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GLS-148419-06
GLS-HQ-1749-06

MEMORANDUM FOR JIMMY L. SMITH
DIRECTOR, SUBMISSION PROCESSING (W&I)

FROM Mark S. Kaizen *Kaizen*
Associate Chief Counsel (GLS)

SUBJECT Hiring Practices – Lockbox Program

This memorandum responds to your request for advice regarding whether the Lockbox Program can establish a requirement that financial institution personnel working at IRS Lockbox sites be U.S. citizens or U.S. nationals. The IRS Lockbox Program consists of a network of financial institutions designated by the Financial Management Service (FMS) to process taxpayer paper remittances for the IRS to accelerate the flow of funds to the U.S. Department of the Treasury (Treasury). IRM 3.0.230.2 (01-01-2004). FMS, a Treasury bureau, is responsible for procuring Lockbox collection services for the IRS. *Id.* Pursuant to a recent Treasury Inspector General for Tax Administration's (TIGTA) recommendation and your own judgment, you believe that it is in the best interest of the Government to require financial institution personnel working at IRS Lockbox sites to be U.S. citizens or U.S. nationals. As explained below, although citizenship discrimination is generally illegal, the Immigration Reform and Control (IRC) Act of 1986 expressly exempts citizenship discrimination if mandated under a government contract. Additionally, the Treasury Security Manual (TSM) requires that contractor personnel serving on contracts designated as high risk be U.S. citizens. If the Lockbox Depository Agreements (LDA's) have been designated as high risk, establishing such a requirement under a government contract would be consistent with the TSM. We recognize, however, that in order to implement this requirement FMS may need to amend or modify the terms of the LDA's. Accordingly, our office does not object to the implementation of this requirement, and you may contact FMS for appropriate action.

Under the IRC Act of 1986, as amended, 8 U.S.C. § 1324b, a policy of only hiring U.S. citizens and U.S. nationals is generally illegal. See 8 U.S.C. § 1324b(a)(1)(B) and 28 C.F.R. § 44.200(a)(1)(ii)(Employment discrimination against a protected individual because of such individual's citizenship status is prohibited).¹ However, the IRC Act does

¹ The term protected individual not only includes an individual who is a citizen or national of the United States, but also includes an individual who is an alien lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence, is admitted as a refugee, or is granted asylum in the United States. 8 U.S.C. FMTA: 00831

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not prohibit citizenship discrimination if U.S. citizenship is required by law, regulation, or Executive Order, or a *government contract*, or if the Attorney General has determined citizenship is essential for an employer to do business with an agency or department of the federal, state, or local government. 8 U.S.C. §§ 1324b(a)(2)(C) and 28 C.F.R. § 44.200(b)(1)(iii). Thus, Section 1324b(a)(2)(C) expressly exempted employment discrimination that is mandated under a government contract from the reach of the statutory anti-discrimination provision.

Under the TSM, access to Treasury and bureau facilities, information systems, security items and products, and sensitive but unclassified information is a privilege, and contractor personnel, assigned to high risk contracts, who have access to these facilities, or security items or products, shall be U.S. citizens. TSM, TD P 15-71, Chapter II, Section 2, pp. 4 and 6 (October 10, 2006). Assuming that the LDA's are designated high risk, we do not object to FMS amending the LDA's to require financial institutions that are part of the IRS Lockbox Program to hire only U.S. citizens or U.S. nationals for processing taxpayer's remittances and sensitive taxpayer data on behalf of the IRS.² However, FMS has exclusive authority to contract for Lockbox services with the selected financial institutions, and FMS must agree to the requirement.

If you have any questions regarding this matter, or if we can provide additional assistance, please contact Radamés Peña-Jordán of this office at (202) 283-7900.

§§ 1324b(a)(3)(A) and 1324b(a)(3)(B), and 28 C.F.R. §§ 44.101(c)(1) and 44.101(c)(2).

² The TSM also requires contractor personnel to undergo investigative processing (e.g. background investigations) based on the contract's risk level designation. TSM, TD P 15-71, Chapter II, Section 2, p. 1 (October 10, 2006). Thus, to comply with the TSM, the party conducting the investigations of the financial institution personnel for the IRS Lockbox Program should conduct such investigations at the designated risk level.