May 15, 2014

Cross-Border Immigration Issues Affecting Canadians Living in the US

Kenneth H. Stern

ken.stern@sterncurray.com

Introduction

Over the last 35-years, I have worked with hundreds, if not thousands, of Canadian citizens residing in the United States. While each person has his own individual goals, interests, and concerns, the following is a list of the most common questions that I have received over the years from my Canadian ex-pat clients and friends and my responses.

Should I Become an American Citizen?

When I started practicing immigration law, the concept of dual citizenship was much more limited. Today, a majority of countries, including Canada, accept dual citizenship. At the same time, this is probably the most emotion-laden question that I receive as it raises issues about identity, heritage, and loyalty.

From a purely practical point of view, the advantages of obtaining US citizenship far outweigh the liabilities or negative consequences. Other speakers address the tax and estate planning implications of obtaining US citizenship.

The most valued benefits of US citizenship are the ability to vote, an enhanced ability to bring relatives to the United States, obtaining citizenship for children born abroad, and most importantly, having a status that can't be lost or taken away. Over the course of 35 years, I have heard and personally experienced many horror stories where longtime permanent residents find themselves in difficult situations that lead to the abandonment or loss of that status. Absent an express intention to do so, it is almost impossible to lose US citizenship.

US citizens are also eligible for certain federal jobs and a broader range of government benefits including social security benefits and financial assistance for students.

How Do I Maintain My Permanent Residence If I Will Be Living Outside of the US for Long Periods of Time?

The I-551 document ("Green Card") allows an individual to present himself or herself for entry into the United States as a permanent resident. It is not a guarantee that entry will be granted.

According to immigration law, a permanent resident returning from an absence of less than six months is not making an "admission" into the United States and therefore cannot be challenged regarding whether he or she is maintaining or has abandoned permanent residence status. This rule is observed more in the breach, meaning that USCBP officials either are unaware of this rule or choose to ignore it. Therefore, an individual can be questioned at any time regarding whether the US continues to be the individual's primary residence or whether the individual has abandoned his or her permanent resident status. Nonetheless, it is a good idea for a permanent resident to travel to the US every six months, or, at a minimum once a year. If a person is outside the US for a year or more, the green card is deemed abandoned and can only be reclaimed through filing and SB-1 application abroad. There are special issues and concerns when permanent resident college students or young adults are studying or working abroad and they should be coached on how to answer questions upon reentry into the US.

The first line of defense against an accusation of abandonment is to have a comprehensive and persuasive explanation as to why the permanent resident is spending extended periods of time outside the United States. This explanation should be supported by objective evidence of the individual's intention to maintain permanent resident status.

The best defense against an accusation of abandonment is to obtain a reentry permit. Reentry permits are granted, initially, for a period of two years and then can be extended on an annual basis. Although it can take many months to receive the actual reentry permit, the receipt notice acts as an informal reentry permit during this waiting period.

A number of years ago, USCIS added the requirement of a biometric exam to the reentry process. This can create scheduling issues since the individual must be in the United States at the time the application is filed and then must appear for a biometrics appointment a few weeks later. Remaining in the United States for a few weeks is difficult for individuals who are temporarily living and/or working abroad. In Colorado, it is possible to do a walk-in biometric appointment as soon as the individual receives the receipt notice for the reentry permit application. USCIS strongly advises individuals to not leave the United States between the time the application is filed and the biometrics appointment; however, experience shows that travel during this period of time is generally not a basis for denying the reentry permit. Possession of a reentry permit does not prohibit a USCBP from inquiring about abandonment but it raises a strong presumption against abandonment.

Some permanent residents want to abandon their permanent resident status to be freed from the obligation of filing tax returns in the US. A CPA should be consulted before doing so since voluntary abandonment can have serious tax consequences.

How Can I "Sponsor" My Relatives to Obtain US Green Cards?

A permanent resident is able to sponsor a spouse and unmarried sons and daughters, but cannot sponsor siblings or parents. Unfortunately, there are substantial backlogs and waiting list in these categories. Historically, it can take up to five years for a green card holder to obtain permanent residence for a spouse or child under 21. An application for children over 21 can take even longer (currently seven years). If the permanent resident petitioner becomes a US citizen, these applications can be upgraded (see below).

A US citizen can apply for a spouse, children, siblings, and parents. Parents, spouses, and children under 21 are "immediate relatives" and not subject to any quotas or backlogs. Married and unmarried sons and daughters (over 21) of US citizens can obtain permanent resident status but the wait is quite long. Brothers and sisters of US citizens are also eligible for permanent resident status but the current waiting period is almost 13 years.

One of the most common mistakes made by individuals who are petitioning for their relatives is to not keep USCIS, and later the National Visa Center, apprised of their current address. An approved petition that is subject to a long waiting list will be cancelled if the agency tries to communicate with the petitioner without success. Accordingly, it is important to notify these agencies of any change in the petitioner's address. Also, it is possible that filing an application for a relative could impact their ability to enter as a visitor.

Should I Agree to Do an Affidavit of Support on Behalf of a Relative or a Friend?

Every petition filed for a relative must be accompanied by an affidavit of support including an affidavit from the petitioner. If, however, the petitioner does not have sufficient income or assets to meet the affidavit of support guidelines, a petitioner can seek an affidavit of support from a co-sponsor. The co-sponsor must be a permanent resident or citizen and could be a relative or a friend of the petitioner or the beneficiary. I routinely receive questions from clients and friends as to whether they should agree to be a co-sponsor. The earlier version of the affidavit of support (Form I-134) was only considered to create a moral responsibility on the part of the affiant to make sure that the beneficiary did not become a "public charge". The most recent version of the affidavit of support (Form I-864), which has been in existence for close to 20 years, creates a more enforceable obligation. Although the I-864 affidavit of support is now considered an enforceable contract against the affiant, it is only occasionally enforced by the government seeking reimbursement for benefits paid to the beneficiary.

In almost every reported case, however, the affidavit of support has been enforced against the petitioner by the beneficiary spouse in a divorce proceeding as opposed to actions against co-sponsors. Therefore, the small risk of enforceability must be weighed against the benefit to the beneficiary who may well be denied permanent residence status without the co-sponsor's affidavit of support. If the beneficiary of the affidavit of support seeks to obtain means-tested benefits, the income and assets of the affidavit of support affiant will be counted as income of the applicant.

False Claim to US Citizenship.

Making a false claim to US citizenship can often be considered by Immigration to be more serious than a crime of violence and can make an individual deportable and permanently inadmissible to the United States. There is no waiver for false claims to US citizenship.

Making a false claim to US citizenship can include registering to vote or voting in a local, state, or federal election, or checking "US Citizen" on an I-9 employment eligibility verification form, claiming to be a US citizen on a student loan application, or claiming US citizenship for any other type of government benefit.

In some jurisdictions, when an individual applies for a driver's license, he or she is given information about how to register to vote. Many people are not aware of the fact that they need to be a US citizen in order to register and thereby accidentally make a false claim to US citizenship. Individuals who are in the United States without work permission who seek employment will often check the US citizen box on the I-9 form without considering the implications.

Based on the draconian nature of the consequences, it is extremely important to avoid any action which could be interpreted as representing a false claim to US citizenship.

What Are the Benefits and Challenges of Being a Canadian "Snowbird"?

Canadians have the easiest time entering United States as temporary visitors for pleasure. Unlike the citizens of other countries, Canadians do not need to obtain a B-2 visitor's visa or comply with the visa waiver (ESTA) program. Additionally, Canadian visitors do not typically receive stamps in their passport or I-94 cards that indicate a specific period of stay. Generally speaking, they are unofficially granted 6 months which is interpreted as 182 days.

Many Canadians would like to remain in the United States for more than six months when visiting this country. The tax implications of prolonged stays in the United States will be covered by our tax expert.

There had been talk of imposing new border crossing fees on visitors from Canada. The Canadian Snowbird Association successfully lobbied for inclusion of a provision in the US Senate's comprehensive immigration reform bill to block implementation of any new fee.

The comprehensive immigration reform bill that passed the US Senate also contains a provision that would extend the period of time that Canadians may visit the United States without a visa up to 240 days within a 12 month period. This provision would be limited to Canadians 55 years and older and their spouse. Canadians would have to maintain their residence in Canada and would also have to either own or rent a residence in the United States for the duration of their stay, (no staying with family or friends).

The Senate bill also contains a provision known as the "retiree visa" which would allow any foreign national, age 55 and older, along with a spouse, to live in the US year round upon issuance of a three year visa. Foreigners will be required to purchase at least one residence in the United States using a minimum of $500,000 in cash and it appears that the purchase would have to take place after comprehensive immigration reform is implemented.

Currently owned residences would not qualify. Residences purchased under this program would have to be purchased for one hundred percent of the appraised value and the individual would need to maintain ownership of the property during the duration of the visa.