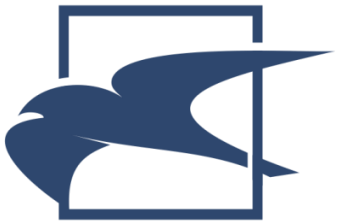

SOUND IMMIGRATION

UNDERSTANDING FOREIGN TRAVEL AS AN LPR (GREEN CARD HOLDER)

Draft article – please pardon any typos

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Your client has finally made it through the lengthy process of becoming a lawful permanent resident (LPR) of the United States – congratulations? Now what is the first thing that she wants to do? Take a trip abroad.

LPR clients may need to travel abroad for any number of reasons ranging from family to professional obligations. Before sending them on their way, ensure that they understand the important implications travel could have for their future in the U.S.

As immigration lawyers, we need to distinguish clearly between different consequences that can follow from an LPR's travel abroad. This article gives an overview of some of the principal items of concern and offers suggestions on advising clients.

I. Continual *residence* for naturalization.

Clients need to understand that extensive travel abroad can delay their ability to naturalize as a U.S. citizen. In order to qualify for naturalization, the LPR will need to meet *continual residence* requirements in the period leading up to her N-400 adjudication.

The concept of continual residence comes into play in no fewer than three ways for a naturalization applicant.

1. **First,** the applicant is required to demonstrate five years of continual residence in the United States immediately prior to filing the N-400 (three for marriage-based applicants).[1]

[1] INA § 316(a)(1). The statute is clear that the period is counted up to the date on which the application is *filed*, not the date on which it is adjudicated.

2. **Second**, she must have resided continually in the same USCIS service district for at least three months immediately prior to filing the N-400.[2]
3. **Third**, she must maintain continual residency in the United States – although not necessarily in the same USCIS service district – between filing the N-400 and taking the oath of citizenship.[3]

Certain military members and military spouses are exempt from the continual residence requirement.[4]

The concept of continual residence, for naturalization purposes, is emphatically not the same as residence for questions of LPR abandonment. Most notably, the subjective intention of the LPR is irrelevant. For naturalization purposes, "residence" is the location where the LPR is actually living, without regard to her intention, such as whether she plans to remain there indefinitely.[5] Somewhat sidestepping the issue of what constitutes an "abode," USCIS says simply, "the applicant's residence is generally the applicant's *actual physical location* regardless of his or her intentions to claim it as his or her residence."[6]

In addition to continual *residency*, applicants must be physically present in the U.S. for "at least half the time for

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[2] *Id.*

[3] INA § 316(a)(2).

[4] 8 C.F.R. § 316.5(b)

[5] 8 C.F.R. § 316.5(a) (residence means the "alien's domicile, or principal actual dwelling place, without regard to the alien's intent...").

[6] USCIS Policy Manual, Vol. 12, Part D, Chap. 3 § A.

which his or her continuous residence is required."[7] "Physical presence refers to the number of days the applicant must physically be present in the United States during the statutory period up to the date of filing for naturalization."[8]

Extended travel abroad can disrupt continual residence, resetting the clock for when the LPR may naturalize. Note that this includes travel up to the date of the oath ceremony, not just to the date of an N-400 interview.[9]

Note that the N-400 may technically be filed up to three months before when the continual residency requirement has been met,[10] but the National Benefit Center will not schedule the interview until the requirement is met.[11]

Single absence under six months. A single absence from the United States of *less than* six months does not break continual residency for purpose of an N-400 adjudication.

Single absence over six months but less than one year. A single absence between 181 and 365 days presumptively breaks continual presence.[12]

How does an LPR rebut a presumptive break in residency? Neither the Policy Manual not C.F.R. articulates a legal standard. The Manual states clearly that the LPR's subjective intention is irrelevant – meaning it does not

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[7] USCIS Policy Manual, Vol. 12, Part D, Chap. 4 § A.

[8] USCIS Policy Manual, Vol. 12, Part D, Chap. 4 § B.

[9] USCIS Policy Manual, Vol. 12, Part D, Chap. 3 § C.

[10] INA § 334(a).

[11] Practice Pointer: When to File a Naturalization Application (Dec. 10, 2012), AILA Doc. No. 12121028.

[12] INA § 316(b).

help if she fully intended to maintain her status indefinitely residence in the U.S.[13]

Instead, the regulations say that the LPR may provide types of documentation that may include, "but are not limited to" evidence that while abroad:

> (A) The applicant did not terminate his or her employment in the United States;
>
> (B) The applicant's immediate family remained in the United States;
>
> (C) The applicant retained full access to his or her United States abode; or
>
> (D) The applicant did not obtain employment while abroad.[14]

Obviously USCIS is interested in the nature of ties that the LPR maintained with the U.S. But note the obvious circularity: (1) an absence of 181 days or more automatically breaks presence; (2) the LPR can rebut the presumption that presence was broken; and (3) the way to do that is providing evidence that she did not disrupt continual residence.

Single absence of one year or longer. A single absence of one year or longer conclusively disrupts continual residence.[15] The only exception to this statutory rule is if the LPR was working for a qualifying government entity *and* filed a pre-departure flight-plan (the Form N-470).[16]

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[13] USCIS Policy Manual, Vol. 12, Part D, Chap. 3 § C(1).

[14] 8 C.F.R. § 316.5(c)

[15] INA § 316(b).

[16] INA § 316(b)(1) & (2).

Importantly, an LPR reentry card *does not* prevent a break in continual presence for purpose of the one-year rule.[17]

II. Abandonment of LPR status.[18]

A. What happens at the port?[19]

Following the recent election, there have been troubling reports of CBP aggressively "encouraging" LPRs to voluntarily relinquish their status upon returning to the United States. Voluntary abandonment is accomplished by executing a Form I-407, Record of Abandonment of Lawful Permanent Resident Status.[20] The Form I-407 is also used by the State Department at consulates.[21]

A returning LPR is *never* required to sign a Form I-407 and in virtually all circumstances the individual should refuse to do so. AILA advises, "signing Form I-407 is... not conclusive evidence that a client intended to abandon their residency."[22] An individual may still request a hearing with an immigration judge, even after signing the Form I-407.[23]

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[17] *See* Form M-476, A Guide to Naturalization (rev'd Nov. 2016), p. 22.

[18] Note that Vol. 7, Part R of the USCIS Policy Manual will address abandonment of LPR status, but is not yet published.

[19] AILA, Practice Alert: What to Do If Clients are Asked to Relinquish Their Green Cards and Sign Form I-407, Abandonment of LPR Status, AILA Doc. No. 17012960 (Feb. 6, 2017).

[20] Form I-407, Record of Abandonment of Lawful Permanent Resident Status, available at https://www.uscis.gov/i-407.

[21] *Cf.* DOS Cable on New USCIS Form I-407, AILA Doc. No. 15040601 (Mar. 26, 2015).

[22] Practice Alert (Feb. 6, 2017), *supra*.

[23] *Id.*

If CBP believes that a returning LPR has abandoned status – and she refuses to sign a Form I-407 – then she will be paroled into the U.S. and served with an NTA.[24] Merely refusing to sign a Form I-407 is not itself grounds for detention by CBP.[25]

So what would trigger scrutiny from CBP? According to CBP itself through its liaisons, "officers are less focused on the length of time abroad and more on *where does the person actually live*."[26] CBP officers, "will look at the totality of the circumstances, including how many years the person has lived in the U.S.; whether the person is employed in the U.S. or abroad; where family members live; [and] whether U.S. taxes have been paid."[27] The now-defunct Inspectors Field Manual suggests that the following factors could indicate abandonment, even on trips under one year:

- employment abroad;
- immediate family members who are not permanent residents;
- arrival on a charter flight where most passengers are non-residents with return passage;

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[24] Practice Alert (Feb. 6, 2017), *supra* ("Abandonment of residence is not a ground of inadmissibility. Thus, the basis for the NTA is violation of INA §237(a)(1)(A) for being inadmissible at the time of admission because LPRs travel abroad and reenter the U.S. as "special immigrants" per INA §101(a)(27).").

[25] Practice Pointer: Rights of LPRs at Ports of Entry, AILA Doc. No. 17032261 (Mar. 21, 2017).

[26] AILA D.C. Chapter CBP Liaison Committee, Practice Pointer: Frequent Travel Abroad and Abandonment of Lawful Permanent Resident Status, AILA Doc. No. 12121356 (Dec. 17, 2012).

[27] *Id*. (internal quotation marks omitted).

- lack of a fixed address in the U.S.; or
- frequent prolonged absences from the United States.[28]

The Manual notes that, "in questionable cases, it is appropriate to ask for other documentation to substantiate residence, such as driver's licenses and employer identification cards."[29]

For an LPR who acquired status through a U.S. spouse, relationship trouble could mean trouble at the returning port of entry. If the LPR has divorced his petitioner, a CBP may question whether the LPR may have made a prior misrepresentation to an immigration agency.[30]

B. The legal standard for abandonment.

Normally, an LPR returning to the United States is not considered to be seeking admission.[31] The individual is seen as applying for admission *only if* she:

- has abandoned or relinquished LPR status;
- has been absent from the United States for a continuous period of 180 days or longer;
- has engaged in illegal activity after having departed the United States,
- has departed from the United States after being served with an NTA;
- has committed designated criminal offenses; or
- attempts to enter without inspection.[32]

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[28] CBP, *Inspectors Field Manual* (2007), § 13.1.

[29] *Id.*

[30] CBP Inspector's Field Manual (2007) § 13.1.

[31] 8 U.S.C. § 1101(a)(13)(C).

[32] *Id,*

Where an individual has been served with an NTA, the question is whether she still qualifies as a "returning alien":

> ...in order to qualify as a returning resident alien, an alien must have acquired lawful permanent resident status in accordance with our laws, must have retained that status from the time that he acquired it, and must be returning to an "*unrelinquished lawful permanent residence*" after a "*temporary visit abroad*.[33]

A visit abroad is *temporary* 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."[34] If the trip is not short in duration, it qualifies as temporary only if the LPR has "a continuous, uninterrupted intention to return to the United States during the entirety of his visit."[35] It is at this second stage

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[33] Matter of Huang, 19 I. & N. Dec.749, 751 (BIA 1988) (quoting Santos v. United States INS, 421 F.2d 1303, 1305 (9th Cir. 1970), INA 101(a)(20) & (27)(A) (1988), and 8 C.F.R. § 211.1(b) (1988)).

[34] Hana v. Gonzales, 400 F.3d 472, 476 (6th Cir.2005) (quoting Singh v. Reno, 113 F.3d at 1514).

[35] Singh v. Reno, 113 F.3d at 1514 (quoting Chavez-Ramirez v. INS, 792 F.2d 932, 937 (9th Cir.1986)). *See*, *e.g.*, Compare to Lateef, 683 F.3d at 281 (alien's fifteen-month trip to Pakistan showed abandonment of status); Singh v. Reno, 113 F.3d 1512, 1515-16 (9th Cir. 1997) (alien abandoned LPR status where he lived abroad most of the year and returned to California to work during the summers); Portillo-Escobar v. Holder, 444 Fed.Appx. 992, 994-95 (9th Cir. 2011) (alien who spent about a year in the United States and four and a half years in El Salvador abandoned LPR status); Usmani v. U.S. Attorney General, 341 Fed.Appx. 473, 475 (11th Cir. 2009) (alien's

of analysis that courts will look to a non-exclusive list of factors, such as:

- Family ties;
- Property holdings; and
- Business affiliations within the United States.[36]

Subjective intent *alone* is insufficient to maintain LPR status – the individual's actions must also be considered.[37]

LPR status may be lost by operation of law where an individual takes actions inconsistent with maintaining LPR status – that is, status may be lost prior to a formal adjudication that status has been lost.[38]

If an applicant for admission has a "colorable claim" to returning resident status, the government has the burden to provide by "clear, unequivocal, and convincing evidence" that the status has been changed or abandoned.[39]

For an unemancipated minor, a parent's abandonment of LPR status will be imputed to the child.[40]

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year-long absence from United States without reasonably possible termination point showed abandonment of status).

[36] Singh v. Reno, 113 F.3d at 1514-15.

[37] Lateef v. Holder, 683 F.3d 275, 280 (6th Cir. 2012). *See*, *e.g.*, Usmani v. U.S. Attorney General, 341 Fed.Appx. 473 (11th Cir. 2009) (respondents had abandoned status – despite subjective intent to the contrary – where they, "(1) did not enroll their children in school; (2) emptied their bank account; and (3) never owned property").

[38] *See*, *e.g.*, United States v. Yakou, 428 F.3d 241 (D.C. Cir. 2005).

[39] Singh v. Reno, 113 F.3d 1512, 1514 (9th Cir. 1997).

[40] Matter of Huang, 19 I. & N. Dec.749, 750 n. 1 (BIA 1988) ("Abandonment of lawful permanent resident status of a parent is imputed to a minor child who is subject to the parent's custody and control."); Matter of Zamora, 17 I. & N. Dec. 395, 396 (BIA 1980)

Understanding reentry permits.

A reentry permit is issued to LPRs who wish to travel abroad for up to two years without abandoning their residency.[41] An LPR applies for a reentry permit by filing a Form I-131, Application for Travel Document.[42] The permit is normally valid for a period of two years; it is issued for only one year if the LPR has spent an aggregate of four of the past five years abroad.[43]

So long as the LPR remains *not otherwise inadmissible*, she does not abandon LPR status while traveling abroad on a valid reentry permit.[44]

("We hold that this voluntary and intended abandonment by the mother is imputed to the applicant, who was an unemancipated minor ... at the time his mother abandoned her lawful resident status."); Matter of Winkens, 15 I. & N. Dec. 451, 452 (BIA 1975) (holding that " [t]he abandonment of [the parents of petitioner's] permanent resident status is imputed to [petitioner], who was subject to their custody and control" when they abandoned). *See*, *e.g.*, Khoshfahm v. Holder, 655 F.3d 1147 (Cir. 2011) (no abandonment where government failed to show parents' intent prior to respondent's 18th birthday).

[41] 8 CFR § 223.1(a) ("A reentry permit allows a permanent resident to apply for admission to the United States upon return from abroad during the period of the permit's validity without the necessity of obtaining a returning resident visa."). *See* USCIS, How do I get a reentry permit?, *available at* http://bit.ly/2peoz1p.

[42] *See* Form I-131, Application for Travel Document, *available at* https://www.uscis.gov/i-131.

[43] 8 CFR § 223.3(a)(1); 8 CFR § 223.3(c)(2). For exceptions, where a two-year permit may be issued despite four aggregate years abroad see 8 CFR § 223.3(c)(2).

[44] 8 CFR § 223.3(d)(1) ("A permanent resident or conditional permanent resident in possession of a valid reentry permit who is otherwise admissible shall not be deemed to have abandoned status

Applicants can avoid the need to attend a biometrics appointment by submitting passport-style photographs when they file their Form I-131.[45]

An LPR who has been outside the United States for 365 days or longer *without* a reentry permit may apply for a returning resident visa.[46]

III. Recommendations for traveling LPRs.

Track travel abroad. Many sophisticated clients will do this without prompting, but it is always a good idea to make the recommendation. LPRs should keep a simply spreadsheet tallying every trip abroad. At the very least, this will save them a huge amount of trouble when they later apply for naturalization. They should also keep proof of foreign travel in case dates are ever disputed. For plane travel this could be as simple as creating an email folder to save trip itineraries.

Especially on lengthy travel, bring proof of U.S. ties. Given CBP's aggressive screening of returning LPRs, clients should be prepared to demonstrate their ties as U.S. residence. AILA recommends that LPRs bring documentation of:

- Their ties to the U.S.;
- The purpose of their visit outside of the U.S.; and

based solely on the duration of an absence or absences while the permit is valid.").

[45] Practice Alert: Tips and Tricks for Filing Reentry Permit Applications, AILA Doc. No. 12100960 (Dec. 1, 2015).

[46] *See* Dept. of State, Returning Resident Visas, http://bit.ly/2px8djZ.

- The expected termination date of the visit abroad or occurrence of facts showing why a date certain is or was not possible.[47]

A practical solution in some cases would be to have this information saved in a cloud-based environment like Google Drive, where it can easily be added to or accessed. When the client is returning from a trip abroad, she can simply print off the material to save her from having to carry it on the entire trip.

Clients should be encouraged *not* to thrust the packet at the CBP officer at the port of entry. Instead, it should be used only if the client is sent to secondary for interrogation on her LPR status. Unless CBP questions LPR abandonment, the client should understand that inspection of such documents does not need to be part of the screening process.

Electronic devices. There have been many reports of CBP taking an especially aggressive approach to searching electronic devices entering the United States. This includes not only devices belonging to LPRs and foreign nationals, but also to U.S. citizens. An individual is not required to release a password to his phone, computer or other device. But in the event she were to refuse such access, CBP asserts the right to confiscate the device and retain it for a period of some so that a search may be performed. This may take weeks or months.[48] Anyone traveling abroad should consider measures to encrypt or eliminate sensitive data from devices before traveling.

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[47] Practice Alert (Feb. 6, 2017), *supra* (quoting Matter of Kane, 15 I&N Dec. 258 (BIA 1975)).

[48] *Cf.* Practice Pointer (Mar. 21, 2017), *supra*.

No right to counsel. It is important for clients to understand that arriving foreign nationals have no right to counsel at U.S. ports of entry.[49] CBP is not required even to communicate with counsel. For this reason, it is important for clients to understand that they will have to advocate on their own behalf, and should not expect their lawyer to be able to assist. For more discussion on legal advocacy at U.S. ports of entry please see our (free) recorded webinar featuring Greg Boos, Margaret Stock and Heather Fathali.[50]

Should LPRs travel at all? After the Trump administration announced its first travel ban, we took the rather extraordinary step of advising all of our non-citizen clients to avoid foreign travel. That is a dramatic measure to take, since our LPR clients have a legal right to return to the United States. But in the wake of the first travel ban, LPRs from the impacted countries were indeed turned away at U.S. ports of entry. The limited (or non-existent) right to counsel at the border makes it exceedingly difficult to challenge even a clearly unlawful detention.

At the time of writing, the administration's first and second travel bans are both enjoined by courts. But what is next? Few immigration lawyers – and certainly not this one – are qualified to predict which way the political winds will blow, let alone to predict the actions of a demonstrably unpredictable president.

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[49] *Cf.* Practice Pointer (Mar. 21, 2017).

[50] Across the Line, Advocacy at U.S. Ports of Entry (Feb. 15, 2016), *available at* https://www.soundimmigration.com/across-line-advocacy-u-s-ports-entry/.

Our firm no longer categorically advises LPRs against foreign travel. But clients should understand that there is a possibility they could be impacted by historically unprecedented immigration policies. Another executive order could be issued with little or no advanced warning. And lawful or not, those caught up by its implementation could be denied rights, including the right to reenter the United States, with only limited means to challenge that action. There is hardly an evidence-based way to counsel clients on the risk of travel in these times. Most clients are as worried or more worried than their lawyer. But it never hurts to highlight the extreme uncertainty of immigration policy.