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US IMMIGRATION & NATIONALITY LAW

WHAT HAPPENS TO A LAWFUL PERMANENT RESIDENT WHO HAS BEEN STRANDED FOR OVER ONE YEAR ABROAD AND THE GREEN CARD VALIDITY HAS EXPIRED?

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COVID-related restrictions have caused difficulties for many noncitizens traveling abroad during the pandemic, but lawful permanent residents (LPRs) who traveled overseas in recent months face a unique set of issues. Many LPRs who traveled overseas in the early days of the COVID-19 pandemic quickly became trapped there for the foreseeable future, either by travel restrictions that prohibited them from reentering the United States or because they or a family member contracted COVID-19. Recent news articles have discussed the plight of these LPRs who have not been able to return to the US within 180 days to the US from their last departure from the US

Our blog FAQ for Green Card Holders During the Covid-19 Period generated tremendous interest. This blog is addressed towards LPRs who have been overseas for more than one year and the ten year validity period on their green cards have expired.

As a background, an LPRs who have been absent from the United States for less than 180 days are not considered to be applicants for admission. An LPR who returns to the United States after more than six months abroad will again be considered an applicant seeking admission under INA 101(a)(13)(C)(ii) and may face additional scrutiny, but is unlikely to be accused of abandonment, especially if the reason for not travelling back within 180 days was due to COVID-19 restrictions. Regardless of whether the LPR is returning within or in excess of 180 days, there may be other grounds under which the LPR will be

treated as an applicant for admission pursuant to INA 101(a)(13)(C).

Essentially, an LPR can be found to have abandoned that status regardless of the time spent abroad. The trip could have been under 180 or over 180 days. The key issue is to determine whether it was a temporary visit abroad. The Ninth Circuit's interpretation in *Singh v. Reno*, 113 F.3d 1512 (9th Cir. 1997) of what constitutes a temporary visit abroad is generally followed:

A trip is a temporary visit abroad 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. If as in (b) the length of the visit is contingent upon the occurrence of an event and is not fixed in time and if the event does not occur within a relatively short period of time, the visit will be considered a "temporary visit abroad" only if the alien has a continuous, uninterrupted intention to return to the United States during the visit.

The Second Circuit in *Ahmed v .Ashcroft*, 286 F.3d 611(2d Cir. 2002) with respect to the second prong, has further clarified that when the visit "relies upon an event with a reasonable possibility of occurring within a short period to time…the intention of the visitor must still be to return within a period relatively short, fixed by some early event." The Sixth Circuit in *Hana v. Gonzales*, 414 F.3d 746 (7th Cir. 2005) held that LPR status was not abandoned where an LPR was compelled to return to Iraq to resume her job and be with her family while they were waiting for immigrant visas to materialize.

After LPRs have spent more than a year outside the United States, their green card document (Form I-551) is technically no longer valid. There is a common misperception that this situation results in an automatic loss of permanent resident status, but an individual is still an LPR until they are found to have abandoned their permanent residence in the United States. Therefore, the test set forth in *Singh v. Reno* and other cases still needs to be followed to determine whether the LPR's visit abroad was temporary or not. The burden is still on the government to prove through clear and convincing evidence that the LPR has abandoned permanent resident status. *See*, *e.g* *Matadin v. Mukasey*, 546 F.3d 85 (2d Cir. 2008) and *Matter of Rivens, 25 I&N Dec. 623 (BIA 2011)*.

LPRs who have been abroad for more than a year may be able to apply for a apply for a Returning Resident (SB-1) Visa at a U.S. Consulate. In order to apply for an SB-1 visa, LPRs will still be required to demonstrate that they have not

abandoned residence in the United States, and should explain that they were trapped outside the country due to the pandemic. However, U.S. consulates have been hesitant to issue SB-1 visas, even before the pandemic. It appears that since the pandemic, US consulates have not been entertaining SB-1. LPRs who wish to try for an SB-1 visa should check the website of the relevant U.S. embassy or consulate for guidance. The U.S. Embassy and Consulates in India website, for example, provides some instruction on how to apply for an SB-1 visa. Alternatively, an LPR whose green card date is still valid could attempt to return to the U.S. anyway and assert at the port of entry that she has not abandoned permanent residence in the United States. Under INA § 211(b), CBP has the statutory authority to provide a waiver to a returning LPR who no longer has a valid green card document. It may be helpful for an LPR who is returning to the U.S. after more than a year abroad to have in hand documentary evidence that they have not abandoned permanent resident status. Documents such as: U.S. income tax returns, evidence of owning or leasing a residence in the U.S., bank statements or other proof of assets in the U.S., a letter or pay stubs from a U.S. employer, evidence of family ties in the U.S., proof of past medical treatments or doctor visits in the U.S., or evidence of membership in religious, professional, or community organizations in the U.S., to provide a few examples, can help stave off any allegation of abandonment of permanent resident status at the port of entry.

If the 10-year expiration date on the green card document has passed, the situation becomes more complicated. However, LPRs whose green card has expired or is about to expire may be able to file Form I-90 to renew their green card. The paper version of Form I-90 contains does not prohibit applicants who are outside the United States from submitting the form, so LPRs may be able to try renewing their green card even if they are stranded in India. USCIS announced in January 2021 that an I-90 receipt notice can be used in conjunction with an expired green card as proof of lawful permanent resident status, so filing an I-90 and obtaining a receipt notice may provide LPRs with a basis to reenter the United States.

Several things can happen when an LPR whose green card document has passed attempts to reenter the United States. For one, the LPR can complete Form I-193, and may be waived into the United States by CBP pursuant to INA § 211(b), if it is determined that they have not abandoned LPR status. Otherwise, the LPR will be placed into removal proceedings pursuant to INA § 212(a)(7)(A)

as an arriving alien. LPRs who are placed into removal proceedings will need to make the case again that they have not abandoned permanent resident status, this time before an immigration judge. The burden of proof in this case is still on the government, and the LPR remains an LPR until a final removal order is issued. Final removal orders may be appealed to the BIA, and then to a circuit court.

An LPR who has an immediate relative who is a U.S. citizen, such as a spouse or a child over the age of 21, may be able to apply for adjustment of status all over again as adjustment can generally serve as a form of relief from removal. *See Matter of Rainford*, 20 I.&N. Dec. 598 (BIA 1992). Note, however, that while there is no statutory bar on LPR re-adjustments, the USCIS may refuse to process such adjustments as a discretionary matter. LPRs who wish to take the lowest risk path can be sponsored again while they are overseas if they have a basis for permanent resident status, such as a family member who can file an I-130 petition, particularly a U.S. citizen or LPR spouse or a U.S. citizen child over the age of 21. Alternatively, one could be sponsored again through an employment-based category such as a multinational executive or manager under the employment-based first preference. Prior to processing for an immigrant visa, they must file Form I-407 to abandon their green card.

It is of course advisable that an LPR do everything to avoid being in the situation of remaining outside the US for more than one year and after the green card validity has expired. The LPR should apply for a reentry permit that would allow them to remain outside for the US for two years, although Form I-131 must be filed while the LPR is in the US. If the LPR has not filed for the reentry permit while in the US, then the next best approach is to try to reenter the US within 1 year from the last departure. If the LPR has remained outside the US for more than one year, LPR status has not been automatically lost and this blog provides a roadmap to still assert LPR status, although one trying this strategy should also be aware of the risks and pitfalls.

(This blog is for information purposes, and should not be relied upon as a substitute for legal advice).

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