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Blaneys on Immigration

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This newsletter is designed to highlight new issues of importance in immigration related law. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Immigration Law Group, Ian Epstein at 416.593.3915 or iepstein@blaney.com.

IN THIS ISSUE:

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A REVIEW OF NEXUS PROGRAM ELIGIBILITY

Henry J. Chang

Introduction

The NEXUS program is a joint initiative of United States Customs and Border Protection ("USCBP") and the Canada Border Services Agency ("CBSA"), which allows pre-approved, low-risk travellers to receive expedited entry when travelling to the United States or Canada. In addition, under the Western Hemisphere Travel Initiative, NEXUS cards are approved for use by United States and Canadian citizens as an alternative to passports for air, land, and sea travel into the United States.

The NEXUS program is also being integrated into USCBP's Global Entry program, a similar trusted traveller program that is available to: (1) U.S. citizens, (2) U.S. lawful permanent residents, (3) Dutch citizens, (4) South Korean citizens, and (5) Mexican nationals. This integration began in December 2010, when USCBP first published a Federal Register Notice announcing that NEXUS members could participate in the Global Entry program using their NEXUS cards.

Unfortunately, not everyone will be in a position to satisfy the NEXUS eligibility criteria. A brief discussion of the relevant criteria appears below.

Eligibility Criteria

United States

As NEXUS is a joint program, an applicant must be approved by both USCBP and CBSA. The denial of an application by either country will prevent an individual from participating in the NEXUS program.

There are no formal regulations that implement the NEXUS program in the United States. However, according to the USCBP website, applicants will not qualify for NEXUS if they:

- Are inadmissible to the United States or Canada under applicable immigration laws;
- Provide false or incomplete information on their application;
- Have been convicted of a criminal offense in any country;
- Have been found in violation of customs, agriculture, or immigration law; or
- Fail to meet other requirements of the NEXUS program.

The above guidance is very limited. However, as USCBP is in the process of integrating NEXUS into its Global Entry program, it would be helpful to consider the implementing regulations of that program.

BLANEYS ON IMMIGRATION

"... an individual is ineligible to participate in Global Entry if USCBP, at its sole discretion, determines that the individual presents a potential risk for terrorism, criminality (such as smuggling), or is otherwise not a low-risk traveler."

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According to 8 CFR §235.12(b)(2), an individual is ineligible to participate in Global Entry if USCBP, at its sole discretion, determines that the individual presents a potential risk for terrorism, criminality (such as smuggling), or is otherwise not a low-risk traveler. This risk determination will be based in part upon an applicant's ability to demonstrate past compliance with laws, regulations, and policies. Reasons why an applicant may not qualify for participation include:

- The applicant provides false or incomplete information on the application;
- The applicant has been arrested for, or convicted of, any criminal offense or has pending criminal charges or outstanding warrants in any country;
- The applicant has been found in violation of any customs, immigration, or agriculture regulations, procedures, or laws in any country;
- The applicant is the subject of an investigation by any federal, state, or local law enforcement agency in any country;
- The applicant is inadmissible to the United States under applicable immigration laws or has, at any time, been granted a waiver of inadmissibility or parole;
- The applicant is known or suspected of being or having been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism; or
- The applicant cannot satisfy USCBP of his or her low-risk status or meet other program requirements.

Canada

In Canada, the NEXUS eligibility criteria are described in the *Presentation of Persons (2003) Regulations* (SOR/2003-323). According to these regulations, an applicant may seek enrollment under NEXUS if he or she:

- Is a permanent resident, within the meaning of the *Immigration and Refugee Protection Act*, a Canadian citizen, or a citizen or permanent resident of the United States;
- Is of good character;
- Is not inadmissible to Canada under the *Immigration and Refugee Protection Act* or its regulations;
- Provides their consent in writing to the use of biometric data for the purposes of the program; and
- Has provided true, accurate and complete information in respect of their application for the authorization.

The language contained in the above regulations is also quite vague. For example, it does not explain when "good character" will be found to exist.

The CBSA website provides only slightly more detailed guidance. It states that applicants will not qualify if they:

- Are inadmissible to Canada or the United States under applicable immigration laws;
- Intentionally provide false or incomplete information on your application;
- Have been convicted of a serious criminal offence in any country for which they have not received a pardon (now known as a "record suspension");
- Have a recorded violation of customs, immigration or agriculture law; or
- Fail to meet other requirements of NEXUS.

"During the past two years, renunciations of United States citizenship have increased significantly."

Conclusion

CBSA's eligibility criteria appear to be more lenient than those applied by USCBP. For example, an applicant who was pardoned for a prior criminal offense could be approved by CBSA but still be denied by USCBP, since the latter does not recognize pardons. In addition, USCBP appears to disqualify applicants who have been arrested (but not convicted) and those who have charges pending.

In any event, since NEXUS applicants must be approved by both USCBP and CBSA, the stricter eligibility criteria applied by USCBP will typically prevail. This means that NEXUS applicants will likely be required to comply with the stricter eligibility criteria that USCBP applies in Global Entry applications.

Although NEXUS offers tangible benefits to frequent travellers, potential applicants must carefully consider their eligibility under both USCBP and CBSA criteria prior to submitting their NEXUS applications. ■

FEE FOR RENOUNCING UNITED STATES CITIZENSHIP INCREASES SIGNIFICANTLY

Henry J. Chang

On August 29, 2014, the U.S. Department of State ("DOS") published an interim final rule in the Federal Register, which raised the fee for processing renunciations of United States citizenship from US$450 to US$2,350, a 522.22% increase. This new fee became effective on September 6, 2014.

The obvious reason for this fee increase is to discourage dual citizens from renouncing their United States citizenship. During the past two years, renunciations of United States citizenship have increased significantly.

Every quarter, the U.S. Department of the Treasury publishes the names of all individuals who have expatriated. For the first two quarters of 2014, the total number of individuals who expatriated was 1,577. The total number of individuals who expatriated in 2013 was 2,999. In 2012, the total was only 932.

It is widely believed that this increase in expatriations is due to the United States' aggressive global tax reporting obligations, which includes the *Foreign Account Tax Compliance Act* ("FATCA"). Among other things, FATCA requires foreign financial institutions and U.S. withholding agents to implement new procedures for tax information reporting and withholding, account identification, and documentation. The objective of these procedures is to identify U.S. persons who are evading U.S. tax obligations using financial accounts held outside of the United States.

The rush to expatriate has created backlogs for renunciation appointments at United States consular posts in Canada. As a result, it is currently not possible to schedule a renunciation appointment until the beginning of 2015.

Many of these proposed renunciants are Canadian citizens who believed that they had lost their United States citizenship years ago. However, as a result of FATCA, they have recently obtained formal legal advice and discovered that they are still United States citizens.

Individuals who intend to renounce their United States citizenship should be aware that, as a result of 1996 amendments to the *Immigration and*

BLANEYS ON IMMIGRATION

Nationality Act, a former U.S. citizen who renounces United States citizenship (on or after September 30, 1996) for the purpose of avoiding U.S. taxation will be considered inadmissible to the United States. In light of this fact, care should be taken to properly document the reason for the renunciation in order to avoid this ground of inadmissibility. Although this ground of inadmissibility is not being aggressively enforced at the present time, this may change in the future.

In some cases, it will be possible for an individual to argue that he or she has already lost U.S. citizenship by operation of law. If the individual is successful, DOS will issue a Certificate of Loss of Nationality, retroactive to the date of the prior loss.

Arguing a prior loss of United States citizenship is preferable to renouncing because it will avoid the potential ground of inadmissibility that could result from a formal renunciation. It could also reduce or eliminate the individual's potential U.S. tax obligations. For example, a former U.S. citizen who successfully establishes that he or she automatically lost citizenship by operation of law ten years ago would have ceased to have U.S. tax obligations as of that prior date.

In conclusion, individuals who believe that they lost their United States citizenship years ago but do not already possess a Certificate of Loss of Nationality should consult with a qualified United States immigration lawyer to determine if they are still United States citizens. Even if they did lose their U.S. citizenship due to a prior expatriating event, they should apply for a Certificate of Loss of Nationality in order to properly document this loss.

If they are still U.S. citizens, they may then decide to formally renounce their United States citizenship at a consular post. However, if they do, they should seek guidance from a qualified United States immigration lawyer to ensure that the renunciation does not result in their inadmissibility at some point in the future.

Within the Province of Ontario, a qualified United States Immigration Lawyer must be admitted to the practice of law in the United States and must also possess a Foreign Legal Consultant Permit issued by the Law Society of Upper Canada. Merely being an Ontario lawyer or paralegal is not sufficient.

Any other individual in Ontario who represents a client in a U.S. renunciation matter (or any other U.S. legal matter) commits an offence under the *Law Society Act* and is subject to a fine of up to $25,000 for a first offense and $50,000 for each subsequent offence. Unfortunately, the Law Society of Upper Canada does not enforce this law so the adage "buyer beware" applies here. ■

EXPECT THE BEST

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