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NATURALIZING IN A FLAT WORLD

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by
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As we enter the second decade of the 21st century, the world seems to be getting far more flat than what Tom Friedman originally envisaged with people being able to deliver services and products to the US and other countries from anywhere via the internet. Also, coinciding with this flat world is the most severe US recession in living memory, which compels people, including immigrants, to find jobs in other parts of the world and yet remain firmly rooted with the US.

Gone are the days when immigrants came to the US in sailboats and steamships, destined never to return home. In today's globalized flat world, with access to cheap direct flights across continents, broadband internet, Blackberries, Twitter, Facebook, LinkedIn and video conferencing, an immigrant can continue to maintain deep ties and bonds even if absent from the country. It is quite typical for a US company to assign its key employee, a freshly minted green card holder, working in the US to set up operations in Mumbai or Shanghai for a few years, with the intention of ultimately returning to the US. Yet, this person's ability to become a US citizen can get jeopardized as a result of this overseas assignment. In our previous article on a related subject, *Home Is Where The Card Is: How To Preserve Lawful Permanent Resident Status In A Global Economy*, 13 Bender's Immigration Bulletin 849 (July 1, 2008), we focused on strategies to preserve permanent residence. In this blog post, we examine the tension between our citizenship laws and the global economy, and the challenges it poses to those who desire to naturalize.

An applicant must meet certain threshold eligibility criteria in order to become a US citizen. Pursuant to § 316(a) of the Immigration & Naturalization Act (INA), the applicant must establish that immediately preceding the filing of the

application, he or she has resided continuously within the US for at least five years after being lawfully admitted for permanent residence. If the applicant has been in marital union with a US citizen spouse for three years, the continuous residence requirement is three years instead of five years. Moreover, under INA § 316(a), the applicant must also establish that he or she has been physically present in the US for periods totaling at least half of that time and has resided within the State or district of the Service where the applicant filed the application for at least three months.

Furthermore, INA § 316(a)(2) also requires the applicant to establish that he or she has resided continuously within the US from the date of the application up to the time of citizenship. INA § 316(a)(3) requires the applicant to establish, inter alia, that he or she is still a person of good moral character during the relevant 5 or 3-year period.

INA § 316(b) states that an absence from the US of more than six months but less than one year during the 5-year period immediately preceding the filing of the application may break the continuity of such residence. INA § 316(b) notes that should such a presumption arise, it may be rebutted if the applicant can establish that he or she in fact did not abandon his or her residence during such period.

This is the killer provision, which we focus on in this post, and which creates problem when a permanent resident is based overseas and wishes to naturalize after completing 3 or 5 years, but is not able to continuously reside in the US even though he or she still returns to the country frequently and maintains extensive ties. Naturalization is a most desired goal, since paradoxically, once the person successfully naturalizes, he or she is no longer required to maintain a residence in the US. However, in order to naturalize, the applicant must maintain continuity of residence, and this is often thwarted by the fact that he or she is working overseas. The spouse who is overseas because he or she is accompanying the other spouse and who is often caring for the children, also suffers as a result.

There appear to be two views of what constitutes residence. INA § 101(a)(33) states: “The term ‘residence’ means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.” Note that the concept of domicile, which considers the applicant’s intent rather than the place where he or she actually lives, is not

relevant in determining whether the applicant for naturalization has resided continuously in the US. Under this provision, an applicant may be deemed to not being a resident regardless of the number of days he or she is away from the US. An applicant who is getting nowhere during the naturalization interview because of the examiner's invocation of § 101(a)(33) should remind the examiner that the statute requires not mere residence but continuous residence in the US, and must point him or her to 8 C.F.R. § 316.5(c)(1)(i), which provides that an absence of between six months and one year shall disrupt the continuity of residence unless the applicant can establish otherwise to the satisfaction of the Service. Thus, unless the applicant was outside the US for six months or more but less than a year, he or she should argue that there was no disruption of continuous residence. Yet the authors have known of naturalization examiners improperly clubbing two back to back lengthy trips although each one was less than 180 days. Remember, if your client did not stay away one year, he or she must be considered a resident of the same state where they lived before leaving. 8 C.F.R. 316.5 (b)(5). *See Accardi V. Shaugnessey*, 347 US 260(1954); *Morton v.Ruiz*, 415 US 199, 235 (1974)("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.").

What if the person was out of the US for more than six months and less than a year and has disrupted continuity of residence? Don't lose hope. 8 C.F.R. § 316.5(c)(1)(i) provides examples of the types of documentation which may establish that the applicant did not disrupt the continuity of his or her residence. Specifically, the regulation states that the evidence may include "but not limited to" evidence that during an extended absence:

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

In *Li v. Chertoff*, 490 F.Supp.2d 130 (D. Massachusetts 2007), a federal district court held that an applicant who had absences of more than six months but less than 1 year as a student in Canada did not disrupt the continuity of residence even though she had obtained permanent residence in Canada. The plaintiff, after being downsized from a US employer, went to Canada to pursue an opportunity to study in a dental program at the University of Alberta. Her husband accompanied her to Canada and took up a job with the same

contractual term as the plaintiff's course of study. The rest of the plaintiff's family still lived in the US and she retained a home in Cambridge, Massachusetts, where mail was delivered and she also continued to file tax returns in the US. While rejecting the application of the generic definition of residence in § 101(a)(33) in favor of continuous residence, the court clarified that that the four criteria in 8 C.F.R. §316.5(c)(1) may establish that the applicant did not disrupt the continuity of her residence, but also noted that it may consider other relevant factors. Although the court did not accept her argument that she did not terminate her employment in the US under prong (A) since her employer forcibly terminated her, the court accepted the fact that her extended family remained in the US under prong (B), even though her most immediate family member, her husband, accompanied her to Canada, and it was undisputed that she retained access to her home in the US under (C) and she did had not obtained employment in Canada under (D).

Compare *Li v. Chertoff* with an earlier case *In Re Bartkiw*, 199 F.Supp. 762 (E.D. Pa. 1961), where the former INS granted naturalization based on incorrect information, not knowing about Bartkiw's relocation to Canada. The district court in Pennsylvania in denying Bartkiw's claim that she had not disrupted residence made an observation which was redolent of an era prior to feminism's onset a few years later:

We find it impossible to conclude that this young woman, married, with her husband holding a responsible position in Canada where he was a citizen, and who thereafter maintained a home with him, did not intend to live in Canada as a resident. It may very well be, as stated in our findings of fact, that both she and her husband hoped that at some time in the future she would become a citizen of the United States; that he would obtain employment in the United States and that they would live here permanently as husband and wife. But, unfortunately for the position of the respondent, that hope for the future and not a present fact.

Bartkiw, 199 F.Supp. at 766.

Clearly, *Li v. Chertoff* is the better decision, and naturalization examiners ought to be taking into account other factors besides the four factors set forth in 8 C.F.R. § 316.5(c)(1). What if the accompanying spouse of the rotational executive is pregnant with complications and both are unable to return to the US within 180 days? Should this not be considered a relevant factor? After all, the regulation suggests that the evidence that may be used to rebut the disruption

of continuity of residence need not be limited to these four factors. In analogous cases involving the abandonment of permanent residence, which can be avoided if the trip abroad was temporary, the term "temporary visit abroad" has recently been subject to interpretation by the Circuit Courts. The Ninth Circuit's interpretation 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.

See Singh v. Reno, 113 F.3d 1512, 1514 (9th Cir. 1997); *Chavez- Ramirez v INS*, 792 F.2d 932 (9th Cir. 1985).

The Second Circuit, 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." *See Ahmed v.Ashcroft*, 286 F.3d 611, 613 (2d Cir. 2002); *see also Hana v. Gonzales*, 400 F.3d 472 (LPR status not abandoned where 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).

Practitioners should creatively argue on behalf of their clients that unforeseen events may have delayed a return back to the US in less than 180 days. Moreover, even if one's intent is not relevant in determining disruption of residence, unlike the law on abandonment of permanent residency, these decisions can still be helpful to argue that there were relevant factors to assess whether or not residence had been abandoned for purposes of naturalization. We should also forcefully argue that working for a US corporation overseas on a temporary basis ought to be a relevant factor and not a negative. *See Matter of Wu*, 14 I&N Dec. 290 (R.C. 1973) (denial of reentry permit was erroneous since the LPR was employed for an American firm overseas and had successfully applied for preservation of continuity of residence for purposes of naturalization).

Finally, while beyond the scope of this post, always explore if there are other ways to naturalize that would obviate the perpetual anxiety of a permanent resident living outside the US. Under INA § 319(b), spouses of US citizens working overseas for US corporations or their subsidiaries, or in certain other capacities, can naturalize without meeting the residency requirements, http://tiny.cc/so5p3. Employees working abroad can preserve their residency by filing Form N-470 if, inter alia, they work for an American firm or corporation, or a subsidiary thereof, that is engaged in the development of foreign trade or commerce of the US. But in order to be eligible, the applicant must demonstrate one year of actual unbroken physical presence in the US after acquiring permanent residency. *Matter of Graves*, 19 I&N Dec. 337 (Comm'r. 1985); *Matter of Copeland*, 19 I&N Dec. 788 (Comm'r. 1988). Very few can meet this requirement as even a brief day trip to Canada during that one year period will disqualify the applicant from filing the N-470 application. Remember what an N-470 will do and what it will not do. If approved, the N-470 means that concerns over continuity of residence can be put aside. However, all other substantive requirements for naturalization, including satisfaction of physical presence requirements still must be satisfied. The N-470 may avoid disruption of continuity of residence but your client could still be deemed to have abandoned permanent resident status. That is where and why the re-entry permit can be a lifesaver especially since, if the issue of green card abandonment is raised when the person returns to the US, contrary to what you and your client might expect, there is some recent case authority for placing the burden of proof that abandonment did not occur squarely upon the unsuspecting shoulders of the soon to be surprised permanent resident. And if you are out for more than one year, you will need to accumulate another round of 4 years and 1 day to naturalize. 8 C.F.R. 316.5(c)(1)(ii). This could be true even if it was Uncle Sam that prevented your client from coming back sooner. In *Gildernew v. Quarantillo*, 594 F.3d 131, 133 (2d Cir. 2010) TSA put the permanent resident on a "No Fly" list for a year while he cooled his heels in Ireland. Ultimately concluding that there was no"derogatory information" against him , TSA let him come home but too late to save his ability to naturalize as he had been out of the US for more than one year.

As the immortal philosopher Will Rogers was fond of saying: "Even if you are on the right track, you'll still get run over if you just sit there."