

9 FAM 42.22 NOTES

*(TL:VISA-545; 05-22-2003)
(Office of Origin: CA/VO/L/R)*

9 FAM 42.22 N1 DETERMINING RETURNING RESIDENT ALIEN STATUS

9 FAM 42.22 N1.1 Evidence of Intent to Return to Unrelinquished Residence in United States

(TL:VISA-331; 11-07-2001)

Department of State regulations specify the following evidence must be presented for an alien to qualify as a returning resident alien. The alien:

- (1) Was a lawfully admitted permanent resident of the United States at the time of departure;
- (2) At the time of departure, had the intention of returning to the United States;
- (3) While residing abroad, did not abandon the intention to return to the United States; and
- (4) Is returning from a temporary residence abroad; or if the stay was protracted, this was caused by reasons beyond the alien's control.

9 FAM 42.22 N1.2 Documentary Evidence of Continued U.S. Residence

(TL:VISA-350; 01-25-2002)

Documentary evidence of an alien's intent to maintain a U.S. residence may consist of, but is not limited to, the following:

- (1) A driver's license issued within the past year and reflecting the same address as that recorded on the Form I-94, Arrival-Departure Record;

- (2) The name and address of the U.S. employer and evidence that a salary has been paid within a reasonable period of time;
- (3) Evidence of children's enrollment in a U.S. school;
- (4) Evidence that extended visit abroad was caused by unforeseen circumstances;
- (5) Evidence of a predetermined termination date, i.e., graduation, employment contract expiration, etc.;
- (6) Evidence of having filed U.S. income tax return(s) for the past year(s); and
- (7) Evidence of property ownership, whether real or personal, in the United States.

9 FAM N1.3 Evidence indicating Abandonment of Residence

(TL:VISA-284; 05-17-2001)

Consular officers should also take into account evidence that indicates abandonment of residence in the United States. Such evidence might consist of the following:

- (1) Extended or frequent absences from the United States;
- (2) Disposition of property or business affiliations in the United States;
- (3) Family, property or business ties abroad;
- (4) Conduct while outside the United States such as, employment by a foreign employer; voting in foreign elections, running for political office in a foreign country, etc.; or
- (5) Failure to file U.S. income tax returns.

9 FAM 42.22 N1.4 Defining Temporary

(TL:VISA-19; 02-27-1989)

The term "temporary" cannot be defined in terms of elapsed time alone. The intent of the alien, when it can be determined, will control. In the Matter of Kane, the Board of Immigration Appeals has described some of the elements to be examined:

- (1) Reason for Absence: Traveler should have a definite reason for traveling abroad temporarily;
- (2) Termination Date: The visit abroad should be expected to terminate within a relatively short period, fixed by some early event;
- (3) Place of Home or Employment: The applicant must expect to return to the United States as an actual home or place of employment. He or she must possess the requisite intent to do so at the time of their departure, and maintain it during the course of their sojourn.

9 FAM 42.22 N1.5 Defining "Lawfully Admitted"

(TL:VISA-284; 05-17-2001)

The INA defines "lawfully admitted for permanent residence" to mean "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."

9 FAM 42.22 N2 RETURNING RESIDENT ALIENS NOT REQUIRING VISA

(TL:VISA-545; 05-22-2003)

A lawful permanent resident returning to an unrelinquished domicile in the United States may not require a visa if the alien:

- (1) Possesses a valid Form I-551, *Permanent Resident Card*, and was absent from the United States for less than one year;
- (2) Possesses an expired Form I-551 (valid for 10 years) if the expiration date is the only reason for not boarding the alien;
- (3) Possesses an expired Form I-551, accompanied by a filing receipt issued within the previous six months for a Form I-751, *Petition to Remove the Conditions on Residence*, or Form I-829, *Petition by Entrepreneur to Remove Conditions*, if seeking admission or readmission after a temporary absence of less than one year;
- (4) Possesses a valid or expired Form I-551, and is a civilian or military employee of the U.S. Government and was outside the United States pursuant to military *official* orders, or the spouse or child of

such alien who has resided with such alien abroad; provided the spouse or child is preceding, accompanying or following to join the employee within four months; or

- (5) Possesses an Form I-551, valid or expired, or a transportation letter, and is an employee of the American University of Beirut who is returning to a permanent residence in the United States after temporary employment with the University; and
- (6) The Legal Permanent Resident (LPR) is an alien commuter residing and employed in contiguous territory.

9 FAM 42.22 N2.1 LPR Possessing a Permanent Resident Card

(TL:VISA-331; 11-07-2001)

- a. An alien in possession of a Form I-551, Permanent Resident Card, who is returning to an unrelinquished residence in the United States after a temporary absence of less than one year, does not require a visa. [See also 8 CFR 211.1(b)(1).]
- b. An alien in possession of an expired Form I-551 valid for 10 years may board an aircraft going to the United States if the expiration date is the only reason for not boarding the alien. No transportation letter is needed, and no fines shall be made against the carrier for transporting the alien. [See also 9 FAM 42.22 PN6.]
- c. However, an alien in possession of an expired permanent resident card with a two-year expiration date must continue to have evidence that the Form I-551 expiration date has been extended.

9 FAM 42.22 N2.2 LPR Possessing Valid Reentry Permit

(TL:VISA-284; 05-17-2001)

- a. An alien in possession of a valid Form I-191, Application for Advance Permission to Return to Unrelinquished Domicile, does not require a visa to reenter the United States. In the absence of contrary evidence, the Department presumes that application for a reentry permit prior to departure is prima facie evidence of intent to retain LPR status. However, failure to obtain a reentry permit should not be viewed automatically as intent to abandon residence and LPR status. A reentry permit, unless otherwise restricted, is valid for a maximum of two years and cannot be

renewed. An alien cannot apply for a reentry permit outside the United States.

- b. Although two years is the maximum period for which a reentry permit is valid, there is no requirement that an application for a returning resident visa be submitted within two years of the alien's departure. It may be that Congress limited the maximum validity of the reentry permit to two years in the belief that the evaluation of the alien's continued intention to return could, after a two-year absence, best be made abroad, through a consular interview.

9 FAM 42.22 N2.3 Alien Commuters

(TL:VISA-489; 11-15-2002)

An alien lawfully admitted for permanent residence may continue to reside in foreign contiguous territory and commute as a special immigrant defined under INA 101(a)(27)(A) to his or her place of employment in the United States. An alien commuter who has been out of regular employment in the United States for a continuous period of six months shall be deemed to have lost residence status, notwithstanding temporary entries in the interim for other than employment purposes. However, an exception applies when employment in the United States was interrupted for reasons beyond the alien's control other than lack of a job opportunity or the commuter can demonstrate that he or she has worked 90 days in the United States in the aggregate during the 12-month period preceding the application for admission into the United States.

9 FAM 42.22 N2.4 Conditional Resident

(TL:VISA-284; 05-17-2001)

- a. An alien granted conditional resident status under INA 216 is issued a Form I-688, Temporary Resident Card, similar to other permanent residents, except that the classification code on the front (photo) side of the card is "CR-", "CF-", "C1-" or "C4-", followed by a one digit number and the reverse side bears a legend stating:

THIS CARD EXPIRES _____

The expiration date is two years from the date the alien obtains lawful permanent resident status. The card is valid until midnight of the date indicated.

- b. An alien may not use an expired Form I-688, except when presented with

a computer-generated receipt issued by the Immigration and Naturalization Service indicating that the applicant has applied for removal of conditional status or been granted a waiver.

9 FAM 42.22 N2.5 Alien Member of U.S. Armed Forces or U.S. Government Employee

(TL:VISA-284; 05-17-2001)

- a. An alien member of the U.S. Armed Forces or a U.S. Government employee may present Form I-551, Permanent Resident Card, in lieu of a visa provided the alien is:
 - (1) Traveling on U.S. Government orders;
 - (2) Returning from a foreign assignment to an unrelinquished residence.
- b. The spouse or child of a U.S. Armed Forces member or U.S. Government employee does not require a visa if:
 - (1) Resided abroad with the spouse while on duty;
 - (2) Is preceding, accompanying, or following-to-join the principal alien; or
 - (3) Married the U.S. Armed Forces member or U.S. Government employee while abroad.

9 FAM 42.22 N2.6 LPR Commuting From Canada or Mexico

(TL:VISA-284; 05-17-2001)

An alien who has been lawfully admitted for permanent residence may commence or continue to reside in foreign contiguous territory. The alien must present a valid Form I-551, Permanent Resident Card, in lieu of an immigrant visa and passport. Such alien may commute as a special immigrant, as defined in INA 101(a)(27)(A), to the alien's place of employment in the United States to engage in daily or seasonal work which, on the whole, is regular and stable. See also INS regulations at 8 CFR 211.5.

9 FAM 42.22 N3 ELIGIBILITY FOR RETURNING RESIDENT (SB) STATUS

9 FAM 42.22 N3.1 LPR Who Was Outside United States for One Year or More

(TL:VISA-144; 06-28-1996)

An LPR who has remained outside the United States for more than one year may be eligible for returning resident status if the consular officer is satisfied that:

- (1) The alien departed the United States with the intention of returning to an unrelinquished residence and
- (2) The alien's stay abroad was for reasons beyond the alien's control and for which the alien was not responsible.

9 FAM 42.22 N3.2 Former U.S. Citizen

(TL:VISA-49; 10-30-1991)

If a naturalized citizen of the United States loses citizenship while in the United States, the status of a returning resident is appropriate if the alien:

- (1) Was a permanent resident of the United States prior to naturalization;
- (2) Has taken no action causing loss of permanent resident status; and
- (3) Departed the United States after losing citizenship; and
- (4) Is returning to the United States after a temporary visit abroad.

9 FAM 42.22 N3.3 Alien Employed Abroad by U.S. Employer

(TL:VISA-489; 11-15-2002)

In the absence of contrary evidence, an alien employed outside the United States by a U.S. employer would not likely be considered to have abandoned U.S. residence. Although, an alien who lives and works in a foreign country, but merely returns to the United States for brief visits periodically, may still be found to have abandoned LPR status. Annual visits to the United States

are no guarantee that LPR status will be preserved.

9 FAM 42.22 N3.4 Religious Missionaries Abroad

(TL:VISA-284; 05-17-2001)

When dealing with extended absences from the United States, consular officers must be aware that the INS has determined that performance of missionary work abroad for a "recognized" U.S. religious denomination does not interrupt LPR status.

9 FAM 42.22 N3.5 LPR Students Studying Abroad

(TL:VISA-284; 05-17-2001)

Several decisions by the INS Administrative Appeals Unit (AAU) relate to LPR students studying abroad. Students who wish to retain LPR status should present evidence of a definitive graduation date. Even prolonged absences from the United States may be considered temporary if the LPR can present evidence of a receipt of a degree within a definitive time. Consular officers should take into account whether students return to the United States at the end of each academic term, or whether they have family still living in the United States. Evidence of property ownership, or a bank account in the United States may indicate the student intends to return to the United States upon completion of studies.

9 FAM 42.22 N3.5 Verifying LPR Status Using VISAS RACCOON Message

(TL:VISA-284; 05-17-2001)

Consular officer may verify an alien's LPR status by sending a VISAS RACCOON cable to the INS Central Office. The message should explain that the alien has requested processing for a returning resident visa but lacks proof of LPR Status.

9 FAM 42.22 N4 DETERMINING LOSS OF LPR STATUS

9 FAM 42.22 N4.1 Loss by Renunciation

(TL:VISA-284; 05-17-2001)

- a. The Immigration and Naturalization Service reserves the right to determine loss or retention of legal resident status. Consular officers are not authorized to make such determinations. However, in a case in which the applicant has abandoned residence and voluntarily surrenders the Form I-551, Permanent Resident Card, consular officers should request that the applicant complete the Form I-407, Abandonment of Lawful Permanent Resident Status, and accept the alien's permanent resident card and return the card to INS. The consular officer shall not require a visa applicant to relinquish the Form I-551, as a condition to issuance of either an immigrant or nonimmigrant visa.
- b. Consular officers should keep in mind it is not the statement renouncing residence, but the absence of a fixed intent to return, that results in the loss of LPR status.

9 FAM 42.22 N4.2 Loss by Recision

(TL:VISA-489; 11-15-2002)

Within five years of an alien's adjustment of status, the Attorney General may rescind an adjustment of status if it is later determined that the alien was ineligible. In such cases, intent is not the issue, it is a question of statutory eligibility.

9 FAM 42.22 N4.3 Loss Due to Deportation

(TL:VISA-284; 05-17-2001)

The Board of Immigrations Appeals (BIA) has held that LPR status ends with the entry of a final administrative order of deportation. Intent in such cases is not the issue, the loss of status occurs by operation of law.

9 FAM 42.22 N4.4 Loss Due to Exclusion

(TL:VISA-284; 05-17-2001)

An LPR status is terminated by the entry of a final administrative order of exclusion. Operation of law, not intent, controls in this case.

9 FAM 42.22 N4.5 Loss by Reversion

(TL:VISA-284; 05-17-2001)

Reversion terminates LPR status. Reversion is the process whereby an LPR

can be adjusted to the status of a nonimmigrant to A, E, or G status. The LPR can prevent reversion by waiving all the rights and benefits of the nonimmigrant status. In such instances, INS is without discretion and must effect a reversion when the alien fails to exercise action to contest the reversion. Thus, reversion is a change in LPR status that may be viewed as primarily driven by the operation of law. However, the alien's intent is important, because the alien can always prevent reversion by executing the statutory waiver of rights.

9 FAM 42.22 N4.6 Loss by Removal

(TL:VISA-284; 05-17-2001)

Removal ends an alien's LPR status. Removal is the process by which an alien is removed from the United States at U.S. Government expense. Removal is the equivalent of deportation.

9 FAM 42.22 N.4-7 Conditional Resident Status

9 FAM 42.22 N4.7-1 Automatic Loss of LPR Status

(TL:VISA-144; 06-28-1996)

A conditional resident alien automatically loses legal permanent resident status on the second anniversary of his or her date of admission as a resident if the Form I-751, Petition to Remove Conditions on Residence, is not filed by that date. However, the law allows INS to accept a late petition if, and only if, the alien can establish that the failure to file on time was for reasons beyond his or her control.

9 FAM 42.22 N4.7-2 Expiration of Conditional Resident Status

(TL:VISA-350; 01-25-2002)

- a. If an alien's conditional resident status has expired and the alien does not meet the conditions described in paragraph c below, the consular officer must determine:
 - (1) Whether the alien was granted conditional resident status; or
 - (2) Whether this status expired solely due to the alien's failure to file a timely application for removal of the conditional status.
- b. Acceptable evidence that the applicant was granted conditional resident

status could be in the form of the ADIT stamp in the applicant's passport or an expired Permanent Resident Card. The consular officer may also send a "VISAS RACCOON" telegram to determine that the alien indeed was granted conditional residence status. [See 9 FAM Appendix N Chapter 300.] If the consular officer is reasonably satisfied that the applicant was a conditional resident and that the marriage appears to be valid on the surface, the consular officer may issue a transportation letter. However, if it appears to the consular officer that there is little or no likelihood of the tardiness being excused by INS, the consular officer shall request a determination by INS, through the Visa Office (CA/VO/F/P).

- c. An alien may not use an expired card to reenter the United States unless the alien is also in possession of a computer-generated receipt issued by the Immigration and Naturalization Service showing that he or she has filed a(n):
 - (1) Form I-751, Petition to Remove Conditions on Residence; or
 - (2) Application for a waiver of the requirement to file a joint petition. In these cases, the consular officer shall consider the Form I-551, Permanent Resident Card, valid for six additional months from the date of such filing while the petition or application is pending before the Immigration and Naturalization Service.
- d. In addition the consular officer shall advise the alien that:
 - (1) The decision to grant or deny the request to excuse the late filing of Form I-751, Petition to Remove the Conditions on Residence, rests with the INS adjudicating officer;
 - (2) Even if the tardiness is excused, INS may still deny the petition for other reasons;
 - (3) If the tardiness is not excused and the petition or application approved, the alien will be required to depart from the United States or appear before an immigration judge in exclusion proceedings;
 - (4) If the alien is excluded and deported from the United States, the alien will not be allowed to return to the United States for one year, unless permission to return is granted; and
 - (5) That the alien may wish to apply for a new immigrant visa rather than accept the risks inherent in filing a tardy petition or application while in a deferred inspection status. The alien may also seek a new immigrant visa if he or she departs voluntarily following a denial of

the petition or application or, if excluded and deported, once the excludability under INA 212(a)(6)(A) has been resolved.

9 FAM 42.22 N5 CHILD UNDER AGE OF 16 YEARS

(TL:VISA-49; 10-30-1991)

- a. An alien child under the age of 16 years is not considered to possess a will or intent separate from that of the parents with regard to a protracted stay abroad. Accordingly, the residence of a child under 16 follows that of the parent(s) unless the consular officer concludes the parents have a separate intention for the child to return to the United States for residence.
- b. In a particular illustrative case of protracted stay abroad by a child, an alien, born in Bermuda in 1941, was formally adopted at the age of six months. The adoptive mother and child were admitted for permanent residence in 1949 but approximately 10 months later the child was returned to Bermuda because the adoptive mother reportedly was unable to care for the child properly and work at the same time. The child remained in Bermuda for six years, most of the time in the custody of a guardian. The adoptive mother in the United States contributed regularly to the child's support but never visited the child. When nearly 14 years of age, the child applied for a special immigrant visa as a returning resident alien under INA 101(a)(27)(A). The Department determined that the child's protracted stay abroad was for reasons beyond the alien's control [see 22 CFR 42.22(a)(3)] and, therefore, had not affected the child's status as an alien lawfully admitted for permanent residence.

9 FAM 42.22 N6 CHILD BORN IN UNITED STATES TO DIPLOMATIC PARENTS

(TL:VISA-144; 06-28-1996)

A child born in the United States to parents in diplomatic status does not acquire U.S. nationality at birth, because the parents are not subject to the jurisdiction of the United States while in that status. [See case of *Nikoi v Attorney General of United States*, 939 F.2d 1065, D.C. Circuit.] However, in accordance with INS regulation 8 CFR 101.3(a)(1), such a child might be considered a lawful permanent resident at birth. The child will normally be considered while under the age of 16 to have the same intent as the parents. Thus, if the parents take the child out of the United States and

abandon their residence in the United States, the child will normally be considered to have lost permanent residence status

9 FAM 42.22 N7 SPOUSE OR CHILD OF LPR

(TL:VISA-144; 06-28-1996)

See 22 CFR 42.1(e).

9 FAM 42.22 N8 BENEFICIARIES OF PRIVATE LAWS

9 FAM 42.22 N8.1 Beneficiary of Private Law

(TL:VISA-49; 10-30-1991)

Beneficiaries of private legislation granting permanent resident status are considered eligible for special immigrant status as returning resident aliens under the provisions of INA 101(a)(27)(A) even though they may have been abroad at the time the legislation was enacted. The spouse and children of such aliens shall also benefit.

9 FAM 42.22 N8.2 Beneficiaries of Private Law 98-53: American University of Beirut (AUB) Employees

(TL:VISA-19; 02-27-1989)

- a. A lawful permanent resident alien employed by the University of AUB may present a Form I-551, Permanent Resident Card, or a boarding letter issued by U. S. consular or immigration officer, in lieu of an immigrant visa provided the alien:
 - (1) Presents evidence of LPR status,
 - (2) Presents proof of AUB employment;
 - (3) Was employed by the AUB immediately prior to traveling to the United States;
 - (4) Seeks admission either to remain temporarily in the United States and then resume employment with the AUB; or

(5) Intends to resume permanent residence in the United States.

b. If the consular officer is reasonably satisfied that the alien is entitled to status, the consular officer shall issue the boarding letter.

9 FAM 42.22 N9 APPLYING INA 316 AND 317

(TL:VISA-144; 06-28-1996)

INA 316(b) and (c) and INA 317 provide that in certain cases, as described below, continuous absence from the United States does not break the continuity of residence for naturalization purposes. It would be inconsistent to permit time spent abroad in such circumstances to be applied for residence for naturalization purposes, but to interpret that same time abroad as interruptive for the purpose of retaining LPR status. Thus, if an alien qualifies for the benefits of INA 316(b) or (c), or INA 317 it may be considered prima facie evidence that the alien is entitled to the status of a returning resident alien as contemplated in INA 101(a)(27)(A). The cases are:

- (1) An employee under contract with the U.S. Government or an U.S. Institution of research recognized by the Attorney General;
- (2) An employee of an U.S. firm or corporation engaged in the development of foreign trade and commerce of the United States or a subsidiary thereof, more than 50 per centum of whose stock is owned by an U.S. firm or corporation;
- (3) An employee of a public international organization of which the United States is a member by treaty or statute and by which the alien was not employed until after being lawfully admitted for permanent residence;
- (4) Any person authorized to perform the ministerial or priestly function of a religious denomination having a bona fide organization within the United States; or
- (5) Any person engaged solely by a religious denomination or interdenominational mission organization having a bona fide organization within the United States as a missionary, brother, nun, or sister.

9 FAM 42.22 N10 VISITOR VISA ISSUANCE NOT RELINQUISHMENT OF RESIDENT STATUS

(TL:VISA-144; 06-28-1996)

- a. An alien is not ineligible for classification as a returning resident alien solely because the alien was previously issued a visitor visa during a stay abroad as a matter of convenience when time did not permit the alien to obtain a returning resident visa. [See also 9 FAM 41.31 N12.]
- b. For example, a permanent resident alien is temporarily assigned abroad but employed by a U.S. corporation. The alien has been outside the United States for more than one year and thus may not return to the United States using the Form I-551, Permanent Resident Card. The alien has never relinquished permanent residence in the United States; has continued to pay U.S. income taxes; and perhaps even maintains a home in the United States. The fact that the alien was issued a nonimmigrant visa for the purpose of making an urgent business trip would not reflect negatively on the retention of resident status.
- c. The consular officer shall not require a visa applicant to relinquish the Form I-551, as a condition to immigrant or nonimmigrant visa issuance.

9 FAM 42.22 N11 DOCUMENTATION REQUIRED UNDER INA 222(B)

(TL:VISA-144; 06-28-1996)

Under the provisions of 22 CFR 42.22(b), a returning resident alien is required to present records and documents required by INA 222(b) only for the period of temporary residence outside the United States. Consular officers should not require a police certificate or other documents for periods of less than six months.

9 FAM 42.22 N12 SEIZING FRAUDULENT INS DOCUMENTS

(TL:VISA-144; 06-28-1996)

- a. Posts should keep in mind that consular officers do not have the authority to make determinations regarding retention or loss of legal resident status and shall not require any alien to relinquish legal resident

documentation. On the other hand, there are no regulations that state that a fraudulent document cannot be retained if presented to a consular officer for verification or other action.

- b. In cases where a post is being required to verify the legitimacy of a particular INS document, posts should follow these instructions:
- (1) If post is certain that the document is fraudulent (i.e., a counterfeit or a genuine document, which has been altered to allow its use by an impostor), posts are authorized to retain the documents;
 - (2) If, on the other hand, a post is only doubtful as to the veracity of a document, then the post should return the questionable document to the bearer. If the alien is traveling, the post should notify the carrier (if known) that the document may be fraudulent. The carrier should be informed that if the document is in fact counterfeit or altered and the carrier has decided to risk transporting the alien, the carrier may be subject to INS fines. In all cases, post should fax a copy of the document to the INS port of entry and should send a copy to CA/VO; or
 - (3) If this method does not satisfy the alien, then the consular officer should advise the alien to seek verification from the nearest INS office.

9 FAM 42.22 N13 SECOND PREFERENCE PETITION FILED ABROAD BY ALIEN DOCUMENTED AS RETURNING RESIDENT

(TL:VISA-284; 05-17-2001)

See 9 FAM 42.31 N5.