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Foreign National's Marijuana Investment = U.S. Lock Out?

Using marijuana or other controlled substances has long been known to be a basis for inadmissibility to the U.S. Over the summer, U.S. Customs and Border Protection (CBP) officers expanded their enforcement of inadmissibility to those with possible connections to the marijuana industry. According to news reports, CBP officers not only questioned foreign nationals seeking entry into the U.S. about their investment in the marijuana industry but also denied entry to individuals who did not have obvious connections to the marijuana industry. For example, a co-owner of a building in Colorado who leased the premises to a marijuana dispensary was found inadmissible and denied entry to the U.S. This inadmissibility determination is permanent. While a waiver may be possible, it can be costly and a lengthy process. Employers may find they have an employee who is now unable to re-enter the U.S. or may be unable to perform their job duties if travel is required for the position.

While investment in the marijuana business is legal in Canada, and the use of marijuana is legal in some states for medicinal and recreational purposes, the determination to admit an individual is made at the U.S. federal level. Marijuana is classified by the federal government under the Controlled Substances Act as a Schedule 1 controlled substance because the federal government believes:

- The drug has a high potential for abuse.
- The drug has no currently accepted medical use for treatment in the United States
- There is a lack of accepted safety for the use of the drug under medical supervision. [21 U.S.C. 812\(b\)\(1\)\(A\)-\(C\)](#).

Therefore, among other things, the sale, use, manufacture, possession, and distribution of marijuana are illegal at the federal level.

The relevant section used to deny admission, [INA 212\(a\)\(2\)\(C\)](#), applies to any alien who the consular officer or the Attorney General

knows, or has reason to believe:

- is or has been an illicit trafficker of any controlled substance or any listed chemical as defined in section 102 of the Controlled Substances Act; or
- is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking of any such controlled or listed substance or chemical, or endeavored to do so; or
- is the spouse, son, or daughter of an illicit trafficker foreign national, who:
 - has obtained any financial or other benefits from the illicit activity of the trafficker within the previous five years and
 - knew or reasonably should have known that the financial or other benefits were the product of such illicit activity.

Accordingly, there was a significant amount of uncertainty as to how broadly CBP would interpret “knowing aider, abettor, assister, conspirator, or colluder.” Once found inadmissible, the affected foreign national may apply for a waiver of that determination. However, the process for a waiver can be time-consuming.

To clarify matters, CBP recently issued a statement regarding how it will enforce this regulation:

A Canadian citizen working in or facilitating the proliferation of the legal marijuana industry in Canada, coming to the U.S. for reasons unrelated to the marijuana industry will generally be admissible to the U.S. However, if a traveler is found to be coming to the U.S. for reasons related to the marijuana industry, they may be deemed inadmissible.

The statement notably only references Canadian citizens working in the marijuana industry in Canada. In that limited situation, the purpose of the visit will dictate whether a person is found to be inadmissible.

Yet, the statement does not address how non-Canadians who work in or have invested in the legal marijuana industry in Canada will be

viewed. Nor does it address how admissibility will be determined for Canadians and non-Canadians who work in or have invested in marijuana businesses in states where it is legal. The conservative approach would be to assume CBP will consider the purpose of the visit to be irrelevant to determining admissibility for individuals in either of these scenarios. Thus, the haze regarding admissibility continues to cloud the minds of those involved in the U.S. marijuana industry and non-Canadian citizens.

The potential impact on foreign nationals and businesses is significant and adds a whole new dimension to investment risk.

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