

Maintaining LPR status in the US

Introduction

A Lawful Permanent Resident (LPR), by definition, has been afforded the privilege of residing in the U.S. “Lawfully admitted for permanent residence” is defined in INA §101(a)(20) 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.” Failing to exercise the privilege of residing in the U.S. may result in the loss of LPR status if the individual does not maintain a continuous, uninterrupted intention to return to the U.S. Therefore, it is critical that LPRs are advised on the risks of residing outside the U.S. as well as the steps they may take to maintain LPR status.

This article discusses the main immigration issues facing an LPR temporarily residing outside the U.S. It is not meant to be a guide on the various applications mentioned, but is instead intended to highlight issues for LPRs and their attorneys.

Protecting LPR status during temporary periods abroad

There are many reasons an LPR may need to or chooses to reside outside the U.S. The most common include employment, spouse’s employment or immigration status, education, taking care of infirmed relatives, medical treatment and attending to assets or business abroad.

An LPR aware that he or she is moving abroad for an extended period of time may take certain precautions before departing the U.S. to maintain LPR status. Whether an individual has maintained LPR status is determined on a case by case basis. However, as stated in Chavez-Ramirez v. I.N.S., 792 F.2d 932, 936-37 (9th Cir. 1986), an LPR returns from a “temporary visit abroad” only when the visit is for “a period relatively short, fixed by some event” or “will terminate upon the occurrence of an event having a reasonable possibility of occurring within a relatively short period of time.” (Internal citations omitted.)

Naturalizing

Applying for naturalization before departure

If eligible, an LPR could apply to naturalize to become a U.S. citizen. Title III: Chapter 2 of the INA and the regulations at 8 C.F.R. §316 outline eligibility for naturalization. Due to processing delays in naturalization applications, an LPR embarking on extended travel abroad may find it difficult to meet the eligibility criteria concerning residence and physical presence set forth in INA §316(a)(1)&(2). These sections require: (1) continuous residence as an LPR within the U.S. for at least five years before the application is filed; (2) physical presence in the U.S. for at least half of that time; (3) residence of three months’ in the state or district in which the application is made; and (4) continuous residence within the U.S. from the date of the application up to the time of admission to citizenship. An LPR who obtained such status through a U.S. citizen spouse and who has been living in marital union with the U.S. citizen spouse may be eligible to naturalize after three years of residency, instead of five, as outlined in INA §319(a) and 8 C.F.R. §319(1).

While an LPR may meet the first three naturalization requirements by filing before an extended absence, he or she may find it difficult to “reside continuously” in the U.S. from the time of filing until he or she is admitted to citizenship. An absence of more than six months but less than a year will break continuity of residence unless the LPR establishes that he or she did not abandon LPR status. See INA §316(b) and USCIS Guide to Naturalization (M-476) (rev. 12/00). The regulations at 8 C.F.R §316.5(c)(1)(i) enumerate the types of documentation that may be provided to establish that an applicant did not disrupt continuity of residence. This includes, but is not limited to, evidence that the applicant did not terminate U.S.

employment, the applicant's immediate family remained in the U.S., the applicant retained a full access U.S. abode or the applicant did not obtain employment while abroad. In addition, the Naturalization Guide's Document Checklist suggests providing proof of IRS tax return transcripts or IRS-certified tax returns listing tax information for the last five years (or three years for spouses of U.S. citizens), rent or mortgage payments, and pay-slips.

An applicant whose absences are found to have disrupted continuous residence may still be considered an LPR under immigration laws. 8 C.F.R. §316.5(c)(1)(i).

An LPR with a naturalization application filed before departure must therefore ensure that he or she maintains continuity of residence from the time of filing until the naturalization ceremony is completed. Thus, to maximize the chances of success, any trip outside the U.S. should be less than six months.

Some LPRs are able to preserve continuous residence even in the event of an absence of one year or more. Section 316(b) of the INA provides an exception for the continuous residence requirement for certain LPRs who have been physically present and who have resided within the U.S. for an uninterrupted period of at least one year *after* obtaining LPR status. Note: there are further exceptions for certain religious workers. The regulations at 8 C.F.R. §316.(d)(1) enumerate the requirements for such an application which is made on Form N-470, Application to Preserve Residence for Naturalization Purposes. The application must be submitted before the LPR departs the U.S. for a continuous period of one year or more.

Section 316(b) details those groups of LPRs who are eligible to file an N-470:

- Employees or individuals under contract to the U.S. government; or
- People performing ministerial or priestly functions for a religious denomination or interdenominational organization with a valid presence in the United States; or
- Employees of an American institution of research recognized by the Attorney General; or
- Employees of an American-owned firm or corporation engaged in the development of foreign trade and commerce for the U.S.; or
- Employees of a public international organization of which the U.S. is a member by law or treaty (if the employment began after the LPR became a permanent resident).

Applying for naturalization after departure

There are several exceptions to the physical presence and residency rules. These exceptions are also outlined in Title III: Chapter 2 of the INA and include §316(b)(1), exception for certain LPRs employed abroad by the U.S. government or certain research institutions, employees of firms, corporations, or certain public international organizations, §317, LPRs performing religious duties abroad, and §319(b)(1), spouses of U.S. citizens employed by certain U.S. organizations abroad.

Perhaps most notable of these exceptions is INA §319(b)(1), which exempts certain spouses of U.S. citizens, including spouses of employees of American firms or corporations engaged in whole or in part in the development of foreign trade and commerce, from the continuous residence and physical presence requirements. This provision permits certain spouses who may not be eligible to naturalize while living in the U.S., seemingly paradoxically, to naturalize while temporarily residing abroad.

The regulations at 8 C.F.R. 319.2 set forth the criteria for an LPR spouse to apply for naturalization pursuant to INA §319(b)(1). USCIS does not currently have published definitions for “American firm or corporation”, “in part” or even “the development of foreign trade and commerce of the United States” and accordingly, this section could, in theory, be used to describe a wide range of employers. Therefore an application submitted under this section should be fully documented and supported to ensure that the employer is able to demonstrate it meets the criteria of this section.

As required by INA §215(b), once an LPR has naturalized, he or she must, as a U.S. citizen, enter and exit the U.S. with a U.S. passport.

Establishing and maintaining permanent ties to the U.S.

Whether an LPR has maintained a permanent residence in the U.S. is determined on a case by case basis. The intention to maintain permanent resident status is not considered the controlling issue; instead it is whether the LPR is able to demonstrate, with evidence, a continuous, uninterrupted intention to return to the U.S.

In Chavez-Ramirez v. I.N.S., 792 F.2d 932, 937 (9th Cir. 1986) the court listed some of the factors that could be used to determine intent. These include family ties, property, business affiliations, amount of time the LPR resided in the U.S. prior to the absence, and family, property and business obligations abroad. Other ties that have been considered include maintaining U.S. bank and credit card accounts, maintaining a current driver’s license in the state of last residence, voting in U.S. based elections not requiring U.S. citizenship, maintaining local library cards, and renewing memberships in professional organizations.

Simply returning to the U.S. once a year may not be considered sufficient to maintain LPR status. In Matter of Kane, 15 I. & N. Dec. 258 (B.I.A. 1975), an LPR who spent eleven months each year in her native country, and only one month a year in the U.S. staying in a rented room was found to have abandoned residence. Similarly in Angeles v. District Director, I.N.S., 729 F. Supp. 479 (D. Md. 1990), the LPR spent ten or eleven months a year in her home country caring for her parents. The court found that she had abandoned LPR status because she left the country less than two months after obtaining LPR status and never had a job or residence, even though all her siblings lived in the U.S. and she maintained a U.S. bank account. See also Alvarez v. INS, 539 F.2d 1220 (9th Cir. 1976) (finding LPR status abandoned where LPR spent eleven months of each year outside the U.S.). In Matter of Huang, 19 I. & N. Dec. 749, (B.I.A. 1988), the LPR returned to the U.S. once a year for four years while working and studying at a medical school abroad. The court found the LPR had abandoned status even though he owned a home in the U.S., paid investment and property taxes and had a U.S. bank account. While his contract with his employer was for a term of five years, the court rejected this as evidence of a specific end to his relationship with the employer.

There is no bright line rule to determine whether the amount of time outside the U.S. will be construed as abandoning residence. For example, in Khodagholian v. Ashcroft, 335 F.3d 1003 (9th Cir. 2003), the LPR spent 15 months outside the U.S., but the court held that he had maintained permanent residence. In that case, the LPR was not consistently employed or filing tax returns in the U.S. However, his wife and children lived the U.S. and he was able to demonstrate that he was required to remain abroad largely due to a tax obligation. Similarly, in Pascual v. Carroll, 976 F.2d 726 (4th Cir. 1992) the LPR spent nearly two years outside the U.S. caring for her husband who suffered from Parkinson’s disease and then another year attending to his estate after his death. In finding that she had maintained LPR status, the court noted the LPR’s employment in the U.S., her U.S. bank account, and the fact that she left her belongings in the U.S. before her temporary absence.

These cases demonstrate that whether an LPR maintains residence and whether he or she is able to demonstrate intent are fact specific. In determining whether an LPR has abandoned LPR status, the immigration and federal courts generally consider a variety of facts and will weigh the LPR's ties to the U.S. with the reason for the extended absence. Therefore, while it is good practice for an LPR who is planning to reside abroad temporarily to maintain ties in the U.S. it is not possible to guarantee the ability to maintain status after lengthy absences from the U.S.

LPRs who are temporarily residing abroad should also seek tax advice from a tax advisor familiar with international tax issues. The regulations at 8 C.F.R. §316.5(c)(2) provide that an LPR who voluntarily claims nonresident alien status or fails to file federal tax returns raises a rebuttable presumption of abandonment of LPR status.

Re-entry permits

An LPR who expects to be outside the U.S. for an extended period of time (even if less than twelve months) should consider applying for a re-entry permit before departing from the U.S. An LPR in possession of a valid re-entry permit who is otherwise admissible cannot be found to have abandoned status solely on the duration of an absence or absences while the permit is valid. 8 C.F.R. §223.3(d)(1). However, mere possession of a re-entry permit will not protect an individual who lacks the intent to maintain permanent residency.

Section 223 of the INA and 8 C.F.R. §223.1 allow LPRs to maintain permanent resident status while outside the U.S. for a maximum of 24 months at a time upon issuance of a re-entry permit. With few exceptions, 8 C.F.R. §223.2(c) limits the period of re-entry permits to twelve months for LPRs who have been outside the U.S. for more than four years' in the aggregate since gaining LPR status or in the last five years, whichever is less.

Re-entry permits are not renewable. An applicant, however, may make a new application for a re-entry permit on the expiration of the previously granted permit. If a re-entry permit is still valid, a new application must be submitted with the previously issued re-entry permit, or with evidence to demonstrate that the original re-entry permit was lost. 8 C.F.R. §223.2(c)(1).

Applications for re-entry permits are submitted on Form I-131, Application for Travel Document, and must be made while the applicant is physically in the U.S. If the individual is planning to depart the U.S. before the application is approved, NSC may send the re-entry permit to a U.S. consulate abroad. 8 C.F.R. §223.2(f). Each LPR must make an individual application for a re-entry permit.

Other issues affecting LPRs residing abroad

Once the LPR is overseas, he or she may be required to deal with other issues involving LPR status.

Lost or expired green cards

As outlined in 8 C.F.R. §211.1(a)(2), an LPR must present a valid, unexpired Form I-551, Permanent Resident Card (green card) if seeking readmission after a temporary absence of less than one year. As an application for a new green card must be made while present in the U.S., an LPR who loses his or her green card or whose green card expires while abroad is advised to enter the U.S. with other evidence of LPR status. The regulations at 8 C.F.R. §§211.1(b) and 211.4 provide a waiver for an LPR, otherwise admissible and not subject to removal, who is entering without a valid green card.

The U.S. Embassy in London advises that in the case of an expired green card, an LPR may travel with the expired card providing the card was valid for ten years, he or she has not been outside the U.S. for more than one year and the expired green card is the only deficient document. Evidence to establish that the LPR has not been outside the U.S. for more than one year could include, but is not limited to, previous boarding passes for trips to the U.S., credit card or bank statements with U.S. activity and previous U.S. immigration stamps, which may be in the current or recently expired passport.

If a green card has been lost or mutilated while abroad, the LPR may request a transportation letter from the nearest U.S. Department of Homeland Security (DHS) office abroad. The DHS office at the U.S. Embassy in London requires an LPR to provide evidence that he or she has been in the U.S. in the last twelve months, a valid passport, photographs, and proof of upcoming travel to the U.S.

If an LPR is unable to obtain a transportation letter, he or she may still be admitted to the U.S. upon establishing an unrelinquished residence and good cause for failing to present a green card to a Customs and Border Protection (CBP) officer. 8 C.F.R. §211.1(b)(3). A waiver application at a port of entry is made on Form I-193, Application for Waiver of Passport and/or Visa or on Form I-90, Application to Replace Permanent Resident Card, if the green card was lost or stolen. If an LPR must travel without a green card or transportation letter, the LPR would be well advised to carry the type of evidence to establish presence in the U.S. in the last year, similar to that which would be required for a transportation letter.

An LPR who requires a new green card should make an application for the new green card without delay upon entry to the U.S. Enquiries as to local procedures should therefore be made before travel. For example, the LPR should be aware of the local opening hours, whether an appointment is required, and the amount of time he or she should expect the application to take.

Special Immigrant Status

The regulations 8 C.F.R. §211.1(a) set out the documentary requirements for an LPR seeking admission to the U.S. after an absence of less than one year. INA §101(a)(27) sets forth the requirements for special immigrant status for certain LPRs who have been outside the U.S. for more than one year. Special immigrant visas may be obtained at a U.S. Embassy or consulate. To qualify for a special immigrant visa, the LPR must have an intention to return to the U.S., evidence of having maintained ties to the U.S., and perhaps most critically, proof that the extended stay was for reasons beyond the LPR's control. Generally acceptable reasons include medical emergencies and inability to travel.

While special immigrants do not require a new petition, they must demonstrate they are eligible to be accorded an immigrant visa and accordingly must undergo a medical exam and provide documentation to establish identity.

Abandoning LPR status

As outlined above, an LPR may not be able to demonstrate an intention to return to a permanent residence in the U.S. or may not actually intend to return to the U.S. If an LPR does not intend to return to the U.S. even if the absence is longer than one year, he or she may execute a formal abandonment of LPR status.

An LPR may formally abandon residence at a DHS office overseas. Form I-407, Abandonment of Permanent Resident Status, must be completed and submitted to a DHS office with the original green card. DHS will then process the abandonment application and provide a copy of the abandonment confirmation to the former LPR.

An LPR may also choose to abandon residence upon entry to the U.S. by completing and signing the I-407 before a CBP officer, normally at full primary (formerly secondary) inspection. The LPR must ensure that he or she is otherwise admissible as a visitor if he or she wishes to abandon residence at a port of entry.

If an LPR does not voluntarily request abandoning permanent residence on admission, a CBP officer who determines that permanent residency has been abandoned, may nonetheless request that the LPR complete Form I-407 and sign a statement abandoning residency. An LPR may contest the CBP officer's determination by refusing to voluntarily surrender residency. Such individuals are entitled to have this determination reviewed by an immigration judge and present evidence that permanent resident status has not been relinquished. They also have the right to appeal the immigration judge's determination to the Board of Immigration Appeals.

Issues regarding non-U.S. citizen spouses and children

An LPR who has been residing outside the U.S. might marry a non-U.S. citizen or another LPR and have non-U.S. citizen or LPR children.

Spouses and children of LPRs fall under the 2A category for family sponsored immigrant visa preferences. These visa numbers are currently subject to a backlog of more than two years. An LPR may be advised to therefore file a Petition for Alien Relative, Form I-130 upon the marriage or birth. The filing of the petition may provide documentary support for the LPR's intention to return to the U.S. and, upon approval of the petition and issuance of the immigrant visa, will enable the LPR to do so with his or her family. While the regulations at 8 C.F.R. §204.1(e)(2)&(3) outline jurisdiction for I-130s submitted by petitioners residing abroad, DHS offices overseas may exercise discretion in defining residence for purposes of jurisdiction. The DHS office in London, for example, will accept I-130 petitions from an LPR residing in the U.K. who is in possession of a valid re-entry permit.

A notable waiver for children born to LPRs abroad is at 8 C.F.R. §211.1(b)(1). A child born during a temporary visit abroad to an LPR mother may enter the U.S. as an LPR. To be eligible for entry as an LPR under this regulation, the child's application for admission to the U.S. must be made within two years of birth. In addition, the LPR mother must be otherwise admissible and be applying for readmission for the first time since the birth of the child.

Conclusion

An LPR embarking on an extended visit abroad, or temporarily residing outside the U.S. should plan ahead and take appropriate steps to preserve LPR status and privileges. There are several possible strategies that could be invoked to preserve LPR status and planning ahead will maximize these options. In addition there are many issues that LPRs outside the U.S. may face and they should be aware of these issues and plan ahead to avoid unnecessary problems and complications.