

Focus IMMIGRATION

Caution urged for green card holders leaving U.S.



Eileen Martin
Katherine Cauley

A foreign national with a United States green card is a Lawful Permanent Resident (LPR). While that provides the *privilege* of residing in the U.S., it also imposes the *responsibility* of residing in the U.S.

LPRs sometimes change their minds about wanting to live in the U.S. Work opportunities or family situations may pull or push them abroad. An LPR who leaves the U.S. and does not file for a re-entry permit that allows residence abroad while maintaining green-card status may actually jeopardize their right to return to the U.S.

Some of the laws pertaining to abandonment of green-card status are clear and explicit. For instance, under the U.S. *Code of Federal Regulations*, after 365 days of continuous abandonment, the green-card holder is deemed to have abandoned their status. The burden of proof is on the government to show that the LPR abandoned status by clear, convincing and unequivocal evidence. The rest of the law relies on subjectivity, as so much of immigration law does.

Abandonment cases are often initiated at ports of entry, when a



-OXFORD- / ISTOCKPHOTO.COM

foreign national is planning to enter the U.S. If a U.S. customs and border protection (CBP) officer determines abandonment may have taken place, they are likely to request the foreign national sign a Form I-407: Abandonment of Lawful Permanent Resident Status. The form reports that the foreign national willingly and voluntarily is abandoning LPR status. If he or she will not sign, they may be told they will be sent to see an immigration judge. If the foreign national still won't sign, the officer can either institute removal proceedings, or simply admit the LPR if they think an administrative immigration judge may not agree with their assessment.

Therefore, the only two people who can actually abandon LPR status, or cause such an abandonment to happen, are the foreign national and the immigration judge. It is important to note that abandoning LPR status should have no practical impact on a foreign national's ability to enter the U.S. as a visitor in the future, or to gain LPR status once again in the future. CBP officers do not harbor feelings of rejection on behalf of their jilted nation from former LPRs.

A re-entry permit can stave off issues of abandonment for a while, perhaps long enough to decide in what country the LPR's future really lies. Practically, it ensures the LPR will not face

abandonment, at least not yet. While re-entry permits can be valid for two years, the longer the LPR holds one, the better the chance that the next such permit will be for only one year. The application process is cumbersome, requiring the LPR's presence in the U.S. at least twice. This process, reduced to an annual requirement, is enough of a discouragement to convince many LPRs to make a firm decision to reside in the U.S., or even to abandon their LPR status altogether. But some others choose to sit on the fence.

Note to the fence-sitters: failure to abandon LPR status can have unintended and potentially costly U.S. tax implications. Generally, LPRs are U.S. taxpayers, meaning they are subject to U.S. income tax on their worldwide income during life, and U.S. estate tax (imposed on the fair market value of an individual's worldwide assets) at death, whereas non-resident aliens are subject to U.S. income tax only on their U.S. source income, and U.S. estate tax only on their U.S. situs assets (i.e., real and tangible property located in the U.S., stock in U.S. companies, and debts of U.S. persons). If an LPR fails to relinquish their green card and file the requisite I-407, the IRS will likely take the position that the LPR in fact continues to be a U.S. taxpayer.

The solution may not be as simple as filing the I-407 and moving on. If the LPR has held the green card for eight of the prior

fifteen tax years, they are deemed to be a long-term green-card holder, and abandoning LPR status makes them an expatriate subject to the U.S. expatriation rules. Further, if the LPR's net worth exceeds \$2 million, or if their average income tax liability for the last five years exceeds \$157,000 or they fail to certify their compliance with U.S. tax filing requirements for the prior five years, they are a covered expatriate. Covered expatriates fall under the mark-to-market rule. The LPR's assets, regardless of location, will be deemed to be sold for fair market value on the day before they cease to be an LPR, and they will recognize gains or losses on the deemed sale (net gain on the deemed sale is reduced, but not below zero, by \$680,000 in 2014—this is an amount that is indexed for inflation). There are no exceptions to the expatriation rules for green-card holders.

We encourage LPRs to make good decisions with proper counsel to ensure best results. Being faced with pressure at a port of entry to sign a form, or putting off deciding until the tax man is two steps from the door, may not afford enough time and consideration for proper decisions and best outcomes.

Eileen Martin and Katherine Cauley are partners at Hodgson Russ. Martin is a member of the law firm's immigration practice group, and Cauley heads the firm's estates & trusts group.

Warrant: The average detention is 25 days, at \$200 a day

Continued from page 14

is not defined. The substance of 20.1 has yet to be considered, but the provision that allows this designation can be applied retroactively to March 31, 2009.

About a third of immigration detainees, generally the longer-term detainees, are held at provincial facilities. According to a survey by the Global Detention Project in 2011, immigration detainees were held at a variety of sites across the country. There are three CBSA detention facilities. In most of the provincial facilities, immigrants are either not entirely segregated from other detainees, or not segregated at all.

The CBSA's 2010-2011 statistics note 8,838 detentions at an average cost per detainee of \$200 daily. The average detention was 25 days—that's over \$44 million in costs. Over 6,000 of the detainees were

“

A number of immigration detainees have been held for years, sometimes on no more than the flight-risk issue, and in situations where, for example, their country of origin would not acknowledge them.

Sarah Boyd
Jackman, Nazami & Associates

released rather than removed. Nearly half were refugee claimants, and over 200 were minors.

Last December, Mexican citizen Lucia Vega Jimenez apparently committed suicide in CBSA custody in Vancouver. In the absence of any appropriately specific oversight body, the B.C. coroner is holding an inquest, which according to the B.C. Civil Liberties Association, “will not be allowed to find fault, or to examine why Canada Border Services kept her death hidden from the public for more than a month, until a journalist broke the story.”

In March, CBC reported the story of Miguel Luna, a failed refugee claimant ordered deported. Mr. Luna, fully compliant with the conditions placed on him by CBSA, attended at their office as asked and agreed to leave voluntarily, but requested

another two weeks so he could finish a work contract and pay his taxes. As a result of this reasonable request, he was deemed a “flight risk” and detained for 48 hours until a full detention review could be held.

There is no civilian oversight of CBSA, the agency responsible for detaining and deporting non-citizens. Unlike federal offenders having recourse to the corrections investigator, and offenders and those on remand in provincial facilities having access to general government oversight processes—although these of course vary in effectiveness—immigration detainees rarely have the opportunity or resources to challenge their detention. In rare cases, such as the recent *Odosashvili v. Canada (Minister of Citizenship and Immigration)* [2014] F.C.J. No. 317, they make it to Federal Court. In that

decision, Justice Russel Zinn excoriates the Minister's counsel and the division member for misrepresenting and for being misled, respectively. Any immigration counsel will agree that the events of the hearing were far from unusual; what was unusual was Odosashvili's ability to retain counsel and avoid deportation for long enough for the case to come before the court. This will remain the exception so as long as immigration detainees have neither access to habeas corpus nor the protection of meaningful oversight.

Sarah Boyd (sboyd@bjackman.com) practises law in the refugee, immigration, and national security areas at Jackman, Nazami & Associates. She has been involved with four of the five security certificate cases which involved long-term detention.