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PRESERVING GREEN CARD STATUS DURING TRIPS ABROAD

It is an all too common situation -- after years of bureaucratic entanglements, a person finally obtains lawful permanent residence in the United States, only to find that business or family concerns will keep them out of the U.S. for an extended period of time. Often, the lawful permanent resident (LPR) will try to re-enter the U.S. and then have a port of entry officer or consular official tell them they have abandoned their permanent residence status.

Absences from the U.S. of more than six months raise a rebuttable presumption that an individual intends to abandon permanent resident status, and absences of more than one year invalidate the green card as an entry document unless the person holds a valid re-entry document. This means that a foreign national who has been continuously abroad for more than 12 months may still be a permanent resident, but a special immigrant visa issued by a U.S. consul may be necessary to re-enter the U.S. unless the individual has a valid re-entry permit.

Extended absences may also adversely affect U.S. citizenship eligibility, despite the existence of a re-entry permit. Therefore, when planning an extended trip abroad, it is necessary to plan ahead to avoid abandonment. Among the many factors that influence the decision on abandonment are the length and reason for the absence and the number and type of connections the LPR maintains in the U.S.

Re-entry Permits

Of course, the LPR can obtain a re-entry permit if the absence is to be longer than one year. A re-entry permit, filed on Form I-131, is usually granted for two years and serves as recognition by the U.S. Citizenship and Immigration Services (USCIS) that the individual does not intend to abandon permanent residence despite prolonged absence from the U.S.

This application is typically submitted by the individual while physically present in the U.S. and must be used prior to the expiration of the document, or two years from the date of issuance. If the holder of a re-entry permit is a conditional permanent resident, the permit will be valid to the date the conditional resident must apply for removal of conditional status.

Documentation of Intent to Remain in the U.S

One of the most important factors in preserving permanent residence is the proper filing of U.S. tax returns while abroad and filing as a U.S. resident and not as a nonresident. Because of international tax laws, there will often be no tax owed to the U.S. government, but failure to file a return is almost always considered a sign that LPR status has been abandoned. The LPR should also maintain a bank account and credit card(s) in the U.S, both of which should be active. For example, if the LPR is employed abroad, the salary should be deposited in the U.S. account. The LPR should also continue to renew his or her U.S. driver's license. If possible, the LPR should also purchase property in the U.S.

If the LPR's absence is due to employment, a letter from the employer detailing the terms and length of employment is very important. If the absence is for family or personal reasons, these should be noted. While such reasons are acceptable, the ease with which they can be manipulated means they should be well documented.

A commonly held but mistaken assumption is that a visit every year to the U.S. will preserve LPR status. While an LPR needs only the green card to re-enter the U.S. after an absence of less than one year, this is not enough to indicate the intent to remain a resident of the U.S. As mentioned above, the LPR must take additional action to preserve his or her status.

B-1/B-2 VISITOR VISAS

The most common nonimmigrant visa is the B visa, of which there are two types: B-1 visas for business visitors and B-2 visas for pleasure visitors. The application for the visa is made at a United States consulate. When applying, the applicant must demonstrate financial arrangements for the trip, specificity of trip plans, ties to the applicant's home country and ties to the U.S.

In most cases, successful applicants for the visa will be given a multiple entry visa stamp saying "B-1/B-2" that is valid for 10 years. However, this does not mean that a person can stay in the U.S. for as long as the visa is valid. The U.S. has a two-part system for entering. The visa is the first part, allowing the alien to seek admission at a U.S. point of entry. The second part is the white I-94 card issued by the inspector at the point of entry, authorizing the visitor to stay in the U.S. for a specified period of time. Thus, the 10-year visa would allow a person to seek admission multiple times over the 10 years, but an inspector will determine the length of time authorized for each visit.

B-1 Business Visitors

The B-1 Business Visitor category is available to persons who can demonstrate that they have no intention of abandoning their residence abroad and they are visiting the U.S. temporarily for business. Most B-1 admissions are approved for just the period necessary to conduct business, and individuals are normally permitted to stay no longer than three months.

Business visitors are limited in the activities in which they are permitted to engage. B-1 visa holders must not be engaged in productive employment in the U.S. either for a U.S. employer or on an independent basis. Any work done in the U.S. must be performed on behalf of a foreign employer and paid for by the foreign employer. The work should also be related to international commerce or trade.

B-2 Pleasure Visitors

The B-2 pleasure visa covers tourists, visits to relatives or friends, visits for health reasons, participation in incidental or short courses of study, and participation in amateur arts and entertainment events. In order to qualify for a B-2 visa, an individual must meet a few broad requirements necessary to show nonimmigrant intent including:

- The alien is coming to the U.S. for a specific period of time;
- The alien will not be engaging in work; and
- The alien has no intention of abandoning his or her residence abroad during the period of stay in the U.S.

NONIMMIGRANT VISA OPTIONS FOR NURSES

Under current United States immigration law, nonimmigrant visa options for nurses are limited because most employers only require a two-year associate degree rather than a four-year bachelor's degree. Note: Most states do not require bachelor's degrees for a nursing license.

A key aspect of nursing immigration is an obstacle to the admission of health care workers to the U.S. That obstacle does not apply, however, to health care workers who obtain a certification from an organization approved by U.S. Citizenship and Immigration Services (USCIS) that states the nurse's education and licensing credentials are equivalent to an American's credentials.

Currently, the acceptable examinations are by the Commission on Graduates of Foreign Nursing Schools (CGFNS) or actual passage of the National Council Licensure state licensing examination, which is now offered at a few overseas locations. CGFNS certifies that the foreign nurse's training and license are equivalent to that of a U.S. nurse, that all their documents are authentic, that the foreign nurse has an unrestricted license, that the foreign nurse is sufficiently proficient in written and spoken English and that the foreign nurse has in fact passed a state licensing exam.

H-1B Visas

H-1B visas are available to individuals who work in an occupation that requires specialized knowledge and a bachelor's or higher degree in the specific specialty or its equivalent.

The USCIS has determined that nursing, as a profession, is not a specialty occupation, because a bachelor's degree is not generally required to become a registered nurse (RN). However, in a 2002 memorandum, USCIS acknowledged that there are areas of nursing where the duties are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's or higher degree. These areas include:

- Advanced Practice Registered Nurses (APRNs), including clinical nurse specialist, nurse practitioner, certified RN anesthetist, certified nurse-midwife or certified nurse practitioner. If the APRN position also requires that the employee be certified in that practice, then the nurse will be required to possess a registered nursing license, at least a bachelor of science degree in nursing and some additional graduate level education;
- Administrative nurse positions, such as "upper-level nurse managers" in hospital administration positions; and Nurses in certain specialized areas. The USCIS specifically cites critical care and peri-operative (operating room) nurses as two examples of positions requiring a higher degree of knowledge and skill than a typical RN or staff nurse position. The USCIS indicates that passing a certification examination for a particular type of position is an important indicator. Examples of these types of certification examinations are school health, occupational health, rehabilitation nursing, emergency room nursing, critical care, operating room, oncology and pediatrics.

Applications should include evidence such as affidavits from independent experts or other means showing that the job duties are so specialized and complex that a bachelor's or higher degree is appropriate. Unfortunately, because these types of cases are adjudicated on a case-by-case basis, the USCIS has applied the memorandum with very strict scrutiny. Nevertheless, the memo certainly will be relevant in cases where employers and applicants seek to appeal denials of properly filed cases.

TN-1 Visas

TN-1 visas are available under the North American Free Trade Agreement (NAFTA) to Canadian and Mexican citizens for a limited group of specialty occupations. Although not uniformly recognized as a specialty occupation for H-1B purposes, RNs were specifically included on the list of professions for which TN visas could be used, and any RN position can potentially qualify.

Under NAFTA, the applicant must possess the required credentials to be considered a professional under the TN category. RNs must demonstrate eligibility by providing a provincial or state license or Licenciatura degree. However, in order to be admitted, the RN must present a permanent state license, a temporary state license or other temporary authorization to work as an RN, issued by the state nursing board in the state of intended employment.

RESIDENCY REQUIREMENTS FOR NATURALIZATION

As a general rule, an applicant for naturalization must have been a permanent resident of the United States for at least five years and also meet certain requirements dealing with the time actually physically spent in the U.S. During the five years immediately preceding the application, the person must have resided in the U.S., with half of that time physically spent in the U.S.

A legal permanent resident whose spouse is a U.S. citizen may seek U.S. citizenship after only three years as a permanent resident, rather than five years. The couple must have been married for the entire three years and the spouse must have been a U.S. citizen for the entire three-year period.

During the three months preceding the application, the person must have resided in the U.S. Citizenship and Immigration Services (USCIS) district where the application will be filed. Between the filing of the application and the granting of citizenship, the applicant must continue to reside in the U.S. While travel is not forbidden, one must not change his or her place of residence during this time, and the requirement of spending half of one's time in the U.S. continues to apply at the time of naturalization as well as the time of application.

Absences of more than one year will terminate continuous residence unless the applicant complies with certain requirements. First, the applicant must have been physically present in the U.S. for one continuous year following admission as a permanent resident. Any absence from the U.S., however brief, is not allowed during this period. Additionally, the applicant must be employed by one of the following:

- The U.S. government;
- A U.S. research institution recognized by the Attorney General;
- A U.S. business engaged in the development of foreign trade and commerce; or
- A public international organization of which the U.S. is a member.

Before the one-year period outside the U.S. is up, the applicant must file an application with the USCIS to preserve residency and must demonstrate employment by one of the organizations listed above. The applicant must then prove again that the absence from the U.S. was because of employment. Even when these requirements are met, it is important to remember that the requirement that half of the five years prior to filing the naturalization application be spent in the U.S. still applies.