **Part C**.
3. Penalties based on having an alcohol use disorder (AUD), and/or dangerous activity relating to the disorder such as driving under the influence (DUI), discussed at **Part D**. This includes:

- a. Inadmissibility under the health grounds for having a physical or mental condition that may pose danger to self or others, which includes suffering from an AUD (referred to there as “alcoholism”) with related dangerous conduct. See INA § 212(a)(1)(A)(iii).
 - b. Barred from establishing good moral character (GMC) due to being a “habitual drunkard” during the period for which GMC must be shown. See INA § 101(f)(1).
 - c. How DUI arrests and/or convictions are used to establish inadmissibility and lack of GMC, or are a negative factor in discretionary determinations.
4. Discretion and hardship, discussed at **Part E**. Advocates can cite medical evidence showing that SUD is a medical condition and a common response to extreme trauma, in order to argue that it should not be considered a negative factor for discretion and instead is evidence of hardship.

Resources. For more information about the SUD and immigration penalties, see articles by experts,⁵ ILRC manuals and practice advisories,⁶ and other resources at **Part II, section E**.

B. Inadmissible (or deportable) for being a “drug abuser or addict”

Inadmissible. A noncitizen can be found inadmissible under the health grounds if the person is classed as a current “drug abuser or addict.” INA § 212(a)(1)(A)(iv). Especially in consular processing cases, a panel physician (doctor employed by the consulate to conduct visa medical exams) may frequently make this finding, which the consular officer then uses as a basis to deny an application for permanent residency.⁷

The “drug abuser or addict” ground applies only to nonmedical use of a substance that is listed on federal drug schedules at 21 USC § 802.⁸ Therefore, this ground does not apply to substance disorders relating to alcohol or to drugs not on federal drug schedules. The person still could be found inadmissible under a different ground, for having a physical or mental condition and associated dangerous behavior. See INA § 212(a)(1)(A)(iii) and **Part D.2**, below.

⁵ See discussion of immigration status and barriers to treatment in DeFries, Triveni, et al. “Immigration Status Matters: The Intersectional Risk of Immigration Vulnerability and Substance Use Disorder.” *Addiction* (Abingdon, England), 2022, <https://doi.org/10.1111/add.15800>, and see legal and historical analysis of current immigration bars and proposals for reform in Sharpless, Rebecca, “Addiction-Informed Immigration Reform,” 94 *Wash. L. Rev* 1981 (2019), <https://digitalcommons.law.uw.edu/wlr/vol94/iss4/7>.

⁶ See national ILRC manuals such as *Inadmissibility and Deportability* (2021) or the comprehensive *Guide for Immigration Advocates* (2022) at <https://www.ilrc.org/publications>. Download practice advisories that use California law as a model, such as §N.2 Definition of Conviction (2019), §N.8 Controlled Substances (2019), and *Pereida and California Offenses* (2021), all at <https://www.ilrc.org/chart>.

⁷ See U.S. Dep’t of State, *Immigrant and Nonimmigrant Visa Ineligibilities Tbl. XX* (Table 20) (2019), <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2019AnnualReport/FY19AnnualReport-TableXX.pdf>. In 2019 consular processing cases, DOS reports that 1,262 people were found ineligible for an immigrant visa under this ground, while 633 findings of ineligibility were overcome – but notes that the ineligibility that was overcome could be for applicants found inadmissible in a prior year who returned. See n.2. This could refer to applicants returning to report “remission” after a year.

⁸ See 42 CFR 34.2(h); 9 FAM 302.2-8(B)(1). The federal drug schedules appear at 21 CFR 1308.

Before 2016, the test for a current “drug abuser or addict” was very broad. Under 1992 regulations, a person who engaged in “more than experimentation” – interpreted as more than one-time use of a controlled substance -- was considered a current abuser or addict until they became “in remission,” meaning they had not used the substance at all for three years. (This was reduced from a previous regulation that had required five years.)⁹ The rule essentially defined “use” as “abuse.” Once found to be an abuser, the person had to amass three years since their last use and then apply again for the visa. As of 2010, the definition of remission was reduced to having one year, rather than three years, since the last use.¹⁰

The current definition is set out in regulations that took effect in 2016.¹¹ The CDC defines “drug abuser or addict” according to standards for determining a substance use disorder (SUD) set out in the most recent edition of *Diagnostic and Statistical Manual of Mental Disorders*, which currently is the Fifth Edition (DSM-5). The DSM-5 criteria are listed in CDC instructions to panel physicians and civil surgeons who conduct medical examinations of applicants for permanent residency through adjustment of status or consular processing.¹² As discussed below, the DSM-5 does not define a SUD as a single use of a substance. Rather, the definition is based on various criteria showing that the use has become a disorder.

However, the unfortunate reality is that some panel physicians associated with certain United States consulates simply do not apply the current DSM-5 standard. Practitioners report that these consulates will find a SUD based on the former standard, if the person admits to (or there is other evidence of) any controlled substance use within one year prior to the examination. In particular, practitioners report that medical examiners with the U.S. consulate in Ciudad Juarez have found applicants inadmissible based on a finding that the person used a controlled substance, including marijuana, just once within the last year. This directly conflicts with the DSM-5 criteria, which require a finding of at least a mild “substance use disorder,” not merely a finding that the person used a substance. As there is virtually no review of a consular officer’s decision, these determinations are often binding.¹³

PRACTICE TIP: Before sending your client to a particular consulate or preparing them for the medical exam, find out what standard the designated panel physicians and the consular officers at that consulate may use to find inadmissibility as a current “drug abuser or addict.”

⁹ See former rules at PHS, *Technical Instructions for Medical Examinations of Aliens and Technical Instructions for Medical Examinations of Aliens in the United States* (June 1991), at III-74 and 1992 Amendments to p. III-14, 15, and see State Department Cable No. 91-State-416180, Dec. 24, 1991. The 1992 update was provided in a letter to panel physicians from Charles R. McCance, Director, Division of Quarantine, National Center for Prevention Services, dated July 13, 1992.

¹⁰ See 9 FAM 302.2-8(B)(7).

¹¹ For consular processing, see the Foreign Affairs Manual, 9 FAM 302.2-8. For adjustment of status applications and other medical tests within the United States, see 42 CFR 34.2(h), (i).

¹² See Centers for Disease Control and Prevention, Immigrant, Refugee, and Migrant Health, Civil Surgeons and Panel Physicians Technical Instructions: Mental Health, <https://www.cdc.gov/immigrantrefugeehealth/civil-surgeons/mental-health.html>, <https://www.cdc.gov/immigrantrefugeehealth/panel-physicians/mental-health.html> (last reviewed July 1, 2021) (“CDC Technical Instructions: Mental Health”), and see Foreign Affairs Manual, 42 CFR 34.2(h) and (i) (2016)

¹³ *Kerry v. Din*, 576 U.S. 86 (2015).

Do they use the DSM-5 criteria for SUD, or do they find that any use of a controlled substance within the last year means the person is inadmissible? Talk with other practitioners or consult professional listservs to gather information about practice in different consulates. Or take the conservative approach of warning the client that either factor—use within the prior year, or coming within two DSM-5 criteria—is dangerous. (An additional danger is that if the person tells the medical examiner that they have illegally used a controlled substance, it is possible that this information would be used to support a charge that the person “admitted” a drug crime. See **Part C.1** on admissions of conduct, below.)

The DSM-5 criteria

The CDC instructs medical examiners to determine whether the person is inadmissible as a current “drug abuser or addict” by using DSM-5 criteria. If the person exhibits just two of the below DSM-5 criteria, they are classed as having a “mild” SUD and will be found inadmissible as a current “drug abuser.” The criteria are:

- Substance often is taken in larger amounts or over a longer period than was intended.
- A persistent desire or unsuccessful efforts to cut down or control use.
- A great deal of time is spent in activities necessary to obtain, use, or recover from the substance’s effects.
- Craving or a strong desire or urge to use the substance.
- Recurrent use resulting in a failure to fulfill major role obligations at work, school, or home.
- Continued use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by its effects
- Important social, occupational, or recreational activities are given up or reduced because of use
- Recurrent use in situations in which it is physically hazardous
- Continued use despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the substance
- Tolerance (using increasing amounts to obtain effect)
- Withdrawal (physical symptoms with cessation of use)

Again, practitioners report that some consulates, such as Ciudad Juarez, have found applicants inadmissible based solely on use of a controlled substance within the last year, even if none of the DSM-5 criteria apply.

PRACTICE TIPS: TALKING WITH THE CLIENT.

The following are suggestions to help ensure that the client is informed and prepared. Well before the client goes to their medical appointment for adjustment or consular processing, we need to advise them about the legal consequences of being found to have a substance or alcohol use disorder (SUD or AUD).

The client needs to understand that the medical interview is not a regular doctor’s appointment. The doctor acting on behalf of immigration authorities. The doctor’s job is *not* to advise the person about their health or to answer their medical questions, but rather to

discover information that can be used to deny the visa application. If concerns arise during the panel physician's exam, that doctor may refer the client to an affiliated psychiatrist for a further evaluation, usually to confirm the doctor's suspicions regarding inadmissibility related to alcohol or substance use. To best prepare the client, consider the following.

Always obtain a client's state and FBI criminal record¹⁴ before the consular processing or adjustment of status interview. You want to know whether your client has been arrested or convicted for any drug or alcohol-related offenses, and to go over this information with them. Tell the client that immigration authorities will have this information, so you need it as well.

Note that using a controlled substance *under a prescription* is not considered addiction or abuse unless the prescription is misused.¹⁵ (However, one must assume that a doctor's letter for medical marijuana will not be treated like a prescription. If the person asserts that they are using marijuana under a doctor's care, they risk being found inadmissible under the criminal grounds for "admitting" to a controlled substance offense. See further discussion of marijuana below and in **Part C**.)

Discuss the issue of drug use privately with each family member who is applying. For example, talk with teenagers and young adults separately from their parents and spouses.

In talking with clients, *start by giving them information about the law and procedure, not by asking them questions about their own use of substances*. Remind the client that you are not a medical expert. Your job is to give them the best legal advice possible, which includes preparing them for the medical visa interview.

Describe the interview. Tell the client that the visa doctor will ask them questions from medical diagnosis criteria (from the DSM-5, discussed above) to see whether they have a substance use disorder. Give the client a copy of the criteria and read each question with them. However, note that the doctor may also ask them related questions, and not the exact questions as stated on the criteria. Tell them that if an applicant meets two or more of these criteria, their visa will be denied for at least one year. *They will have to stay outside the United States during this period*. They may also be required to undergo drug abuse courses and submit to random testing, in order to show "sustained remission."

Further, in some consulates the visa may be denied if the client admits that they used a controlled substance at all in the year preceding the appointment, or if there is evidence that they did (such as a positive drug test). If the consulate where their interview will be scheduled might have this practice, warn the client about that. Caution the clients that an admission to something as minor as "tasting" cocaine or sharing a joint once at a party could lead to a finding of inadmissibility on health-related grounds for SUD. If they are denied based on that,

¹⁴ See ILRC, How to Check if You Have a Criminal Record (Nov. 2019), https://www.ilrc.org/background_check_advisory. Some practitioners also try to obtain juvenile records, but these may be protected under state confidentiality laws. Further it may be that it is not in the applicant's interest to obtain the record and then face pressure to give it to immigration authorities. See, e.g., ILRC, Confidentiality of Juvenile Records in California (Sept. 2022), https://www.ilrc.org/sites/default/files/resources/confidentiality_of_juvenile_records_advisory_2022.pdf.

¹⁵ See CDC Technical Instructions: Mental Health, "Key Concepts: Categorization of Substances."

they will have to stay outside the United States at least until they have accrued one year of not using any controlled substance, starting from their last use.

Educate the client about immigration and marijuana. Immigration law treats marijuana the same as it treats heroin or any other controlled substance, even if marijuana use is legalized in the state where they reside. Tell them that the doctor will ask them about any history of substance use, including alcohol and “legal” marijuana, and might give them a urine or blood test to detect substances. They should understand that marijuana can be present in the urine for a month or more, and for several months in hair samples, which are sometimes requested if use is suspected. Note that *working legally in the legitimate cannabis industry* is a basis for denial. Adjustment of status and visa applications are being denied by both USCIS and the consulates under the crimes grounds because the person simply is or was lawfully employed in the legitimate cannabis industry (or in some consular processing cases, denied because the client indicates they plan to seek that employment).¹⁶ See **Part C**, below.

Once you have explained the law, answer any questions that they have. If it helps them to feel less awkward, have them ask questions “for a friend.” Then, ask to discuss your client’s history of substance use, if any. Review the above list of DSM-5 criteria again and have them discuss and practice answering the questions. Continue to answer their questions. In going through the DSM-5, you may want to remind them again that you are not a medical professional and you cannot advise them on substance abuse as a health issue. In case they would like to discuss substance use issues with a professional, connect clients to medical treatment for substance use disorder. Please see Part II for resources for clients. Participating in non-coerced treatment will improve their chances of recovery.

If a client might have an SUD or might trigger any DSM-5 criteria, or if they appear likely to be denied due to evidence of use or their own admission that they used a controlled substance in the last year, consider postponing the medical and other interviews, and/or get expert advice. Remind the client that they might have to undergo drug testing.¹⁷ If the test reveals traces of marijuana or other federal controlled substances, they may be found inadmissible. If the client is interested, connect them to medical treatment for substance use disorder. If you are postponing for a period, make sure your client gets (non-coerced) treatment so they have a chance to improve and receive care. See more information in **Part II**.

Risks in Consular Processing. Compared to an application for adjustment of status, consular processing poses especially serious risks. The client will be in another country and without counsel, and there is no true appeal process and no judicial review of the consulate’s decision.¹⁸ Before sending the client abroad for a consular medical exam and interview, consult colleagues to determine the practice of panel physicians associated with the consulate where your client will be interviewed. Some consulates, including Ciudad Juarez, will find the person inadmissible under the health grounds if they simply admit to having used any controlled substance within the last year. Other consulates may follow the CDC instruction to

¹⁶ See discussion in ILRC, *Immigrants and Marijuana* (June 2021), <https://www.ilrc.org/resources/immigrants-and-marijuana>, and see 9 FAM 302.5-4(B)(4).

¹⁷ Medical examiners are told not to conduct random or wide-scale drug testing, but can order testing based on their evaluation of an individual’s “history, behavior, and physical appearance.” 9 FAM 302.2-8(b)(4)(e).

¹⁸ *Kerry v. Din*, 576 U.S. 86 (2015).

apply the DSM-5 criteria for having a SUD, rather than the “use in the last year” standard. If the interview is at a consulate taking the most extreme position on SUD, it is likely best to delay the consular medical exam and interview until one year past “last use.”

In consular processing cases, a client found inadmissible for having a SUD likely must remain in the home country for a year or more after the last admitted or documented drug use, to amass time in “sustained remission.” See below. Any provisional waiver already approved for unlawful presence will be revoked, and the waiver will need to be resubmitted after a subsequent interview and after a determination of “sustained remission” by the panel physician. This process can lead to very lengthy delays for the client who in most cases must remain outside the U.S. until an immigrant visa may finally be approved.

Example: X is a 17-year-old from California who went to an appointment to apply for his family-based immigrant visa at the U.S. consulate in Ciudad Juarez, Mexico. At the medical appointment he told the panel physician that he took no illegal drugs, “only marijuana, because that’s legal.” In response to further questions, he said that sometimes he thought he should smoke less marijuana but that it was a helpful way to deal with the stress of school and work. Based on that answer, the panel physician found that X was inadmissible because he came within two of the DSM-5 criteria: he had cravings and he was not successful in trying to stop. But *even without the DSM-5 criteria finding*, at that consulate it is quite possible that X would have been denied just because he admitted using a federal controlled substance (marijuana) within the year before the appointment. The denial means that X will have to remain in Mexico until he can show that he is in “sustained remission,” which the consulate defines, at a minimum, as having a year during which he did not use a controlled substance at all, since his last use.

If an immigration advocate had counseled X, X would have known that marijuana is a federal controlled substance; that his casual answers to the questions about quitting might be used to assert that he had a mild SUD; and that, at least at the Ciudad Juarez consulate, simply admitting to marijuana use within the prior year likely would cause him to be found inadmissible. He could have thought carefully about when he last used marijuana, and he and the immigration advocate might have decided to put off the appointment for some months or a year. If it appeared that X might have a SUD, the advocate could have referred him to a clinic for voluntary counseling to address the problem.

Example: Y is an adult who went to an appointment to get a family-based immigrant visa at a U.S. consulate in Brazil. At the medical interview he said that he had tried cocaine twice but decided he did not like it. Fortunately, this particular civil surgeon applied the DSM-5 criteria. She found that Y did *not* come within two or more criteria, and thus found that he was admissible under the health grounds. Y also was very fortunate that his statement to the panel physician did not lead a consular officer to try to get him to formally admit that he had committed a controlled substance offense (had ever taken cocaine as an adult). A qualifying admission would make him *permanently* inadmissible for permanent residency through family-based immigration under the criminal grounds, with no possible waiver.

If the immigration advocate had counseled Y, then Y would have known that a single admission of taking cocaine *might* lead to inadmissibility under the criminal grounds. If he understood the legal requirements, he could have considered, how did he know that the

substance someone gave him at a party actually was cocaine? In addition, the advocate could have gathered information about the practice at that consulate, so that Y could have made an informed decision about how to proceed. Luckily, he was granted the visa even without this advice.

Sustained Remission after a Year. One must be a *current* “drug abuser or addict” (currently suffering from at least a mild SUD) to be inadmissible. A person is not inadmissible if they are in “sustained remission.” The CDC immigration medical guidelines state that according to the DSM-5, sustained remission after a finding of a SUD requires a twelve-month period of *no use* of the substance or associated harmful behavior.¹⁹ A person who admits to a single use of the substance in the preceding year will be found not to be in sustained remission.

(Note that the CDC guidelines appear to be inconsistent with medical standards on this point. The DSM-5 does not define sustained remission as no use of the substance at all; it defines it as a year or more of not meeting any of the SUD criteria other than cravings.²⁰ But because medical officers are bound to follow the CDC instructions, advocates seeking change will have to persuade the CDC to correct their guidelines.)

In consular processing cases, generally the person must remain in the home country during the remission period. The medical examiner may require a period of more than a year since last use, or other conditions such as random drug testing or attendance at drug abuse classes or Narcotics Anonymous (NA) type meetings. The period required can be less than a year, for example if the person admits to last use of a drug six months ago so that they only need another six months to be able to demonstrate “sustained remission.” When the remission period has been met, the applicant will need to request a new consular appointment and schedule a new medical exam, and hopefully will be found in sustained remission, admissible, and permitted to immigrate, if no other inadmissibility grounds are applicable which then require the filing of an application for a waiver.

Immigration Applications, Waivers, and Relief. Being inadmissible for suffering from a SUD not in sustained remission, which the INA refers to as being a current “drug abuser or addict,” is a bar to eligibility for some but not all applications for lawful immigration status or temporary protection. For summaries of the various immigration applications and the bars that apply to each of them, see ILRC, *Immigration Relief Toolkit* (2018) and other resources.²¹

¹⁹ See CDC Technical Instructions: Mental Health Examination at “Remission.”

²⁰ For example, the DSM-5 criteria for alcohol use disorder in sustained remission states sustained remission is “after full criteria for alcohol use disorder were previously met, none of the criteria for alcohol use have been met at any time during a period of 12 months or longer (with the exception ... [of], ‘Craving, or a strong desire or urge to use alcohol,’ may be met.” (DSM-5: American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition; ICD-10-CM: International Statistical Classification of Diseases and Related Health Problems, 10th Revision, Clinical Modification). In contrast, the CDC Technical Manual for Civil Surgeons misstates that “the current vision of the DSM defines sustained remission as a period of at least 12 months during which no substance use or mental disorder-associated behaviors have occurred, with the exception of craving in the cause of substance use disorder” (CDC Technical Manual: Mental Health).

²¹ See free online resources such as ILRC, §N.17 Immigration Relief Toolkit (2018) and §N.17A Updated Immigration Relief Chart (Nov. 2021), both at <https://www.ilrc.org/chart>, and see other advisories at <https://www.ilrc.org/> on relief such as VAWA, SIJS, U and T visas, family immigration, asylum, TPS,

There is *no* waiver of the “drug abuser or addict” inadmissibility ground for people applying for permanent residency through an employment or family visa, including as a VAWA self-petitioner. As described above, however, because the ground requires a “current” SUD diagnosis (not in sustained remission), the person can amass a year or more of meeting requirements to show remission, and then go through the medical exam again to show that they now are admissible.

This inadmissibility ground is a bar to some other immigration applications, although discretionary waivers may be available. It is a statutory bar to eligibility for Temporary Protected Status, a T or U non-immigrant visa, and adjustment of status as an asylee, refugee, special immigrant juvenile, or T visa holder. However, each of these forms of relief has its own discretionary waiver that, if granted, will cure this ground. This ground is not a bar to applying for cancellation of removal for permanent residents, non-permanent residents, or VAWA applicants and it does not “stop the clock” on the period of continuous residence or physical presence required for cancellation. It is not a bar to establishing good moral character.

There are two important caveats, however. First, all of the above forms of relief are highly discretionary. An immigration judge or official may view the finding that the person has a SUD as a sign that the person is immoral, weak, or dangerous, as the name “drug abuser” implies, rather than a person who has a medical condition. Educate the adjudicator about the medical nature of SUD and the realities that sufferers face, and argue that your client’s medical condition is not a negative discretionary factor. See **Part II** of this Advisory for more information.

Second, even if a waiver is available for being inadmissible for having a SUD, one must be careful to avoid coming within a related and far more serious inadmissibility ground, which is that a person is inadmissible who makes a qualifying admission to an immigration authority that they have committed a controlled substance offense (e.g., that they possessed or used a controlled substance, including marijuana). Such an admission will bring them within the *criminal* grounds of inadmissibility, which are more punitive than the health grounds. See **Part C**, below.

Apart from applying for consular processing or adjustment of status, which require medical exams, the medical issue of a SUD would come up only if the person’s history signals the issue, e.g., they had multiple past charges for drug offenses in criminal or delinquency proceedings, even if they never were convicted.

Deportable. A noncitizen is deportable who has been a “drug abuser or addict” (suffered from a SUD that was not in remission) at any time since their admission into the United States. INA § 237(a)(2)(B)(ii). This ground is very rarely charged. If it is charged, seek expert legal advice and remember that this is a medical determination that can have a medically based defense.

cancellation, and removal defense. See also ILRC webinars and manuals available for purchase, at <https://www.ilrc.org/store>.

C. Avoid “criminal” inadmissibility grounds relating to controlled substances

Being a current “drug abuser or addict” is a *health* ground of inadmissibility, at INA § 212(a)(1). The *crimes-based* grounds of inadmissibility at INA § 212(a)(2) carry more serious penalties.

This section will discuss inadmissibility under the crimes-based grounds, which are based on the person making a qualifying admission that they committed a controlled substance offense, or on immigration authorities having “reason to believe” the person participated in drug trafficking or, in some cases, benefitted from a relative’s trafficking. (For a discussion of criminal *convictions* of drug offenses, which are bases for inadmissibility and deportability, see other resources.²²)

1. Inadmissible for “admitting” having possessed or used a controlled substance

A noncitizen is inadmissible who either is convicted of, or who makes a qualifying *admission* to immigration authorities that they committed, an offense relating to a federally defined controlled substance.²³ Admitting the offense when there is no conviction is not a ground of deportability, but only of inadmissibility. Coming within this inadmissibility ground is a bar to most applications for permanent residency and to many, but not all, other forms of immigration relief. Some waivers are available; see below.

For inadmissibility purposes, making a qualifying admission that one committed a drug offense has the same penalties as a conviction. An admission poses a risk to noncitizens who have or had a SUD related to a controlled substance, in that they have engaged in use or possession of the substance. Admitting that they have possessed marijuana triggers this ground even if it was permitted under state law.

In discussing their medical condition with an immigration service doctor, official, or judge, the person risks being found inadmissible for having “admitted” the offense. This reality underscores the need to carefully screen and talk with clients before any government interview, to attend the interview with the client if possible, and not to proceed if there is a risk. Of course, this is especially difficult in consular processing.²⁴

The main strategy to avoid coming within this ground is for the person to avoid making a *legally qualifying admission* of drug offense, and/or to argue that any prior admission did not qualify. If the person has been found to have a SUD that is not in sustained remission (a current “drug abuser or addict”), the goal is to keep the focus on medical issues and the health

²² See, e.g., ILRC, How to Defend Immigrants Charged with Drug Offenses (Jan. 2023), www.ilrc.org/crimes and see §N.2 Definition of Conviction (2019), §N.8 Controlled Substances (2019), and ILRC, Pereida and California Offenses (2021), all at <https://www.ilrc.org/chart>.

²³ INA § 212(a)(2)(A)(i)(II) [8 USC § 1182].

²⁴ In consular processing, arguably an applicant could simply decline to answer an officer’s “fishing” question about drug use if there is no evidence of use, on the grounds that they should not be required to prove a negative, and that consular processing – as opposed to, e.g., adjustment of status – is not a discretionary application and should not be denied based on refusing to answer. This would be a risky strategy, however.

grounds of inadmissibility, not the criminal grounds, and to avoid making a qualifying admission.

What is a qualifying admission of an offense? The BIA has set out requirements for a qualifying admission, which are designed to provide some due process.²⁵ For example, the immigration official first must provide the person with an understandable definition of all the elements of the controlled substance offense, and then the person must voluntarily admit facts that meet each of these elements.²⁶ But in some cases authorities have ignored this requirement. In one case, the Ninth Circuit upheld the use of an admission to a doctor at a consular medical appointment, even though the doctor did not provide the person with an explanation of elements of an offense.²⁷ The admitted conduct must involve a “controlled substance” as that is defined under federal law. Recall that this applies to marijuana even if possession and use is legalized in the state. See online resources for suggestions of strategies to avoid such an admission while still pursuing an application, or to assert that a client’s prior statement was not a qualifying admission.²⁸

A beneficial exception to this ground is that several older BIA decisions provide that if the conduct was charged in criminal court and the final disposition was something less than a conviction, the person should not be found inadmissible for admitting that same conduct.²⁹ For example, if Mary was criminally charged with being under the influence of cocaine on March 4, 2020, and if this did not result in a conviction (e.g., because the charge was dismissed, or Mary was convicted but the conviction was eliminated for immigration purposes by post-conviction relief³⁰), then Mary cannot be found inadmissible for admitting that same incident. This would be true even if she admits the incident before an immigration officer or judge. However, she could be found inadmissible for admitting conduct on a different day, if that conduct was not charged.

Also, neither a delinquency adjudication nor an admission of conduct that one committed while under the age of 18 triggers this crimes-based ground, because the person must admit to

²⁵ See, e.g., discussion in ILRC, *Immigrants and Marijuana* (May 2021) (Part IV), *supra*, and in Kesselbrenner and Rosenberg, *Immigration Law and Crimes*, Chapter 3.

²⁶ See, e.g., *Matter of K-*, 7 I&N Dec. 594 (BIA 1957). *Matter of K-*, 9 I&N Dec. 715 (BIA 1962); *Matter of G-M-*, 7 I&N Dec. 40 (AG 1956), and other cases cited in *Immigrants and Marijuana*, *supra*.

²⁷ *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002).

²⁸ See discussion of different strategies in ILRC, *Immigrants and Marijuana*, *supra* and see the ILRC webinar, *Marijuana and Immigrants* (May 2021) available at <https://www.ilrc.org/recordings>.

²⁹ See, e.g., *Matter of E.V.*, 5 I&N Dec. 194 (BIA 1953); *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968), *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980). Despite this, it may be best to decline to formally admit the conduct to immigration authorities.

³⁰ For more information as to the immigration definition of conviction, see ILRC, *What Qualifies as a Conviction for Immigration Purposes?* (2019), <https://www.ilrc.org/resources/what-qualifies-conviction-immigration-purposes>. For information as to what post-conviction relief, using California law as a model, see the ILRC manual, *California Post-Conviction Relief for Immigrant: How to Use Criminal Courts to Erase the Immigration Consequences of Crimes* (January 2023), <https://store.ilrc.org/store> and the ILRC practice advisory, *Overview of California Post-Conviction Relief for Immigrants* (July 2022), <https://www.ilrc.org/resources/overview-california-post-conviction-relief-immigrants>.

committing an adult “crime,” not civil delinquency.³¹ (But a minor can be found inadmissible under the health grounds as a “drug abuser or addict” (see **Part B**, above) or under the criminal “reason to believe” trafficking ground (see **Subpart 2**, below).)

Penalties for being inadmissible for admitting to a controlled substance offense. The penalties are far harsher than for being an “abuser or addict” under the health grounds.

First, this inadmissibility ground is permanent. There is no one-year “sustained remission” possible as there is with the “abuser or addict” ground. Here the person remains inadmissible unless and until they are granted some immigration waiver or status that “forgives” the ground.

Second, fewer waivers and relief are available. The person is permanently barred from immigrating through family or employment, as a VAWA self-petitioner, or as a special immigrant juvenile (if they were 18 or older when they committed the conduct).³² For these categories of relief, no waiver of this ground is available. Being inadmissible under the crimes grounds also is an unwaivable bar to TPS, and it can disqualify applicants for any kind of cancellation of removal by “stopping the clock” on the accrual of the required period of physical presence or continuous residence as of the date of the conduct.³³ It is a statutory bar to establishing good moral character, which is a requirement for naturalization and some forms of relief, if the admitted conduct occurred within the GMC period.

Some relief remains available. A noncitizen who has admitted using or possessing a controlled substance is not barred from eligibility for asylum, withholding, Convention Against Torture (CAT) relief, or DACA. The person can apply for a waiver of inadmissibility in an application for a U or T visa or adjustment of status as an asylee, refugee, or T visa holder (U visa adjustment does not require admissibility for most grounds). All of this relief is highly discretionary, however. See **Part II** regarding why having a SUD that caused one to use a controlled substance should not be a negative factor in discretion. See other resources for further discussion of eligibility for relief despite criminal record issues.³⁴

³¹ *Matter of MU*, 2 I&N Dec. 92 (BIA 1944); see also *Matter of Devison*, 22 I&N Dec. 1362 BIA 2000) (en banc). See ILRC, What are the Immigration Consequences of Delinquency? (March 2020) at <https://www.ilrc.org/what-are-immigration-consequences-delinquency>.

³² A waiver might be available if the admitted conduct was a single incident involving simple possession of 30 grams or less of marijuana. See INA § 212(h) [8 USC § 1182] and see ILRC, Immigrants and Marijuana (Part III), *supra*.

³³ Regarding TPS, see INA § 245A(c)(2)(A) and see ILRC manual, *Temporary Protected Status: Strategies and Practice* (July 2022) at www.ilrc.org/store. Regarding cancellation of removal, see, e.g., ILRC, Practice Advisory: Eligibility for Relief: Update on LPR Cancellation of Removal (Nov. 2021), https://www.ilrc.org/sites/default/files/resources/relief_cancellation_removal_lpr_11.2020.pdf.

³⁴ See generally ILRC, §N.17 Immigration Relief Toolkit (2018) and §N.17A Updated Immigration Relief Chart (Nov. 2021), both at <https://www.ilrc.org/chart>, and see other advisories on specific relief at <https://www.ilrc.org/>.

2. Inadmissible if immigration authorities have “reason to believe” the person participated in, or in some cases benefitted from, drug trafficking

A non-U.S. citizen is inadmissible if a relevant immigration official has “reason to believe” they ever assisted or participated in drug trafficking. INA § 212(a)(2)(C)(i). This ground is not limited to major drug dealers. Some people who have a SUD may end up selling small amounts of controlled substances for subsistence. The person’s own statement about sales, or any other substantial, probative evidence, could be used as evidence against them. The person’s statement about trafficking does not have to meet all the requirements of a qualifying “admission” of conduct, set out in **Subpart 1**, above. Minors have been found inadmissible for trafficking under this ground, although advocates should fight against this.³⁵ Clients must understand this extra risk.

This ground also can punish the trafficker’s family. The spouse, son, or daughter of a non-U.S. citizen who is inadmissible for trafficking also is inadmissible, if within the last 5 years they “obtained any financial or other benefit” from the trafficking, and knew or reasonably should have known that trafficking was the source. See INA § 212(a)(2)(C)(ii).

The penalties for this ground are worse than for admitting possession or use of a controlled substance. For example, there is no waiver of the trafficking inadmissibility ground for an asylee or refugee who applies for adjustment. See INA § 209(c).

3. Inadmissible for legally working in the legitimate cannabis industry, or planning to do so

The majority of states have legalized the recreational or medical use of marijuana, and the legitimate cannabis industry is a multi-billion-dollar U.S. industry. However, marijuana remains a Schedule I controlled substance for *federal law* purposes, including immigration. Immigrants who have lawfully worked in the industry, even after having paid state and federal income taxes on their earnings, can nevertheless be held inadmissible in a few ways: either because they admit committing a federal controlled substance offense by working in an enterprise that produces, distributes, or sells marijuana (and perhaps in an enterprise that, e.g., provides research or marketing, and has clients in the cannabis industry) or because immigration authorities now have “reason to believe” they participated in illicit drug trafficking. See **subparts 1 and 2** above. In addition, the Department of State *Foreign Affairs Manual* instructs United States consular officials that a visa applicant who *intends* to work in the cannabis industry is engaging in “unlawful activity” that will make them inadmissible under the national security/terrorism grounds.³⁶

³⁵ See defense suggestions at Junck, *The Impact of Drug Trafficking on Unaccompanied Minor Cases* (2015), https://www.ilrc.org/sites/default/files/resources/impact_drug_trffk_unacomp_minor_cases-20180719.pdf.

³⁶ The national security/terrorism inadmissibility ground, INA § 212(a)(3)(A)(ii), states that a person is inadmissible who is “traveling to the United States solely, principally, or incidentally to engage in ... any other unlawful activity.” The *Foreign Affairs Manual* (FAM) lists “travel to engage in business activities related to the marijuana industry that violate federal criminal law” as an example of such unlawful activity. See 9 FAM 302.5-4(B)(4), added in 2020.

D. Alcohol use disorder, driving under the influence

Noncitizens who may have an alcohol use disorder (AUD, called alcoholism in CDC instructions) face three possible penalties: 1) They can be barred from establishing “good moral character” if they are a “habitual drunkard”; 2) they are inadmissible under the health grounds if they have or have had a mental or physical disorder (such as AUD) and related behavior may cause danger to self or others (such as driving under the influence); and 3) a conviction or even an arrest for driving under the influence (DUI) can cause a variety of penalties.

1. “Habitual drunkards” and good moral character

To be eligible for naturalization and some forms of immigration relief,³⁷ a noncitizen must establish that they have been of “good moral character” (GMC) during a certain period of time leading up to filing the application, e.g., the preceding five years. The person cannot establish good moral character if during the period for which GMC must be shown they have come within certain statutory bars to establishing GMC. See INA § 101(f). If a bar applies, the person must amass the required number of years of good moral character, starting after the date they committed the disqualifying act.³⁸

The first bar on the statutory list is being a “habitual drunkard.” INA § 101(f)(1). This term derives from the common law status offense of being a “common drunkard.”³⁹ The more accurate, medical description would be that the person suffers from an alcohol use disorder (AUD). Based on the meaning of the pejorative phrase “habitual drunkard,” arguably this requires a “severe” (as opposed to “mild”) AUD⁴⁰ that results in the person causing harm to others.

Advocates have argued that making a medical condition like an AUD a bar to establishing that one has good moral character violates the Constitution for lack of any rational basis. The Sixth and the Ninth Circuit Courts of Appeals have upheld the constitutionality of the bar, however. The Sixth Circuit upheld the bar only by interpreting “habitual drunkard” to require not just the medical condition, but also a showing of associated harmful conduct.⁴¹ Advocates can consider arguments that a client who has an AUD but has not shown harm to the community is not barred from establishing GMC. However, in a Ninth Circuit *en banc* decision, with two concurrences and a dissent, the plurality held that “good moral character” should be viewed simply as a requirement for certain applications rather than an actual description of character,

³⁷ Notably, an applicant for non-LPR cancellation must show GMC for the preceding ten years, an applicant for VAWA cancellation for the preceding three years, and a VAWA self-petitioner must show GMC but with some possible waivers. See discussion of relief in ILRC, N.17 Immigration Relief Toolkit, §17.26 (2018) at <https://www.ilrc.org/chart>.

³⁸ See further discussion of GMC in immigration manuals and at ILRC, N.17 Immigration Relief Toolkit, §17.26, *supra*.

³⁹ See Sharpless, pp. 1904-1905 and n. 71.

⁴⁰ According to the DSM-5, mild SUD is diagnosed when 2-3 manifestations from the listed substance criteria are met, moderate SUD is when 4-5 manifestations are found, and severe SUD is when 6 or more manifestations are met.

⁴¹ *Tomaszczyk v. Whitaker*, 909 F.3d 159, 166 (6th Cir. 2018) See further discussion in Sharpless, pp. 1923-1932.

and that “Congress reasonably could have concluded that, because persons who regularly drink alcoholic beverages to excess pose increased risks to themselves and to others,” they will be barred from establishing “good moral character.”⁴² Otherwise, one could not hold that a medical condition like substance abuse is a reflection of bad character.

2. Inadmissible due to a mental or physical disorder and related behavior that poses a danger to self or others

An applicant is inadmissible under the health grounds if (a) they have a mental or physical disorder and related behavior that may pose, or has posed, a threat to property, self, or others, or (b) they had such a disorder and history of behavior in the past, and the behavior is likely to recur. INA § 212(a)(1)(A)(iii). In some cases this ground may be overcome by filing a waiver,⁴³ and the government also may require a bond.

The CDC includes alcohol use disorder (AUD), which it refers to as “alcoholism,” in this category. It is evaluated according to the same DSM-5 categories for SUD relating to controlled substances.⁴⁴ See **Part B**, above.

PRACTICE TIP: As with a SUD relating to any drug, a person may avoid inadmissibility for an alcohol use disorder if they are in “sustained remission.” It may be helpful to provide an independent evaluation by a medical expert explaining how the client is in remission.

Along with a diagnosis of AUD, there must be evidence of related behavior that can pose a danger to the “property, safety, or welfare” of the applicant or others. Arrests or convictions for driving under the influence (DUI) often serve as such evidence. The Foreign Affairs Manual for consular processing indicates that a person should be referred back to the panel physician for additional evaluation if it is discovered by a consular officer that they have been arrested for or convicted of one DUI within the last five years, two DUI’s within the last 10 years, or if there is “other evidence of an alcohol problem.”⁴⁵ However, advocates report that some United States consulates (for example, in Ciudad Juarez) have not applied the “other evidence” provision consistently with the CDC guidelines. For example, they report that the consulate denied one applicant based on a single DUI *more* than ten years in the past, and denied another applicant who just reported drinking 3-4 beers on occasional weekends and never had a DUI arrest. Although such interpretations by panel physicians and the psychiatrists they refer to for extended evaluations, appear not to comply with the DSM-5 definition of an AUD, consular decisions based on “factual” determinations are extremely difficult if not impossible to overturn. Clients must be warned to be cautious and accurate in describing their alcohol consumption, and to understand that the panel physicians are an arm of the consulate and not a “regular”

⁴² The Ninth Circuit en banc overturned a published panel decision that had held the “habitual drunkard” bar to be unconstitutional because it is not rational “to link a person’s medical disability with his moral character.” *Ledezma-Cosino v. Lynch*, 819 F.3d 1070, 1974 (9th Cir. 2016), overruled sub nom by 857 F.3d 1042 (9th Cir. 2017) (en banc). See further discussion in Sharpless, pp. 1923-1932, and her opinion that constitutional attacks on the definition are unlikely to prevail.

⁴³ See INA § 212(g), 8 CFR § 212.7(b).

⁴⁴ See CDC Technical Instructions: Mental Health, “Additional Concepts: Alcohol.”

⁴⁵ See Department of State, Foreign Affairs Manual, 9 FAM 302.27(b)(3), https://fam.state.gov/fam/09FAM/09FAM030202.html#M302_2_7_B.

doctor. Clients even may want to reduce their alcohol consumption significantly in the year prior to their anticipated consular interview and medical examination. Delaying a consular interview, and/or obtaining an expert evaluation related to alcohol abuse to take to the medical examination, might assist in convincing the panel physician that no diagnosis of AUD should be made.

If a noncitizen passes their medical examination, but authorities later acquire criminal records and learn that the person had an undisclosed “significant history” of alcohol-related driving incidents,⁴⁶ they will be recalled for reexamination.

3. Arrest and conviction for driving under the influence

Multiple immigration issues can arise from conviction of, or just arrest for, a drug- or alcohol-related driving offense such as driving under the influence or driving while intoxicated, which we will refer to as a DUI. As discussed in Subparts 1 and 2, above, DUI arrests or convictions can serve as evidence that the person is barred from establishing good moral character as a “habitual drunkard,” or is inadmissible due to a mental or physical condition and related behavior that may pose a threat to self or others, or is a “drug abuser or addict.” Conviction of a DUI is a bar to DACA, and a DUI with injury has been held a potential bar to asylum as a “particularly serious crime.”⁴⁷

In California, a plea to reckless driving with alcohol, Vehicle Code § 23103.5 (“wet reckless”), as an alternative to a DUI has some advantages. It is not a bar to DACA and has not been held a particularly serious crime, and it is somewhat less damaging in discretionary decisions. Of course, VC § 23103, (reckless driving, or “dry” reckless), or some lesser offense, is far better than a wet reckless.

A conviction for a DUI is a serious negative factor as a matter of discretion, including in bond hearings. In *Matter of Siniauskas*, 27 I&N Dec. 207, 209 (BIA 2018) the BIA stated that driving under the influence “is a significant adverse consideration in determining whether an alien is a danger to the community in bond proceedings.” In practice, a single, relatively recent DUI is likely to prevent release on bond.

Attorney General Barr held that there is a presumption that a person convicted of two DUI offenses during the statutory GMC period is barred from showing good moral character, regardless of the person’s rehabilitation or the fact that the person is not a “habitual drunkard.” *Matter of Castillo-Perez*, 27 I&N Dec. 664 (AG 2019) (denying eligibility to apply for non-LPR cancellation, which requires the person to establish GMC for the preceding 10 years). The presumption cannot be rebutted by rehabilitation or good works during the GMC period, but

⁴⁶ The USCIS Policy Manual sets out what arrests or convictions amount to a significant history. See USCIS Policy Manual, Vol. 8, Part B, Chap. 7, <https://www.uscis.gov/policy-manual/volume-8-part-b-chapter-7>.

⁴⁷ In a fact-based assessment, a conviction of a DUI with injury was held to be a particularly serious crime. Generally multiple DUI’s, and/or a DUI with a high Blood Alcohol Count (BAC), have not been held particularly serious crimes but there is no guarantee that this will continue. For more information on DUI’s see ILRC, *Immigration Consequences of Driving under the Influence* (2017), https://www.ilrc.org/sites/default/files/resources/dui_advisory_2final.pdf.

perhaps by a showing that the conduct was an “aberration.” *Id.* at 671. See online practice advisory.⁴⁸

E. Discretion and hardship

Discretion. As **Part II** of this Advisory demonstrates, having a substance use disorder is a medical condition, one that often arises as a response to trauma. As such, it should not be a negative factor for discretion—especially when the person is making strong efforts to heal. Immigration adjudicators, however, may treat a SUD or AUD as evidence that the person is immoral, weak, and/or dangerous.

The medical information set out in Part II of this Advisory can help to educate the immigration judge or official that they should view the person as someone trying to deal with a chronic illness. Remind them that the CDC, Department of State, and USCIS all have adopted this view for immigration purposes. Findings or testimony by a psychologist, medical professional, the person’s Narcotics Anonymous (NA) or Alcoholics Anonymous (AA) sponsor, family members, or similar relevant testimony can make a difference. Some people’s recovery from severe SUD is nothing short of heroic. Significantly, many immigrants have survived extreme trauma, and an expert can tie the experience of trauma to the response of SUD, and the client’s efforts to recover. Of course, this is especially relevant where the person is applying for relief based on traumatic abuse, persecution, or other experiences.

As we discussed in **Part C**, above, it may be critical for the applicant to avoid making a qualifying “admission” that they violated any drug law, because that will make them inadmissible under the crimes grounds and ineligible for admission or some forms of relief. Discussing their history of dealing with a SUD while not formally “admitting” to using a controlled substance requires careful attention.⁴⁹ For some forms of relief, “admitting” to drug use or possession is not great, but not fatal. This may be true for, e.g., asylum, withholding, CAT, perhaps T and U visas, and their related applications for adjustment to permanent residency, for those in which adjustment is subsequently possible.⁵⁰

Hardship. Like any serious medical condition, suffering from SUD, or having a relative or partner who does, causes hardship. Advocates can find and submit evidence that shows that the country to which the family may be removed provides little or no access to effective care for a SUD, and sufferers can be subject to abuse and violence, including by drug cartels.⁵¹

⁴⁸ See discussion at CLINIC/NIPNLG, Practice Pointer: *Matter of Castillo-Perez* (March 2020), https://nipnlg.org/PDFs/practitioners/practice_advisories/gen/2020_25Mar_Castillo-Perez.pdf.

⁴⁹ See discussion of strategies at ILRC, *Immigrants and Marijuana* (June 2021), *supra*.

⁵⁰ Withholding and CAT relief do not result in eligibility for permanent residence. Rather, removal is ordered but “withheld” and if country conditions change the person may then be removed.

⁵¹ For example, regarding Mexico see, e.g., CBS News, “6 people shot dead at drug rehab center in Mexico,” July 25, 2022, <https://www.cbsnews.com/news/six-killed-drug-rehab-center-jalisco-mexico/>; Rafful, Medina-Mora, González-Zúñiga, Jenkins, Rangel, Strathdee & Davidson, “‘Somebody Is Gonna Be Hurt’: Involuntary Drug Treatment in Mexico,” *Medical Anthropology*, 39:2, 139-152 (May 17, 2019), <https://www.tandfonline.com/doi/full/10.1080/01459740.2019.1609470>, and Vice News, “Inside the Secretive, Abusive World of Mexico’s Private Drug Rehab Centers” (April 27, 2016), <https://www.vice.com/en/article/gy9kkx/inside-the-secretive-abusive-world-of-mexicos-private-drug-rehab-centers>.

This ends Part I of this Advisory. Please continue to Part II.

Part I and Part II both are available at <https://www.ilrc.org/resources/immigrants-and-substance-use-disorders-legal-and-medical-perspective-0>.

**San Francisco**

1458 Howard Street
San Francisco, CA 94103
t: 415.255.9499
f: 415.255.9792

ilrc@ilrc.org
www.ilrc.org

Washington D.C.

1015 15th Street, NW
Suite 600
Washington, DC 20005
t: 202.777.8999
f: 202.293.2849

Austin

6633 East Hwy 290
Suite 102
Austin, TX 78723
t: 512.879.1616

San Antonio

10127 Morocco
Street
Suite 149
San Antonio, TX
78216

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.