Pot, Booze, and What Your Students and Scholars Could Lose: Developing Best Practices for Educating and Advising

Presented by:
Mary Clabaugh, Scholar Advisor
Kim Haky, Senior Immigration Advisor
Outline of Today’s Presentation

I. Inadmissibility/Removability
II. Criminal Immigration Basics
III. Prudential Visa Revocation (DUI-related)
IV. Immigration Consequences of Marijuana
V. Developing Best Practices
VI. Case Examples
VII. Q and A
Inadmissibility vs. Removability

Foreign nationals (FN) become inadmissible and/or removable based on exhibiting behavior or having characteristics which Congress deems undesirable.

**Inadmissibility**
- Applies to FNs that have not been formally “admitted” into the U.S.:
  - NIV and IV applicants abroad
  - Applicants at ports of entry
  - Adjustment of status applicants
    - See inadmissibility grounds at INA Sec. 212(a)
- Inadmissibility grounds are broader than deportability.

**Removability (deportability)**
- Applies to FNs in the U.S. following admission
  - See deportability grounds at INA Sec. 237(a)
Common Criminal Activity with Immigration Consequences

• Crimes of moral turpitude
• Drug-related offenses
• Domestic violence
• Aggravated felonies (most serious crimes)
• Two or more crimes
How does DHS/DOS know of Criminal Activities?

• Through interfaces between govt. agency databases including:
  1) NCIC (National Crime Information Center): used by all consular posts
  2) CLASS (Consular Lookout and Support System): computerized name search system

• Firsthand by foreign national’s admission to crime during application for visa, entry or other immigration benefit
What is a “Conviction” under Immigration Law?

• Defined as – a formal judgment of guilt (including “no contest”) entered by a court
  • Generally, even if the record is sealed, expunged, or pardoned, the conviction still stands in the immigration context
• Admission of elements of a crime (e.g. during interview)
What if I am Convicted?

• Convictions, even misdemeanors, can have very negative consequences when attempting to obtain a visa or re-enter the US

• If convicted in the U.S. and crime is not serious enough, ICE may not pick up
But what about Arrests?

- Arrests can still have a big impact on immigration especially now with DUIs, even if no conviction
  - Once the individual is arrested it triggers an NCIC hit
  - Possible ineligibility for visas, adjustment of status and other immigration benefits in the U.S.
Prudential Visa Revocation

9 FAM 403.11-5(B)

DOS (CA/VO/SAC-Departments Visa Office of Screening, Analysis and Coordination) may revoke a visa if an ineligibility is suspected, or for virtually any other reason. DOS may receive derogatory information from another US government agency, etc.
A consular officer can revoke a nonimmigrant visa if:

• The alien is not eligible for the particular visa classification
• The alien has been issued an immigrant visa
• The visa has been physically removed from the passport in which it was issued, or
• The alien is subject to a “Watchlist Promote Hit” for an arrest or conviction of driving under the influence, driving while intoxicated, or similar arrests/convictions (DUI) that occurred within the previous five years, pursuant to 9 FAM 403.11-5(B)
• Although consular officers generally may revoke a visa only if the alien is ineligible under INA 212(a) or is no longer entitled to the visa classification, they now have the authority, without referring the case to DOS, to prudentially revoke a visa on the basis of a potential INA 212(a)(1)(A) ineligibility when a “Watchlist Promote Hit” appears for a **DUI (or related) arrest or conviction** that occurred within the previous 5 years.
  • This does not apply:
    (1) when the arrest has already been addressed within the context of a visa application, or
    (2) to other alcohol-related offenses such as public intoxication that do not involve operation of a vehicle.
Can Consular Officers Revoke the Visa of Someone in the U.S.?

• Generally NO but now YES for DUIs only
  • Under no circumstances should a consular officer abroad revoke a visa of someone in the US, other than a revocation based on a DUI. 9 FAM 403.11-3, 12/08/2015

• For individuals in the US, revocations based on DUIs are effective immediately upon their departure from the U.S.

• DOS has indicated that dependent visas will also be revoked
What Does this Mean for Those in the U.S.?

• Revocation should NOT affect a student/scholar’s status in the U.S. despite immigration law
  • An individual whose visa is revoked is deportable. INA 237(a)(1)(B)

• Student/scholars DO NOT have to depart the US if their visa is revoked
  • During early implementation of new policy, some consular notices apparently stated must depart but issue has been corrected

• As a DSO/ARO, do not terminate the student/scholar’s SEVIS record while in the U.S.!
  • But what about after departure?
But what about Applying for New Immigration Benefits in the U.S?

• Revocations *should not* impact nonimmigrant status nor eligibility for student/scholar benefits
  • But still not entirely clear
  • Report to NAFSA Issue Net if you see this

• Some OPT applications were denied due to visa revocation – apparently in error which USCIS says has been fixed
Summary Review: DUI Prudential Visa Revocation

Consular officers can now:

1) revoke nonimmigrant visas based on a DUI (or related) arrest or conviction before an inadmissibility finding; and
2) can do so to individuals in the U.S.

*On 9/2/2016, the DOS published a Guidance Directive on this new visa revocation policy*
Rationale for DOS Policy on DUIs

• Driving under the influence is indicative of a possible INA 212(a)(1)(A)(iii) - ineligibility for a possible physical or mental disorder with associated harmful behavior

• “The Department takes seriously drunk driving/driving under the influence, driving while intoxicated and similar arrests. It is both a public safety issue and evidence of a possible visa ineligibility.” (See DOS – AILA Liaison Notes 4/7/16)
So How Does Visa Revocation Take Place?

• Once arrested for a DUI offense, whether or not ultimately convicted, the student/scholar will be notified by the consular post that issued the visa of its cancellation
  • Notice by phone, email and/or postal letter
• The post informs ICE but does not recommend action
If a Student or Scholar Departs the U.S. after Visa Revocation, can they Return?

- Must reapply for a new visa at the consulate
- Those with a DUI-related arrest or conviction within the prior 5 years (or two in past 10) should be referred to a Panel Physician (PP) who assesses for alcoholism or drug abuse
  - Panel Physicians are hired by the CDC and their decision cannot be appealed
- The process and outcomes with PPs can vary greatly by consulate
What if Deemed Inadmissible by Panel Physician under INA 212(a)(1)(A)(III) due to Alcoholism and DUI?

Generally, this means the student/scholar will need to remain abroad for 1 year until can prove “clean”

- Applicants who are have been determined to have a Class A medical condition are not eligible for a waiver and must complete the time period for sustained, full remission before reapplying for a visa—general one year of full remission
How to Advise a Student or Scholar with a DUI Arrest or Conviction?

Consult with a “criminal immigration” attorney ASAP after arrest:

1. Immigration attorney can work with criminal defense attorney to possibly plea to lesser offense (e.g. disorderly conduct) without immigration consequences (but difficult with DUI charges)

2. Attorney can advise on staying in vs. departing U.S.
   - Should resolve case with the courts to avoid a bench warrant and more complication
   - Generally best to put as much time as possible between arrest/conviction and departing, at least 3 years
Attorney Advice Continued:

3. Attorney can advise on what certified court records to present (and what not to) and prepare legal brief, as needed

4. Attorneys can advise on preparing for Panel Physician examination e.g.:
   - Attend AA or NA (but Catch 22?)
   - Random alcohol or drug testing
   - Counseling for drugs & alcohol
   - Expert opinions from addiction specialists
   - Declarations from witnesses
Uh oh! I Left the U.S. but my Court Case is Still Open. What to do?

• Consular officers are unlikely to issue a visa when there is a pending criminal case but can try
  • Judges hearing DUI cases need the student/scholar to be present for the case or will issue warrant for failure to appear

• Always best to resolve DUI case before departing to show compliance, rehabilitation, etc.
What Happens at the POE with CBP?

• Individuals with a DUI arrest/conviction who travel under ESTA could be denied entry

• After a student or scholar obtains a visa, they must go through CBP:
  • CBP Officer ask questions leading to confessions of “other” crimes – If serious enough, will refuse entry or take student/scholar into custody.

• Thus, student/scholar should always travel with certified copies of court records and legal brief if advised
Wait, Wait I get the DUI, but I Thought Marijuana is Legal?
Yes, recreational marijuana is legal in 8 states and medicinal is legal in 28 states
Proposition 64 has Decriminalized MJ in CA

1) Adults (21+) can buy, use, possess, transport, give away, and grow small amounts of mj
   • Reduces some other offenses to infractions
2) Makes above conduct an infraction for person age 18-20
3) Allows some relief for prior convictions
What MJ Conduct is still Criminal in CA?

• Give away to person under 21
• Possess more than 28.5 grams
• Use of MJ in public or on school ground
• Open container while driving
• DUI
Notwithstanding State Laws…

Foreign nationals even LPRs (green card holders) are subject to federal immigration law = meaning marijuana even for medical purposes is prohibited.
Under Federal Immigration Law:
MJ is a Deportable/Inadmissible Conviction

✓ Simple possession
  - May be exception for 1st offense if less than 30 grams

✓ Transport for personal use

✓ Give away a “small amount” of mj

✓ “Offer to” sell, give away, transport (Ninth Circuit only; elsewhere is an aggravated felony)
Worse, MJ can be an Aggravated Felony (severe immigration consequences)

- Second possession, if prior possession is used to trigger a recidivist sentence
- Sale
- Cultivation, including for personal use
- Transportation
- Giving away more than 30 grams
Is a CA Infraction a “Conviction”? 

Unclear: But DOJ/DHS has treated some CA infractions as convictions.
The Interplay of Federal and State Law is Complex and Confusing

• U.S. Supreme Court found MJ offense committed on state property is still a federal crime
• In the past, Dept of Justice has said personal marijuana use is not worth federal time/money to investigate –DHS has not followed this guidance
  • Advocates in our field and AILA have pushed DHS to follow DOJ advice on this
Political Climate

• Now with the appointment of Jeff Sessions as AG what can we expect?

• Sessions has said “Good people don’t smoke marijuana” and when questioned on the Dept. of Justice previous attitude on legalized marijuana and federal strain on enforcement said “won’t commit to never enforcing federal law”
What can we do?
Developing Best Practices

• In an environment moving towards strict enforcement, developing best practices for our students and scholars is essential

• In small groups of 4 -5 discuss the following questions:
  • What practices/efforts/resources has your institution developed to assist student and/or scholars who find themselves in this situation?
  • Do you have any educational outreach/prevention programming with students and/or scholars?

• Be prepared to share with the audience.
Best Practice Tips

• At orientation, explain to students/scholars the difference between state vs. federal law in terms of DUIs and MJ and the impact it could have on their immigration status

• Provide students/scholars a brief overview of drinking responsibly along with services they can use if intoxicated i.e., car services (Uber, Lyft), campus safe ride programs

• Explain to students/scholars about social media posting impacts
  • CBP can search bags, cell phones, etc.

• Have a list of reputable immigration attorneys including those specializing in criminal immigration to provide to students/scholars facing these issues
Case Study 1: DUI F-1 Student

• Chinese student came in and discussed his experience
• Currently, he is on a visitor visa handling his court case and in process of changing back to student status
• He was charged with a DUI last year but forgot to follow the guidance of his attorney and left the U.S. prior to court case and lawyer had to ask for it to be postponed
• He was out on the country for a year after being denied by the Panel Physician and visa officer twice but was finally successful to return to handle his case
Case Study 1: Continued

Student gave some personal tips he found helpful for meeting with the panel and visa officers but noted each experience will be different based on the person assigned to you.

Tip 1: Be honest with the officer about the situation. Admit the mistake and willingness to change. He said the first officer was rude and told him directly I don’t believe you have changed and will not issue you a visa but the second officer was much kinder and inquired after making changes what will you be doing and wished student best of luck in trying to resume his studies once court case is resolved.

Tip 2: Be prepared, stay calm and go in with the mindset being denied is a possibility but don’t give up you can try again. Look I am proof you can make it eventually.

Tip 3: Consult you immigration advisor and also ask for lawyer references who are experienced in immigration and criminal law.
Case Study 2: J-1 Scholar with a DUI

• J-1 scholar from Saudi Arabia got a DUI during his stay in U.S.
• Decided to travel in August after warned not to during his program
• Tried to come back, but was stopped at the airport and told he could not board
• CBP canceled his visa and told him to go to DOS to see what the issue is
• Applied for a new visa but did not disclose DUI
• Consular office questioned this and scholar claimed he was confused why he got his visa revoked
• Consular officer denied the scholar the visa but said he could reapply
Case Study 2: Continued

• Scholar applied again and that time, the officer said he would be allowed to meet with Panel Physician
• Physician asked if he had a substance abuse or alcohol problem and ran several tests on him,
• Advised to wait for notice from consulate
• While waiting, scholar was persistent: called and emailed the consulate daily, posted on their Twitter and Instagram page
• Was issued the visa within a month and able to return to the U.S. in October
Case Study 3: H-1B Highly Skilled Worker

• Scholar from France has pending charges for DUI but had not been convicted prior to leaving the U.S.
• Had to risk traveling travel back home because father was ill
• Was referred to the Panel Physician and went through a special medical exam and was issued a new visa 3 weeks after exam
• Upon entry to the U.S. was taken into secondary by CBP
• CBP advised he carry his court documents on future trips
Case Study 4: The MJ Student

• A F-1 student from Sweden returning from the winter break comes through SeaTac airport entry
• Asked if student has ever smoked MJ to which student replies yes
• Ask to see students phone and looks at recent calls, social media postings to which student has picture with a bong
• Student’s visa is cancelled and sent home
Q&A
Regulations and Resources

• Foreign Affairs Manual (FAM) Visa Revocation
  https://fam.state.gov/fam/09FAM/09FAM040311.html

• Immigration and Nationality Act (INA)

• NAFSA Visa Revocation

• NAFSA DOS Cable on Visa Applicants with Drunk Driving Hits
  https://www.nafsa.org/Resource_Library_Assets/Regulatory_Information/DOS_Cable_on_Processing_Visa_Applicants_With_Drunk_Driving_Hits(2)/

• Marijuana legalization and risk for immigrants: