

Magrath LLP  
solicitors



Immigration briefing from Magrath LLP published in the  
September 2010 issue of The In-House Lawyer:

New guidance impacts on health-related inadmissibility

**THE**  
**IN-HOUSE**  
**LAWYER**

## New guidance impacts on health-related inadmissibility

THE US IMMIGRATION AND NATIONALITY ACT (the Immigration Act) – the key federal law governing immigration and citizenship – is one of the more complex and frequently amended US statutes. Together with Title 8 of the Code of Federal Regulations, it contains the rules and regulations for entry to and exclusion from the US by non-immigrant visitors, or 'aliens'. Section 212(a) of the Immigration Act lists the categories of aliens who are ineligible for US visas or admission, and covers persons inadmissible on health-related grounds (s212(a)(1)(A)).

Both alcohol abuse and the use or abuse of a controlled substance are health-related grounds of inadmissibility under s212(a)(1)(A). Individuals who are abusing alcohol are inadmissible under s212(a)(1)(A)(iii), which defines as inadmissible any person who is determined to:

- 1) 'have a physical or mental disorder and behaviour associated with the disorder that may have posed a threat to the property, safety or welfare of the alien or others'; or
- 2) 'have had a physical or mental disorder and a history of behaviour associated with the disorder, which behaviour has posed a threat to the property, safety, or welfare of the alien or others and which behaviour is likely to recur or to lead to other harmful behaviour'.

Persons using or abusing drugs are inadmissible under s212(a)(1)(A) b(iv), which denies entry to any alien:

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

These subsections of s212(a)(1)(A) have proven to be difficult to administer, as

they require a medical determination of whether an individual's use of alcohol poses a threat to themselves or others, or use of a controlled substance (as defined in US law) constitutes an abuse or addiction, alongside a consular officer's determination on visa eligibility. To understand how this process works, it is helpful to examine the role of the consular officer in adjudicating visa applications by individuals who may be inadmissible under the Immigration Act.

Consular officers at US embassies and consulates around the world are charged with determining the visa eligibility of individuals seeking entry to the US, and must evaluate all visa applicants to ascertain whether they are inadmissible under any of the provisions of s212(a). In practical terms, this means that, in the case of possible health-related inadmissibility, consuls must make a preliminary determination as to whether there is evidence that an applicant is either abusing alcohol or has used, and is continuing to use, a controlled substance. If the applicant is found to have done so, the consular officer must refer them to one of the embassy's 'panel physicians' for evaluation. These physicians are locally designated and perform mandatory physical examinations of US immigrant visa applicants, as the question of whether an applicant is abusing or addicted to alcohol or a controlled substance is a medical one.

The principle tool used by consular officers in adjudicating visas is Volume 9 of the Foreign Affairs Manual, which contains the laws and regulations governing visa issuance and provides interpretative language to guide consular officers in making legally sound visa decisions. Consular officers turn to Volume 9 for help in determining whether the set of facts before them in an individual visa case constitutes grounds for visa issuance or denial. Specifically in connection with visa applications by aliens who may be using or abusing alcohol or controlled substances,



***'The changes to the US Foreign Affairs Manual will benefit individuals whose use of a controlled substance has been incidental, infrequent and well in the past.'***

Stephen Pattison, partner, Magrath LLP  
E-mail: [stephen.pattison@magrath.co.uk](mailto:stephen.pattison@magrath.co.uk)

Volume 9 40.11 Note 11 (Note 11) addresses the question of what constitutes use or abuse for purposes of applying s212(a)(1)(A)(iii)-(iv).

On 1 June 2010 the US State Department amended key portions of Note 11, addressing questions of inadmissibility for alcohol and substance abuse. The amendments greatly expand Note 11 and create new standards for evaluating visa applicants that could have a significant impact on how these cases will be handled by consular adjudicators.

The changes to Note 11 concerning alcohol abuse are fairly straightforward. Before the recent amendments were adopted, Volume 9 40.11 instructed consular officers to refer visa applicants to a panel physician if they had been involved in a single alcohol-related arrest or conviction in the previous three years, or two such arrests or convictions at any time. Under the amendments, both immigrant and non-immigrant visa applicants must be evaluated by a panel physician for evidence of possible alcohol abuse when they have had a single alcohol-related arrest or conviction in the past five years, or two or more alcohol-related arrests or convictions in the past ten years. In other words, the time frame relating to applicants with a single alcohol-related arrest or conviction has been made more strict, but the period relevant to individuals with two or more alcohol-related arrests has been reduced.

The changes to Note 11 relating to controlled substance abuse are more complicated. Perhaps the most significant change involves the definition of what constitutes both drug abuse and drug addiction for the purpose of determining inadmissibility under s212(a)(1)(A)(iv).

The new instructions remove the very restrictive language relating to drug abuse and drug addiction of the previous Volume 9 Note 12.2, which defined drug abuse as:

‘The non-medical use of a substance listed in... the Controlled Substances Act that has not necessarily resulted in physical or psychological dependence.’

The previous Note defined drug addiction as:

‘The non-medical use of such substances that has resulted in physical or psychological dependence.’

Under these instructions, consular officers were to refer applicants who had acknowledged use of substances listed in the Controlled Substance Act to a panel physician to determine if they were still using the substance. If the panel

***‘The time frame relating to US visa applicants with a single alcohol-related arrest or conviction has been made more strict, but the period relevant to individuals with two or more alcohol-related arrests has been reduced.’***

physician determined that the applicant was continuing to make non-medical use of a controlled substance, the applicant would have to be found ineligible on medical grounds as a drug abuser if there was no physical or psychological dependence, and as a drug addict if there was evidence of either kind of dependence. If the physician determined that the applicant was no longer using the substance, they would not be found to be inadmissible under s212(a)(1)(A)(iv) if they had been clean for either two or three years, depending on the substance. This meant that applicants who had used a controlled substance, such as cocaine, once in the past three years would have been held to be a drug abuser and inadmissible under s212(a)(1)(A)(iv).

The new language of Note 11 reduces the period of ‘sustained, full remission’ for purposes of determining if a substance abuse problem exists to one year, based on current medical knowledge of the period that needs to elapse before an abuser can be held to be in remission. This gives the panel physician more leeway in determining whether an applicant would fall into either the drug abuse or drug addiction category.

The newly revised portions of Volume 9 governing substance abuse read:

‘5(1): In general, to establish any substance-related diagnosis,

the examining physician must document the *pattern or use* of the substance and behavioral, physical, and psychological effects associated with the use or cessation of use of that substance.

5(2): Substance dependence, either on alcohol or other psychoactive substances is characterised by

*compulsive long-term use of the substance* despite significant substance-related physical, psychological, social, occupational, or behavioural problems.

5(3): Substance abuse is characterised by a *pattern of recurrent substance use* despite adverse consequences or impairment.’ [Emphasis added.]

In both instances, the panel physician’s role in determining whether an incident or incidents of controlled substance use fall into either definition of abuse or addiction now allows for a determination that someone who may have used such substances occasionally in the past was not doing so in a way that would qualify as a pattern of recurrent use or compulsive long-term use. The practical result would be to make it less likely that a client who has used such substances a few times recreationally will automatically be found inadmissible for substance abuse or addiction under s212(a)(1)(A)(iv).

While the new instructions will benefit individuals whose use of a controlled substance has been incidental, infrequent and well in the past, they may actually make it harder for persons who have recently documented compulsive or recurrent use of controlled substances to obtain a waiver if they are found to be

inadmissible under s12(a)(1)(A)(iv). State Department guidance about the new instructions sent to consular officers on 10 June 2010 (via State cable 057660) advised that the practical significance for a diagnosis of remission is that applicants who are or have been determined to be inadmissible for drug abuse or addiction will not be eligible for a waiver of their inadmissibility until the full one-year period for determining that there has been a sustained, full remission has passed.

**COMMENT**

Because the amended Volume 9 40.11 has only just come into effect, it is too early to know how consular officers will apply it to visa adjudications. However, if State Department guidance is to be believed, consular officers will routinely decline to recommend a waiver of inadmissibility for persons whom a panel physician has determined to be abusing or addicted to a controlled substance until a full year has passed and the applicant has been further

evaluated to determine if remission has occurred. The applicant can then reapply for a visa and, if determined to be in remission by a panel physician, issued the visa. Practitioners should carefully examine the amended Note 11 before advising clients who may be inadmissible under 212(a)(1)(A)(iv) about the availability of waiver relief.

*By Stephen Pattison, partner, Magrath LLP.  
E-mail: [stephen.pattison@magrath.co.uk](mailto:stephen.pattison@magrath.co.uk).*