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US IMMIGRATION & NATIONALITY LAW

HOME IS WHERE THE CARD IS: HOW TO PRESERVE LAWFUL PERMANENT RESIDENT STATUS IN A GLOBAL ECONOMY[1]

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INTRODUCTION

After working hard to obtain lawful permanent residency for a client, immigration practitioners are often confounded by their client's willingness to jeopardize this hard won status by wishing to remain outside the United States. This is becoming increasingly common today with attractive career opportunities outside the country. As these opportunities multiply, the tension between national immigration laws and a global economy will continue to grow, posing new and unanticipated challenges for immigrants and their counsel. While the Immigration and Nationality Act ("INA"), like all national schemes, judges the integrity of lawful permanent resident (LPR) status by the frequency, depth and extent of the alien's contacts with the US, the global economy, like all great movements of capital, does not recognize or respect national boundaries, flowing across them in search of profit and potential. The job of the skilled lawyer is to recognize the inherent tension in this ever-changing relationship, understand its logic, and, to the extent possible, attempt to shape legal strategy to fit the contours of its evolving dynamic.

This article provides practitioners with practice pointers on how to preserve LPR status for their clients. In today's global economy, where attractive opportunities abound outside the US, a practitioner is often asked by an LPR client about his or her ability to take up employment, or an assignment, in a foreign country and still preserve permanent residence. Furthermore, this

client will also be interested in preserving the ability to naturalize in the future. Despite wanting to reside outside the US, the LPR continues to have a strong bond to this country and desires to return. Indeed, in the global economy, establishing a business organization overseas, with deep ties to the US, could result in the LPR continuing to have strong affiliations with this country and benefiting it in immeasurable ways. Gone are the days when immigrants came to the US in sailboats and steamships, destined never to return home. In today's globalized world, with access to cheap airfares and direct flights, broadband internet, Blackberries, webcams and video conferencing, an immigrant can continue to maintain deep ties and bonds even if absent from this country.

While the article will focus on the obvious pitfalls - abandonment of permanent residence and the inability to naturalize – if the LPR opts for a career overseas, it also explores ways for the client to minimize these pitfalls. The article also advocates for a re- appraisal of abandonment in light of changing mores in an increasingly interconnected and interdependent world.

TRENDS AND FACT PATTERNS

With the rise in the economies of China and India, a permanent resident is often offered a plumb position overseas.[2] A common fact pattern encountered by an immigration practitioner is as follows:

> Client A, an LPR and a citizen of Brazil, is employed in a high level capacity for a US financial services institution in the US, which is a subsidiary of a French bank. He is offered an even better position with the subsidiary of the US financial institution in Shanghai, China, to establish and bolster its business there. He is also offered a fancy expatriate US dollar salary, and is often required to come to the US entity's offices in New York for meetings and intense strategy sessions. The US firm has explicitly indicated that he will resume a position in the US after the successful accomplishment of business operations in Shanghai. It is anticipated that this assignment in China will take two years to complete. Client A opts to continue to maintain a home in the US, and his spouse continues to hold a part time job at the local pre-school. The children also continue their schooling in the US.
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> Below is yet another fact pattern that an immigration practitioner is likely

to encounter:

> Client B, also an LPR and a citizen of India, encouraged by expanding opportunities in her country of origin, chooses to quit her job as a financial analyst with a US-based investment bank. She is in the process of establishing a business in Bangalore, India, to provide back office support operations to US companies in the area of financial analysis and related services. She cannot bear to see her family separated, and her spouse and children have accompanied her to Bangalore, and the children have enrolled in an international school there. Although Client B has moved her employment and family overseas, she still harbors the hope of returning to the US and intends to travel frequently to the US. She believes that her start up business in India will allow her to continue to have contacts with the US, and once her business takes off, she will also establish a branch in the US to further liaise with her US client base.

Both Client A and B wish to preserve their green card as they continue to have substantial business connections with the US.[3] They ideally would like to naturalize, but only received permanent residency four years back.[4] They have also heard that Custom and Border Patrol (CBP) inspectors at airports have become increasingly probing about abandonment, and wish to ensure that they can enter the US without intrusive questioning at a port of entry. Finally, both Client A and B have parents in the home country who are not in good health, and it is possible that an unforeseen medical emergency could prolong their stay outside the US.

The careful and thorough practitioner must use the basic analytical tools provided by the statute, regulations and case law to evaluate each client's situation and provide the appropriate legal advice.[5]

LAW ON ABANDONMENT OF PERMANENT RESIDENCE

Most clients labor under the enticing, false, and frequently fatal illusion that, as long as they return to the United States within a certain period of time, they will not be at risk of losing permanent residence.

It is true that the green card can only be presented at a port of entry after a temporary absence abroad not exceeding one year.[6] If however an LPR remains

outside the US for over a year, and even if the green card cannot be used any longer, it does not mean that he or she ceases to be an LPR. There is a critical, but often overlooked, difference between the validity of the green card as a travel document and the continued viability of one's claim to resident alien status. Whether one has abandoned LPR status turns on intent rather than the length of time spent abroad. [7] While the green card may be valid so long as the client enters the US within a year from the prior departure, he or she could be still found to have abandoned LPR status.

Many are also confused by the language in INA § 101(a)(13)(C), which states the various grounds under which an LPR would be regarded as seeking admission in the US. An LPR will seek admission if he or she "has been absent from the United States for a continuous period in excess of 180 days..."[8] This has led many to believe that if an LPR returns to the US within less than 180 days he or she will not be regarded as having sought admission. Yet, another provision under INA § 101(a)(13) considers an LPR as seeking admission if he or she "has abandoned or relinquished that status"[9] regardless of the time spent abroad.

In analyzing whether one has abandoned LPR status, the practitioner must look to the client's intent rather than specific time frames. Essentially, an LPR who returns to the United States is a "special immigrant," which under INA § 101(a)(27) is "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad."[10]

TEMPORARY VISIT ABROAD

The term "temporary visit abroad" has recently been subject to interpretation by the Circuit Courts. The Ninth Circuit's interpretation is generally followed:

"A trip is a 'temporary visit abroad' if (a) it is for a relatively short period, fixed by some early event; or (b) the trip will terminate upon the occurrence of an event that has a reasonable possibility of occurring within a relatively short period of time." If as in (b) "the length of the visit is contingent upon the occurrence of an event and is not fixed in time and if the event does not occur within a relatively short period of time, the visit will be considered a "temporary visit abroad" only if the alien has a continuous, uninterrupted intention to return to the United States during the visit."[11]

Moreover the Ninth Circuit has added: "Some of the factors that could be used

to determine whether an alien harbored a continuous, uninterrupted intention to return in addition to the alien's testimony include the alien's family ties, property holdings, and business affiliations within the United States, the duration of the alien's residence in the United States, and the alien's family, property and business ties in the foreign country."[12]

The Second Circuit, with respect to the second prong, has further clarified that when the visit "relies upon an event with a reasonable possibility of occurring within a short period to time...the intention of the visitor must still be to return within a period relatively short, fixed by some early event."[13] Finally, the Sixth Circuit, while following the two prong analysis, has added that the "totality of the alien's circumstances" must be taken into account in addition to the usual factors such as the alien's family, property, and job, and ...the length of the alien's trip(s) abroad."[14]

Applying this analysis to our fact pattern, Client A is less at risk of a finding of abandonment on his LPR status. Client A's objective to go overseas is fixed by the occurrence of an event, which is the successful completion of the establishment of business operations for the US firm overseas. Upon that occurrence, Client A intends to return to the US. The only hitch is that Client A plans to spend at least two years to accomplish the US company's objective overseas, and that may not be construed as a "relatively short period of time." On the other hand, Client A can clearly document that his conduct is consistent with the fact that he harbors the hope of returning to the US. His family will stay in the US, he will continue to own his own home here, and he will frequently visit the US for important business and strategy meetings with the US firm during this two year period overseas.

Client B, on the other hand, faces more of a risk of losing LPR status. Although she too will maintain contacts with the US and harbors an intention to return to the US, it is not predicated upon the occurrence of an event that has a reasonable possibility of occurring with a relatively short period of time. Moreover, her conduct is not consistent with her intent as she has moved her home and family. On the other hand, she will continue to have business ties with the US as the purpose of her overseas start up is to provide back office financial services to US investment banks and credit rating agencies.

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849 (July 1, 2008). If readers want the entire article they should subscribe to BIB (http://bookstore.lexis.com/bookstore/product/10762.html) OR if they email a request to info@cyrusmehta.com or call (212) 425-0555 stating their mailing address, the firm would send them a paper copy of the entire article BY MAIL.

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[1] A version of this article appeared in Immigration & Nationality Law Handbook, AILA (2008-09 Ed.).

[2] *See* Anna Lee Saxenian, *Local and Global Networks of Immigrant Professionals in Silicon Valley*, PUBLIC POLICY INSTITUE OF CALIFORNIA (2002), available at http://www.ppic.org/content/pubs/report/R_502ASR.pdf. This study reveals extensive evidence of brain circulation, or two-way flows of highly skilled professionals, between California and fast-growing regions in India and Greater China, and many immigrants have established business operations in emerging technology regions - especially Bangalore, Bombay, Taiwan, Beijing and Shanghai -and frequently travel between these regions and Silicon Valley. *See also* John Trumpbour, *Circular migration, S&E Returnees and the Advance of R&D in India and China*, Seminar Report, **Sloan West Coast Program on Science and Engineering Workers, The H-1B Program and Labor Certification: Attestation and PERM, University of Davis, CA, January 18, 2008,**, available at http://migration.ucdavis.edu/wcpsew/files/J_Trumpbour.pdf

[3] The term 'green card' is used colloquially for LPR status since at one time the resident alien card was green in color. It is officially called the "Alien Registration Receipt Card," Form I-551. § 101(a)(20) of the Immigration and Nationality Act (INA) defines LPR as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."

[4] INA § 316(a) makes an alien eligible for naturalization 5 years from the date of issuance of LPR status. If the naturalization applicant is married to a US citizen, the residency requirement is reduced to 3 years if the spouse has been a USC for 3 years and the parties have been living in "marital union" at the time of filing the application for 3 years. INA § 319(a). We assume that neither Client A nor B is married to a US citizen.

[5] For an in depth and scholarly treatment on this subject, *See* Gary Endelman, *You Can Go Home Again – How To Prevent Abandonment Of Lawful Permanent Resident Status*, 91-04 Immigration Briefings 1, (April 1991) @ Thomson/West. Portions of this article are taken directly from the April 1991 article, and are reprinted with permission.

[6] 8 C.F.R. §211.1(a)(2).

[7] For an update on recent developments in the circuits, *See* Jill A. Apa and Sophie I. Feal, *Not Just A Matter Of Time: The Concept Of Abandonment of Permanent Reisdency Under Immigration and Nationality Law*, 12 Bender's Immigration Bulletin 614, March 15, 2007.

[8] INA § 101(a)(13)(C)(ii).

[9] INA § 101 (a)(13)(C)(i).

[10] INA § 101(A)(27)(A).

[11] *See Singh v. Reno*, 113 F.3d 1512, 1514 (9th Cir. 1997); *Chavez- Ramirez v. INS*, 792 F.2d 932 (9th Cir. 1985). The term "temporary" is not subject to inflexible definition; its meaning has to change in alignment with the facts and circumstances of each particular case. *See Gamero v. INS*, 367 F.2d 123 (9th Cir. 1966). What is a temporary visit cannot be defined solely in terms of elapsed time. *See United States ex rel. Polymeris v. Trudell*, 49 F.2d 730 (2d Cir. 1931), aff'd, 284 U.S. 279 (1932). Rather, the intention of the alien, when it can be determined with reliable and reasonable precision will control. *See Matter of Kane*, 15 I &N Dec. 258 (BIA 1975); *see also United States ex rel. Alther v. McCandless*, 46 F.2d 288 (3d Cir. 1931).

[12] *Chavez-Ramirez,* 792 F.2d at 937. A diligent researcher with an inquiring mind and strong constitution can find a treasure trove of legal support in precedential decisions by the Board of Immigration Appeals. Much as the Circuit Courts have done most recently, the BIA has previously focused on the location of the alien's family ties, property holdings, and job, and the intention of the alien with respect to both the location of his actual home and the anticipated length of his excursion. *See Matter of Muller*, 16 I&N Dec. 637 (BIA 1978); *Matter of Quijencio*, 15 I&N Dec. 95 (BIA 1974). Also a good lawyer should consider the client's purpose in departing from the United States, whether the visit abroad can be expected to conclude soon, or relatively soon, and whether the termination date can be fixed by some early event. *Matter of Kane*, *supra*. *See also Matter of Castro, 14 I&N Dec. 492 (BIA 1973),* and the cases cited therein. "The intention of the departing immigrant must be to return within a period relatively short, fixed by some early event." *U.S. ex. rel. Lesto v. Day, 21 F.2d 307 (2nd Cir. 1927); See also Matter of Kane, supra, Matter of Montero, 14 I&N Dec. 399 (BIA 1973).* Sometimes, the agile advocate can turn to the law on naturalization

to help preserve your client's green card. In *Matter of Wu*, 14 I&N Dec. 290 (R.C. 1973), it was held that an alien whose absences were caused by his employment abroad for an American firm did not lose his status as a lawful permanent resident since such a finding would have contradicted and frustrated the objectives of § 316(b) of the Act, relating to naturalization.

[13] *See Ahmed v. Ashcroft*, 286 F.3d 611, 613 (2d Cir. 2002).

[14] *See Hanna v. Gonzales*, 335 F.3d 1003 (6th Cir. 2005).