How US federal cannabis legalization would affect US immigration laws

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Introduction

During the 115th United States Congress, several Bills were introduced to legalize marijuana at the federal level. The Bills that received the most attention were: (1) the *Strengthening the Tenth Amendment Through Entrusting States Act* (STATES Act); (2) *Marijuana Justice Act of 2017*/*Marijuana Justice Act of 2018* (Marijuana Justice Act); and (3) the *Marijuana Freedom and Opportunity Act* (Marijuana Freedom Act). However, when the 115th United States Congress ended on January 3, 2019, these three Bills (collectively, the Congressional Bills) died.

The Congressional Bills must be reintroduced in the 116th United States Congress before they may be considered again. Assuming that all three are eventually reintroduced (without change) during the 116th United States Congress, an analysis of how they might affect the ability of foreign nationals (i.e., individuals other than US citizens) to enter the United States is provided below.

The Congressional Bills

The STATES Act

During the 115th United States Congress, Sen. Elizabeth Warren (D-MA) introduced the STATES Act in the Senate on June 7, 2018. On the same day, Rep. David P. Joyce (R-OH) introduced an identical version of the STATES Act in the House of Representatives.

For the 116th United States Congress, Sen. Elizabeth Warren (D-MA) and Sen. Cory Gardner (R-CO) reintroduced the STATES Act in the Senate on April 4, 2019. Rep. Earl Blumenauer (D-OR) also reintroduced the STATES Act in the House of Representatives on the same date.

The STATES Act would leave marijuana as a Schedule I controlled substance under the *Controlled Substances Act* (CSA). However, it would also clarify that the CSA (subject to limited exceptions) does not apply to a person who acts in compliance with the laws of a particular state, or a federally-recognized Indian tribe within its jurisdiction, relating to the manufacture, production, possession, distribution, dispensation, administration or delivery of marijuana.

In other words, if a particular state or tribe has legalized marijuana, an entity engaged in marijuana-related activities within its jurisdiction would be deemed not to have violated the CSA. However, in other jurisdictions where marijuana remains illegal, it would be considered a federal offense, as well as a state offense.

The STATES Act may have the highest probability of becoming law. The day after the STATES Act was first

introduced, President Trump confirmed that he would probably end up supporting it.

The Marijuana Justice Act

During the 115th United States Congress, Sen. Cory Booker (D-NJ) introduced the Marijuana Justice Act in the Senate on August 1, 2017. Rep. Barbara Lee (D-CA) introduced an identical version in the House of Representatives on January 17, 2018.

For the 116th United States Congress, Sen. Cory Booker (D-NJ) reintroduced the Marijuana Justice Act in the Senate on February 28, 2019. Rep. Barbara Lee (D-CA) also reintroduced the Marijuana Justice Act in the House of Representatives on February 28, 2019.

The Marijuana Justice Act would provide for the removal of marijuana and tetrahydrocannabinoids (THC) from Schedule I of Subsection 202(c) of the CSA. It would also require each federal court to expunge convictions for any federal offense (but not a state-level offense) involving marijuana use or possession, which occurred before the effective date of the legislation.

The Marijuana Freedom Act

During the 115th United States Congress, Sen. Chuck Schumer (D-NY) introduced the Marijuana Freedom Act in the Senate on June 27, 2018. On May 9, 2019, he announced that he would be reintroducing the Marijuana Freedom Act in the Senate and that Rep. Hakeem Jeffries (D-NY) would be reintroducing an identical bill in the House of Representatives.

The Marijuana Freedom Act would also remove marijuana and THC from Schedule I of Subsection 202(c) of the CSA. However, it would not provide for federal expungements of past offenses.

Marijuana possession/Use after federal legalization

Under §212(a)(2)(A)(i)(II) of the *Immigration and Nationality Act* (INA), individuals who have been convicted of, or who admit to having committed the essential elements of, a violation of (or a conspiracy or attempt to violate) any law or regulation of a state, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the CSA, which refers to the five schedules of controlled substances) are inadmissible.

If any of the Congressional Bills becomes law, marijuana possession or use by a foreign national after federal legalization will not result in a bar under INA §212(a)(2)(A)(i)(II), at least in states that have legalized it. This is because such conduct would not be considered a controlled substance offense under INA §212(a)(2)(A)(i)(II). However, if the state has not legalized marijuana, the foreign national will still be committing a state-level controlled substance offense (or in the case of the STATES Act, both a federal- and state-level controlled substance offense), which can result in inadmissibility under INA §212(a)(2)(A)(i)(II).

In addition, a foreign national who engages in lawful marijuana use after federal legalization (either in the US or abroad), may still be barred under one of the following grounds of inadmissibility:

a) INA §212(a)(1)(A)(iii) - the mental defect ground of inadmissibility. However, this requires associated harmful behavior (for example, driving while impaired by marijuana); and

b) INA §212(a)(1)(A)(iv) - the drug abuser or drug addict ground of inadmissibility. The terms “drug abuse” and “drug addiction” refer to use of a controlled substance listed in Section 202 of the CSA.

INA §212(a)(1)(A)(iii) will continue to apply even after federal legalization. This is because the mental defect ground

does not necessarily require the use of an illegal substance. For example, even alcohol abuse with associated harmful behavior could result in a bar under INA §212(a)(1)(A)(iii).[1]

If the STATES Act becomes law, INA §212(a)(1)(A)(iv) could still apply since marijuana would remain on Schedule I of Subsection 202(c) of the CSA. However, this would not be the case if either the Marijuana Justice Act or the Marijuana Freedom Act becomes law, since marijuana would no longer be considered a controlled substance under Section 202 of the CSA.

Marijuana-related convictions prior to federal legalization

None of the Congressional Bills indicate that they would be applied retroactively. As a result, it is very likely that a foreign national who has a prior **US or foreign** conviction for marijuana possession (or who has admitted to committing the essential elements of such an offense), will continue to be inadmissible under INA §212(a)(2)(A)(i)(II) even after federal legalization.

Of course, the Marijuana Justice Act will allow the federal court to expunge federal (but not state level) convictions involving marijuana use or possession, which occurred before the effective date of the legislation. Such an expungement would likely have the same effect as the current expungement provisions contained in the *Federal First Offender Act* (FFOA).[2]

The FFOA provides that a first-time federal offense for simple possession of a controlled substance may be expunged, assuming that the defendant was under the age of twenty-one at the time of the offense and has never before received first offender treatment under the statute. The FFOA specifically states that, if an expungement order is granted, it will not be considered a conviction for the purpose of a disqualification or disability imposed by law upon conviction of a crime, or for any other purpose.

It is well established that an expungement granted under the FFOA negates a conviction for purposes of INA §212(a)(2)(A)(i)(II).[3] As expungements under the Marijuana Justice Act would likely have the same effect as the FFOA, an individual who successfully obtains one should no longer be inadmissible under INA §212(a)(2)(A)(i)(II).

In conclusion, none of the Congressional Bills are expected to have any retroactive effect on the inadmissibility of a foreign national who has a prior **US or foreign** conviction for marijuana possession. However, the Marijuana Justice Act would at least provide a process to seek expungements for prior federal marijuana offenses, which should negate the conviction for the purposes of INA §212(a)(2)(A)(i)(II).

Commission of marijuana-related offenses prior to federal legalization

INA §212(a)(2)(A)(i)(II) bars foreign nationals who admit to committing the essential elements of a controlled substance offense, even if they were never charged or convicted of the offense. Such admissions are typically made to a United States Customs and Border Protection (USCBP) officer during an application for admission. A foreign national who admits to committing a controlled substance offense **priorto** federal legalization can be permanently barred under INA §212(a)(2)(A)(i)(II), even if the actual admission does not occur until **after** federal legalization.

A foreign national who is barred for admitting to the prior commission of a marijuana-related offense would continue to

be inadmissible under INA §212(a)(2)(A)(i)(II), even after federal legalization. In addition, as there would be no actual conviction, the foreign national would be unable to seek an expungement even if the Marijuana Justice Act becomes law.

Foreign nationals employed by US cannabis businesses

INA §212(a)(2)(C) permanently bars a foreign national if USCBP has reason to believe that he or she is (or has been) an illicit trafficker in a controlled substance or any listed chemical (as defined in Section 102 of the CSA, or a knowing assister, abettor, conspirator or colluder in illicit trafficking of such controlled substances or listed chemicals. This is the ground of inadmissibility that would typically be applied to employees (and investors) of cannabis businesses.

Cannabis businesses located in the United States, even in states that have legalized marijuana, still technically operate in violation of the CSA. However, these businesses were tolerated during the Obama Administration.

In January 2018, the United States Department of Justice (DOJ) announced it was rescinding its prior policy directing federal prosecutors not to target cannabis businesses operating legally under state law. However, after Senator Gardner blocked President Trump's DOJ nominees, President Trump agreed not to prosecute cannabis businesses operating in compliance with state law. During his testimony to the Senate on January 15, 2019, then-nominee for Attorney General William Barr also stated that marijuana companies operating legally according to state laws would not face action by the DOJ.

Assuming the DOJ continues its policy of not prosecuting cannabis businesses that are operating in compliance with state law, US citizens working for (or investing in) these cannabis companies should not be at risk. However, the same cannot be said for foreign nationals who are employed by (or who invest in) these cannabis businesses.

Foreign nationals are still subject to the INA, which applies federal law (including the CSA) in inadmissibility adjudications. This means that any foreign national currently working for (or investing in) a US cannabis business, even one that is operating in compliance with state law, is at risk of being permanently banned under the controlled substance trafficking ground.

If any of the Congressional Bills become law, foreign nationals employed by (or investing in) a US cannabis business operating in compliance with state law will not be inadmissible under INA §212(a)(2)(C). However, since these Congressional Bills are not expected to be applied retroactively, any foreign national who did so prior to federal legalization could still be barred under INA §212(a)(2)(C).

Foreign nationals employed by Canadian cannabis businesses

At the present time, there is still a great deal of uncertainty regarding whether employees (and investors) of Canadian cannabis companies will be permitted to enter the United States for business purposes. Although USCBP has now clarified that these employees may enter for tourism, it is still not clear what business activities will be permitted.

On October 9, 2018, USCBP revised its Policy Statement on Canada's Legalization of Marijuana and Crossing the Border (Revised Statement).[4] Prior to this date, USCBP took the position that merely being an employee (or an investor) of a legal cannabis business in Canada could result in inadmissibility under INA §212(a)(2)(C).

Prior to the Revised Statement, there were already reported cases of employees of Canadian cannabis businesses receiving lifetime bans under INA §212(a)(2)(C). Also, in at least one case, an investor in a Canadian cannabis company also received a lifetime ban under INA §212(a)(2)(C). Although these cases appeared to be limited to ports of entry on the West Coast, they demonstrated that employees and investors of Canadian cannabis companies might actually be banned as illicit traffickers.

The risk became even greater when *Politico interviewed Todd Owen, Executive Assistant Commissioner for USCBP's Office of Field Operations* in September 2018. During this interview, he specifically told *Politico* that working in the Canadian cannabis industry would be grounds for inadmissibility.

The Revised Statement was considered welcome news for employees and investors of Canadian cannabis companies. The current position taken by USCBP is as follows:

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

The Revised Statement was significant because it confirmed that employees of Canadian cannabis companies should be admissible if their reasons for coming to the United States are "unrelated to the marijuana industry." This clearly includes travelling purely for tourism (for example, going to Disneyland), and business visitor activities that are completely unrelated to the marijuana industry (for example, representing a different company that is not involved in the cannabis industry). Although the Revised Statement does not specifically refer to investors in the Canadian cannabis industry, it clearly includes a passive investor who is not entering the United States as a representative (i.e., officer, board member, etc.) of the cannabis company in which they have invested.

Although the Revised Statement was a step in the right direction, it did not state what activities would be considered "unrelated to the marijuana industry." This has left open the possibility that someone could be barred merely for attending a marijuana conference in the United States or visiting a US-based investor in their Canadian cannabis company.

On October 25, 2018, the *Canadian Press reported* that they had received an email from Stephanie Malin, USCBP Branch Chief for Northern/Coastal Regions, which stated the following:

If the purpose of travel is unrelated to the marijuana industry, such as a vacation, shopping trip, visit to relatives, they will generally be admissible to the US. However, if they are coming for reasons related to the industry, such as the conference… they may be found inadmissible.

Chief Malin was referring to the MJBizCon cannabis industry conference in Las Vegas as an example of a reason that could result in a finding of inadmissibility under INA §212(a)(2)(C).

Most of the foreign nationals who travelled to MJBizCon were eventually admitted to the United States, although many were detained for several hours before being permitted to enter. At least one investor in a cannabis business received a permanent bar under INA §212(a)(2)(C), on his way to the MJBizCon. However, the decision to impose the ban in his case was likely due to the fact that his company operated a cannabis facility in the State of Nevada.

At the present time, foreign national employees (and investors) of Canadian cannabis companies continue to face uncertainty when travelling to the United States for purposes that are not clearly unrelated to the marijuana industry. However, if any of the Congressional Bills become law, the level of certainty will increase significantly.

If the STATES Act becomes law, foreign national employees (and investors) of Canadian cannabis companies should be able to enter the United States for matters related to the marijuana industry, as long as their activities occur in a state that has legalized marijuana. However, travelling to a state that has not legalized marijuana could expose the

foreign national employee (or investor) to a permanent bar under INA §212(a)(2)(C), even if the proposed activity is considered a non-criminal violation of that state's laws.

If either the Marijuana Justice Act or Marijuana Freedom Act become law, it may also be possible for foreign national employees (and investors) of Canadian cannabis companies to travel to states that have not legalized marijuana, for matters related to the marijuana industry, without being barred under INA §212(a)(2)(C). However, they would need to ensure that the proposed activity would not be considered a criminal offense under that state's laws.

Conclusion

Regardless of which Congressional Bill becomes law, it will be welcome news for Canadian- and US-based cannabis businesses, as well as individual foreign nationals. However, it could take another 12 to 24 months (possibly longer) before federal legalization actually occurs.

Dentons' leading Cannabis group will continue to help industry stakeholders understand the new regulatory framework impacting US immigration laws. If you wish to discuss the possible implications to you and your business, please contact Henry Chang.

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1. See https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume8-PartB-Chapter7.html↩
2. 8 USC §3607.↩
3. See 9 FAM 302.3-2(B)(3)(e), although it mistakenly cites INA §212(a)(2)(A)(i)(I) instead of INA §212(a)(2)(A)(i)(II).↩
4. See https://www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-canadas-legalization-marijuana-and-crossing-border.↩

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