

The Moving Executive: Preserving Residency for Naturalization a/k/a "Perma-Shaving Naturalization"

By Joel H. Paget

I. INTRODUCTION

In the mobile world of international commerce, trade and travel, corporate executives who are lawful U.S. permanent residents ("LPRs") frequently find themselves traveling and residing in several countries, as well as several states within the United States, during any five-year period. Others return to their home countries to deal with personal and family problems. Traveling abroad often puts the corporate executive LPRs at odds with their ultimate desire to naturalize and become citizens of the United States. To this end, the immigration practitioner must be prepared to advise his or her clients on the most appropriate steps to preserve the corporate executive LPRs' right to naturalize. Following is a discussion of the naturalization residence requirements; how certain LPRs can preserve this right to naturalize, even if they have to live outside the United States; and how to reduce the time it takes to naturalize, so as to reduce the risk of losing the right to naturalize.

II. NATURALIZATION RESIDENCE REQUIREMENTS

To be eligible for naturalization, an LPR, immediately preceding the date of the filing of his or her application for naturalization, typically must have resided continuously in the United States for five years after being admitted for permanent residence.¹ Immigration and Nationality Act of 1952, as amended, Pub. L. No. 82-414, 66 Stat. 163 (hereinafter "INA") § 316(a), 8 USC § 1427(a) (2012). In addition, he/she must have been physically present in the United States for a period totaling one-half of that period (30 months). *Id.* The INA defines "residence" as the "place of general abode," which, in turn, is defined as "his principal, actual dwelling place in fact, without regard to intent."²

The applicant also must have lived in the state of USCIS district where the LPR is filing her/her application for at least three months immediately before filing her application. If the applicant lived in the district within the last year that time can be counted if the applicant moves back to the district before filing. Also, if the applicant is filing three months before being eligible then the applicant only needs to have lived in the district for the three months prior to the interview. 8 C.F.R. Section 316.2(a)(5).

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¹ The LPR who is subject to a requirement of continuous residence under INA § 316(a), 8 USC § 1427(a) or INA § 319(a), 8 USC § 1430 may file an application up to three months before the date the LPR would first otherwise meet such continuous residence requirement. INA § 334(a), 8 USC § 1445(a) (1970). The three month in-state residency requirement only has to be satisfied prior to the examination. 8 CFR § 316.2(a)(5) (1994).

² INA § 101(a)(33), 8 USC § 1101(a)(33) (2012).

A. Continuous Residence

Continuous residence does not require that the LPR be physically present in the United States during the entire specified period. The INA recognizes that LPRs may have to leave the United States for prolonged periods of time.

B. Effects of Departures

Departures of less than six months generally do not affect the continuity of residence. Departures of more than six months, but less than one year, are *presumed* to break the continuity of residence, unless the LPR establishes that he/she, in fact, did not intend to abandon his/her residence. INA § 316(b), 8 USC § 1427(b) (2012). However, such absences typically are found by immigration courts and the U.S. Citizenship and Immigration Service (“USCIS”) not to break the continuity if the applicant states that he/she did not intend to abandon his/her residence in the United States and this subjective intent is supported by objective factors. *Matter of Kale*, 15 I&N Dec.258, 265 (BIA 1975), *Matter of Muller*, 16 I&N Dec. 637, 639 (BA 1978) and *Matter of Quijenerio*, 15 I&N Dec. 95, 97 (BIA 1975). Departures of more than one year *do break* the continuity of residence and are deemed an absolute bar to naturalization, unless extended absence benefits are granted. INA § 316(b), 8 USC §1427(b) (2012). See *Re Petition for Naturalization of Vafaei-Makhsos*, 597 F. Supp. 499 (D. Minn. 1984); *United States v. Larson*, 165 F.2d 433 (2d Cir. 1947). If the continuity of residence is broken, the LPR must start the qualifying period all over again.

A naturalization applicant may file for naturalization four years and one day after his/her return to the United States, unless married to a U.S. citizen. USCIS Policy Manual Volume 12, Part D, Chapter 3, paragraph C.3. If an applicant is married to a U.S. citizen, he or she may apply for naturalization after only two years and one day.

III. EXTENDED ABSENCE BENEFITS

The INA provides certain LPRs the option of remaining outside the United States for extended periods without negatively impacting their eligibility to naturalize.³

A. Statutory Requirements Under INA § 316(b), 8 USC § 1427(b) (2012)

To be entitled to extended absence benefits under the INA, the LPR must establish *both* of the following:

1. Necessary Residence and Physical Presence

Physical presence and residence in the United States for an uninterrupted period of at least one year after being admitted as an LPR. INA § 316(b), 8 USC § 1427(b) (2012). There are exceptions for certain persons engaged in religious work and for employees of the Central Intelligence Agency. (See subparagraphs III.B. and V.A.4. below.)

2. Employment With One of the Following Entities:

- a. The U.S. Government or persons working under contract with the Government. 8 CFR § 316.20(a);

³ INA §§ 316(b), 317; 8 USC §§ 1427(b), 1428 (2012).

- b. An American research institution recognized as such by the Attorney General. See 8 CFR § 316.20 for list of recognized institutes and organizations. See also *Matter of Warrach*, 17 I&N Dec. 285, 287 (BIA 1979);
- c. An American firm, corporation, or subsidiary thereof engaged in foreign trade and commerce or a foreign subsidiary (more than 50% owned by the American firm or corporation) 8 CFR § 316(b);⁴
or
- d. A public international organization of which the United States is a member by treaty or statute. (The person must have been employed after lawful admission.) 8 CFR § 316(c).

B. Religious Workers Under INA § 317, 8 USC § 1428 (2012)

Under the INA, extended absence benefits also are available to clergy, missionaries, brothers, nuns, or sisters.⁵ To qualify under this section of the INA, the LPR must meet the following:

1. Permanent Residence

Have been admitted for permanent residence.

2. Necessary Residence and Physical Presence

Have resided in and been physically present in the United States for at least one year. (*See* paragraph 4 below.)

3. Eligible Purposes

Either before or after naturalization, have been, or intend to be, absent from the United States temporarily to perform priestly or ministerial functions of a religious denomination or to serve solely as a missionary, brother, nun, or sister of a denomination.

4. Constructive Physical Presence

LPRs who are religious workers are deemed to have constructive physical presence for naturalization purposes during their absence. The Board of Immigration Appeals also has held that this section may be used to determine whether or not abandonment of permanent residence has occurred. If the LPR has constructive physical presence, then his/her permanent residency has not been abandoned. *Matter of John*, 17 I&N Dec. (1980). The applicant also must satisfy the six months' state residency requirement if he or she returns to a state different from the one which the applicant departed. INS Interpretations 316.1©8, 317.1(b)(3).

⁴ The nationality of a firm or corporation is determined by the nationality of those persons who own more than fifty-one percent of the stock of that firm or corporation. The mere fact that a corporation is incorporated in a state of the United States does not determine that it is an American firm. USCIS Policy Manual, Volume 12, Part D, Chapter 3, paragraph D.

⁵ INA § 317, 8 USC § 1428 (2012).



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C. Procedures

Application for extended absence benefits under both INA §§ 316(b) and 317, 8 USC § 1427(b) and § 1428 (2012), is made to the USCIS on Form N-470 (“Application to Preserve Residence for Naturalization Purposes”), with a fee of \$330. Applicants who will work for the U.S. Government or a public international organization must provide an official communication from the appropriate Government official. Employees of an American research institution, religious denomination or interdenominational mission, or an American firm, corporation or subsidiary must present an affidavit executed by the appropriate administrative official setting forth details regarding the employment.

1. Use of Affidavit

The affidavit must set forth the following information:

- a. Title of the person making the affidavit, name of company, and statement that the affiant has access to the records of the company;
- b. Whether the employing organization is an American firm or corporation engaged in the development of foreign trade and commerce of the United States, or a subsidiary thereof;
- c. The nature of the business which is conducted by the employing organization, church, religious denomination, or interdenominational mission;
- d. If a corporation, state of incorporation, date of incorporation, and that it is an existing and ongoing corporate entity;
- e. If it is a subsidiary of an American firm or corporation, facts of ownership and control and the exact percentage of stock owned by the parent company;
- f. The details of the applicant’s employment, including the nature of the services to be performed during the period or periods of absence to be considered; and
- g. Whether the applicant will engage in the development of foreign trade and commerce of the United States; whether the applicant’s absence was or will be necessary for the protection of the property rights abroad; and whether the applicant will be engaged abroad as a regularly ordained clergyman, missionary, brother, nun, or sister; and in the case of a public international organization, the date and place where the applicant was first employed.

D. Failure to File Timely

Failure to file for extended absence benefits timely under INA § 316(b), 8 USC § 1427(b) disqualifies the applicant from receiving such benefits. The application may be filed before or after the LPR’s absence from the United States. INA § 317, 8 USC § 1427(b) (2012). However, it is to be filed either before or after the foreign employment commences *and* before the LPR has been absent for a continuous year. 8 CFR § 316.5(d)(1)(k).

E. Results of Benefits

If the extended absence application is approved, the applicant, his/her spouse, and his/her dependent unmarried sons and daughters who reside abroad, are covered by the benefit.⁶ The Notice of Approval, Form N-472, identifies all family members covered. 8 CFR § 316.5(d)(1). However, the benefit of extended absence does not relieve the applicant of the need to be physically present in the United States for that period required by statute, except for those LPRs who are considered to be constructively physically present in the United States.

The approved absence is only for the occupation and duties prescribed in Form N-470. If the employer or employment changes, the applicant must submit a new Form N-470.

IV. RELATIONSHIP RESIDENCY FOR NATURALIZATION AND FOR MAINTAINING PERMANENT RESIDENCE

LPRs returning from absences from the United States may sometimes encounter difficulties in gaining admission because of a US Customs and Border Protection (“USCBP”) officer’s suspicion that the LPR has abandoned his or her status. In most cases, a USCBP officer who suspects that a returning LPR has abandoned lawful permanent residence in the United States is instructed to “lift” the green card of the LPR and issue the individual a temporary replacement card, which will allow the person to work until the matter is resolved. USCBP Operations Instruction § 235.1(k)(4). The person may then be placed in exclusion proceedings and paroled into the United States, the person’s inspection may be deferred, or the person may be allowed to withdraw his/her application for admission into the United States. However, a LPR who qualifies for extended absence benefits, as discussed in paragraph III above, may be considered *prima facie* entitled to the status of a returning LPR. 9 Dep’t of State, *Foreign Affairs Manual*, Note 1.7-2 to 22 CFR § 42.22.

For a detailed discussion on how to prevent the loss of permanent residency, see Gary Endelman’s article entitled “You Can Go Home Again – How to Prevent Abandonment of Lawful Permanent Residence Status”, *Immigration Briefings* No. 01-4, April 1991.

A. Actions Which May Be Taken

The returning LPR at the time of entry in the United States may apply for a waiver of the immigrant visa requirement under INA § 211(b), 8 USC § 1181(b) (2012). Alternatively, if the LPR agrees that he or she has indeed abandoned lawful permanent residence in the United States, the LPR may formally renounce his/her status and apply for a nonimmigrant visa waiver as a means of gaining admission into the United States. INA § 212(d)(4), 8 USC § 1182(d)(4) (2012).

B. Special Problems on Canadian Border

For LPRs returning to the United States from Canada, the USCBP’s practice regarding inadmissible LPRs is more harsh; such LPRs are generally denied admission or parole, turned back, and not allowed entry into the United States until their case is resolved at a hearing. A 1992 case in the Eastern District of New York offers some due process hope for aliens in such a situation. That court held that LPRs denied admission into the United States are entitled to a full hearing to adjudicate their applications for parole into the country. *Hamaya v. McElroy*, 797 F. Supp.

⁶ An application may be approved after the applicant has been continuously absent for more than the one year period, under certain circumstances; such as when there is (1) a letter requesting a grant of 8 CFR § 316(B) benefit, or (2) as application was timely mailed but not received, or (3) detrimental reliance on official misinformation. INS Interpretations 316.1(c)(2)(ii)(iii) and (iv).



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186 (E.D.N.Y. 1992). Although the INS declined to appeal the decision, this protection is generally unavailable to LPRs outside the Eastern District of New York.

V. SHAVING TIME OFF OF RESIDENCY REQUIREMENT FOR NATURALIZATION

The immigration practitioner also may assist corporate executive LPRs in preserving their eligibility to naturalize by qualifying them for a reduction in the residency requirements for naturalization or by reducing the waiting periods for either the examination or swearing in ceremony. There also are ways to reduce the time delay in processing the application. There are eight special classes of people who qualify for reduction in residency requirements. Following is a discussion regarding these special classes and how to reduce the processing delays.

A. Reduction in Residency Requirements

1. Spouses of U.S. Citizens

- a. Spouses of U.S. citizens may file for naturalization after three years, not five. INA § 319(a), 8 USC § 1430(a) (2012)
- b. Requirements under INA § 319(a) and § 319(b), 8 USC § 1430(a) and (b) (2012).
 - (1) Spouse must be U.S. citizen during the entire three-year period.
 - (2) LPR must be living in marital union with citizen spouse for at least three years immediately preceding filing of the application.
 - (a) A substantial portion thereof must be in the United States with the citizen spouse.
 - (b) A divorce prior to taking of oath renders applicant ineligible for naturalization under this special provision.
 - (3) Alien must be physically present in the United States for 18 months during the eligibility period and have resided within the state or district of the INS in the United States in which the application is filed for at least three months.
 - (4) Alien need only establish good moral character during the three-year eligibility period, but it must continue up to the administration of the oath.⁷
 - (5) The permanent residency and marriage to the U.S. citizen must coincide for the full-three year period.

2. Spouses of U.S. Citizens Stationed Abroad

⁷ The USCIS may take into consideration the applicant's conduct and acts prior to the statutory period if the conduct of the applicant during the statutory period does not reflect that there has been reform of character from an earlier period or if the earlier conduct and acts appear to be relevant to a determination of the applicant's present moral character. 8 CFR § 316.10(a)(2).

a. Aliens whose citizen spouses are stationed abroad in the employ of the U.S. Government or certain other designated organizations, and who, by reason of this enforced absence from the United States, cannot meet the normal residence requirements may file for naturalization. INA § 319(b), 8 USC § 1430(b) (2012). *See also Petition of Gray*, 369 F. Supp. 1049 (D. Miss. 1973).

b. Requirements under INA § 319(b), 8 USC § 1430(b) (2012):

(1) Lawful admission for permanent residence.

(2) Marriage to a U.S. citizen.

(3) Citizen spouse must have prescribed type of employment abroad:

(a) U.S. Government; or

(b) American research institution recognized by the Attorney General, see 8 CFR § 316.20 for list; or

(c) American firm, corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or by a subsidiary in which a majority of the stock is owned by an American firm or corporation; or

(d) Public international organizations in which the United States participates by treaty or statute; or

(e) Minister, priest or missionary.

(4) Intention to join or accompany spouse abroad.

(5) Intention to return immediately to United States upon termination of such employment abroad by the U.S. citizen spouse.

(6) Regularly stationed abroad in employment.

c. Benefits under INA § 319(b), 8 USC § 1430(b), as compared to INA § 319(a), 8 USC § 1430(a):

(1) No specified period of residence or physical presence in the United States required.

(2) No state residence required. The applicant may file application for naturalization anywhere in United States regardless of actual residence of applicant. The applicant must, however, be in the United States at the time of naturalization.

(3) No particular period of time during which good moral character or attachment required. The USCIS test is a “reasonable period of time.”

(4) No need to file Form N-470 to preserve continuity because there is no requirement for residency under INA § 319(b), 8 USC § 1430(b) (2012)

3. Members of the U.S. Armed Forces

a. Requirements if Application Filed While in U.S. Armed Forces or Within Six Months of Discharge

Applicant may file for naturalization if he/she has an aggregate of three years' honorable service at any time in the U.S. Armed Forces. INA § 328, 8 USC § 1439 (2012).

- (1) Must be lawfully admitted to the United States for permanent residence before the application is filed.
- (2) Must never have been discharged from military service under other than honorable conditions. Honorable military service and discharge to be proved by authenticated copies of service records (Form N-426).
- (3) No residence in the United States required and no physical presence.
- (4) May file application in any INS office.
- (5) Case should be expedited (*see* SRO Memo SR-328-C dated 10/23/81). "Section 328 applications should be given the same priority consideration as Section 319(b) cases."
- (6) No particular period of good moral character required.

b. Requirements if Application Not Filed While in U.S. Armed Forces or Within Six Months of Discharge

Applicant may still apply for naturalization even after six months from date of discharge. INA § 328(d), 8 USC § 1439(d) (2012).

The applicant must comply with INA § 316(a) requirements, except that military service within five years immediately preceding the date of filing such application shall be considered as residence and physical presence within the United States.

c. Active Duty Service

Service during war or in other periods of military hostilities is defined in the INA. INA § 329, 8 USC § 1440 (2012).

- (1) Dates of active duty service: World War I, 4/6/17 through 11/11/18; World War II, 9/1/39 through 12/31/46; Korean Hostilities, 6/25/50 through 7/1/55; Vietnam Hostilities, 2/28/61 through 10/15/78; Grenada Hostilities, 10/25/83 through 11/2/83. But *see Matter of the Petition of Arthur Espineli Reyes*, 910 F.2d 611 (9th Cir. 1990). (Also note that the "Desert Storm" hostilities have not yet been designated as active duty service as defined in the INA.)
- (2) Must be an alien or national during time of active service.

- (3) Must have been separated under honorable conditions, but not for alienage.
- (4) Must have enlisted or been inducted or reenlisted in the United States, in the Canal Zone, American Samoa or Swains Island; or be lawfully admitted to the United States for permanent residence before the application is filed.
- (5) No residence required in the United States or state, and no physical presence required.
- (6) May file application in any INS office.
- (7) Period of good moral character is “reasonable period of time.”
- (8) Application should be expedited.

4. Spouses and Children of U.S. Armed Forces

Effective January 28, 2008, spouses and children of U.S. Armed Forces members who are authorized to accompany their military spouse or parent abroad will have all periods of residency and physical presence abroad while accompanying their military spouse or parent treated as periods of residency and physical presence in the United States, and such spouses and children also may take the oath of citizenship and become naturalized abroad. INA Sections 319 and 322, 8 USC Sections 1430 and 1433 (2012).

5. Other Special Groups

The INA has or does consider the following classes of people in a special manner:

a. Previously Expatriated

People who expatriated themselves by:

- (1) Serving in the armed forces of a country at war with the United States during World War II. INA § 327(a), 8 USC § 1438(a) (2012) do not have to comply with the residency requirements before applying for naturalization.
- (2) Marrying a foreign national prior to September 22, 1922 (law now repealed) does not have to comply with any residency requirements. INA § 324, 8 USC § 1435 (2012).

b. Surviving Spouses

No prior residence or specified period of physical presence within the United States or any state or district of the INS in the United States, or proof thereof, is required for naturalization of surviving spouses of U.S. citizens who died during a period of honorable service in an active duty status in the U.S. Armed Forces. INA § 319(d), 8 USC § 1430(d) (2012).

c. Employees of U.S. Nonprofit Information Corporations

No prior residence or specified period of physical presence within the United States or any state or district of the INS in the United States, or proof thereof, is required for naturalization of employees of U.S. nonprofit corporations that disseminate information overseas and promote the interests of the United States. INA § 319(c), 8 USC 1430(c) (2012).

d. Filipino World War II Veterans

Natives of the Philippines who served honorably in the U.S. Armed Forces or with the Philippine Army, the Philippine Scouts, or recognized guerrilla units during World War II. INA § 329, 8 USC § 1440 (2012), 8 CFR § 329.5.

e. National Security

No prior residence or specified period of physical presence within the United States or any state or district of the Service in the United States, or proof thereof, is required for naturalization of persons who the Director of the Central Intelligence Agency, Attorney General or the Commissioner of the INS have determined to have made an extraordinary contribution to the national security of the United States or to the conduct of U.S. intelligence activities so long as the applicant has continuously resided in the United States for at least one year prior to naturalization. INA § 316(f)(1); 8 USC § 1427(f)(1) (2012).

B. District Shopping

For naturalization purposes, the LPR, immediately preceding the date of the filing of his/her application for naturalization (*see* footnote 3 above), must have resided continuously for three months within the state or within the district of the USCIS in the United States in which the application is being filed. INA § 316(a), 8 USC 1427(a) (2012).⁸

Among the 45 plus USCIS districts, there are significant time variations from the date of filing to the date of the interview and from the date of the interview to the date of the final hearing when the LPR is sworn in as a U.S. citizen. The American Immigration Lawyers Association in its *AILA Monthly Mailing* issues a report card on the time delays at various USCIS district offices. The difference between districts in processing can be nine months or more.

The corporate executive may be able to locate his/her residence for three months in a district where the process would be completed 60 days after the five years of U.S. residency has been completed. When the applicant is a resident of more than one state, residence for INA § 316, 8 USC § 1427 purposes is determined by reference to the location where the annual Federal individual income tax returns have been, and are being, filed. 8 CFR § 316.5(b)(4). In those cases where the LPR is exempted from U.S. and state residency requirements, the process could be completed in three months from the date of filing.

It is also possible to request with the application or after filing with the USCIS Customer Service Center or at the local office with an INFO pass to expedite a naturalization application other than in the strict chronological order by date of receipt as required by USCIS (www.uscis.gov/forms/expedite-criteria). Exceptions to the policy may be made upon a clear showing of “extreme emergent circumstances,” or, at some USCIS offices, when it is shown to be clearly in the interest of the United States.

⁸ The USCIS also takes the position that the LPR has to reside in the same district where the interview takes place.



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“Emergent circumstances” are not established by the mere failure of a person to plan ahead. Such circumstances involve a serious or life threatening situation which could not have been reasonably foreseen by the applicant. The request must also establish how the expeditious processing of the case will alleviate the adverse conditions, or how the hazardous conditions will be improved through USCIS action.

Establishing “national interest” requires that a U.S. Government agency, organization, or contractor, or a significant public corporation or organization, provide documentation clearly articulating the applicant’s particular skills or expertise and explaining how the mission or function of the organization (not merely the interests of the applicant) will be jeopardized if the case is not expedited.

However, the interpretation of what is an “emergent circumstance” or what is clearly in the “national interest” varies from district to district. The practitioner and his/her client are well served by contacting an attorney who practices naturalization law in the district where the application could be filed to find out how the policy is being administered.

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