IMMIGRANTS AND MARIJUANA

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I. Overview: Immigrants and Legalized Marijuana

As of May 2021, 36 states[2] and the District of Columbia have legalized medical marijuana. Of these, 18 states[3] and the District of Columbia also have legalized recreational marijuana for adults. Noncitizens residing in these states may reasonably think that using "legal" marijuana in accordance with state law will not hurt their immigration status, or their prospects for getting lawful status. Unfortunately, that is wrong. For immigration purposes, it is federal law that controls, and it remains a federal offense to possess marijuana.

In particular, a noncitizen who admits to an immigration official that they possessed marijuana can be found inadmissible, denied entry into the United States, or have their application for lawful status or naturalization denied. Depending on the circumstances, it can make a lawful permanent resident deportable. This is true even if the conduct was permitted under state law, the person never was convicted of a crime, and the conduct took place in their own home.

State laws legalizing marijuana provide many benefits, but unfortunately, they also are a trap for unwary immigrants. Believing that they have done nothing wrong, immigrants may readily admit to officials that they possessed marijuana. In some states, such as Washington, ICE, CIS, and/or CBP agents have aggressively asked noncitizens if they ever have possessed marijuana, in an attempt to find people inadmissible. In other states, such as California, CIS does not appear to be doing this, although CBP officials at border and internal checkpoints are.

This Advisory will review the laws and key defense strategies. The very best strategy is to educate noncitizens ahead of time – individually with clients, and also with the community. Advocates can distribute community flyers, talk to local groups, share information through ethnic media including newspapers, radio and television, reach out to past clients, and employ other strategies. The message is simple: Immigration law treats any marijuana-related activity as a crime, with harsh immigration penalties, even if it is permitted under state law.

The advice is:

- Stay away from marijuana until you are a U.S. citizen.
- If you truly need medical marijuana, get a legal consult.
- Do not carry marijuana, a medical marijuana card, or marijuana stickers, t-shirts, etc. Remove any text or photos relating to marijuana from your social media and phone.
- If you have used marijuana, or worked in the industry, get a legal consult before leaving the United States or applying for naturalization or immigration status.

- Never discuss conduct involving marijuana with immigration, border, consular, or law enforcement authorities -- unless your immigration attorney has advised that this is safe.

This advisory uses the terms "cannabis," "marijuana" and "marihuana" interchangeably, since different statutes use different terms although they all refer to the same plant. Note, however, that state and federal definitions can differ regarding which *parts* of the plant they include. The federal definition of "marihuana" excludes hemp and mature stalks, whereas some state definitions include one or both of these. The difference may support an immigration defense. See Part VI, below.

Possible Changes in Federal Law. As of May 2021, there is some possibility that this year Congress will remove marijuana from federal drug schedules. That would prevent new conduct and convictions relating to marijuana from being an immigration problem, because marijuana would no longer be a federally-defined controlled substance. Congress also could include retroactive provisions to protect immigrants with past conduct or convictions relating to marijuana. In 2020, the House passed the MORE Act, including these provisions, and a similar bill is being introduced in the Senate. In light of this, if there is no better option for a case, consider the "wait, litigate, vacate" options. Wait to file a problematic affirmative case until we have more information; keep litigating valid claims in an already existing case, which also will keep it alive in case there is change in the law; and use this time to investigate obtaining a vacatur based on legal error, to eliminate a conviction for immigration purposes.

II. Federal and State Marijuana Laws

State laws that legalize marijuana fall into two categories. State *medical* marijuana laws typically require the person to have a doctor's order. They permit buying, owning, using, and often growing a small amount of marijuana, but do not permit giving away, selling (without a license), or other conduct. State *recreational* marijuana laws don't require a doctor's order, but do require the person to be an adult. With some restrictions, they may permit buying, owning, using, growing, and giving away a small amount of marijuana, but not selling (without a license) or other conduct. States may also license businesses and other entities, and their employees, to engage in regulated commerce involving marijuana.

In contrast, federal law has no marijuana exceptions for medical or other use. It is a federal offense to possess, give away, sell, cultivate, import or export marijuana. This includes any activity, commercial or otherwise, involving *almost* any part (see Part VI, below) or derivative of the plant. However, using or being under the influence of a controlled substance, and possessing paraphernalia, are *not* federal offenses (see Part IV.D, below).

One does not need to be on federal property or travel between states to be guilty of a federal drug crime. The Supreme Court held that even growing and using a marijuana plant at home for medical purposes, in accordance with state law, is an activity that is regulated by federal law because it may affect interstate commerce.[4] This is why even conduct like lawfully (under state law) possessing a small amount of marijuana within one's own home is a federal drug offense.

Despite the fact that possession of marijuana for personal use is a federal crime, there have been few recent federal criminal prosecutions for such conduct. Since 2014, Congress has passed appropriations riders that bar the Department of Justice from using any federal funds to bring criminal prosecutions based on conduct that is permitted by state medical marijuana laws. This funding prohibition effectively bars federal prosecution. See discussion in *U.S. v. McIntosh*, 833 F.3d 1163, 1169-70 (9th Cir. 2016). This rider must be continually renewed in various budget bills. It likely will be renewed in 2021, and possibly expanded to include state recreational laws, not just medical.

Significantly, the appropriations rider does not prohibit Department of Homeland Security from imposing *severe penalties under civil immigration law* on those who have used medical or recreational marijuana in accordance with state law. Noncitizens who formally admit to using medical or recreational marijuana in accordance with state law, and even those who merely have worked in the industry, can be found "inadmissible" under immigration laws. See next section.

III. Removal Grounds and Good Moral Character Bars Triggered by Marijuana

A. Conviction Can Make a Noncitizen Deportable, Inadmissible, Temporarily Barred from Establishing Good Moral Character, and/or an Aggravated Felon

A conviction relating to marijuana (as it is federally defined) can have serious immigration consequences.

- A conviction relating to marijuana can cause deportability under the controlled substance ground. There is one exception: one or more convictions that arise from a single incident involving possession of 30 grams or less for personal use, or certain closely related offenses, does not cause deportability.[5]

- The conviction can cause inadmissibility under the controlled substance ground. There is no 30-grams exception.[6]

- ✓ A lawful permanent resident who is convicted of possessing 30 grams or less of marijuana is not deportable, but is inadmissible. They are safe if they remain in the United States, but if they travel abroad, upon their return they can be found to be seeking a new admission at the border under INA § 101(a)(13)(C)(v) and found inadmissible under INA § 212(a)(2). They can be excluded unless they qualify for and are granted some waiver or relief. If instead they are mistakenly allowed to re-enter the United States without this procedure, they can be charged with being deportable for having been inadmissible at last entry under INA § 237(a)(1). Always check for travel if a permanent resident has been convicted of a marijuana offense.

- Under INA § 101(f)(3), a person cannot establish good moral character (GMC) if, during the time for which GMC must be shown, they fit the description in the controlled substance inadmissibility ground. In that case they may begin a new GMC period as of the date that they *committed* the offense that later they were convicted of (or admitted). This is a temporary or "conditional" rather than a permanent bar to establishing GMC; a new period of GMC can begin to accrue after the date the offense was committed. Unlike the controlled substance inadmissibility ground, the GMC bar does provide an exception for a single offense of simple possession of 30 grams or less of marijuana.

- A "drug trafficking" aggravated felony includes a conviction relating to trafficking as that is generally defined (e.g., sale, possession for sale of marijuana), as well as conviction of certain federal drug felonies and analogous state offenses. INA § 101(a)(43)(B). The latter includes, e.g., conviction of cultivation or manufacture, including growing a small amount of marijuana for one's own use.[7] Conviction for distribution without remuneration of (giving away) a controlled substance is an aggravated felony as a federal analogue, except this does *not* apply to giving away a "small amount" of marijuana. That offense is punished as a misdemeanor under federal law, and so it is not an aggravated felony as a federal analogue.[8]

- Generally, the BIA has held that sale and even giving away a controlled substance is a crime involving moral turpitude.[9] However, given that 36 states have legalized sale of recreational and/or medical marijuana, advocates should push back against charges that sale or giving away marijuana is a crime involving moral turpitude.

Convictions and Post-Conviction Relief. Federal immigration law has its own standard for evaluating when a criminal court disposition is a "conviction." For example, the term conviction does not include juvenile delinquency adjudications or, according to the BIA, a conviction that is on direct appeal of right, but it does include most diversion programs that require a guilty

plea, even if no conviction is found to exist under state law.[10] See INA § 101(a)(48)(A) and ILRC resources.[11]

Once a conviction exists, it can be eliminated for immigration purposes only by a criminal court order vacating it *based on legal or procedural error*.[12] The two exceptions to this rule are that convictions for purposes of DACA, and, in the Ninth Circuit only, certain minor drug convictions from on or before July 14, 2011, may be eliminated by rehabilitative relief (which immigration authorities may call "expungements") that are based not on error but on, e.g., completing probation or other conditions.[13]

The fact that a state later legalizes conduct involving marijuana does not mean that the person no longer has a prior state conviction for that conduct. Some states now provide ways to eliminate prior marijuana convictions, and even arrange for mass expungements or sealings of records. However, immigration authorities are likely to not give effect to these dispositions, unless they are based on a finding of legal or procedural error. The ILRC is available to advise immigration groups and state policymakers on how to try to make such changes benefit all state residents, including noncitizens.[14]

B. Inadmissible for Admitting Commission of a State or Federal Drug Offense; Conditional Bar to Establishing Good Moral Character

Unlike the deportation ground, the controlled substance inadmissibility ground is triggered by a conviction, or an ***admission*** of conduct without a conviction. INA § 212(a)(2)(A)(i)(II). The admission also is a conditional bar to establishing good moral character (GMC) under INA § 101(f)(3). The GMC period stops as of the date of the latest conduct to which the person admitted. (See further description of good moral character in Part A, above).

A danger posed by state-legalized marijuana is that immigrants have every reason to believe that possessing marijuana is entirely legal. They may be surrounded by billboards and bus signs advertising home delivery. They may try "legal" marijuana when they would not have used an "illegal" drug. They may wrongly believe that it is safe to disclose this "lawful" conduct to federal officials; in some cases, they are trapped by aggressive USCIS or border official questioning. Part IV of this Advisory will discuss how to defend against this. Significantly, the person's verbal statement will not cause inadmissibility as an "admission" unless it meets certain requirements – for example, the person must have voluntarily admitted all of the elements of the offense, after they were explained. A discretionary waiver under INA § 212(h) may be available to the person, but only if they admitted to a single instance involving 30 grams or less of marijuana.

A formal admission might not be required to be a basis for denying naturalization. According to the *USCIS Policy Manual*, admission of conduct (and employment in the industry, see below) is a bar to establishing good moral character required for naturalization, even if it is legal under state law. While the Policy Manual acknowledges that a qualifying conviction or admission is required for a conditional bar, it also provides that "*even if an applicant does not have a conviction or make a valid admission to a marijuana-related offense, he or she may be unable to meet the burden of proof to show that he or she has not committed such an offense."* This appears to assert that to establish good moral character, one must establish lack of conduct involving marijuana. See Policy Manual, Volume 12, Chapter 5, Part C.2, "Conditional GMC Bar Applies Regardless of State Law Decriminalizing Marijuana." (2019).

C. Inadmissible if Immigration Authorities Gain "Reason to Believe" the Person Participated in Trafficking; Conditional Bar to Establishing Good Moral Character

A noncitizen is inadmissible if they have participated in, aided, abetted, etc. the trafficking of a federally-defined controlled substance such as marijuana. Here, trafficking means for some commercial purpose, not sharing for free. A noncitizen also is inadmissible if within the last five years they have benefitted from such trafficking by an inadmissible spouse or parent. INA § 212(a)(2)(C). This also is a "conditional" bar to establishing good moral character. INA § 101(f)(3).

This ground is not triggered by possession, use, growing for personal use, or sharing for free. It is triggered by the appropriate DHS or DOJ officials obtaining sufficient, reliable, probative evidence to support a conclusion that the person has engaged in trafficking.[15]

D. Inadmissible, Barred from Establishing Good Moral Character, Due to Lawful Employment in the Cannabis Industry

Cannabis is a boom industry. As *Forbes* noted, "For cannabis, 2020 was a breakout year. Legal sales across the U.S. …. hit a record of $17.5 billion, a 46% increase from 2019." The industry predicts that by 2026 the legal U.S. cannabis market will reach $41 billion per year.[16]

The industry has achieved this while technically operating in violation of federal law. At the same time, federal authorities have focused on punishing the industry's lawful noncitizen workers, people with permanent residence or employment authorization who work legally (under state law) and pay state and federal income taxes on their wages. This was a USCIS focus even before the Trump administration, although they made it worse and more official. Employment in the legitimate cannabis industry can result in the following penalties:

- ✓ Inadmissible because the government has reason to believe the person participates in drug trafficking, INA § 212(a)(2)(C); see above. The assertion is that, because the company's goal is to sell a controlled substance, employment provides reason to believe that any employee – even one with no contact with marijuana – aids and abets trafficking.

- ✓ Inadmissible for admitting a controlled substance offense, such as handling or preparing marijuana. INA § 212(a)(2)(I)(ii)

- ✓ According to the *Foreign Affairs Manual* (FAM), inadmissible under the national security/terrorism ground provisions, INA § 212(a)(3)(A)(ii), if the person is "traveling to the United States solely, principally, or incidentally to engage in 'any other unlawful activity.'" Intent to engage with the cannabis industry is listed as a qualifying unlawful activity. See 9 FAM 302.5-4(a) and 302.5-4(b)(4) (added in 2020).

- ✓ According to the *USCIS Policy Manual*, employment in the industry (like admission of conduct) is a bar to establishing good moral character required for naturalization, even if it is legal under state law. See Policy Manual, Volume 12, Chapter 5, Part C.2, "Conditional GMC Bar Applies Regardless of State Law Decriminalizing Marijuana." (2019). Well before the *Policy Manual* section was published in 2019, there were instances in multiple states of N-400 denials based on employment in the industry.

Practice strategy: In creating the list of employers required in I-485 and N-400 forms, some applicants identify a cannabis-related business by its initials, while providing its full address and phone number.

E. Inadmissible and Deportable for a Finding of Addiction or Abuse

Even without a conviction, a finding of addiction to or abuse of any federally-defined controlled substance, including marijuana, is a basis for inadmissibility if the condition is current, which is often applied to mean any use in the past year. Addiction or abuse is also a ground of deportability if it occurred at any time since admission, although this is so rarely used that there are no guidelines or legal interpretations of what it means. In particular, persons going through consular processing should be warned that the doctor and officer may question them, and the doctor may give them a urine test to detect marijuana.

A finding of inadmissibility for being an abuser can be cured by waiting a year without use, so in that way it is much better than making a formal admission to having possession marijuana, which like other removal grounds is permanent unless it is waived.

F. The *Fact* that One Possessed Marijuana, or Evidence Showing This, Does Not Cause Inadmissibility. That Requires a Conviction, Admission, Reason to Believe Trafficking, Finding of Abuse or Addiction, or Employment in the Industry

It is good to remember this distinction when considering some of the defense strategies discussed below. The *fact* that one has possessed marijuana is not a basis for inadmissibility, absent a conviction or admission. There may be some instances where we refuse to let the client make a formal admission, which could make them inadmissible, but make it clear that we do not oppose the adjudicator concluding that they in fact used the substance: that fact does not make them inadmissible, although it might or might not be a negative discretionary factor. Note other substantive defenses discussed below. For example, being under the influence of marijuana is not a federal offense, although possession is. Arguably, an admission to "sharing" a cigarette being passed around does not trigger inadmissibility, because it is not a crime under federal or (where legalized) state law. Also, it is possible that your state's definition of marijuana Is overbroad and indivisible compared to the federal definition. See Parts IV, VI, below.

IV. Defend Immigrants from Becoming Inadmissible for Admitting to Marijuana Conduct

Legal admissions of conduct can occur in many circumstances: at the border, before USCIS at an interview or in a written application, when confronted by ICE or the police, at a consular or visa medical interview, or on the stand in removal proceedings. In all of these contexts, immigrants must be knowledgeable and prepared for questions about marijuana use. This section will review some key risks and defenses.

A. Inform the Client about the Law

Education is the very best defense. Noncitizens should be warned that possessing marijuana is treated as a federal crime, as described above, even if it is permitted under the law of their state. People who have a medical need for marijuana should be referred for legal and medical assistance, to see what options are available to provide for their health and their immigration status. For example, permanent residents are not harmed by admitting use of medical marijuana, unless they need to travel outside the United States or to apply for naturalization. (This is assuming that federal authorities continue to not criminally prosecute persons who use medical marijuana in compliance with state law. See Part II, above.)

Noncitizens must be warned about what will happen if they have used marijuana (or worked in the industry) and they discuss this with any DHS or DOS employee, or with a doctor at a medical visa interview.

In private office consultations, group-processing contexts, and other "know-your-rights" contexts, ***advocates should carefully explain the immigration penalties that could apply if people admit to having possessed/used/worked with marijuana***, ***before*** ***they permit the clients to respond to questions or complete drafts of forms.***

For example, the advocate might say, "Before we begin, I want to let you know that a noncitizen who admits possessing *any* controlled substance can be found inadmissible. When I say *any* controlled substance, this includes marijuana. Even though marijuana is legal under our state law, it still is listed as a controlled substance under federal law, and federal law is what applies to immigration applications. For immigration purposes, admitting to using marijuana will be treated exactly like admitting to using heroin. The application for _____ will be denied. Do you have any questions about this? If it makes it easier, we can have a discussion about a friend and any questions you think they might have." In group processing settings, if people have questions, speak with each person privately, one on one.

B. Instruct the Client Not to Answer the Question; Asserting the Fifth Amendment

Each case requires an individual analysis, but there are very few instances when it is advisable to admit to having possessed marijuana. If a noncitizen is applying for admission at the border, adjustment of status, or other relief for which they must affirmatively show their eligibility, and they refuse to answer a question or submit requested relevant evidence, the authorities may well deny the application for failure to cooperate/prosecute. However, that may not be the worst possible outcome. This generally is better than admitting to possession or other conduct, having that information stay in their immigration record, and thereby being found permanently inadmissible under the controlled substance grounds.

Warn noncitizens that if any DHS employee or officer asks about marijuana possession or other conduct, it is best to simply decline to answer and say that you wish to speak with an attorney before answering any such questions (even if it means a denial of the benefit sought).

If the client is in a removal hearing or interview, consider whether it is best to advise them to decline to answer and to take the Fifth Amendment. The ICE attorney or USCIS officer may be trying to elicit a formal admission to what they assert is a federal drug crime, so declining to answer under the Fifth Amendment is an appropriate recourse. In immigration proceedings, a penalty for asserting the Fifth Amendment can be that the adjudicator can take the negative inference, i.e., decide that your client did use marijuana. *Matter of Guevara*, 20 I&N Dec. 238 (BIA 1991). You may want to invite the adjudicator to do that. You can stress that the applicant is not trying to hide any facts and is cooperating with the inquiry. You are simply advising the person not to make a legally disqualifying admission. Again, the *fact* that a noncitizen possessed marijuana does not trigger the controlled substance inadmissibility

ground. Under the terms of INA 212(a)(2)(A)(i), that requires a conviction or admission. The fact might be treated as a negative discretionary factor. (However, if the conduct was permitted under state law you can argue that because the person quite reasonably believed they were obeying all laws, the conduct should not be treated as a negative factor, or at least not a serious one.) If an immigration judge presses, advocates might consider whether to present evidence that the person did use marijuana (and, if applicable, that the person thought they were obeying the law). A friend or family member could provide a declaration or testimony, without the person "admitting" use.

The Fifth Amendment defense has additional strength if the government's question is a fishing expedition, with no other evidence to anchor it – for example, if there are no arrests or other evidence in your client's history to suggest that they use marijuana. Regarding the burden of proving eligibility for relief, 8 CFR 1240.8(d) provides: "The respondent shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. *If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply*, the [noncitizen] shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." (emphasis added) Without any evidence that a ground *may* apply, the applicant should not have the burden to disprove all baseless allegations that the government chooses to make.[17] But, depending on the case, there still may be a benefit to inviting the adjudicator to make the negative inference, as discussed above. This shows that, while the person is not willing to needlessly disqualify themselves from relief, they are willing to provide the adjudicator with all relevant requested information.

C. Argue That a Prior Statement by the Client Was Not a Qualifying "Admission"

If the person already admitted possessing marijuana to the authorities, get a transcript of the encounter (through a FOIA request if necessary) and carefully review possible defenses. The statement must meet the following requirements in order to be considered a qualifying admission:[18]

1. Voluntary Admission of Facts That Constitute the Elements of an Offense, After the Official Has Explained the Elements.

The person's admission must be free and voluntary.[19] The person must admit to commission of facts that constitute the elements of the offense.[20] The official must provide the noncitizen with an understandable definition of the elements of the offense.[21] But in a questionable older case, the Ninth Circuit upheld the use of an admission to a doctor at a consular medical appointment for a visa, despite the fact that the doctor did not provide this information.[22]

The conduct admitted must be a crime under the laws of the place where it was committed. The government will argue that possession of marijuana is a federal offense if committed anywhere within the United States.[23]

2. Exception: Conduct Charged in Criminal Court If Result was Less Than a Conviction

If a criminal court judge has heard charges relating to an incident, and the final disposition is something less than a conviction, the person is not inadmissible for admitting the conduct. The BIA has declined to find inadmissibility if the conviction later was eliminated by effective post-conviction relief, or if no conviction occurred in the first place because the person completed pre-guilty plea diversion or if charges were dismissed without a guilty plea for any reason. This is true even if the defendant later admits the crime before an immigration officer or judge[24] (although it may be best to decline to do this).

3. Exception: Admission of Conduct Committed While a Minor

An admission made by a minor, or by an adult about conduct they engaged in when they were a minor, should not trigger inadmissibility under this ground, because the admission was of committing civil juvenile delinquency, not a crime.[25] If the person admits participating in any way in drug *trafficking* as a minor, however, DHS might assert that even this conduct while a juvenile triggers inadmissibility under a separate ground, by providing DHS with "reason to believe" the person participated in trafficking. The ground also applies to a person who within the last five years benefitted from a noncitizen parent's or spouse's trafficking.[26]

D. Argue That an Admission that the Person Used, Rather than Possessed, Marijuana Is Not an Admission of a Federal Controlled Substance Offense

What if the person only admitted to using, rather than possessing, marijuana? For example, say that the client was acting in accord with state recreational marijuana law, and the only legal issue is whether they have admitted to committing a federal offense. The person might admit to experimentation, or being at a party where marijuana that they did not "own" was passed to them, or offered in vape or brownie such that the individual did not know that the substance in their possession even contained marijuana until after it was consumed.

Admitting use of marijuana could cause the person to be charged with being inadmissible, and a noncitizen should not consider it safe to admit to this, or at least without careful consultation with an expert. However, if the person has admitted this already, counsel can argue that it does not trigger the inadmissibility ground, because it was not an admission of the essential elements of a federal offense. Courts have found that using a drug or being under the influence does not contain the essential elements of the federal offense of possession.[27]

Neither should admission of use shift the burden to the person to prove that they did not possess the marijuana.[28] Possessing drug paraphernalia also is not a federal offense, so if it is also lawful under state law, argue that admitting that conduct is not admission of a "crime" under the controlling jurisdiction and does not trigger inadmissibility.

V. Risks and Defense Strategies in Different Contexts

A. Adjustment of Status and Consular Processing

An applicant for permanent resident status must prove that they are admissible. If the government asks questions such as, "Have you ever used or possessed marijuana?" or "Have you ever committed a drug offense?" then a person who has possessed or committed other conduct relating to marijuana has no good choices.

Option 1A: If they admit to having possessed marijuana in the United States, then they will be inadmissible based on having made an admission to a federal crime.

Option 1B: If they admit to having experimented/tried/used marijuana in a U.S. state where the state law does not criminalize such use, then they can argue that such activities should be adjudicated through the application of only the health grounds of inadmissibility (and not the criminal grounds), which generally provide that admissibility can be established by a finding of remission of any addiction/abuse after one year with no use.

Option 2: If they decline to answer the question, then they will not be held inadmissible based on the answer, but the application likely will be denied for failure to prosecute (and in some circumstances, a negative inference could be made). You can argue against this.

Option 3: If they respond falsely to the question by saying "no", there are potential serious consequences. For example, a *knowing* false answer to a material question such as this would cause the government to find that they are also subject to the fraud ground of inadmissibility, either at that moment, or later (should the facts become known). An *unknowing* false statement (such as one made by an applicant who honestly believed he had not committed a crime due to state law provisions) might not trigger the fraud inadmissibility but still might cause the government to later charge the individual with having obtained their residency improperly.

In some cases, a waiver for the admission may be available. If the person admits only to a one-time incident involving possession of 30 grams or less marijuana, then they may apply for an INA § 212(h) waiver of inadmissibility in a family visa petition. Other adjustment applications, for example as an asylee or refugee, have other waivers that would cover this ground.

In at least one questionable decision, a statement to the doctor at a visa medical exam was held to be an "admission" of committing a controlled substance offense.[29] (Of course, also warn the client that statements to a visa medical doctor could result in the doctor finding that the person is inadmissible as a drug abuser, or as someone who ever participated in drug trafficking.[30] Warn the client that in some cases, applicants are required to take a urine test for drugs.)

B. Naturalization

An applicant for naturalization must establish that they have had good moral character for a certain period of time. A person who committed conduct described in INA § 212(a)(2) during the period for which good moral character must be proved, is statutorily barred from establishing good moral character. INA § 101(f)(3).

In Washington state, where recreational marijuana has been legal since 2012, USCIS has aggressively questioned naturalization applicants about marijuana use. Some applicants readily admit to engaging in what they believe is perfectly lawful conduct. The CIS officers have held the applicants to be statutorily barred from establishing good moral character as of the date of the last admitted conduct. There, USCIS has had noncitizens sign "marijuana affidavits" to make sure that it captures a qualifying admission from naturalization and adjustment applicants.

> **Example**: At her naturalization hearing in 2021, Marta admitted that she last possessed marijuana on February 2, 2018. The officer denied her application and found that she is statutorily barred from establishing her required 5 years of good moral character until at least February 3, 2023.

A qualifying admission of possessing[31] marijuana will make an LPR inadmissible and barred from establishing good moral character, but by itself it will not make an LPR deportable. The LPR can simply stop possessing marijuana and re-apply for naturalization after amassing a new period of good moral character. (In cases where stopping use of medical marijuana, or where delay in adjudicating the application, would cause great hardship, and it is clear that naturalization officers are asking all applicants about marijuana, counsel can consider trying to intervene with the official and to persuade them not to inquire.)

Warning: A naturalization applicant who has admitted possessing marijuana to USCIS must not travel outside the United States. The person may be found inadmissible. They could be found to be seeking a new admission upon return from a trip. See next section. Or if they were permitted to re-enter, they could be charged with being deportable for having been inadmissible at last entry.[32]

Warning: Employment in a state-sanctioned marijuana enterprise may cause the N-400 application to be denied. Further, the person might be labeled as inadmissible as a "drug trafficker," and they should not travel outside the United States until they have naturalized. The same may apply to their noncitizen spouse and/or children. See Part III.D, above, regarding employment in the industry. Applicants who have listed such employment on the N-400 have been denied naturalization for lack of good moral character. Applicants who have been denied based on this employment should consult counsel. To naturalize, they may have two choices: either leave that job and amass a new period of good moral character, or wait and hope that the law on marijuana and immigration changes. They must *not* travel outside the U.S. after submitting the N-400. They could lose their green card, as a returning permanent resident who is inadmissible as a drug trafficker. See next section. Further, it is conceivable that their noncitizen spouse and children also would be found inadmissible under the trafficking ground. If a noncitizen is inadmissible for drug trafficking, then their spouse or children also are inadmissible if they have "benefitted" from the trafficking within the last five years and knew it came from this illicit activity. INA § 212(a)(2)(C)(ii).

C. At the Border

Persons who are not permanent residents. Generally, a noncitizen applying for admission to the United States must prove that they are admissible. This includes individuals with valid visas (or on the visa waiver program) who can be subjected to questioning at the consular interview and/or again at the border. If the person declines to respond to a question about marijuana, border officials can (and likely will) simply deny them admission.

The best practice for noncitizens who have possessed marijuana, or engaged in other marijuana-related conduct, is to not travel outside the United States until they become citizens. If people do intend to travel, advise them not to bring a medical marijuana card (backpacks are searched), or have anything on their person, phone, or social media relating to marijuana (border officials may demand access to smartphones and passwords to Facebook), because these factors can lead to aggressive questioning. If questioned about marijuana, the best course is to decline to answer, even if it means the person will be refused admission. Then they should contact an attorney -- and hope for the best. This is why the safest advice is to not travel.

Returning permanent residents. Even for permanent residents, the safest practice is to not travel if you've possessed or used marijuana. However, a permanent resident returning from a trip abroad has some important legal advantages. They are deemed *not* to be seeking a new legal admission to the United States, unless they come within one of the six exceptions listed at INA § 101(A)(13)(C). Being inadmissible under the crimes grounds is one of these exceptions. Therefore, *if* the returning LPR makes a qualifying admission to a border official

that they possessed marijuana, they will be found to come within INA § 101(a)(13)(C)(v), and they can be denied admission. However, the government has the burden of *proving* that a returning LPR comes within INA § 101(a)(13)(C). [33] It would appear that if the LPR declines to either answer questions or admit conduct, then the government cannot prove that INA § 101(a)(13)(C) applies, and eventually they must let them re-enter. (Compare this to other immigrants at the border, discussed above, who may be denied admission if they decline to answer a question.)

If the person *already* has been found inadmissible – for example, if USCIS denied their naturalization application based on an admission of conduct, or employment relating to marijuana – travel is truly dangerous. The person already may come within INA § 101(a)(13)(C) exception, for having admitted a drug offense or for there being reason to believe they are a drug trafficker (employment). Even if the person does not make further admissions at the border and is permitted to re-enter, later they could be charged with being deportable for having been inadmissible at last entry under INA § 237(a)(1).

D. Removal Proceedings: LPR Cancellation of Removal and Other Defensive Relief

Related to the issue of having to answer questions in affirmative applications for benefits, is the issue of having to answer questions in defensive applications for relief from removal. This can be a complex topic that is only briefly addressed here. In removal proceedings, while the applicant is on the stand, ICE may try to elicit damaging admissions that can destroy eligibility for the relief. An admission that one has possessed marijuana, or a conviction arising from a single incident involving 30 grams or less of marijuana, does not cause deportability, but does cause inadmissibility and that in turn can affect eligibility for relied.

The same strategies apply. Instruct the person not to respond to the dangerous question. If necessary, have the person take the Fifth Amendment and decline to admit a federal offense. See discussion at Part IV.B, above.

1. LPR Cancellation of Removal and *Barton v. Barr*

An applicant for LPR cancellation must show that they have accrued seven years of continuous residence since admission in any status, before either (1) a Notice to Appear is served on the applicant, or (2) the applicant commits certain offenses. See INA § 240A(a)(2), (d). When either of those events occurs, the applicant will stop accruing time toward the required seven years; practitioners may say that the seven-year "clock" has stopped. If this happens before the person has accrued the seven years, they are not eligible for LPR cancellation.

The Supreme Court held that if a cancellation applicant is described in certain criminal *inadmissibility* grounds at INA § 212(a)(2), then the clock stops as of the date that the person *committed* the relevant offense. (This is the Court's ruling even if the person was admitted to the U.S. and so was not subject to the grounds of inadmissibility.) *Barton v. Barr*, 140 S.Ct. 1442 (2020). For example, a person is described in the controlled substance inadmissibility ground if they are convicted of, or formally admit to committing, a qualifying controlled substance offense, including possession of marijuana. (Remember that for the inadmissibility ground, there is no exception for a single incident involving 30 grams or less of marijuana.) Once the conviction or admission occurs, their seven-year clock is deemed to have stopped as of the date that the conduct took place (not the date that the conviction or admission took place).

ICE may try to elicit an "admission" from your client during or before removal proceedings, in an attempt to disqualify them from relief.

> *Example*: Marco was admitted to the United States on a border crossing card in 2010 and became a permanent resident in 2012. He became deportable for a conviction of a domestic violence offense in 2018. He was served with a Notice to Appear in 2019. Marco has the seven years of continuous residence between the date he was admitted into the United States in 2010 and the date of the service of the NTA in 2019.
>
> In 2021, he has his hearing for LPR cancellation. The ICE attorney asks him, "Have you ever used marijuana?" If Marco were to say, "I tried it a few times in 2015 after it became legal, but I never really liked it," ICE could assert that he is no longer eligible for LPR cancellation: he is described in the inadmissibility ground (because he admitted the elements of a controlled substance offense) and the admitted conduct occurred in 2015, before he had accrued the seven years.

This is a novel situation, and advocates can investigate various strategies, depending also on the facts of the case. See further discussion of these strategies at Part IV, above. For example:

- As part of the case preparation, inform Marco about the penalties of discussing marijuana or any drug with immigration authorities, *before* asking him any questions about drug use. Practice responses to this kind of question;

- Object to the fact that the ICE attorney is on a fishing expedition with no related evidence, and state that the burden is not on the respondent to address it;

- Tell Marco beforehand not to answer the question if asked at the hearing. He himself can decline to answer, or ask him just to pause so that you can intercede and state that he will decline to answer. If necessary, invoke the Fifth Amendment on his behalf (you may have to do this for each individual question) or have him do it;

- Explain to the judge what ICE is attempting to do. Assure the judge that Marco is not trying to hide information. If needed, invite the judge to take the negative inference from his silence and assume that Marco tried "legal" marijuana. Explain why that does not "stop the clock" (or act as a negative discretionary factor, given that a reasonable person would think it is legal.).

- If Marco did answer the ICE question, assert that this was not a qualifying admission that stops the clock, based on any of the reasons discussed in Part IV.C, above (for example, in this exchange, ICE did not inform Marco of all of the elements of the offense). You can make the objection at the time Marco answers. Or it may be preferable to wait to see if the judge makes an adverse ruling based on the admission and, if so, make the objection at the end of the removal hearing.

2. Other Forms of Cancellation of Removal, and Any Relief Requiring Good Moral Character

To qualify for non-LPR cancellation, among other things the person must have accrued 10 years of continuous physical presence immediately preceding the date of application, and 10 years of good moral character counting backward from the immigration judge or BIA's decision. INA 240A(b)(1), (d).

The "clock" for the ten years of continuous physical presence is the same as for the seven years required for LPR cancellation. Under INA § 240A(d), it will stop as of the date the person committed an offense that ultimately made them inadmissible under the crimes grounds. This includes admitting having possessed marijuana at some point during the ten years. The ten years of good moral character also end in this way, although for good moral character an admission of a single incident involving simple possession of 30 grams or less of marijuana is not an automatic bar.

VAWA cancellation has somewhat similar requirements requiring three years of physical presence and good moral character, although with possible waivers. INA 240A(b)(2), (d).

These cancellation applicants face the same threat as the applicant for LPR cancellation. If ICE is able to elicit a formal admission that they used marijuana during the period for which physical presence or good moral character must be shown, they will no longer be eligible. The

same defense strategies may protect them. See discussion in Part 1 dealing with LPR cancellation, above and see Part IV, above.

VI. Is Your State Definition of Marijuana Broader Than the Federal Definition, and Therefore Not a Federal Controlled Substance Offense?

This defense can be used to assert that a client's conviction involving marijuana does not come within the controlled substance grounds of inadmissibility and deportability. Advocates can consider arguments that this might also be applicable to an admission.

For this defense, the first thing to do is to identify how the state statute or other law at issue defined marijuana at the time of conviction. If your definition *includes* "mature stalks" of the cannabis plant, and/or "hemp" (part of the cannabis plant that contains no more than 0.3% THC), then this defense is worth investigating.

The defense is based on the categorical approach. For more information on that analysis, see cases and online resources.[34] In brief, every criminal law term that appears in removal grounds (e.g., controlled substance, crime involving moral turpitude, burglary) has a technical, federal definition, referred to as the "generic" offense definition. The categorical approach determines whether the offense that the noncitizen was convicted of sufficiently matches that generic definition, such that it makes the person removable.

In Step One of the categorical approach, we compare the elements of the generic definition of the term in the removal ground, to the elements of the criminal statute of which our client was convicted. We do not look at what our client actually did or pled guilty to. Instead, we consider *all possible conduct* that has a realistic probability of being prosecuted under that criminal statute, and compare *that* to the generic definition. We hope to find that the criminal statute is "overbroad," meaning that the statute reaches some conduct that is not covered by the generic definition.

The federal, generic definition of marijuana includes the entire cannabis plant, *except*:

- It has long excluded "mature stalks" of the plant (see 21 USC § 802(16)(B)), and
- As of December 20, 2018, under the Hemp Farming Act, the definition at § 802(16)(B) also excludes "hemp," which is defined at 7 USC § 1639o as any part of the plant that contains no more than 0.3% of THC.

So, federal law does not reach any cannabis with 0.3% or less of THC, *or* any mature stalks at all, regardless of percent of THC. This makes the generic definition of marijuana a bit narrow, which we want, since the goal is to find that our state definition of marijuana is broader.

Next, we compare the generic definition to the state's definition of marijuana. Consider the definition under Florida Statute §§ 893.02(2), (3). Like the federal statute, for years Florida excluded mature stalks from its definition, until in 1978 it decided to add them back in. In *Matter of Guadarrama*, 27 I&N Dec. 560 (BIA 2019), the respondent was convicted in Florida of possession of 20 grams of marijuana, and was found to be inadmissible. On appeal, he argued that he was not inadmissible, because marijuana as defined by Florida law is overbroad as a federally-defined controlled substance: the Florida definition (which includes mature stalks) is broader than the federal definition (which does not). The BIA acknowledged that under the plain language of the Florida statute, the Florida definition of marijuana is overbroad. The reasoning is:

- *Federal, generic definition of "marihuana."* Under 21 USC 802, marihuana includes all parts of the cannabis plant except for mature stalks and hemp.
- *Florida definition of marijuana, Fl Stat* 893.02(2), (3) . This includes all parts of the cannabis plant, including mature stalks, but not including hemp.
- *Result:* On its face, the Florida offense of possessing marijuana is "overbroad" because it includes possessing a substance (mature stalks of marijuana, minus those that qualify as hemp) that is not punished under federal law.

However, the BIA denied Mr. Guadarrama's case. Under the categorical approach, along with showing that a state statute reaches conduct not covered by the generic definition, one also must show a "realistic probability" that this conduct actually will be prosecuted, and that the conduct was not just proposed as an exercise in "legal imagination."[35] This can be done by producing an actual case where that conduct was prosecuted. In addition, in most jurisdictions, this showing is made if the clear language of the statute describes conduct not in the generic definition. In *Guadarrama*, the BIA reaffirmed its stance that the language of a state statute alone is not enough to establish a "realistic probability" of persecution. The person must present actual prosecutions, in this case cases involving mature stalks. Mr. Guadarrama did not present this, and the BIA denied his case.

Most circuit courts of appeals disagree with the BIA, however. They permit clear statutory language to demonstrate a realistic probability of prosecution, and would have found that Mr. Guadarrama was not deportable. For example, the Eighth Circuit recently considered this same fact situation involving Florida's definition of marijuana. The court acknowledged that case examples are required if a statute is ambiguous or vague. "But when the statute's reach is clear on its face, it takes no 'legal imagination' or 'improbable hypotheticals' to understand how it may be applied and to determine whether it covers conduct an analogous federal statute

does not." *Gonzalez v. Wilkinson,* 990 F.3d 654, 660 (8th Cir. 2021). The Eighth Circuit found that the person was not deportable based on the Florida marijuana conviction.

The Eighth Circuit noted that the First, Second, Third, Fourth, Ninth, and Tenth Circuits, and Sixth Circuit in unpublished opinions, also have held that clear statutory language alone, without case examples, is sufficient to prove realistic probability of prosecution. [36] The Eleventh Circuit had held that as well; in *Matter of Guadarrama* the BIA asserted that it had abandoned the position, but that is debatable.[37] The Supreme Court has relied on clear statutory language to establish realistic probability, including in controlled substance cases, although without discussion.[38] The Fifth Circuit, like the BIA, requires case examples.[39]

Consider the California definition of marijuana, at H&S C § 11018. That definition used to exclude mature stalks, until Proposition 64 ended that exclusion and re-included mature stalks as of November 9, 2016.[40] This is the same progression as Florida's statute, and in *Matter of Guadarrama* the BIA acknowledged that the Florida statutory definition was overbroad on its face. But while the BIA denied Mr. Guadarrama because he failed to produce case examples to show a realistic probability of prosecution, the Ninth Circuit (and most other jurisdictions) find that clear statutory language alone is sufficient to meet that requirement. Therefore, the California definition of cannabis should be held to be overbroad. The California statute, § 11018, is not divisible; among other things, it is not phrased in the alternative, one of which involves mature stalks. Therefore, the California definition is overbroad and indivisible, and no California cannabis conviction from on or after Proposition 64's effective date of November 9, 2016 should be held a controlled substance conviction for immigration purposes. There is no precedent at this time, however.

End Notes

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The Immigrant Legal Resource Center is a national, nonprofit resource center that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The mission of the ILRC is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. For the latest version of this practice advisory, please visit www.ilrc.org. For comments regarding the content of this advisory, please contact Kathy Brady at kbrady@ilrc.org.

[2] Medical marijuana alone is legal in Arkansas, Connecticut, Delaware, Florida, Hawaii, Louisiana, Maryland, Minnesota, Mississippi (voted for), Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Utah, West Virginia.

[3] Recreational and medical marijuana is legal in Alaska, Arizona, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico (6/29/21), New York, Oregon, South Dakota (7/1/21), Vermont, Virginia (7/1/21), and Washington, as well as the District of Columbia.

[4] *Gonzales v. Raich*, 545 U.S. 1 (2005)

[5] See controlled substance deportability ground and exception at INA § 237(a)(2)(B)(i) [8 USC § 1227].

[6] See controlled substance inadmissibility ground at INA § 212(a)(2)(I)(ii) [8 USC § 1182]

[7] See, e.g., *United States v. Reveles-Espinoza*, 522 F.3d 1044 (9th Cir. 2008).

[8] See 21 USC § 841(b)(4), discussed in *Moncrieffe v. Holder*, 569 U.S. 184, 193-99 (2013).

[9] See, e.g., *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997).

[10] See *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000) (*en banc*) (juvenile), Matter of J.M. Acosta, 27 I&N Dec. 420 (BIA 2018)(appeal of right) and Matter of Mohamed, 27 I&N Dec. 92 (BIA 2017) (diversion).

[11] See ILRC, *What Qualifies as a Conviction for Immigration Purposes?* (2019) at www.ilrc.org/chart.

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

[13] See DACA materials at www.ilrc.org/daca and see discussion of *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc) at ILRC, *Practice Advisory: Lujan and Nunez, July 14, 2011* (2011) at https://www.ilrc.org/practice-advisory-lujan-nunez-july-14-2011

[14] Contact Rose Cahn at rcahn@ilrc.org.

[15] See, e.g., discussion in *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823-24 (9th Cir. 2003).

[16] See Yakowicz, "U.S. Cannabis Sales Hit §17.5 Billion as More Americans Consume Marijuana Than Ever Before," *Forbes* (March 3, 2021) at https://www.forbes.com/sites/willyakowicz/2021/03/03/us-cannabis-sales-hit-record-175-billion-as-americans-consume-more-marijuana-than-ever-before/?sh=3446b74b2bcf.

[17] See, e.g., discussion in *Garcia-Andrade v. Holder*, 395 F. App'x 417 (9th Cir. 2010) (unpublished) (under 8 CFR 1240.8(d), a prior expunged conviction for possessing marijuana is not sufficient evidence to put the burden on the defendant to prove that they did *not* use marijuana; also, the defendant's assertion of the Fifth Amendment is not enough to prove that they are statutorily barred from establishing good moral character required for non-LPR cancellation, as that requires an admission or conviction).

[18] See further discussion in Kesselbrenner and Rosenberg, *Immigration Law and Crimes,* §§ 3.2-3.6

[19] *Matter of G-*, 6 I&N Dec. 9 (BIA 1953); *Matter of G-*, 1 I&N Dec. 225 (BIA 1942); *Matter of M-C-*, 3 I&N Dec. 76 (BIA 1947).

[20] *Matter of B-M-*, 6 I&N Dec. 806 (BIA 1955); *Matter of A-*, 3 I&N Dec. 168 (BIA 1948); *Matter of Espinosa*, 10 I&N Dec. 98 (BIA, 1962). *Matter of G-M-*, 7 I&N Dec. 40 (Att'y Gen. 1956); *Matter of E-N-*, 7 I&N Dec. 153 (BIA 1956).

[21] *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).

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

[23] *Matter of D-S-*, 1 I&N Dec. 553 (BIA 1943) (attempt to smuggle not a crime); 22 CFR § 40.21(a).

[24] 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). The BIA has held that, depending on the constitutional protections provided, some state "infractions" or "offenses" do not amount to a conviction for immigration purposes. See *Matter of Cuellar,* 25 I&N Dec. 850 (BIA 2012) and ILRC, *Arguing that a California Infraction is Not a Conviction* (2012) at www.ilrc.org/crimes. Counsel can investigate arguments that the person cannot be found inadmissible based on a guilty plea or subsequent admission in this context, because charges resulted in a disposition less than a conviction.

[25] *Matter of MU*, 2 I&N Dec. 92 (BIA 1944) (juvenile admission does not cause inadmissibility as a crime involving moral turpitude). This is in keeping with the BIA's consistent holdings "that acts of juvenile delinquency are not crimes … for immigration purposes. *Matter of Devison*, 22 I&N Dec. 1362 BIA 2000) (*en banc*). See also ILRC, *What are the Immigration Consequences of Delinquency?* (March 2020) at https://www.ilrc.org/sites/default/files/resources/imm_consequences_of_delinq_3.30.20.pdf

[26] See INA § 212(a)(2)(C), 8 USC § 1182(a)(2)(C) and see Junck, *The Impact of Drug Trafficking on Unaccompanied Minor Immigration Cases* (2015, Vera Institute) at https://www.ilrc.org/sites/default/files/resources/impact_drug_trffk_unacomp_minor_cases-20180719.pdf

[27] See, e.g., *Rice v. Holder*, 597 F.3d 952, 956 (9th Cir. 2010) (use, under the influence are not federal offenses), overturned on other grounds by *Nunez-Reyes v. Holder*, 646 F.3d 684, 695 (9th Cir. 2011) (which noted that being under the influence is not a possession offense or a lesser included offense to possession). See the on-point discussion in *Hernandez-Munoz v. Sessions*, No. 14-72542 (9th Cir. Nov. 6, 2017) (unpublished), where the court held that an applicant for adjustment who admitted to having used marijuana on several occasions was not inadmissible for having admitted the elements of the federal offense of possession, citing cases holding that use of a drug is at most circumstantial evidence of possession.

[28] See *Hernandez-Munoz, supra,* where, based on the language of the inadmissibility ground, the court dismissed the government's argument that the admission imposed a burden on the applicant to prove that he had not possessed marijuana.

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

[30] See INA §§ 212(a)(1), 237(a)(2)(B)(2) (current drug addict or abuser); INA § 212(a)(2)(C) (DHS has "reason to believe" the person ever participated in drug trafficking, or benefitted from a noncitizen spouse's or parent's trafficking within the last five years).

[31] Or similar admissions involving marijuana-related offenses that could arise in the context of a naturalization application, such as employment at a dispensary or membership in a collective.

[32] See INA § 237(a)(1), 8 USC § 1227(a)(1).

[33] *Matter of Rivens*, 25 I&N Dec. 623, 626 (BIA 2011).

[34] See, e.g., *Mathis v. United States,* 136 S.Ct. 2243 (2016) and see ILRC, *How to Use the Categorical Approach Now* (Dec. 2019, update forthcoming) available at https://www.ilrc.org/chart

[35] See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), cited in *Matter of Guadarrama,* 27 I&N Dec. at 562.

[36] See citations in *Gonzalez v. Wilkinson,* 990 F.3d at 660 and n. 3.

[37] The Eleventh Circuit upheld that statutory language rule in *Ramos v. Att'y Gen*., 709 F.3d 1066, 1071-72 (11th Cir. 2013). In *Matter of Guadarrama*, 27 I&N Dec at 562-66, the BIA cited Eleventh Circuit cases that it interpreted as abandoning (without discussion) *Ramos*. However, *Ramos* has not been overruled, and the case debate appears to focus on how specific the statutory language must be. See, e.g., *Aspilaire v. U.S. Att'y Gen.,* 992 F.3d 1248, 1257 (11th Cir. 2021), *Bourtzakis v. United States Att'y Gen*., 940 F.3d 616, 620 (11th Cir. 2019), citing the rule in *Ramos* but finding the statutes at issue are not sufficiently specific.

[38] See, e.g., discussion in *Gonzalez v. Wilkinson,* 990 F.3d 654, 660 (8th Cir. 2021), of *Mellouli v. Lynch,* 575 U.S. 798 (2015) and *Mathis v. United States,* 136 S. Ct. 2243 (2016).

[39] *United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc).

[40] Before Proposition 64 took effect on November 9, 2016, the California definition of marijuana included mature stalks. California H&S C § 11018 provided in part, "'Marijuana' means all parts of the plant Cannabis sativa L. … It does not include the mature stalks of the plant …" (November 8, 2016). Proposition 64, § 4.1, amended § 11018 by ending the exclusion of mature plant stalks, and instead excluding the narrower category of "industrial hemp," under § 11018.5 (which is defined the same way as federal "hemp": any part of the plant that contains no more than 0.3% of THC). Now California cannabis is broader than federal marijuana, because federal law does not regulate any mature stalks, even if they have more than 0.3% THC, while California does regulate mature stalks as long as they have more than 0.3% THC. (Some mature cannabis stalks do have a THC level higher than 0.3 percent, which is why California decided to regulate them.)

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