

RIAC2



CRIMINAL LAW

FAMILY LAW



IMMIGRATION LAW

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The Regional Immigration Assistance Center provides legal support for attorneys who represent indigent noncitizen clients in criminal and family court. Founded in the wake of Padilla v. Kentucky, there are six centers located in New York State. Region 2 covers sixteen counties in the central part of the state.

**RIAC2 is administered by the Criminal Division of the Oneida County Public Defender.*

This month we are taking a very brief look at the immigration consequences of the Marijuana Regulation and Taxation Act (MRTA) for noncitizen clients. While this legislation “legalizes” marijuana in New York State in many circumstances, **marijuana is still a “controlled substance” under federal law, and by extension, immigration law.**

In This Issue:

THE MRTA AND NONCITIZEN CLIENTS

UPCOMING EVENTS:

09/28/2021: 10:00 AM – 12:00 PM
Onondaga Co. ACP Nuts & Bolts
Training (Onondaga Co ACP
attorneys only)

10/13/2021: 12:00 – 1:30 PM
CRIM IMM 101 for Criminal
Defense Attorneys
Online via Webex. To register:
marcello@ocgov.net

10/21/2021: 12:00 – 1:30 PM
CRIM IMM 101 for Family Court
Attorneys
Online via Webex. To register:
marcello@ocgov.net

11/09/2021: 12:00 – 1:30 PM
Advanced Crim Imm: The MRTA
and its Impact on Noncitizens
Online via Webex. To register:
marcello@ocgov.net

THE MRTA & NONCITIZEN CLIENTS

1. What remains criminalized under the new legislation?

A. Possession:

- NYPL §§222.25, 222.30, 222.35, 222.40
- Possession of “illicit” cannabis (untaxed/unregulated) by a licensed person (CAN §136(2))

B. Sale:

- NYPL §§222.45, 222.50, 222.55, 222.60, 222.65
- Possession with intent to sell “illicit” cannabis by a licensed person (CAN §136(4))
- Sale of “illicit” cannabis by a licensed person (CAN §136(3))
- Sale with a suspended license under Article 222
- Sale to people under 21 NYPL §§222.50(2), 222.55(2)

C. V & T:

- Cannabis consumption in a motor vehicle (VTL §1227).
- DWAI under §1192(4) and §1192(4-a) remain the same.

2. **Immigration consequences:**

A. Possession: A “Controlled Substance Offense (CSO)” conviction:

- *Deportability* (INA §237(a)(2)(B)(i)) –The new “violation” level (PL §222.25) *exceeds* the amount to qualify for the immigration exception (i.e., less than 30 grams) under grounds of deportability.
- *Inadmissibility* (INA §212(a)(2)(A)(i)(II)) - inadmissibility is PERMANENT; i.e., there is no waiver available.
- *Lack of “good moral character (GMC)”* (INA §101(f)(3)) – e.g., naturalization, relief from removal, waiver applications.

B. Sale:

- “Controlled Substance Offense (CSO)” consequences as stated above;



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Assigned Counsel
Administrators:
Contact the RIAC2 to
schedule your next
training, lunch hour or
other session in your
office/county.
We will provide CLE credit!**

- Drug trafficking Aggravated Felony (INA §101(a)(43)(B)) – **All PL §222 sales will likely be deemed a Drug Trafficking Aggravated Felony.**
- Crime Involving Moral Turpitude (CIMT) – **All PL §222 sales are CIMTs.**
- Inadmissibility because there is “reason to believe” client is a drug trafficker.
- Sale to a person under 18 could be a Crime Against a Child (CAC). (INA §237(a)(2)(E)(i)).

3. What about old convictions?

Prior convictions for NYS marijuana offenses may still make client deportable or inadmissible on “controlled substance” grounds or “reason to believe” client is a drug trafficker, **even if sealed, vacated or expunged.**

4. What about expungements?

Expanded CPL §160.50(3)(k): Cannabis violations(both possession and sale), including civil violations, will be automatically sealed and expunged.

- Still a “conviction” for immigration purposes
- Rap sheet will not reveal expunged cases. Client may be otherwise deportable because of an Article 222 conviction, but attorney will not know. Also impossible to identify cases for necessary 440 motion for an old Article 221 conviction.
- Record destruction – records may still be available from OCA if necessary (see below).

5. Important considerations: When your client has the burden of proof in an immigration matter, court dispositions/records relating to any arrests must be provided. This includes:

- A. Removal proceeding based on inadmissibility (INA §212): Respondent has the burden of proof to show that he/she is not inadmissible to the United States.
- B. Applications with USCIS:
 - Adjustment of Status – an application for lawful permanent residence, applicant has burden to show he/she is not inadmissible.
 - Application for Citizenship – burden is on applicant to demonstrate eligibility, including “good moral character”.
- C. Certain Petitions (e.g., VAWA, Special Immigrant Juveniles, DACA, TPS)
- D. Waivers necessary for the approval of an Application or Petition
- E. Application for relief in removal proceeding (e.g., cancellation of removal, asylum, adjustment of status, VAWA, waivers)
- F. Any matter involving use of discretion (e.g., removal proceedings, bond, citizenship, waivers, adjustment of status, where applicant must prove he/she is deserving of grant as a matter of discretion)

5. Strategies and Options:

- **Do a thorough intake** to screen for **all** prior arrests and convictions for marijuana offenses, even if violations.
- Avoid any marijuana convictions going forward regardless of the new laws.
- Seek vacatur via an Article 440 motion when necessary on legal/constitutional grounds.

As always, call the RIAC at the earliest moment in your representation of a noncitizen client!