TEACHING, INTERPRETING AND CHANGING LAW SINCE 1979

Practice Advisory:
Immigration Consequences of a Plea to Calif. H&S § 11357(b), Now an Infraction

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A. Summary

California Health and Safety Code § 11357(b) prohibits possession of not more than 28.5 grams of marijuana. After January 1, 2011 it will be treated as an infraction. This offense has some immigration advantages:

- A *first conviction* for simple possession of less than 30 grams of marijuana or hashish will not make a permanent resident ("green card" holder) deportable.

- The same *first conviction* will make a noncitizen inadmissible, which means that it can prevent an undocumented person from getting lawful immigration status, and can prevent a permanent resident who leaves the U.S. from being able to return. The good news is that for some noncitizens, there is a discretionary "*waiver"* (pardon) of inadmissibility for this conviction. The bad news is, it can be very hard to get the waiver granted.

- Because H&S § 11357(b) is now an infraction, immigration advocates have an argument that it is not a "*conviction*" at all for immigration purposes, and therefore would not even make the noncitizen inadmissible. Because courts have not yet ruled on this argument, however, defenders must conservatively assume that an infraction will make noncitizens inadmissible.

- Regardless of whether it is held a "conviction," a California infraction will not be held a "misdemeanor" and therefore will not disqualify a noncitizen for "Temporary Protected Status," (a type of relief for those fleeing civil war, famine or natural disaster in designated countries), which is not available if the noncitizen has a felony or two misdemeanor convictions.

B. Bottom-Line Advice

- If there is no other alternative, a first conviction under § 11357(b) is a good plea for a permanent resident who is not already deportable, because it will not make the person deportable. All noncitizens should be warned that such a plea *might* make them inadmissible, however, depending upon whether a California infraction will be held a "conviction." If the infraction does make them inadmissible, they might be eligible to apply for a discretionary waiver set out at 8 USC § 1182(h). See below.

- Because counsel should assume conservatively that the plea will make noncitizens inadmissible, there are better alternative pleas, which are discussed in detail below. These include H&S § 11350 or H&S § 11377 with the controlled substance unspecified; P.C. § 32; V.C. § 23152(b); or P.C. § 415 or § 647(c),(e), or (h).

C. Analysis

A noncitizen is deportable and inadmissible based upon a "conviction" of any offense relating to a federally defined controlled substance.[1] A finding of guilt under § 11357(b) has fewer consequences than almost any other drug conviction, for the following reasons:

Exception to deportation ground. A *first* conviction for simple possession of less than 30 grams of marijuana is automatically not a deportable offense.[2] Thus, a lawful permanent resident with only one such conviction is not deportable. If there is a drug prior, this conviction would make the person deportable.

Inadmissible, but a possible waiver. A *first* conviction for simple possession of less than 30 grams of marijuana is an inadmissible offense. That means that a permanent resident who travels abroad could be refused admission back into the U.S., and an undocumented person who was otherwise qualified to get a green card could be barred based on the conviction.

In some cases the noncitizen may request a discretionary "waiver" (pardon) of the ground, known as a § 212(h) waiver.[3] A noncitizen convicted of § 11357(b) may request the waiver if: (a) he or she is the spouse, parent, son, or daughter of a U.S. citizen or permanent resident, and the noncitizen's removal would cause severe hardship to that relative; or (b) the conviction at issue is at least 15 years old; or (c) he or she is applying for lawful status under the Violence Against Women Act (VAWA), as a person subjected to abuse by a U.S. citizen or permanent resident spouse or parent.[4] Assuming that the noncitizen may submit an application, he or she still must persuade the immigration judge or office to grant it as a matter of discretion. These waivers can be hard to obtain.[5] For this reason we suggest counsel consider the alternative pleas suggested in Part D, below.

Is a California infraction even a "conviction" for immigration purposes? It is possible but not guaranteed that immigration authorities will find that a California infraction is not a "conviction" at all for immigration purposes. In that case, an infraction will *not* be held a deportable or inadmissible conviction, and it is a safe plea.

The Board of Immigration Appeals found that a "violation" under Oregon law was not a conviction for immigration purposes because the proceedings lacked the usual constitutional protections of a criminal trial, such as a right to counsel, right to a jury trial, and the requirement of proving guilt beyond a reasonable doubt. *Matter of Eslamizar*, 23 I&N Dec. 684, 687-88 (BIA 2004). The question will be, whether the California infraction is sufficiently similar to the Oregon violation that it too will be ruled not to be a conviction, despite the fact that California infraction does require proof beyond a reasonable doubt. To date there is no published decision on this point. ***Therefore, while conviction of a controlled substance offense as an infraction is better than most other drug convictions, presently there is no guarantee that it will not be held an inadmissible or (if it is not the first drug conviction) deportable offense.*** Therefore, counsel should obtain a better plea when it is possible to do so, as instructed below, Part D.

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[1] 8 USC § 1227(a)(2)(B)(i) and 8 USC § 1182(a)(2)(A)(i)(II).
[2] 8 USC § 1227(a)(2)(B)(i).
[3] 8 USC § 1182(h).
[4] For more information on VAWA, go to http://www.ilrc.org/immigration_law/vawa_and_u-visas.php.
[5] For more information on § 212(h) waivers, see Brady et al., *Defending Immigrants in the Ninth Circuit* § 11.2 (updated 2010) and see Brady, "Update on § 212(h) Defenses," at www.ilrc.org/criminal.php.

D. What drug plea would be a safer option for a non-citizen?

For a non-citizen, the following offenses would be safer pleas from an immigration perspective:

- A plea to possession of an **unnamed** controlled substance under either Calif. H&S §§ 11350 or 11377. The crucial point here is the controlled substance must be unnamed in the record of conviction, which includes the charging document, plea colloquy, minute order, abstract of judgment, and *any documented stipulated to as the factual basis for a plea*.

- A plea to Calif. P.C. § 32, accessory after the fact, but only if it is possible to obtain a sentence imposed of **less than one year**. Accessory after the fact does not take on the character of the principal offense, so it avoids the controlled substance consequences. With a sentence of one year or more, this could be an aggravated felony as obstruction of justice.

- A plea to VC § 23152(b) or, if (b) is not possible, to (a), with the record of conviction vague identifying that the client as to whether the client was under the influence of an alcoholic beverage, drug or both.

- A plea to another offense not related to drugs and without harmful immigration effect, such as disturbing the peace or loitering.

If none of these pleas is available, a plea to an infraction for HS § 11357(b) is the best option.

E. Other Immigration Concerns With a Controlled Substance Infraction

Possible Elimination of* Lujan *Relief for First Time Simple Possession Offense where prior record reflects a drug infraction. Since 2000, the rule in the Ninth Circuit has been that a first conviction for simple possession of a controlled substance, or certain other minor drug offenses, can be eliminated for immigration purposes by "rehabilitative relief." *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). Rehabilitative relief means withdrawal of plea after successful completion of probation, counseling, or other requirement, pursuant to expungement, deferred adjudication, etc. If, however, the first conviction follows a prior infraction under 11357(b), it likely will *not* be eligible for *Lujan* relief, even if it otherwise meets the *Lujan* criteria for "rehabilitative relief." Furthermore, note that *Lujan-Armendariz* is currently under attack in a case under *en banc* review by the Ninth Circuit. The entire rule may be overturned, and defense counsel should conservatively assume it will be. *See* ILRC Practice Alert (Sept. 29, 2010), at www.ilrc.org/immigration_law/pdf/important_advice_for_defending_noncitizens_1st_drug_possession.pdf.

Drug Abuser or Addict Ground of Deportability and Inadmissibility.[6] This ground is conduct-based and may attach even where there is no conviction. In practice, immigrants are rarely charged under this ground, except where a person admits, or is subject to a finding, that he or she is an addict or abuser in order to participate in a "drug court" or therapeutic placement. There is a possibility, however, that it will be charged more often if the marijuana infraction becomes a more common offense.

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[6] INA § 212(a)(1)(A)(iii), 8 USC § 1182(a)(1)(A)(iii) (inadmissibility ground); INA § 237(a)(2)(B)(ii), 8 USC § 1227(a)(2)(B)(ii) (deportation ground).

Admission to a Controlled Substance Offense. An infrequently used provision provides that a noncitizen is inadmissible if she formally admits all of the elements of a controlled substance conviction. 8 USC § 1182(a)(2)(A)(i). The latter does not apply, however, if the charge was brought up in criminal court and resulted in something less than a conviction, such as an infraction.[7]

[7] See, e.g., *Matter of CYC*, 3 I&N Dec. 623 (BIA 1950) (dismissal of charges overcomes independent admission).