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U.S. Residence: A Tale of Two (or More) Definitions

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The concept of "U.S. residence" is of critical importance to both U.S. immigration law and U.S. tax law, but the meaning of U.S. residence (and the correlative consequences of not being a U.S. resident) under each area of law can be significantly different. These differences present both potential traps for the unwary and potential planning opportunities for the informed.

Residence From an Immigration Perspective. On the immigration side, a distinction is made between U.S. permanent residents and legal non-immigrants. A U.S. permanent resident (i.e., a holder of a U.S. "green card") is treated as a legal immigrant and has the ability to reside in the United States without restriction for an unlimited time period. On the other hand, legal non-immigrants or non-residents, in many cases, have restrictions on the amount of time they can reside and/or work in the United States and must conform to other conditions associated with non-immigrant status.

The most significant categories of those who can stay and work as legal non-immigrants in the United States are holders of H-1B visas (principally, specialty occupation workers), L-1 visas (intracompany transferees), E visas (treaty traders and investors), and O-1 visas (aliens of extraordinary ability in the sciences, arts, education, business or athletics). Holders of H-1B visas are generally subject to a six-year maximum period during which they can work and live in the United States. Holders of L-1A visas (intracompany executives or managers) and L-1B visas (intracompany transferees with specialized knowledge) are limited to seven and five-year stays in the United States, respectively. There is no absolute bar on the time that an individual in E status or O-1 status can remain in the United States as long as such individual renews status periodically. E visas have to be renewed every five years; O-1 visas generally each year.

Residence From a Tax Perspective. A person who is a U.S. tax resident is generally subject to U.S. income tax on their worldwide income and often also subject to U.S. gift and estate tax on transfers of their worldwide assets wherever situated. Different tests apply to determine whether a non-U.S. citizen is considered resident for U.S. income tax and information reporting purposes and whether a non-U.S. citizen is considered resident for U.S. estate and gift tax purposes.

U.S. income tax residents, aside from U.S. citizens, include (1) lawful permanent residents (i.e., holders of U.S. green cards) and (2) people who meet the "substantial presence" test under Internal Revenue Code (IRC) §7701(b)(1)(A)(ii). Under the "lawful permanent residence" test, a foreign national

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is generally considered resident in the United States from the day he/she first enters the United States with a U.S. green card until the day that resident status is revoked by the immigration authorities or judicially determined to have lapsed. During the period that a foreign national maintains permanent resident status, he/she is considered to be a U.S. tax resident for income tax purposes (and subject to worldwide U.S. income taxation) even if living outside the United States.

Under the "substantial presence" test, a foreign national is generally considered resident in the United States for U.S. income tax purposes if (1) present in the United States for at least 31 days during the current calendar year, and (2) present in the United States for a weighted average of at least 183 days over a three-year period covering the current calendar year and the two preceding calendar years, with all days present

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in the United States during the current calendar year being multiplied by one, all days present last year being multiplied by one-third and all days present in the year before last being multiplied by one-sixth.[1]

Residency for U.S. estate and gift tax purposes is determined by one's "domicile." The key is whether a foreign national is residing currently in the United States and has no "definite present intention of later removing therefrom."[2] The immigration concept of "permanent residence" and the tax concept of domicile clearly overlap but are not perfectly coincident, leaving open the possibility that at least a small minority of green card holders who may not be living all the time in the United States may not be subject to U.S. estate and gift tax on a worldwide basis.

As discussed below, U.S. permanent residents should generally be careful to maintain consistency between their immigration and tax resident statuses, while legal non-immigrants have a choice in whether to become U.S. tax residents or maintain non-U.S. tax status.

Importance of Maintaining Consistency Between U.S. Resident Status for Tax and Immigration Purposes. A U.S. permanent resident who is also considered by another country with which the United States has an income tax treaty to be a resident of that other country may be able to take the position under "tie-breaker" provisions of such treaty that he/she is a nonresident for U.S. income tax purposes and avoid U.S. taxation on his/her worldwide income. However, there may be both immigration and tax dangers for adopting such a position.

The immigration danger is that U.S. immigration authorities may consider filing as a nonresident for U.S. income tax purposes based on a treaty to be inconsistent with an intent to be a permanent resident, leading to a determination that such individual has abandoned permanent resident status.[3] In addition, as to any permanent resident who is contemplating applying for U.S. citizenship, filing as a U.S. nonresident pursuant to an income tax treaty creates a rebuttable presumption that the applicant for naturalization "has relinquished the privileges of permanent resident status in the United States" and therefore is ineligible for naturalization.[4]

U.S. permanent residents should generally be careful to **maintain consistency** between their immigration and tax resident statuses, while legal non-immigrants **have a choice** in whether to become U.S. tax residents or maintain non-U.S. tax status.

The tax danger is that a U.S. permanent resident taking a treaty position who has had a green card in eight of 15 years (including the current year) and has substantial amounts of assets or income (a so-called "covered expatriate") may be subject to the same "exit tax" on certain deferred income and on the unrealized appreciation of his/her worldwide assets to which a U.S. citizen or a long-term U.S. permanent resident with substantial assets or income would be subject upon renunciation of U.S. citizenship or abandonment of U.S. permanent residence.[5] Ironically, a U.S. permanent resident who becomes subject to the "exit tax" by virtue of asserting a treaty position still remains obligated to comply with many U.S. reporting requirements including, but not limited to, the Report of Foreign Bank and Financial Accounts (commonly known as the FBAR form), Form 8938 (Specified Foreign Financial Assets), Form 5471 (U.S. Persons With Respect to Certain Foreign Corporations), and Form 3520 (Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts) as long as he/she continues to hold the "green card."[6]

Relation Between U.S. Legal Non-Immigrant Status and Non-Resident Tax Status. The fact that an individual is a legal non-immigrant of the United States does not mean that that person cannot become a U.S. income tax resident or even a U.S. resident for U.S. estate and gift tax purposes. Even though such an individual will not become U.S. tax resident simply by virtue of being a legal non-immigrant, he/she can become a U.S. income tax resident under the "substantial presence" test and can become a U.S. gift and estate tax resident under the domicile test. Thus, in many cases, holders of H-1B and L-1 category visas will work in the United States and become U.S. income tax residents by virtue of the "substantial presence" test, but they stand a relatively small risk of becoming U.S. residents for estate and gift tax purposes because of the time bar on how long they can remain in the United States under those visas.

However, the repeal in 1990 of the immigration law doctrine of "dual intent" for H-1B and L-1 visas,[7] which had barred a holder of a non-immigrant visa who formed an intent to stay in the United States permanently from eligibility for non-immigrant status, now means that H-1B and L-1 visa holders can plan for obtaining permanent resident status in the United States and still maintain valid non-immigrant status. Subsequently, Congress enacted "portability" legislation allowing H-1B visa holders (ordinarily subject to a six-year limitation of stay), whose employers filed applications for U.S. permanent resident status on their behalf, to renew H-1B status annually, pending the outcome of those applications. Such an H-1B person clearly could in that time acquire a U.S. domicile and become subject to worldwide U.S. estate and gift tax.

Legal non-immigrants in E and O-1 visa status are more vulnerable to becoming not only U.S. income tax residents but also U.S. residents for U.S. estate and gift tax purposes because there is no absolute limitation on the time they can spend in the United States. Following the statutory repeal of the "dual intent" doctrine for H-1B and L-1 visas, the doctrine was administratively repealed for E and O-1 visas.[8] As such, the estates of E and O-1 visa holders may not be able to argue convincingly that, solely due to their decedent's non-immigrant status, such decedent could not have intended to make the United States his/her domicile and subject his/her worldwide estate to U.S. estate taxation.[9]

On the other hand, for individuals who wish to avoid U.S. tax residency, maintaining H-1B, L-1, E or O-1 visa status allows them to enter the United States whenever they want, to be employed by a U.S. employer, and to receive employment-related remuneration from U.S. sources without becoming U.S. tax resident. None of the criteria for eligibility for any of these visas necessarily requires the holder to stay in the United States an amount of time that would make him/her a U.S. tax resident for U.S. income tax purposes under the "substantial presence" test. For example, an individual who is an officer of a foreign parent could also serve as an officer of its U.S. subsidiary, receive remuneration from such subsidiary, and spend up to 121 days per year in the United States without triggering resident status under the U.S. income tax laws. Moreover, it is important to note that the five, six and seven-year limitations for L-1B, H-1B and L-1A statuses, respectively, apply to days actually spent in the United States. Therefore, persons in these visa categories who spend less than 365 days in the United States of any authorized year of stay may essentially recoup all the days not spent in the United States in any such year until they have exhausted the limitation period.[10] Thus, for example, an L-1A executive who carefully tracks and documents the days he/she spends inside and outside the United States and only spends 91 days a year in the United States (i.e., the equivalent of one-quarter of a year) in any year after commencing L-1A status could theoretically extend L-1A status for as long as 28 years and still not trigger U.S. resident tax status.

Even if a person holding a non-immigrant visa should stay long enough in the United States to become a U.S. income tax resident under the "substantial presence test," but continues to maintain a home or close economic ties to another country with which the United States has an income tax treaty, he/she may be able to take a treaty position that he/she is a resident of that other country and file his/her U.S. income tax return on a non-resident basis without the adverse consequences that may follow when a long-term U.S. permanent resident attempts to do the same. Taking a treaty position, however, as mentioned above, does not exonerate the U.S. income tax resident from having to comply with U.S. reporting requirements related to foreign accounts and assets.

> The fact that an individual is a **legal non-immigrant** of the United States does not mean that that person cannot become a **U.S. income tax resident or even a U.S. resident** for U.S. estate and gift tax purposes.

A New Immigration Era? Currently, there is much public discourse as Congress considers historic legislation that would not only legalize the immigration status of millions of people presently living in the United States without legal status but may also widen eligibility for obtaining immigrant or legal non-immigrant status based on skills, education, and other related criteria.

Any person, while residing in the United States illegally, could become a U.S. income tax resident (and thereby subject his/her worldwide income to U.S. income taxation) by virtue of meeting the "substantial presence" test described above. Additionally, any such person can assume a U.S. domicile and therefore be treated as a U.S. resident for U.S. estate and gift tax purposes. It is precisely for this reason that many of these illegal immigrants will likely need to regularize their U.S. tax compliance in order to rectify their immigration status.

Under an expanded basis for immigration based on skills and education, it is more likely that future candidates for U.S. legal immigrant or non-immigrant status will come to the United States already holding non-U.S. assets and financial interests. Such individuals must be aware that U.S. income tax compliance not only entails the filing of income tax returns, but also the filing of various types of disclosure about non-U.S. assets including, but not limited to, the FBAR form, Form 8938, Form 5471 and Form 3520, starting with the first year they qualify as U.S. income tax residents. Such individuals, therefore, will need to be well-advised about these requirements because failure to comply not only could carry substantial penalties, but under certain circumstances, depending on the final terms of any enacted legislation, could actually jeopardize their long-run eligibility to obtain valid U.S. immigration status.

1. Exceptions exist that allow some foreign nationals to avoid being treated as resident aliens even though their U.S. presence would satisfy the three-year "look-back" rule (for example, foreign government employees, certain foreign students and exchange visitors).

2. Treasury Regulations §20.0-1(b). While there is no bright-line test, U.S. courts look to several factors in gauging which location an individual has intended to be his/her domicile. Court rulings can be surprising at times. (See, e.g., *Estate of Khan v. Comm.*, TC Memo 1998-22 (1998) (still finding U.S. green card holder living abroad for final four years of his life to be U.S. domiciliary for U.S. estate tax purposes)).

3. See "INS Discusses Effect of Nonresident Tax Filing on Permanent Residence," 73 Interpreter Releases 929-931 (July 15, 1996).

4. 8 C.F.R. §316.5(c)(2).

5. See IRC §877A(g)(3)(B) and §7701(b)(6).

6. See generally Treasury Regulations §301.7701(b)-7(a)(3) (IRS forms); 76 Fed. Reg. 10234, 10238 (2/24/11) (FBAR form). While a dual-resident alien claiming the benefit of a treaty will be treated as nonresident for purposes of computing his/her U.S. income tax liability, Treasury Regulations §301.7701(b)-7(a)(3) treats him/her as a U.S. income tax resident for all other purposes of the IRC which arguably suggests that he/she would still be obligated to file most, if not all, U.S. foreign disclosure forms (such as Forms 8938, 5471, 8621, 926, 3520, 8865, etc.) when applicable.

7. INA §214(h) (8 U.S.C. 1184(h)).

8. See Kurzban, Immigration Law Sourcebook, 759-60 (2012) and INS documentation cited therein (E status) and 8 C.F.R. §214.2(o)(13) (O-1 status).

9. See, e.g., *Estate of Jack v. United States*, 54 Fed. Cl. 590 (2002) (decedent who held TN status, for which "dual intent" doctrine had not been repealed, could be found to be U.S. domiciliary).

10. See USCIS Interoffice Memorandum, Michael Aytes, Acting Associate Director for Domestic Operations, Oct. 21, 2005.