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# KEEPING TABS ON A NON-CITIZEN'S ELIGIBILITY FOR HEALTH COVERAGE UNDER THE AFFORDABLE CARE ACT

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President Obama's healthcare law, the Affordable Care Act (ACA), is here to stay especially after the law withstood a challenge in *King v. Burwell* that allows the federal government to provide subsidies to poor and middle class people to buy health insurance on a nationwide basis.

Even non-citizens who are lawfully present may access the health exchange to buy insurance under the ACA. Many non-citizens will also be subject to the individual mandate or "individual shared responsibility provision" if they do not maintain essential health coverage. It is thus important to keep track of a non-citizen's eligibility as well as when such an individual may be penalized on his or her next tax return for not maintaining essential coverage, which has been explained in Who is Lawfully Present Under the Affordable Care Act?

**Becoming Lawfully Present After Enrollment Period Has Closed**

The next open enrollment period for 2016 starts November 1, 2015 and ends January 31, 2016. The last open enrollment closed on February 15, 2015. What if a non-citizen becomes eligible for ACA coverage between February 15, 2015 and November 1, 2015?

Take the example of a US citizen who has sponsored her parents, John Smith and Jane Smith, under the immediate relative category through the filing of an I-130 petition while they were outside the United States. They came to the United States on June 25, 2015 as permanent residents upon the approval of the I-130 and the issuance of immigrant visas at the consular post overseas. A permanent resident is a qualified alien who is eligible for coverage on a health exchange and is also subject to the mandate. Although the open enrollment

closed on February 15, 2015, John and Jane are eligible under the 60 day special enrollment period because they just became permanent residents after the prior enrollment period closed on February 15, 2015. Assuming that they do not have minimum essential coverage as yet, if John and Jane do not take advantage of the special enrollment period and get coverage in the first full month during which they are present for the entirety of the month, they will be subject to a penalty when they file their tax returns for 2015. Even if John and Jane choose to return to their original country for two years on a reentry permit to wrap up their business and sell their home, they must still enroll for health coverage or qualify for an exception, which includes qualifying under the foreign earned income exclusion pursuant to section 911(d)(1)(A) or 911(d)(1)(B) of the Internal Revenue Code. This is more fully explained in the blog entitled The Impact of Obamacare on Green Card Holders Who Reside Outside the United States.

Let's discuss another example of a person who applies for permanent residence from within the United States. Maria Fernandez entered the United States on a B-2 visitor's visa on January 1, 2009 and has remained ever since. She overstayed her authorized stay as a visitor after July 1, 2009. As a result of overstaying her B-2 visa status, she is not considered lawfully present under the ACA. On April 1, 2015, Maria married a US citizen, who filed an I-130 petition on her behalf and she concurrently filed an I-485 application for adjustment of status. Under the definition of "lawfully present" in 45 CFR 152.2(4)(vii), she is not yet lawfully present as the underlying I-130 visa petition has not been approved. For immigration purposes, Maria will be considered lawfully present as an adjustment application, but some of the definitions of "lawfully present" under the ACA are not in harmony under immigration law. However, if Maria obtains employment authorization as an adjustment applicant, she will be considered lawfully present pursuant to 45 CFR 152.2(4)(iii). Suppose Maria obtains employment authorization on July 1, 2015, although the next open enrollment starts on November 1, 2015 and assuming she does not have minimum essential coverage, Maria will be eligible for the special 60 day enrollment period under 45 CFR 155.420(d)(3).

If on the other hand, Maria does not apply for employment authorization as an adjustment applicant pursuant to 8 CFR 274a.12(c)(9), she will not be considered lawfully present until after her I-130 petition is approved or when she becomes a lawful permanent resident, whichever is earlier.

Special enrollment is available when "he qualified individual, or his or her dependent, which was not previously a citizen, national, or lawfully present individual gains such status." 45 CFR 155.420(d)(3). It is unclear whether special enrollment would be available to someone who was previously lawfully present, then fell out of status, and now regains another status. However, it would be bizarre if this rule precluded someone who had ever been lawfully present in their life previously. If the rule was applied so rigidly, someone like Maria in the above example would not qualify for special enrollment and would have to wait for the next open enrollment on November 1, 2015. Even visitors in B-2 status may be considered lawfully present under the ACA, but they may not be required to seek health coverage if they have not yet become tax residents. Special enrollment ought to cover anyone who goes from not being lawfully present to being lawfully present.

**Lawfully Present Non-Citizens with Low Incomes**

Lawful Permanent residents are excluded from Medicaid unless they have had this status for at least 5 years under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). The Children's Health Insurance Program of 1997 (CHIP), however, allows pregnant women and children lawfully residing in the United States to access both Medicaid and CHIP even if they have not resided in the United States for five years. Not all states, though, have lifted the 5 year waiting period for CHIP coverage. Although newly minted LPRs with low incomes may not be able to access Medicaid within the first five years unless they qualify for CHIP, the ACA provides subsidies to eligible non-citizens, which are now protected even if offered through the federal health exchange after *King v. Burwell.* Lawfully present non-citizens with incomes up to 250% of the Federal Poverty Level (FPL) are eligible for cost sharing subsidies, and those up to 400% of the FPL are eligible for tax credits to offset the costs of purchasing private plans. Due to the 5 year Medicaid ban, lawfully present immigrants that have incomes under 100% of the FPL can also receive subsidies and tax credits that their US citizen counterparts are precluded from obtaining in states that have refused to expand Medicaid. Although the Supreme Court in *National Federation of Independent Business v. Sibelius* upheld the constitutionality of the ACA, it also gave states the choice of whether or not to expand Medicaid. At the time of writing, 30 states including the District of Columbia have opted for expanded Medicaid.

Low income non-citizens who avail of either Medicaid or other subsidies will not

be rendered a public charge for immigration purposes. According to USCIS policy, "Non-cash or special purpose cash benefits that are generally supplemental in nature and do not make the person primarily dependent on the government for subsistence do not impact a public charge determination." On the other hand institutionalization for long term care through Medicaid or other subsidies would be considered as a factor in making a public charge determination.

**Conclusion**

In *King v. Burwell*, Chief Justice Roberts who wrote the majority opinion stated that "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them." Since the ACA is here to stay and will most likely be firmly entrenched in the nation's DNA like Social Security and Medicare, many qualified and lawfully present non-citizens will also be able to access benefits the ACA and may also become subject to the mandate. At this point, undocumented immigrants or recipients of Deferred Action for Childhood Arrivals (DACA) cannot access the health exchanges or avail of the subsidies. Some states may have their own rules, so for example in New York, DACA recipients and other 'permanent residents under color of law" (PRUCOL) can still avail of Medicaid since the New York Court of Appeals in *Aliessa ex rel. Fayad v. Novello* held that PRWORA violated New York's Equal Protection Clause. The ACA is becoming more and more linked to immigration issues. While an immigration practitioner need not be an expert in other disciplines, he or she must be aware of eligible statuses for coverage under the ACA, the deadlines for enrollment and when the 60 day special enrollment may become available and the potential for someone to be subject to additional payment to the IRS for failing to obtain coverage, unless the client can qualify for an exemption.