An LPR Who Has Been Outside of the US For Six Months or More

The large portion of the information on this page came from https://myattorneyusa.com/immigration-blog/immigration-to-the-usa/case-law-on-the-abandonment-of-permanent-resident-status/ which is one of the best immigration attorney blogs on the web.

You can find more information about maintaining resident status on the Department of State website at https://jp.usembassy.gov/visas/immigrant-visas/green-card/maintaining-permanent-resident-status/.

Abandonment of Residency

Legal Permanent Residents (LPR's) are treated as seeking re-admission if they have been absent from the United States for a continuous period of longer than 180 days. INA § 101(a)(13)(C)(ii). Although an LPR returning from a visit of more than 180 days is subject to the grounds of inadmissibility and can be questioned as to potential abandonment of residency, this usually

only comes up when the LPR has been gone for more than one year.

Abandonment of LPR status is determined by a number of factors, however, and the length of the absence is only one of them. The factors that the agency will consider include the following: the LPR's intent when leaving the country; any employment abroad; U.S. business affiliations; ownership of residence or property holdings in the United States; payment of U.S. taxes; length of time in the United States; community ties developed before the departure; maintenance of a bank account, club memberships, or other social ties within this country; and U.S. residence of other immediate family members during this period.

> **Annual visits to the United States are no guarantee that LPR status will be preserved. 9 FAM 422.22 N. 1.10.**

Evidence of Abandonment

Evidence that the LPR has abandoned residency can include the following: extended or frequent absences from the United States; disposing of property or terminating a job in the United States before leaving; family, property, or business ties all located abroad; certain conduct while outside the United States, such as working for a foreign employer, voting in a foreign election, or running for political office in a foreign country; and failure to file U.S. income tax returns. 9 FAM 422.22 N. 1.4. Filing taxes as a nonresident alien is tantamount to an admission of abandonment.

> **When an LPR has been abroad continuously for more than one year, the presumption is that abandonment has occurred. 8 CFR § 211.1(a)(2).**

Questions regarding the abandonment of LPR status usually arise when an LPR is abroad for at least one year continuously. Under 8 C.F.R. 211.1(a)(2), most LPRs will be ineligible to return to the United States with the presentation of a Form I-551 after being abroad for one year or longer and will have to apply for an SB-1 visa to enter as a returning resident. An LPR can be found to have abandoned their residency in the United States during a trip shorter than a year if they failed to continuously maintain the intent to remain a permanent resident.

The issue may also arise when returning from an absence of six months or more. Under section 101(a)(13)(ii), an LPR who has been absent for a continuous period of more than 180 days will be treated as an applicant for admission. Under section 101(a)(13)(i), an LPR may also be treated as an applicant for admission if they abandoned their LPR status.

If a LPR in the United States is charged with having abandoned his or her LPR status, the alien will be charged with inadmissibility under section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (INA) for being present in the United States without a valid entry document. If it is found that the alien abandoned his or her LPR status, the alien will be subject to removal from the United States.

Overcoming Presumed Abandonment

The presumption is that abandonment has occurred. 8 CFR § 211.1(a)(2). But this can be overcome by the LPR's evidencing that he or she has maintained sufficient ties to the United States and never intended to abandon residency. For example, the LPR may have intended to leave for a short period of time

to care for a sick family member, but was required to stay longer than expected. A natural disaster, civil strife, or foreign government action could prevent the LPR from returning within the one-year period.

Reentry Permit

Form I-327

LPRs who may be outside the United States for more than one year are advised to obtain a reentry permit, Form I-327. Possessing this form removes the length of the absence as a factor as to whether residency was abandoned, assuming the LPR returns within the allowed period (a maximum of two years). This reentry permit may be obtained by filing Form I-131 with the USCIS before leaving, along with a filing fee of $360 and $85 biometrics fee.

USCIS' How Do I Get a Reentry Permit informational handout.

Application to Determine Returning Resident Status

Form DS-117

Form DS-117, Application to Determine Returning Resident Status, along with a fee of $275, with the U.S. consulate.

This form may also be filed by LPRs whose resident alien card expired during their absence abroad. They must submit evidence of LPR status, dates of travel outside the United States, proof of ties to the United States and intention to return, and proof that the protracted stay was for reasons

beyond his or her control. Documentary evidence of the LPR's intent to maintain a U.S. residence may consist of the following: a driver's license issued within the past year and reflecting the same address as that recorded on the Form I-94, Arrival and Departure Record; the name and address of the U.S. employer and evidence that a salary has been paid within a reasonable period of time; evidence of children's enrollment in a U.S. school; evidence that the extended visit abroad was caused by unforeseen circumstances; evidence of a predetermined travel termination date, such as graduation or employment contract expiration; evidence of having filed U.S. income tax return(s) for the past year(s); and evidence of property ownership, whether real or personal, in the United States. 9 FAM 42.22 N. 1.3.

The consulate will conduct an interview and make a determination as to whether the LPR has abandoned resident status. A key factor in determining loss of LPR status, according to the State Department, is the absence of a fixed intent to return to the United States. 9 FAM 42.22 N.3. The DS-117 is considered an application for Special Immigrant Status, as set forth in INA § 101(a)(27)(A). If approved, the visit abroad will be considered temporary and the LPR will be readmitted as a returning resident in the SB-1 immigrant visa category.

Department of State Website with information about obtaining Returning Resident Status.

SB-1 Visa (Returning Resident Visa)

If the above Application is granted then the applicant will be issued an SB-1 Returning Resident Visa.

Under 8 C.F.R. 211.1(a)(2), most LPRs will be ineligible to return to the United States with the presentation of a Form I-551 after being abroad for one year or longer and will have to apply for an SB-1 visa to enter as a returning resident. From the Department of State Website:

> **"If you are a Lawful Permanent Resident and you have been outside the United States over one year (or beyond the validity of your re-entry permit) for reasons beyond your control, you may be eligible for a Returning Resident (SB-1) Visa. You can learn more about Returning Resident Visas on the Department of State website.**
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> **Please note that if you were originally admitted to the United States in conditional status, you cannot qualify for SB-1 returning resident status if your two-year Green Card has already expired and you have not taken the appropriate timely steps to have your conditional status lifted before the card expired. In this case, you must have a new petition filed on your behalf with the U.S. Citizenship and Immigration Service (USCIS) and start the entire immigrant visa process all over again.**
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> **If your application for returning resident status is approved, this eliminates the requirement that an immigrant visa petition be filed on your behalf with the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS). SB-1 visa applicants must come in person to the U.S. Embassy to be interviewed two different times. The first interview includes a review of the application to**

determine if the applicant qualifies for returning resident status. If the application for returning resident status is approved, then a second interview with a consular officer will be conducted to ensure the SB-1 applicant meets the documentary and eligibility requirement for an immigrant visa. This includes presenting all civil documents required for an immigrant visa and obtaining a medical examination.

Qualifications for Returning Resident Status

To qualify for returning resident status, you will need to prove to the Consular Officer that you:

- **Had the status of a lawful permanent resident at the time of departure from the U.S.;**
- **Departed from the U.S. with the intention to return and have not abandoned this intention; and**
- **Are**
was
you

How to Apply

Applicants seeking to apply for Returning Resident Visa (SB-1) need to submit copies of these documents to the Immigrant Visa Unit in Bangkok by email at ivschedulingbangkok@state.gov:

- **Completed Form DS-117 Application to Determine Returning Resident Status**
- **Your US**

All Returning Resident Applicants must pay an application fee of $180.00 to the consular cashier on their first interview date. U.S. Embassy accepts payment using U.S. Dollars or Thai Baht in cash, or the following credit cards in U.S. Dollars: Visa, MasterCard, Discover and American Express. Payment of the filing fee is not refundable and does not guarantee that the application will be approved. *If your application for returning resident status is approved, you will be required to pay*

> *an additional fee of $205.00 when you return for your second interview for your immigrant visa.*

Right to a Hearing Upon Return

Permanent resident aliens are entitled to a hearing as to whether they have abandoned their LPR status when returning from a lengthy absence. If it is requested, they will be paroled into the country for that purpose. The government has the burden of proving by clear, unequivocal, and convincing evidence that the LPR's status has changed. In those cases, an immigration judge will hear testimony and weigh the evidence as to whether abandonment has occurred. An LPR retains that status until a formal determination has been made.

Re-Immigrating to the US

An LPR who has abandoned residency abroad who is able to re-immigrate, such as through a U.S. citizen or LPR family member, would then proceed with the filing of an I-130 and going through consular processing. Those who no longer have those family relations and cannot re-immigrate through some other means may still apply for a nonimmigrant visa. But in both cases, the client should formally renounce his or her LPR status. This is accomplished by filing Form I-407, "Abandonment of Lawful Permanent Resident Status," with DHS at a port of entry or at any U.S. consulate. There is no filing fee. Form I-407 allows individuals to indicate either that they are seeking to abandon their LPR status or that they already "have abandoned [that] status" prior to filing the form. When an LPR parent's residency is judged

relinquished or abandoned, the LPR status of any minor children who accompanied the parent will also be lost.

Case Law On Abandonment of LPR Status

In Matter of B—, 9 I&N Dec. 211 (BIA 1961) the Board held that a "temporary visit" abroad requires an intent to "return within a period relatively short, fixed by some early event." The Board further held that "[a] mere absence of the intention to remain abroad permanently will not preserve the alien's [resident] status."

In Matter of Guiot, 14 I&N Dec. 393 (D.D. 1973), the Board said that an alien's "intent" may be considered when determining whether he or she abandoned permanent residency. In *Guiot,* the Board held that an alien who had been abroad for two years had not abandoned his permanent residency because he maintained the intent to return to the United States while abroad. The Board held specifically that section 101(a)(20) of the INA allows for the consideration of factors such as whether the alien acted contrary to maintaining his or her LPR status (*e.g.,* if an alien claims nonresident alien status for Federal income tax purposes, that may be weighed in considering whether he or she abandoned LPR status).

Factors to Consider

In the Matter of Kane, 15 I&N Dec. 258 (BIA 1975), the Board explained that it may assess the subjective intent of a returning LPR to determine whether their trip was a "temporary visit abroad." Citing to Gamero v. INS, 367 F.2d 123, 126 (9th Cir. 1966), the Board explained that it cannot look merely at the amount of time an LPR was outside the US when determining abandonment. The Board listed three factors in *Kane* that should be considered:

1. Purpose for Departing

Did the returning LPR has a "definite reason" for making the trip abroad?

The Board cited to the Matter of Guiot, 14 I&N Dec. 393 (D.D. 1973), wherein it had held that a trip abroad to accept a two-year position with a foreign university did not lead to the abandonment of LPR status. In the Matter of Souqi, 14 I&N Dec. 390 (1973), it was held that a prolonged trip abroad to liquidate assets and bring family to the United States does not constitute abandonment of LPR status. In *U.S. ex rel.* Polymeris v. Trudell, 49 F.2d 730 (2d Cir. 1931), the Second Circuit held that a trip abroad to settle an estate is a permissible reason for making a trip abroad for purpose of retaining LPR status.

2. Termination Date

Is their trip abraod expected to terminate "within a period that is relatively short, fixed by some early event"

In U.S. ex rel. Polymeris v. Trudell, 49 F.2d 730 (2d Cir. 1931), the Second Circuit held that the temporariness of a visit "cannot be defined in terms of elapsed time alone." This concept was developed further by the Ninth Circuit in one of the most cited decisions on abandonment, Chairez-Ramirez v. INS,

792 F.2d 932 (9th Cir. 1986). The Ninth Circuit held that a visit is only a temporary visit abroad when there is a reasonable possibility at the outset of the trip that it will terminate within a short period of time and when the alien "has a continuous, uninterrupted intention to return to the United States during the entirety of his [or her] visit." So long as the alien maintains a continuous, uninterrupted intention to return to the United States throughout the entirety of his or her visit, the alien may be able to demonstrate that residence was not abandoned even if the visit is protracted.

3. Place of Employment or Actual Home

Does the returning LPR intend to return to the United States as a place of employment or business and as an actual home.

Citing to the Matter of Quijencio, 15 I&N Dec. 95 (BIA 1974), the Board explained that factors such as the location of the alien's ties (*e.g.,* family, job, or property) "may aid in determining the alien's intent."

> **The USCIS has taken the position that filing a tax return as a nonresident alien rather than as an LPR "raises a rebuttable presumption that the alien has abandoned LPR status."**

In the Matter of Muller, 16 I&N Dec. 637 (BIA 1978), the Board held that the factors that adjudicators should consider in determining whether LPR status was abandoned include:

1. *Duration of the alien's absence from the United States;Location of the alien's family ties;Alien's*

It is important to note that while it is necessary for an alien to have the intent to return to the United States when he or she departs and to maintain

such intention throughout the duration of the trip abroad, this is not sufficient for showing that LPR status has not been abandoned. In the Matter of Huang, 19 I&N Dec. 749 (BIA 1988), the Board explained that "[a]n alien's desire to retain [his or] her status, without more, is not sufficient." Rather, adjudicators must consider the factors set forth in *Kane* to determine whether an alien not only had and maintained the intention of retaining his or her LPR status, but whether his or her actions did not constitute the abandonment of such status. In Ahmed v. Ashcroft, 286 F.3d 611 (2d Cir. 2002), the Second Circuit held that merely finding that an alien had never consciously formed an intention to abandon LPR status did not preclude a finding of abandonment where the alien had remained outside the United States for nine years and lacked the intent to return within a period relatively short, fixed by some event.

In the *Matter of Huang,* 19 I&N Dec. 749 (BIA 1988), the Board held that the term "relinquished permanent residence" "can have reference to something less than a permanent dwelling place in the United States." The Board further explained that the emphasis is on whether an applicant abandoned "[LPR] status in this country" rather than whether he or she "abandoned a particular dwelling place." In Saxbe v. Bustos, 419 U.S. 65 (1974) , the Supreme Court held that an LPR who maintains a home in Canada or Mexico and commutes daily to his or her place of work in the United States does not lose LPR status solely on account of maintaining a residence abroad.

In *Moin v. Ashcroft,* 335 F.3d 415 (5th Cir. 2003) , the Fifth Circuit held that administrative determinations of an alien's subjective intent to remain a resident of the United States are subject to judicial review because such a determination is "essentially factual."

Second Circuit Case Law

In *Ahmed v. Ashcroft,* **286 F.3d 611 (2d Cir. 2002), the Second Circuit held that, upon finding an alien had abandoned his LPR status at a specific point, his or her conduct subsequent to the point at which abandonment occurred cannot be considered in determining whether LPR status was in fact abandoned.**

U.S. ex rel. Polymeris v. Trudell, **49 F.2d 730 (2d Cir. 1931), the Second Circuit held that the temporariness of a visit "cannot be defined in terms of elapsed time alone."**

Children of LPRs

Under the *Matter of Zamora,* **17 I&N Dec. 395 (BIA 1980) , if an LPR parent is found to have abandoned his or her status while abroad with his or her LPR child (defined as being under the age of 18), the abandonment of LPR status shall apply to the child. Also see the** *Matter of Winkens,* **15 I&N Dec. 451 (BIA 1975), wherein a 14-year old child was found to have lost his LPR status when he left the United States in the custody of his parents who abandoned their residence in the United States. More broadly, the Board held that the abandonment of an LPR parent's status is imputed to LPR minor children under his or her custody and control. In the** *Matter of Huang,* **19 I&N Dec. 749, the Board held that "the excludability of the [LPR] children is dependent on the excludability of the [LPR parent]."**

In *Khoshfham v. Holder,* **655 F.3d 1147 (9th Cir. 2011), the Ninth Circuit held that in order for an LPR's abandonment to apply to his or her LPR child, it must be found that the abandonment occurred before the child turned 18. If the child is still an LPR when he or she turns 18, his or her intent will control rather than the intent of his or her parent(s).**

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