The Canadian Government Plans to Pardon Past Marijuana Convictions But Is It Enough?

Date: October 17, 2018

Original Newsletter(s) this article was published in: Blaneys on Immigration: October 2018

With marijuana legalization scheduled to occur on October 17, 2018, it has been suggested that something should be done to help individuals with past marijuana convictions. In response, the Canadian Government just announced its plan to offer expedited Pardons (now known as Record Suspensions) to individuals who were previously convicted of simple possession of marijuana in Canada. However, does this plan go far enough? Unfortunately, the answer is "no."

The Effect of a Canadian Pardon

Canadian Pardons (i.e. Record Suspensions) are administrative and are not considered Executive Pardons, such as those granted by United States Governors or the President of the United States. As a result, Canadian Pardons do not have the same effect as an Executive Pardon granted in the United States.

According to Subsection 2.3(b) of the *Criminal Records Act*,[1] a Record Suspension requires that the judicial record of the conviction be kept separate and apart from other criminal records and removes any disqualification or obligation to which the applicant is, by reason of the conviction, subject under any Act of Parliament. In other words, a Record Suspension does not erase the fact that an individual was convicted of an offence; it merely seals their criminal record and removes any disqualification that might otherwise be imposed under Canadian federal law.

Even if the Canadian Government proceeds with its plan to address past marijuana convictions by means of a simplified or expedited Record Suspension, this will do nothing to address the U.S. inadmissibility of individuals who may have been convicted of simple marijuana possession offences prior to legalization. These individuals will remain permanently barred from the United States.

U.S. Inadmissibility after Legalization

As I have previously explained, the following rules will apply on October 17, 2018:

- Prior convictions for marijuana use/possession before legalization will still result in a permanent bar. As stated above, the receipt of a Canadian Pardon (i.e. Record Suspension) will not change this fact.
- Admitting to prior marijuana use/possession that occurred prior to legalization will still result in a permanent bar (whether or not the individual was ever charged or convicted of the offense), even if the individual does not make such an admission until after legalization.
- Admitting to marijuana use/possession that occurs after legalization can still result in a bar under the "drug abuser or addict" or "mental defect" grounds of inadmissibility; these grounds continue to apply even after legalization. Although they require a medical assessment from an approved panel physician, the possibility of being barred under one of these two grounds of inadmissibility still exists.

Expungement as an Alternative to Record Suspension

On October 4, 2018, NDP Justice Critic Murray Rankin tabled a private members bill, which offered a different approach to dealing with prior marijuana possession convictions. Bill C-415, also known as the *Expungement of Certain Cannabis-related Convictions Act*, would expunge these past convictions rather than address them by means of a Canadian Pardon (i.e. Record Suspension). This proposal is not without precedent. A similar bill to expunge the prior convictions of individuals who had previously been convicted for consensual sexual activity with a person of the same sex (known as the *Expungement of Historically Unjust Convictions Act*[2]) received Royal Assent on June 21, 2018.

Although the terms "expungement" and "pardon: are sometimes used interchangeably by the media, they are actually quite different. While a Canadian Pardon/Record Suspension merely seals the criminal record of an individual, when an expungement is granted the individual is deemed never to have been convicted of the offence.

Despite this rather significant distinction, the court decisions in the United States have taken the position that no foreign pardon, expungement, or amnesty will be recognized for the purposes of U.S. immigration law, regardless of whether it expunges the actual conviction or merely the penalty.[3] As a result, even if Bill C-415 becomes law, it will not affect the inadmissibility of individuals who were convicted of marijuana related offences prior to legalization.

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[1] R.S.C., 1985, c. C-47.

[2] S.C. 2018, c. 11.

[3] See *Matter of Dillingham*, 21 I. & N. Dec. 1001 (BIA 1997).