



U.S. Customs and  
Border Protection

# CBP Information Guide

## Legalization of Marijuana in Canada

*October 2018*

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Note: Pre-decisional Work Product

## Introduction

- This has been developed in order to assist managers in the Field regarding Canada legalizing marijuana.
- This is meant to be a guide, and many decisions will be made on a case by case basis by port management based on case facts and operationsl needs.

INTRODUCTION

## **Purpose**

This User Guide (UG) has been developed by Admissibility and Passenger Programs (APP) to assist the field with case law and scenarios to assist with the upcoming legalization of marijuana in Canada.

## **Subject**

Impact on U.S. Customs and Border Protection (CBP) and the admissibility of Canadian Citizens after the legalization of recreational use of marijuana in Canada, which will occur on October 17, 2018.

## **Executive Summary**

Canada's legalization of the recreational use of marijuana has the potential for an increase of secondary inspections related to controlled substance violations. The manner in which Customs and Border Protection Officers (CBPO) at United States (U.S.) Ports of Entry (POE) enforce federal law will not change when Canada legalizes marijuana. However, the practical implications of marijuana in Canada could lead to a potential increase of inadmissible aliens arriving from Canada.

## **Analysis**

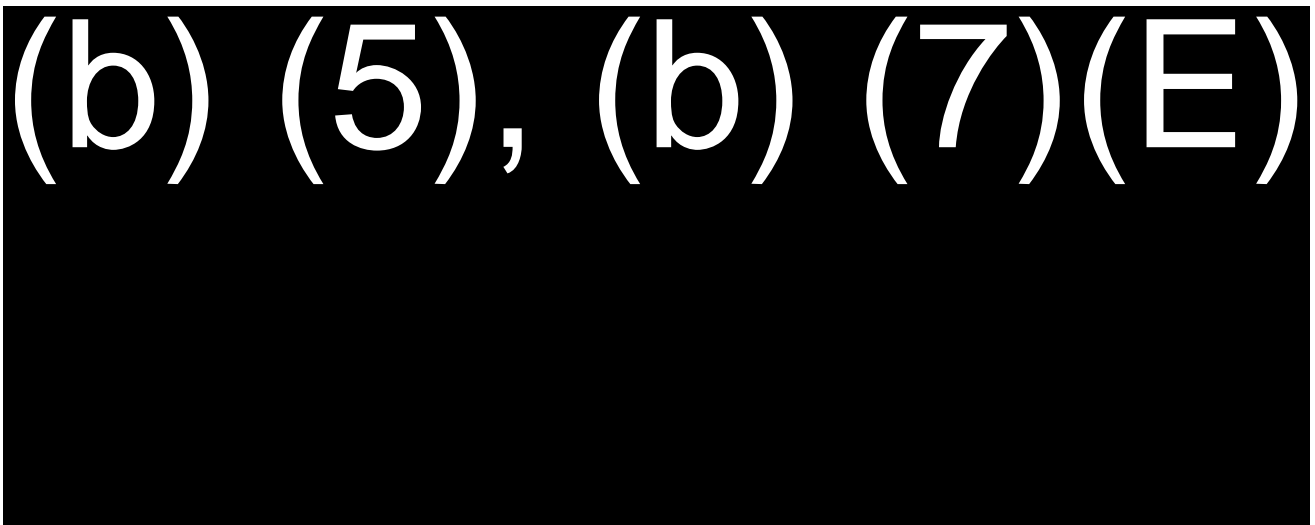
Every individual entering the U.S. is subject to examination by CBP. All aliens entering the U.S. are presumed to be intending immigrants until they satisfy during an inspection that they are otherwise admissible. Generally, an inspection is to determine the identity, alienage and admissibility of the individual and the goods in their possession. Further, the Immigration and Nationality Act (INA) (as amended) does not allow for the admission of any alien deemed inadmissible under §212. *See §212(a) and generally §214(b) & §235(b)(2)(A)*. CBP has the discretion to issue, and approve, an I-193, "Application for Waiver of Passport and/or parole an individual into the United States, that may be otherwise inadmissible under Section 212 of the INA. See appendix C for further details to included statistics regarding the projected possible impact of legalizing marijuana in Canada at the border.

## Determining Admissibility & Applicable Grounds of Inadmissibility

In the context of marijuana use, the relevant grounds of inadmissibility under 8 USC 1182 (Section 212 of the INA) are:

- Drug (controlled substance) abusers/addicts §212(a)(1)(A)(iv) – requires a panel physician determination from the United States Public Health Service (USPHS).
- Conviction or commission of a Crime Involving Morale Turpitude (CIMT) §212(a)(2)(A)(i)(I) – Trafficking in, but not simple possession of, a controlled substance, is a CIMT under §212(a)(2)(C).
- Controlled substance violation §212(a)(2)(A)(i)(II) – Based on a violation of any law or regulation of a State, the United States, or a foreign country relating (to include use) of a controlled substance. It is important to note that an inadmissibility would depend on whether the drug use occurs during a prohibitive period; recreational marijuana use post legalization in Canada would not be a basis under this charge.
  - In order to deem an alien inadmissible under §212(a)(2)(A)(i)(II) (b) (7)(E) (b) (5), (b) (7)(E) (see appendix A for further information)
- Controlled Substance Trafficker (reason to believe) §212(a)(2)(C)(i) – Alien who is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in [21 C.F.R. 802], or is, or has been, a knowing aider, abettor, assistor, conspirator, or colluder with others in the illicit trafficking, or endeavored to do so.

In order to have a formal order of removal under the aforementioned grounds, the alien must be served a Notice to Appear (NTA) before an Immigration Judge (IJ), who will make the final determination of admissibility and removal. Given the length of this process, and that an alien may have access to the U.S., if the alien is paroled, a non-immigrant alien is generally offered the opportunity to withdraw their application for admission instead of being referred to an IJ.



(b) (5), (b) (7)(E)

## Waivers

ARO adjudicates all nonimmigrant discretionary requests for waivers under INA §212(d)(3)(A), to include Canadian citizens who are exempt the visa requirement. In FY17, ARO adjudicated 9,991 waiver applications, submitted by visa exempt nonimmigrants, with a 94% approval rate; Canadian citizens submitted approximately 96% of these waiver requests. ARO has already seen a marginal increase in the number of aliens seeking waivers for nonimmigrant purposes as they relate to drug use. This marginal increase stems from aliens refusing to answer questions at the POE relating to drug use or individuals, who have not been inspected, but nonetheless are

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proactively applying for a waiver. While ARO cannot render a decision for these types of waiver requests, the operational impact of the legalization of marijuana may significantly increase the amount of waiver requests ARO must adjudicate, with a correlating effect on processing times being increased from the current average of 70 to 90 days.

ARO looks at a multitude of factors when determining the suitability of a waiver of inadmissibility. Further, each request is considered individually, and is based on the facts and circumstances which are presented and available to CBP.

Established through case law, each application is reviewed through a weighing of at least three factors:

- 1) The risk of harm to society if the applicant is admitted;
- 2) The seriousness of the underlying cause of the applicant's inadmissibility and,
- 3) The nature of the applicant's reason for wishing to enter the United States.

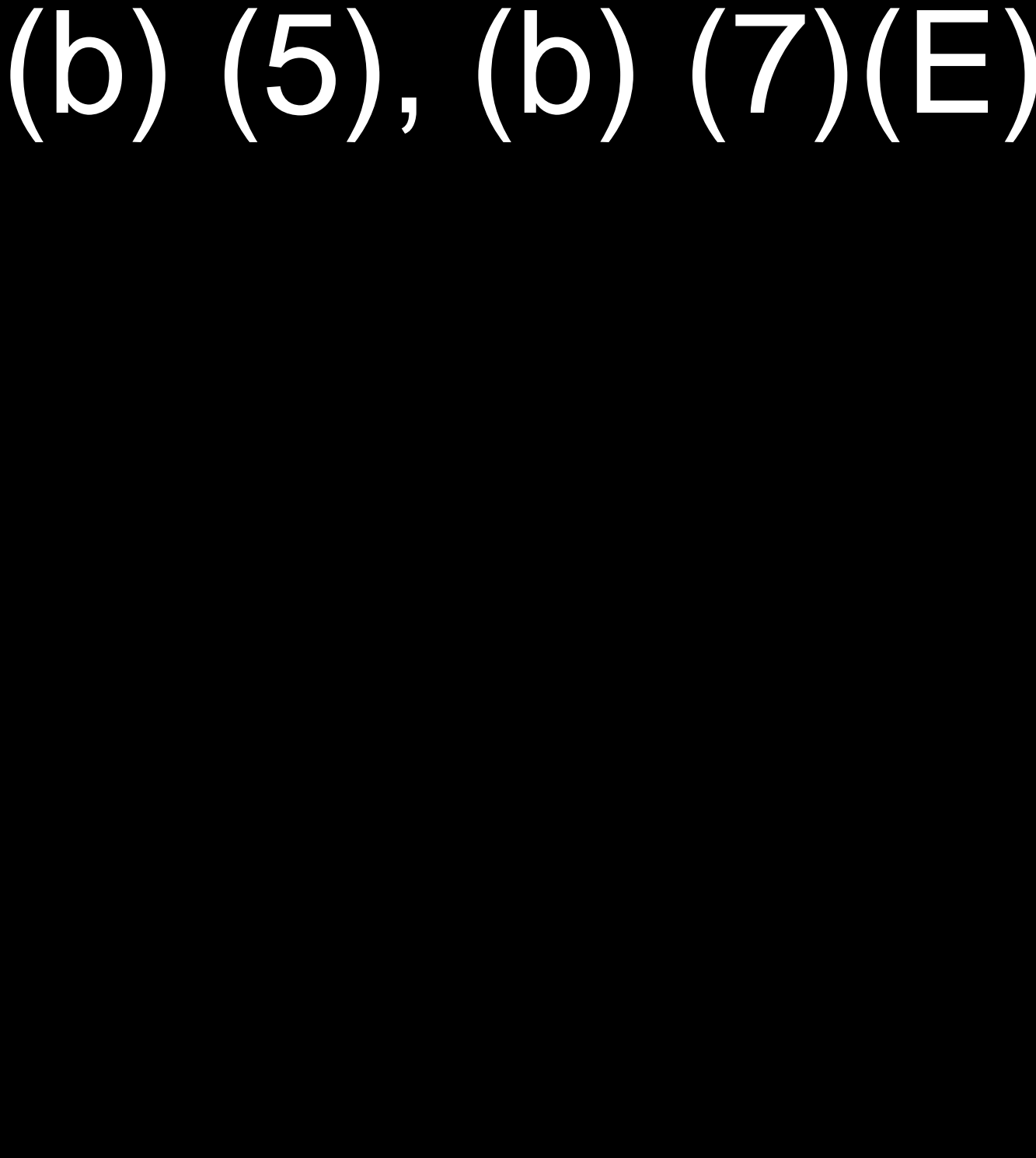
Additional factors evaluated by CBP are, the nature of the offense, the circumstances which led to the offense, how recently the offense occurred, whether it was an isolated incident or part of a pattern of misconduct, and any evidence of reformation, or rehabilitation, that is provided by the applicant. Relief is often granted for applications from simple possession of marijuana, with no other criminality or mitigating charges, after a passage of time, and a weighing of the information provided. The granting of relief is similar to other applications with a single charge or incident, which caused the underlying inadmissibility with a significant passage of time and no other criminality, or other weighted circumstances.

## Scenarios - Marijuana Legalization

(b) (5), (b) (7)(E)

SCENARIOS

(b) (5), (b) (7)(E)



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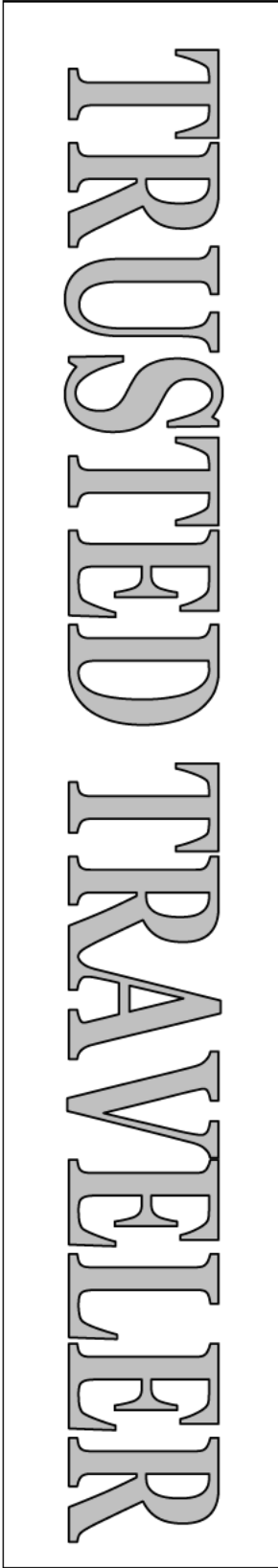
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## Trusted Traveler Programs

Currently there are no questions related to drug use during Trusted Traveler Program eligibility interviews. However, aliens who are found inadmissible due to a controlled substance violation, (b) (7)(E) (b) (5), (b) (7)(E) would not be eligible to participate in Trusted Traveler Programs, such as NEXUS, Global Entry, Free and Secure Trade (FAST) or secure Electronic Network for Travelers Rapid Inspection (SENTRI).

(b) (7)(E)



## Talking Points

APP has coordinated with the Office of Public Affairs (OPA) and the Office of Congressional Affairs (OCA) to craft the appropriate messaging for public and congressional outreach.

APP will provide support to DHS' outreach efforts. Additionally, APP will prepare the Agency call centers to engage in outreach assistance.

*Currently OPA and OFO Communications Management Office (CMO) has been distributing the below approved statement when approached by the media:*

“Entry requirements for international travelers wishing to enter the United States are governed by and conducted in accordance with U.S. federal law, which supersedes state laws. Currently, marijuana possession is against U.S. federal law and U.S. Customs and Border Protection enforces those laws as appropriate.

APP will continue to engage with Canadian Border Services Agency (CBSA) on joint messaging regarding the marijuana being illegal to possess at border crossings.

TALKING POINTS

## Appendix A

- Section 212(a) and how it applies to marijuana

APPENDIX A



*Under section 212 of the INA below are a few sections that we will concentrate on regarding grounds of removal from the United States for Aliens using Marijuana in Canada once it becomes legal Canada wide.*

Sec. 212. [8 U.S.C. 1182]

(a) Classes of Aliens Ineligible for Visas or Admission. - Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas, and ineligible to be admitted to the United States:

(1) Health-related grounds.-

(A) In general.-Any alien-

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)-

(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict, is inadmissible.

**(b) (5), (b) (7)(E)**

(2) (A) Conviction of certain crimes.-

(i) In general. - Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(II) 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 Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

**(b) (5), (b) (7)(E)**

(C) CONTROLLED SUBSTANCE TRAFFICKERS- Any alien who the consular officer or the Attorney General knows or has reason to believe—

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(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

**(b) (5), (b) (7)(E)**

(6) Illegal entrants and immigration violators.-

(C) Misrepresentation.-

(i) In general. - Any alien who, by fraud, or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States, or other benefit provided under this Act, is inadmissible

**(b) (5), (b) (7)(E)**

Sec. 235. (a) Inspection.-

(1) Aliens treated as applicants for admission. - An alien present in the United States who has not been admitted, or who arrives in the United States (whether or not at a designated port of arrival, and including an alien who is brought to the United States after having been interdicted in international, or United States, waters) shall be deemed for purposes of this Act an applicant for admission.

(3) Inspection. - All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.

(4) Withdrawal of application for admission. - An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States.

(5) Statements. - An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States, including the applicant's intended length of stay, and whether the applicant intends to remain permanently, or become a United States citizen, and whether the applicant is inadmissible.

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(b) Inspection of Applicants for Admission.-

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled.-

(A) Screening.-

(i) In general. - If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section [212\(a\)\(6\)\(C\)](#) or [212\(a\)\(7\)](#), the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution.

(b) Inspection of Applicants for Admission.-

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled.-

(A) Screening.-

(i) In general.-If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section [212\(a\)\(6\)\(C\)](#) or [212\(a\)\(7\)](#), the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution.

C) Treatment of aliens arriving from contiguous territory. - In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section [240](#).

3) Administration of oath and consideration of evidence. - The Attorney General and any immigration officer shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service.

*Aliens who are found to be removable from the United States under sections 212(a)(6)(C), are subject to removal under the Expedited Removal Provisions. All other Aliens arriving from contiguous territory could be allowed to withdraw their application for admission from the United States. An Alien who refuses to withdraw their application should be processed for a 240 removal hearing and returned to contiguous territory (if arriving by land) to await their proceedings under 240.*

## Appendix B

- Case laws regarding essential elements of a crime, and what a seizure constitutes.
- Counsel’s decision stating that an administrative seizure penalty does not constitute a ground of inadmissibility under the INA.

APPENDIX B

## Case Law and Elements of a Crime

The INA provides that arriving aliens are inadmissible to the United States if they have been convicted of a crime involving moral turpitude, an attempt or conspiracy to commit such a crime, or a violation of a controlled substance offense of any State, the United States, or a foreign country. These aliens are also inadmissible if they merely admit having committed one of those offenses, even where there was no criminal prosecution. Finally, these aliens need only admit the essential elements during a sworn statement of the criminal offense to be deemed inadmissible. *Matter of E-V-*, 5 I&N Dec. 194 (BIA 1953)) It is not necessary that they admit the legal conclusion that they in fact committed a specific crime.

In *Matter of K-*, the Board held that before an alien can be charged with inadmissibility due to admitting the elements of a crime involving moral turpitude, the alien must be given the following: 1) an adequate definition of the crime, including all essential elements, and 2) an explanation of the crime in understandable terms. The Board noted that these rules “were not based on any specific statutory requirement but appear to have been adopted for the purpose of insuring that the alien would receive fair play, and to preclude any possible later claim by him or her that they had been unwittingly entrapped into admitting the commission of a crime involving moral turpitude.”

### ADMISSIONS

An alien need only admit the elements of the crime, not the legal conclusion that they actually committed the crime. However, the admissions must be voluntary and unequivocal. The admissions must, by themselves, constitute full and complete admission of (or attempt or conspiracy to commit) a crime involving moral turpitude or a controlled substance offense. If an alien has received a pardon from Canada for an offense, subsequent admission to the offense will still render them inadmissible due to the United States not recognizing Canadian pardons. If the criminal offense was adjudicated, and resulted in dismissal, subsequent admissions by the alien will not establish inadmissibility, unless the dismissal by the criminal court was on purely technical grounds

## ***Essential Elements of Possession of Controlled Substance***

### UNDER 21 U.S.C. 844 AND IMPORTATION OF CONTROLLED SUBSTANCE UNDER 21 U.S.C. 952

The essential elements of simple possession of marijuana, a controlled substance, under 21 U.S.C. Sec. 844(a) are as follows:

- (a) That the defendant knew that the substance possessed was marijuana, a controlled substance; and
- (b) That the defendant had control of the marijuana, by either actual or constructive possession. *U.S. v. Schocket*, 753 F.2d 336 (3rdCir. 1985); *U.S. v. Holloway*, 744 F.2d 527 (6thCir.1984); *Amaya v. U.S.*, 373 F.2d 197 (9thCir. 1967); *Bass v. U.S.*, 326 F.2d 884 (8thCir. 1964).

The essential elements of importation of a controlled substance under 21 U.S.C. Sec. 952 are as follows:

- (a) That the defendant knew that the substance imported was marijuana, a controlled substance);
- (b) That the defendant brought the marijuana into the United States from a place outside the United States; and
- (c) That the defendant knowingly and willfully imported the marijuana into the United States.

*U.S. v. Andrews*, No. 92-7625, 1994 U.S. App. LEXIS 13422 (5thCir. June 7, 1994), *U.S. v. Oiebode*, 957 F.2d 1218 (5thCir. 1992); *U.S. v. Londono-Villa*, 930 F.2d 994 (2d Cir. 1991); *U.S. v. Samad*, 754 F.2d 1091 (3rdCir. 1984).

Definition of Controlled Substance: Means any substance included in Schedule I, II, III, IV, or V

Controlled drugs in the above mentioned Schedule includes but is not limited to the following: Opium, Codeine, Morphine, Dihydromorphinone, Cocaine, Methadone, Cannabis, Cannabis resin, Cannabis (marijuana), Amphetamines, LSD, Barbiturates.

Controlled Substances, as prescribed in the Canadian Criminal Code 2003 (Marijuana will be removed once it is considered a legal substance in Canada)

1. Possession of substance: Except as authorized under regulations, no person shall possess a substance included in Schedule I II, and III.

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2. Obtaining substance: No person shall seek or obtain a substance included in Schedule I, II, III, IV, or V.
3. Trafficking in substance: No person shall traffic in a substance including Schedule I, II, III, or IV.
4. Possession for purpose of trafficking: No person shall, for the purposes of trafficking, possess a substance included in Schedule I, II, III, or V.
5. Importing and exporting: Except as authorized under regulations, no person shall import into the U.S., or export from the U.S., a substance included in Schedule I, II, III, IV, V, VI.
6. Production of substance: Except as authorized under regulations, no person shall produce a substance included in Schedule I, II, III, or IV.
7. Produce: Means, in respect of a substance included in any of the schedules I to IV to obtain the substance by any method of process including, manufacturing, synthesizing, cultivating, propagating or harvesting the substance or any living thing from which the substance may be extracted or otherwise obtained.

*Definitions within the Controlled Drugs and Substance Act.*

1. Possession: Means possession within the meaning of subsection 4(3) of *the* criminal code. Criminal code.
2. Provide: Means to give, transfer or otherwise make available in any manner, whether directly or indirectly.
3. Sell: Includes offer for sale, expose for sale, and have in possession for sale and distribute.
4. Traffic: Means in respect of a substance included in any of Schedules I to IV, to sell, administer, give, transfer, transport, or send or deliver the substance.

June 30, 1998 DOJ Immigration Judge Memo regarding admission of crime



U.S. Department of Justice  
Immigration and Naturalization Service

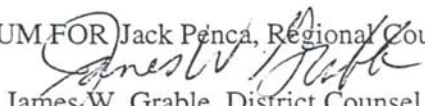
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Office of the District Counsel

130 Delaware Avenue  
Buffalo, NY 14202

June 30, 1998

MEMORANDUM FOR Jack Pence, Regional Counsel, Eastern

FROM:   
James W. Grable, District Counsel  
Buffalo District

SUBJECT: Admission of Crime – Inadmissibility under INA Section 212(a)(2)(A)(i)(II).

The United States Customs Service recently implemented a program at selected preclearance sites in Canada, including Toronto, requiring random drug searches of aliens seeking admission to the United States in preclearance inspection in Canada. In some instances, the Customs search results in the discovery of small quantities of marijuana. Alien applicants found in possession of small quantities of marijuana in preclearance inspection are required to pay a monetary penalty to Customs.

A prior General Counsel Opinion, 95-4, entitled Excludability under Customs Zero-Tolerance Fines, dated January 20, 1995, (copy attached) concluded that an alien's execution of a Customs "Agreement to Pay a Monetary Penalty" form does not constitute an admission of the commission of acts which constitute the essential elements of a controlled substance law violation that would establish inadmissibility under INA § 212(a)(2)(A)(i)(II).

The Inspections Program is now seeking to establish what evidence is required, in addition to the execution of the aforesaid Customs form, to establish inadmissibility under the "admission of crime" provision in INA § 212(a)(2)(A)(i)(II). To this extent, the Office of the General Counsel may be requested by Inspections to provide a formal legal opinion addressing this inquiry.

For an admission of crime involving a controlled substance law to constitute a ground of inadmissibility under the statute in question, the alien must admit all the elements of the crime involved and must have been furnished a definition of the offense in understandable terms. See Matter of G-M-, 7 I&N Dec. 40 (Att'y Gen. 1956); Matter of K-, 7 I&N Dec. 594 (BIA 1957).

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Penca, Regional Counsel

Page 2

Subject: Admission of the Crime – Inadmissibility under INA Section 212(a)(2)(A)(i)(II)

Under the cited administrative decisions, it has been established that the alien must be clearly advised of the essential elements of the crime and the alien must admit all the acts constituting the essential elements of the crime. The alien must be given an adequate definition of the crime, explained in understandable terms, to obtain a valid admission of a crime establishing inadmissibility under the referenced statute.

An alien seeking admission to the United States in preclearance inspection who pays a Customs fine for failure to declare a small quantity of a controlled substance discovered during the inspection may have violated Title 21 USC §§ 952 and 963 by attempting or conspiring to import a controlled substance into the United States. See 21 USC §§ 952 and 963 (copies attached). The essential elements of these statutes are contained in jury instructions. (See Fifth and Seventh Circuit Federal Criminal Jury Instructions (copies attached).

To establish the “admission of crime” foundation in preclearance inspections involving Customs fines, immigration inspectors may be required to make specific reference to the attached statutes and jury instructions to sufficiently advise the alien applicants of all the essential elements of the controlled substance violation under 21 USC §§ 952 and 963 that may have been committed. The immigration inspector would be required to document his explanation to the alien of the essential elements of the crime involved. The immigration inspector would also be required to obtain a detailed written statement from the alien admitting commission of all the acts constituting the essential elements of the crime.

*According to this memo the “Agreement to Pay a Monetary Penalty” does not constitute an admission of the commission of acts which constitute the essential elements of a controlled substance law violation that would establish inadmissibility under INA 212(a)(2)(A)(i)(II).*

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