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Immigration Insights (October 2009)

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May Employers Require Job Applicants to be only U.S. Citizens or Lawful Permanent Residents?

Under the Immigration Reform and Control Act of 1986 (IRCA), limiting employment to U.S. citizens or lawful permanent residents (green card holders) can be a violation of law. Under IRCA, the protected class of individuals who generally may not be discriminated against in hiring, termination, and recruiting, or referring for a fee consists of U.S. citizens, lawful permanent residents, "temporary residents" (a term of art that applies to almost no one anymore), and refugees and asylees. The U.S. Department of Justice Best Practices page offers the following guidance:

"Do *avoid* the following language in job postings:

- 'Only U.S. Citizens'
- 'Citizenship requirement'*
- 'Only U.S. Citizens or Green Card Holders'
- 'H-1Bs Only'
- 'Must have a U.S. Passport'
- 'Must have a green card'

* UNLESS U.S. citizenship is required by law, regulation, executive order, or government contract."
While the "unless" language above may be a basis for restricting employment to U.S. citizens or lawful permanent residents, you must determine whether the restriction is required "by law, regulation, executive order, or government contract." For example, an employer may impose this limitation if the employment must be compliant with the International Traffic in Arms Regulations (ITAR)--regulations that control the export and import of defense-related articles and services on the U.S. Munitions List.

2011 "Diversity Visa" Lottery Registration Period Open Until November 30, 2009

The Department of State ("DOS") opened the registration period for the Diversity Immigrant Visa Program for Fiscal Year 2011 (DV-2011) on October 2, 2009. The Diversity Visa program makes available 50,000 permanent resident visas ("green cards") annually. DOS randomly selects winners from a pool of persons who register and meet certain eligibility requirements and are from countries with low rates of immigration to the United States. Nationals of countries sending more than 50,000 immigrants to the United States over the period of the past five years are not eligible. This year, individuals born in Brazil, Canada, China (mainland) Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, India, Jamaica, Mexico, Pakistan, Peru, Philippines, Poland, South Korea, United Kingdom (except Northern Ireland) and its dependent territories, and Vietnam are not eligible to participate. The program requires that every entrant must have at least a high school education or its equivalent or have, within the past five years, two years of work experience in an occupation requiring at least two years' training or experience. For more information

regarding who is eligible to register please see the DOS website.

Entries must be submitted online here. Paper entries are not acceptable. All successful entrants will be notified by mail, but entrants who retain their online confirmation page will be able to check their entry status via the internet.

DOS has announced that during the first week of the 2011 Diversity Immigrant Visa Program, applicants from around the world have already submitted over 900,000 entries—a 63 percent increase over the same period last year. More than 13 million entries are expected before the registration period ends on November 30, 2009.

Lawful Permanent Residents with Prior Convictions Should Exercise Caution Upon Re-entry to the U.S.

As U.S. borders continue to get tighter, it is vital that lawful permanent residents (LPRs) who have prior convictions or arrests or who ever participated in criminal activity understand the current risks at U.S. ports of entry. U.S. Customs and Border Protection (CBP) has the authority to find an LPR inadmissible to the United States or to initiate removal (deportation) proceedings based upon a past conviction, arrest or *admission* of criminal activity.

Regarding admission of past criminal activity, LPRs should note that they can be detained or found inadmissible to the U.S. based solely upon admitting having committed the essential elements of a crime of moral turpitude or a violation of any law relating to a controlled substance. The LPR need not have been convicted or even arrested of such crime, but only admit to a CBP officer having committed the essential elements of a crime. (The Immigration and Nationality Act (INA) at § 212(a)(2)(A)(i), provides that "any alien ... who admits having committed, or who admits committing acts which constitute the essential elements of ... a crime involving moral turpitude ... or an attempt or conspiracy to commit such a crime ... or a violation of any law ... relating to a controlled substance ... is inadmissible.")

Increased immigration control and scrutiny at U.S. ports of entry mean that even those LPRs who have never been stopped in the past may find themselves questioned, detained, and found inadmissible to or removable from the U.S. based on an old conviction or arrest or admission to having committed a crime for which there was no official arrest or conviction.

If an LPR plans to travel abroad and has prior convictions or arrests (or has committed a crime in the past that the LPR was not arrested or convicted of), we recommend that the LPR seek advice from immigration counsel before departing from the United States.

Changes Regarding Re-entry of Permanent Residents with Prior Criminal Convictions

U.S. Customs and Border Protection (CBP) announced that effective October 1, 2009 there is a greater likelihood that returning Lawful Permanent Residents (LPRs) who have prior criminal convictions will be issued a Notice to Appear rather than an Order to Appear for Deferred Inspection. In the past, CBP generally issued an Order to Appear for Deferred Inspection when an immediate decision concerning the immigration status of an LPR returning to the U.S. from abroad could not be made at the port of entry because of a lack of documentation. CBP typically scheduled a time for the returning LPR to report for a "deferred inspection" at a future date and to present documentation and/or information so that a determination could be made about whether the LPR would be re-admitted to the U.S. or placed in removal (deportation) proceedings.

CBP modified its policy on deferring inspection because an appreciable percentage of those granted deferred inspection did not show up at the appointed time. The Notice to Appear (NTA) is a notice ordering an LPR to appear before an immigration judge for removal proceedings. By issuing the NTA, as opposed to deferring the person's inspection, CBP is raising the stakes. If an LPR does not appear on the appointed immigration court date, the court can hold a hearing and order removal in absentia (meaning in the person’s absence).

If an LPR ever has been charged with committing, or has committed, or has been found guilty of committing any crime or non-traffic offense, the LPR should immediately consult a U.S. immigration attorney to understand the risks associated with a departure from the U.S. followed by a request for re-admission to the country.