Immigration Law Home Away From Home: Permanent Residents Temporarily Abroad

Ted J. Chiappari and Angelo A. Paparelli
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United States' tax obligations can be a major consideration for lawful permanent residents ("green card" holders) on assignment outside of the U.S., and the recommendations made by tax advisers may conflict with the advice given by immigration counsel. The tax laws do clearly offer certain benefits to lawful permanent residents living and working abroad, and tax advisers are generally expected by their clients to minimize tax liability to the extent legally possible.

Claiming those tax benefits, however, can result in the denial of an application for naturalization (to U.S. citizenship) or, even worse, the loss of the green card. Claiming the foreign earned income exclusion under Internal Revenue Code (IRC) §911 (on Form 2555), claiming nonresident status on a federal income tax return pursuant to an income tax treaty, and claiming nonresident status on a state income tax return are three examples of where immigration advice may conflict with tax advice. Conversely, tax and immigration advisers generally agree that maintaining green card status for a prolonged period can, if the status is later abandoned or surrendered, lead to expensive tax consequences under the expatriation tax and its "mark to market" rules.1

Lawful permanent residents living abroad (who wish to retain their green card status) should maintain three things: a valid travel document to return to the United States; "unrelinquished" permanent residence in the United States; and "continuous" residence in order to be eligible for U.S. citizenship through naturalization. How income tax returns are completed can affect the latter two—whether two units of the Department of Homeland Security, the U.S. Customs & Border Protection (CBP) and the U.S. Citizenship and Immigration Services (USCIS), determine that residency in the United States has been interrupted, in which case the lawful permanent resident may become ineligible for U.S. citizenship (at least temporarily), or abandoned, in which case the green card status, if desired, must be acquired anew.

To understand the impact of income tax returns on lawful permanent residents living abroad, some background is helpful on their general rights and obligations as well as how they are treated when returning to the United States from abroad. Lawful permanent residents have the right to remain indefinitely in the United States so long as (a) they do not commit any offense that would result in removal from the United States (e.g., certain crimes), and (b) they intend (and manifest by conduct reflecting the intent) that the United States remains their country of permanent residence.2

Evidence of lawful permanent resident status is established by possession of the actual "green card" (Form I-551, a polychromatic identification card valid for 10 years, renewable indefinitely as long as permanent residence status is maintained, or one of its predecessor versions) or temporary evidence of permanent status such as by a stamp in the passport (e.g., while the green card is being manufactured; generally valid for one year).3 Even though evidence of lawful permanent resident status (the actual card or stamp in the passport) expires and needs to be renewed to allow for international travel and verification of employment eligibility, the status itself is indefinite so long as the lawful permanent resident does not travel outside of the United States or is not ordered removed from the country.

Leaving the United States

As soon as a lawful permanent resident leaves the United States, however, he or she must, upon return to the United States, generally go through the same inspection process at the port of entry that other foreign nationals do. Generally, for purposes of inspection, a lawful permanent resident returning to the United States after an absence of 180 days or less will be treated as if he or she never left the United States.4 Nonetheless, lawful permanent residents are subject to US-VISIT, a program at ports of entry and pre-flight inspection posts for collecting and confirming biometric identifiers—digital fingerprints and a photograph—to verify that the person entering the United States is the same person who was issued the green card and that the person's name has not been included on a watch list of known criminals, suspected terrorists and those who have violated immigration laws in the past.

If returning from abroad after an extended absence from the United States, permanent residents must present a valid travel document: beyond a valid passport, a permanent resident returning to the United States must also present evidence of green card status. Such an admission document can be in the form of the actual "green card," a temporary stamp in the passport, or a special travel document, resembling a white U.S. passport, called a "reentry permit" if an extended stay abroad is anticipated. A returning lawful permanent resident may generally present the green card only if coming back to an unrelinquished permanent residence in the United States after a temporary absence abroad not exceeding one year. If the stay abroad has been for one year or more, then a reentry permit or a returning resident immigrant visa issued by a U.S. consular officer is ordinarily required.5

Intent and Factors

Whether a green card holder is returning to an unrelinquished permanent residence after a temporary absence abroad depends on the intent of the individual and the specific facts underlying the absence. An immigration officer can look at objective criteria to determine or verify the green card holder's subjective intent. These criteria include the following:

- The length of the person's absences;
- The purpose for the person's departure;

- The existence of a pre-set date for return after departure from the United States;
- The location and nature of the person's employment, for example, whether with a U.S. or a foreign employer, and whether the employment abroad is temporary or indefinite;
- The continuous filing of U.S. tax returns as a resident (on Form 1040);
- The maintenance of ties with the United States such as an apartment or house, property ownership, bank accounts, credit cards, and driver's license;
- The location of the individual's family members (e.g., where the children attend school).

In light of these factors, it is generally recommended that the green card holder maintain a residential address and property in the United States; maintain U.S. bank accounts, credit cards and drivers licenses; continue to file U.S. tax returns as a resident; if employed abroad, obtain a letter explaining the reasons and anticipated length of time for the temporary foreign assignment; and, if warranted, obtain reentry permits before departure.

Merely returning to the United States once a year for a few days does not, by itself, constitute maintenance of permanent residence here. The immigration officer—usually the Customs and Border Protection inspector at the port of entry—can still, based on the specific facts and perceived intent of the individual, conclude that the person has abandoned his or her permanent residence. If that happens, the permanent resident is either issued a Notice to Appear before an immigration judge for a removal hearing or allowed to complete Form I-407 (Abandonment of Lawful Permanent Resident Status) and surrender the green card.

A somewhat different (albeit related) set of considerations applies when trying to maintain eligibility for U.S. citizenship. To become a U.S. citizen through naturalization, a lawful permanent resident generally must have resided continuously in the United States as a permanent resident for a period of five years prior to submitting an application for naturalization (three years if the permanent resident is the spouse of a U.S. citizen and they have been residing together throughout the three-year period) and must be actually physically present in the United States for at least one half of that period (two and a half years for most applicants, or one and a half years for the spouse of a U.S. citizen).

As noted, the question of maintenance of lawful permanent resident status hinges on intent as manifested by conduct. The term "residence" for purposes of naturalization is similarly defined in general as domicile, or principal actual dwelling place, without regard to intent.6 In addition, the green card holder must have resided "continuously" in the United States for the foregoing five-year or three-year period. Accordingly, even though an extended absence may not affect lawful permanent resident status (because of the intent to return to the United States after a temporary period abroad), it could "disrupt" the continuity of residence required for naturalization. Under 8 CFR §316.5, for purposes of naturalization, the following rules apply to absences and the continuity of residence.

- A key exception to the definition of residence as "actual dwelling place" is that a naturalization applicant's residence during any absence of less than one year continues to be the state where

the applicant last resided at the time of the applicant's departure abroad. As a practical matter, lawful permanent residents returning to the United States at least once every 364 days during an extended period abroad can maintain residence in the United States for naturalization purposes even though the actual dwelling place is abroad. Whether such residence is "continuous" (an additional requirement to qualify for citizenship) is determined by the following rules:

- An absence of less than six months does not break the continuity of residence.
- An absence of six months or more but less than one year is presumed to break the continuity of residence, unless the lawful permanent resident is able to provide an explanation for the absence satisfactory to the USCIS examiner, e.g., a temporary assignment abroad by a U.S. employer.
- An absence of one year or more breaks the continuity of residence.7

Income Tax Filings

In the USCIS regulations on the definition of residence for naturalization purposes, there are two references to income tax filings. One section, 8 CFR §316.5(c)(2), provides:

Claim of nonresident alien status for income tax purposes after lawful admission as a permanent resident. An applicant who is a lawfully admitted permanent resident of the United States, but who voluntarily claims nonresident alien status to qualify for special exemptions from income tax liability, or fails to file either federal or state income tax returns because he considers himself or herself to be a nonresident alien, raises a rebuttable presumption that the applicant has relinquished the privileges of permanent resident status in the United States.

The other section, 8 CFR §316.5(c)(1)(i), states that absences from the United States for continuous periods between six months and one year disrupt the continuity of residence unless established otherwise to the satisfaction of the USCIS examiner. It goes on: "This finding [of disruption of continuity of residence] remains valid even if the applicant did not apply for or otherwise request a nonresident classification for tax purposes…."

Case law on the impact of tax filings on naturalization applications is sparse. Despite the reference in 8 CFR §316.5(c)(2) to "relinquish[ing] the privileges of permanent resident status," this provision appears only in the regulations governing naturalization (i.e., it is not on its face applicable to questions of maintenance of permanent resident status), and it is not ordinarily cited as authority when a lawful permanent resident is asked to surrender the green card.

Overcoming a rebuttable presumption in a naturalization hearing is no easy task. The rebuttable presumption generally results in a denial of the initial application, which has to be appealed in the context of a second hearing. For those lawful permanent residents who plan on pursuing U.S. citizenship, it is therefore not recommended to claim nonresident status, even if allowed under an income tax treaty or under the definition of residency for state income tax purposes.

Claiming the earned income credit exclusion appears, at first blush, to be less risky. There are two tests used to qualify for the earned income credit exclusion, the “bona fide residence test” and the “physical presence” test, and the physical presence test seems harmless enough given that it is based on being physically present in a foreign country. However, all taxpayers claiming the exclusion, regardless of the test used, must state the “tax home” used during the year. Those with a “tax home” in the United States are precluded from taking the exclusion.

A naturalization examiner confronted with the issue—e.g., if a naturalization applicant had disrupted the continuity of residence by spending more than six months outside of the United States and therefore had the burden of establishing to the satisfaction of the USCIS examiner that the continuity hadn’t been disrupted—would presumably find claiming a “tax home” outside of the United States to be inconsistent with claiming continuous residence in the United States for naturalization purposes and deny the application.

As can be seen, naturalization applicants face the clearest restrictions on positions that they may take on their income tax returns. Green card holders, however, even those with no intention of acquiring U.S. citizenship, may risk the loss of permanent resident status by declaring nonresident tax status or taking the foreign earned income exclusion.8 For lawful permanent residents, whether or not keen on becoming U.S. citizens, it therefore makes sense to consult with immigration counsel before following the advice of their tax lawyers or accountants.

Ted J. Chiappari is a partner at Satterlee Stephens Burke & Burke in New York City. Angelo A. Paparelli is a partner at Seyfarth Shaw in New York, and Irvine, Calif.

Endnotes:

1. If a lawful permanent resident surrenders the green card after having had that status for a period covering any portion of eight calendar years (for example, lawful permanent resident status obtained in December would still count as one full year for these purposes), then he or she may be subject to the expatriation tax. See IRC §§877A(g)(2)(B), (g)(5), & 877(e)(2).

2. Immigration and Nationality Act (INA) §101(a)(33) [8 U.S.C. §101(a)(33)] defines the term “residence” to mean “the place of general abode” and “the place of general abode” to mean a person’s “principal, actual dwelling place in fact, without regard to intent.” Another subsection, INA §101(a)(31) [8 U.S.C. §101(a)(31)] states that “[t]he term ‘permanent’ means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.” The Board of Immigration Appeals has held that: “The definition of ‘residence’ in section 101(a)(33) of the Act, which would preclude consideration of the alien’s ‘intent’ in proceeding or remaining abroad, is inapplicable in determining whether the alien has abandoned her lawful permanent resident status.” Matter of Huang, 19 I &N Dec. 749, 755 (BIA, Sept. 28, 1988).

3. The temporary stamp conferring permanent resident status can be granted, alternatively, by USCIS upon approval of an individual's application for adjustment of status in the United States, or, in a two-step process involving (1) the issuance of an immigrant visa (by a U.S. Consular Officer at an American consulate or embassy abroad) bearing an annotation that the immigrant visa also constitutes a temporary Form I-551 when endorsed by a CBP immigration inspector who admits the individual as a permanent resident of the United States at a U.S. port of entry or pre-flight inspection post.

4. INA §101(a)(13)(C)(ii) [8 U.S.C. §1101(a)(13)(C)(ii)].

5. As alternatives, CBP officials at land borders or at deferred-inspection offices within the United States, or immigration judges presiding over removal hearings, have the power to admit a person as a permanent resident even if the individual has been absent from the United States beyond the period of an acceptable travel document (one year for green cards and two years for reentry permits). Typically, the individual must establish that permanent residence, despite prolonged absence from the United States had not been abandoned. See Khodagholian v. Ashcroft, 335 F.3d 1003 (9th Cir. 2003) (individual held not to have abandoned residency where he made three trips out of the United States and the last trip exceeded a year); compare Moin v. Ashcroft, 335 F.3d 415, 421 (5th Cir. 2003) (residency abandoned where the person lived only six months in U.S. over a 54-month period).

6. Matter of Huang, supra note 1, applies only in the context of returning residents, and there are no comparable cases in the naturalization context allowing for consideration of intent.

7. There is an exception if the lawful permanent resident has been physically present in the United States for an uninterrupted period of one year and is employed abroad by, or under contract with, either the U.S. government, a U.S. research institute, a public international organization (of which the United States is a member), or a U.S. corporation or U.S. subsidiary engaged in the development of foreign trade and commerce of the United States. In these cases, Form N-470 (application to preserve continuity of residence) must be filed before one year of absence has been accrued.

8. See the USCIS Web site, www.uscis.gov, which states, in a section titled, "Maintaining Permanent Residence" (accessible at http://tinyurl.com/yet8jyo; last accessed on April 21, 2010):

You may be found to have abandoned your permanent resident status if you:…

- Fail to file income tax returns while living outside of the United States for any period
- Declare yourself a "nonimmigrant" on your tax returns