

THE FPTR NEWS

"... useful information for clients and prospective clients."

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Attorneys at Law

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EFFECTIVE COUNSEL

You Need It Because You Never Know

Immigration authorities in New Jersey and Nationwide have stepped up deportations of immigrants who have been convicted of past crimes. As a result of a close association with various immigration attorneys, Fischer Porter Thomas & Reinfeld, P.C. ("FPTR") recently handled two New Jersey cases involving past criminal convictions that were deportable offenses, got the convictions vacated, and made the convictions eligible for expungement. The likely result of these efforts means that one long time resident will be able to stay in the United States and the other Client will receive her Green Card. In detailing the law and these cases, it will become apparent to you that your choice of knowledgeable criminal counsel is critical.

United States Immigration Law and the Concept of Aggravated Felonies

A key mechanism for enforcing the law against non-citizens already in the country is through their deportation. Under United States Immigration Law, the term *aggravated felony* refers to a broad category of crimes that carry certain severe consequences for aliens seeking asylum, legal permanent residency, citizenship or the avoidance of deportation proceedings. Originally, "aggravated felonies" meant only murder and trafficking in drugs or firearms. Laws enacted in 1996 greatly expanded the category to include crimes related to gambling, passport fraud, and most crimes carrying a sentence of at least one year regardless of whether the sentence had been

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HEALTHCARE REFORM

Benefits for You Are Now Available!

On March 23, 2010, President Obama signed into law one of the most significant, broad-reaching pieces of social legislation since the creations of Social Security and Welfare. The Patient Protection and Affordable Care Act (P.L. 111-148), as subsequently amended by the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152) (together, the "Healthcare Reform Law" or the "Act"), makes extensive changes to health insurance coverage requirements for individuals and businesses, with the ambitious goal of insuring an additional 32 million Americans. This article highlights a selection of the Act's requirements which pertain to individuals and small businesses.

Individuals

Many of the reforms under the Act do not take effect until 2014. However, among the reforms instituted as of September 23 are those that require health insurers to: cover children of insureds up to 26 years of age; cover kids under age 19 with pre-existing conditions; forgive innocent mistakes made on insurance applications (i.e., fraud must be proven to cancel policies); allow insureds to appeal denied claims, permit insureds to choose primary care doctors, OB/GYN's, and pediatricians; permit insureds to use the nearest emergency rooms without prior approval; and eliminate lifetime limits on benefits.

Already available to seniors who have reached the Medicare Part D donut hole, the new law provides a

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Fischer Porter Thomas & Reinfeld, PC is a multi-service law firm dedicated to providing high quality legal services with offices in Bergen County, New Jersey; Rockland and Westchester Counties, New York; and New York City. We are AV Rated and listed in the Bar Register of Preeminent Law Firms. Our attorneys' experience and ability to handle a broad range of legal matters enables us to offer comprehensive legal assistance to new and existing clients. Visit our web site to learn more. www.fpmtlaw.com

suspended. In general, drug possession, DUI's, and offenses/ misdemeanors when the punishment cannot exceed one year are not classified as "aggravated felonies":

In general, an alien convicted of an aggravated felony may not: receive asylum; become a citizen; or subsequently enter the United States. More important for clients to understand is that aliens convicted of aggravated felonies are automatically deported through expedited procedures with only minimal judicial review. Indeed, the law requires that an alien, even if he has served his sentence many years ago, be detained while awaiting deportation.

State v. J.D.

In July, 1988, J.D., a permanent resident of the United States, was arrested in New Jersey for selling drugs along with other charges. Later that year, he was arrested again and charged with both possession and intent to sell drugs. J.D. retained the same attorney for both cases, who knew of his immigration status. J.D. was smart enough to ask his Attorney regarding the immigration consequences of his plea. His attorney wrongly advised JD not to worry

because the two convictions would only count as one conviction as he was being sentenced at the same time. Even though J.D. had valid defenses to the charges, he was offered probation and being confident of the fact that there were no adverse immigration consequences, he entered a guilty plea to possession with intent to distribute drugs. J.D. then paid all of his fines and successfully completed probation.

In the following years, J.D. got married, had six children, and ended up owning a successful business in the Midwest. When returning from overseas recently, J.D. was subjected to a *random* fingerprint check. His Green Card was confiscated based upon his prior convictions. J.D. then consulted our firm about a possible expungement. He was told for the first time that he was ineligible for expungement because, even though the charges carried the same sentencing date, they would be treated as two convictions and the conviction for possession with intent was an "aggravated felony" for immigration purposes.

FPTR filed a Petition for Post-Conviction Relief based upon ineffective assistance of counsel and the fact that J.D.'s pleas were not knowing and voluntary. While New Jersey Courts have ruled that a judge need not explain to a defendant the impact of a defendant's plea on his immigration status," the Courts have also ruled that guilty pleas can be vacated because of misinformation received during a plea process. Based upon counsel's errors, FPTR was able to obtain vacation of J.D.'s conviction for possession with intent to distribute and to have the arrest expunged. Since J.D. was then only left with a possession charge and enough time had passed to allow him to expunge it, he was not subject to deportation based upon "aggravated felony."

State v. E.H.

E.H. is originally from Egypt. She entered the United States on a tourist visa in 2004 and overstayed her visit. In 2005, she was playing blackjack at an Atlantic City casino and after a bad hand she took out an imitation handgun, which was actually an adult toy, and allegedly pointed it at the Pit Boss. The Police Report stated E.H. immediately told the Police (and casino security) that she was joking around and

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Arthur "Scott" L. Porter, Jr.
Managing Partner
aporter@fpmtlaw.com

Alan C. Thomas
Managing Editor
athomas@fpmtlaw.com

Joel J. Reinfeld
jreinfeld@fpmtlaw.com

Jay D. Fischer
jfischer@fpmtlaw.com

Our address in New Jersey is 180 Sylvan Avenue (Route 9W), Englewood Cliffs, NJ 07632.

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HEALTHCARE REFORM *(continued from page 1)*

\$250 rebate for prescription drugs. Beginning in 2011, there will be a 50% discount on those who reach the donut hole – a discount that increases as the years progress until it is no longer a hold in 2020.

Beginning on January 1, 2014, the Healthcare Reform Law will mandate most Americans and legal residents to obtain health insurance. Subject to certain hardship or religious exemptions, individuals who do not obtain the required coverage will face escalating tax penalties (\$695 per annum up to \$2,085 per year, or 2.5% of household income, whichever is greater) for noncompliance, subject to further cost-of-living adjustments in 2016.

Beginning no later than 2014, all states will be required to create state operated insurance pools known as American Health Benefit Exchanges. Individuals and families with incomes between 133-400 (133-400%) percent of the federal poverty level (e.g., \$18,310 for family of three in 2009) will be eligible to receive a subsidy in the form of premium and cost-sharing credits.

Small Businesses

Starting with tax year 2010, small businesses with 25 or fewer employees and average yearly wages of less than \$50,000.00 will get a tax credit of up to 35% their health insurance costs. Beginning in 2011, insurers must spend at least 80% of each premium dollar paid by small business group plans on benefits and improved services. If they don't, the insurer must give the employer a rebate.

Beginning in January 1, 2014, the Healthcare Reform Law will employ the proverbial "stick" to require employers to pay penalties for employees who receive the aforementioned individuals' tax credits for health insurance through an Exchange, with exceptions for small employers. The Act will assess employers with more than 50 employees that do not offer health coverage and have at least one full-time employee who receives a premium tax credit a fee of \$2,000 per full-time employee, excluding the first 30 employees for assessment. Employers with more than 50 employees that offer employees coverage, but still have at least one full-time employee receiving a premium tax credit, will pay the lesser of \$3,000 for each employee receiving a premium credit or \$2,000 for each full-

time employee. Small businesses with less than 50 employees are exempt from these requirements.

Beginning in 2014, states are required to create Exchanges (separate from individuals pools) for small businesses to purchase coverage. Also beginning in 2014, employees that offer coverage to employees will be required to provide "vouchers" to employees with: 1) incomes less than 400% of the Federal Poverty Level; 2) whose share of the premium is between 8% and 9.8% of their income; and 3) choose to enroll in an Exchange plan. The vouchers are used to offset the premium costs to the Exchange plan. Employer provided vouchers are not subject to the premium credit penalties above. Businesses with more than 200 employees are required to auto-enroll employees into health insurance coverage plans offered by the business. Employees may elect to opt-out of said plans.

Conclusion

The information above represents but a small sampling of the comprehensive Healthcare Reform Law. The federal government has set up a website filled with the highlights and details of the new law, including a timeline of when things take effect. The link is: www.healthcare.gov.

And regardless of one's political views, President Obama's words on the day he signed the Act into law applies to all Americans. He said:

Here, in this country, we shape our own destiny. That is what we do. That is who we are. That is what makes us the United States of America.

And we have now just enshrined, as soon as I sign this bill, the core principle that everybody should have some basic security when it comes to their health care.

If you have more questions, you can also contact your attorney and insurance agent to assess how to manage your personal and businesses insurance coverage needs in light of the Act.

- Albert Kwon and Alan Thomas

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that the Pit Boss did not wish to pursue a criminal complaint. A review of the videotape of the incident also corroborated E.H.'s story. Nevertheless, E.H. was arrested and subsequently indicted on two charges: making terroristic threats and possession of an imitation handgun under circumstances wherein it would lead the observer to believe that it was possessed for an unlawful purpose. The attorney E.H. hired recommended she apply for Pre-Trial Intervention ("PTI"), a program for first offenders: In PTI, the defendant need only stay out of trouble and perform community service for a set period of time and the charges are dismissed. Her attorney wrote and warned E.H. that the "the nature of your indictment may prevent your entry into the program. *However, I will do my best if this is the best avenue to pursue.*"

The Probation Department provisionally rejected E.H. for PTI *solely on her immigration status*, but afforded her three weeks to adjust her status. Although E.H. had a boyfriend, who was in the process of becoming a United States citizen and who she did eventually marry, they were not married at the time. Therefore, any attempt to contact immigration about adjusting her status would have been futile. Probation then sent E.H. a final PTI rejection letter. The letter, however, did not inform E.H. of her right to appeal. Her attorney just accepted the decision and did absolutely nothing, i.e., he did not use his *best efforts* to obtain E.H.'s entry into PTI. On her attorney's recommendation, E.H. accepted a plea bargain in which she pled guilty to the terroristic threats charge and was sentenced to just probation. Here, here attorney made more errors.

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Before accepting the plea, E.H. discussed the immigration question with her attorney. He told her that it did not matter "because she was an illegal immigrant anyway." This advice was wrong because it did not take into account her plans to marry a soon-to-be U.S. citizen.

FPTR filed a Petition for Post-Conviction Relief on E.H.'s behalf. We argued that E.H. was denied effective assistance of counsel because she was misled as to the immigration consequences of her plea and her attorney never appealed her denial into PTI, which was based solely on her alienage. In deciding in E.H.'s favor, the Court ruled that in deciding PTI applications, the Probation Department and prosecutors cannot rely solely on a defendant's illegal immigration status. Instead, they must consider an individual defendant's features that bear on his or her amenability to rehabilitation" and that evaluation must be conducted in compliance with the criteria set forth in *Guideline 3 of Rule 3:28*. Guideline 2 clearly states that "[a]ny defendant accused of crime shall be eligible for admission into a PTI program." Thus, apart from some limited exceptions, the use of a *per se* rule is prohibited. Based upon FPTR's argument, E.H., who had already completed four years of probation, was retroactively admitted into PTI, which she successfully completed. Her record has been expunged and she should be allowed to remain in the United States with her husband.

Conclusion

Interestingly, the local probation officer commented that this was the first time that an attorney had challenged her department's use of a *per se* rule for immigration status to overturn a conviction. She found that very surprising. While FPTR was able to assist these Clients in rectifying past mistakes by other counsel, the best way to deal with these situations is to have knowledgeable counsel from the inception of your case. — *Joel J. Reinfeld*

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