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**THE NEED FOR TAX RESIDENCY CLARITY FOR THOSE
“GREEN CARD HOLDER’S” WHO HAVE LOST THEIR LAWFUL
PERMANENT RESIDENCY STATUS AS A MATTER OF LAW¹**

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DISCUSSION

I. SUMMARY

Lawful permanent residents (“LPR”)⁵ are generally subject to U.S. income taxation on their worldwide income until their immigration status has changed.⁶ Federal income tax law defines a LPR with specific reference to the U.S. immigration law.⁷

The tax statute has a two-part test and importantly, the language of the first part requires the individual to have “... *been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws . . .*” [emphasis added].⁸ The second part of the test is that “such status has not been revoked (and *has not been administratively or judicially determined to have been abandoned*).”⁹ [emphasis added]

Millions of current or former U.S. taxpayers who are or were LPRs are affected annually by these rules. Specifically, the federal government reports that in excess of 3 million LPRs emigrate and leave the United States annually; 3.19M in 2015 increasing annually to 3.6M in 2019.¹⁰ Amazingly few former LPRs ever file their record of abandonment, USCIS form I- 407. In the year 2015, for example, only 3/10 of 1% (0.003) of the estimated 3.19 million that abandoned their permanent resident status filed such form with the appropriate government authorities.¹¹

Importantly, taxpayers who are or were LPRs have few resources to guide them about their United States income tax residency: whether they have it, how they might lose it, whether they need to file any particular federal immigration or tax forms when they

⁵ See, I.R.C. [Title 26] § 7701(b)(6) that defines the term “lawful permanent resident.” In contrast, the immigration statute [Title 8] does not use the term “lawful permanent resident” but rather uses the term “lawfully admitted for permanent residence.” See, 8 U.S.C. § 1101(a)(20), which provides in its entirety as follows:

(20) The term “**lawfully admitted for permanent residence**” means 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**. [emphasis added]

⁶ See, I.R.C. §§ 61, 7701(b)(1)(A)(i) and (b)(6) and Treas. Reg. § 301.7701(b)-1(b).

⁷ See, I.R.C. § 7701(b)(6)(A) and (B). See, also 8 U.S.C. § 1101(a)(6), (13)(C) and (20).

⁸ See, I.R.C. § 7701(b)(6)(A).

⁹ See, I.R.C. § 7701(b)(6)(B).

¹⁰ See, Estimates of the Lawful Permanent Resident Population in the United States and the Subpopulation Eligible to Naturalize: 2015-2019 (population estimates, September, 2019), DHS, Office of immigration statistics. Available at:

https://www.dhs.gov/sites/default/files/publications/lpr_population_estimates_january_2015_-_2019.pdf

¹¹ *Id.* Table 1. Incidentally, in the year 2015, the USCIS reported only 9,842 LPRs filed USCIS Form I-407 Record of Abandonment of Legal Permanent Status. See also, FOIA response to co-author Patrick W. Martin from the DHS. Relevant data available at <https://tax-expatriation.com/category/statistics/>

simply leave the United States to live overseas, etc.¹² The authors propose some guidance for these millions of individuals along the lines of an existing IRS resource titled “Tax Information and Responsibilities for Emigrating out of the United States.”¹³

This paper proposes clarifying the Treasury Regulations¹⁴ to make them consistent with the statutory language and changes in the immigration laws that have occurred after the 1992 tax residency regulations went into effect.¹⁵ Importantly, this will help these past and present LPRs to know whether they should file (i) resident¹⁶ or non-resident¹⁷ U.S. federal income tax returns and/or (ii) information returns¹⁸ for any particular tax year.

II. U.S. INCOME TAXATION OF “UNITED STATES PERSONS” VS. “NONRESIDENT ALIENS”

The U.S. income tax rules impose U.S. federal income taxation on the worldwide income¹⁹ of a “citizen or resident of the United States.”²⁰ An “alien”²¹ is also treated as a “resident of the United States with respect to any calendar year... [resident alien]” if he or she meets one of three tests.²² The first test is an individual who is “. . . accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws...”²³ and hence subject to income taxation on his or her worldwide income, subject to one key exception in the law added in 2008.²⁴

In contrast a “nonresident” alien is only subject to limited types of income and gains from U.S. sources.²⁵

¹² The IRS has an excellent resource for individuals coming to the United States titled, Tax Information and Responsibilities for New Immigrants to the United States: <https://www.irs.gov/individuals/international-taxpayers/tax-information-and-responsibilities-for-new-immigrants-to-the-united-states>.

¹³ *Id.*

¹⁴ *See*, Treas. Reg. § 301.7701(b)-1(b).

¹⁵ *See*, footnote 46.

¹⁶ *See*, IRS Form 1040, U.S. Individual Income Tax Return.

¹⁷ *See*, IRS Form 1040NR, U.S. Nonresident Alien Income Tax Return.

¹⁸ *See*, IRS Forms 8938, 8858, 5471, 8865, 8858, 3520, 8854, 3520-A, 926, 8621, etc.) and/or Report of Foreign Bank and Financial Accounts (“FBAR”) on Financial Crimes Enforcement Network (FinCEN) Form 114.

¹⁹ I.R.C. § 61.

²⁰ I.R.C. § 7701(a)(30).

²¹ The authors are of the view that the word “alien” in the statute and the Regulations should be replaced by other expression such as “non-U.S. citizens.” The use of the word “alien” throughout this paper is exclusively used to conform to the statutory and regulatory rules currently in force.

²² I.R.C. § 7701(b)(1)(A).

²³ I.R.C. §§ 7701(a)(30) and (b)(1)(A)(i) and (b)(6).

²⁴ *See infra*, V. CONGRESS LATER CLARIFIED THAT LPRs MAY NOT BE RESIDENTS BY APPLICATION OF AN INCOME TAX TREATY, 0 and footnote 86.

²⁵ The following income is subject to U.S. taxation for a non-resident alien: (i) the so-called “fixed or determinable annual or periodical” income (“FDAP”) from sources within the U.S., *See*, IRC § 871(a)(1)(A); (ii) certain other types of non FDAP income, including original issue discount (OID), *See*, IRC § 871(a)(1)(C); (iii) Social Security payments at the statutory rate of 25.5% (i.e., 85% x 30%), *See*, IRC §§ 871(a)(3) and 1441; (iv) capital gains derived from the sale or disposition of United States real property interests, *See*, IRC §§ 897 and 1445; (v) income effectively connected with the conduct of a U.S. trade or

There is a disconnect between (i) those 3+ million individuals who leave the U.S. annually who had at one time been “*accorded the privilege of residing permanently in the United States*”; yet have emigrated from the U.S., and (ii) knowing whether they have any U.S. tax filing obligations.²⁶

There is a strong policy for “each and every taxpayer [to understand they have] ... a set of fundamental rights they should be aware of when dealing with the IRS.”²⁷ Accordingly, all 3+ million of the LPRs who annually emigrate from the U.S. should (i) be informed, (ii) know how to pay no more than the correct amount of U.S. tax and (iii) have a fair and just tax system. Certainly, a LPR who has emigrated and does not file U.S. federal income tax returns with a good faith understanding that he or she has no further U.S. tax obligations stands to be harmed significantly if the IRS later takes the position that tax returns were required to be filed.²⁸

III. STATUTORY DEFINITION OF “RESIDENT” AND “UNITED STATES PERSON” WITH REFERENCE TO TITLE 8 (IMMIGRATION LAW)

As explained above, the tax statute that was adopted in 1984 has a two-part conjunctive test. The language of the first part requires the individual to have “... *been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws...*” [emphasis added].²⁹ The second

business by such person, *See*, IRC § § 864 and 871(b); and (vi) the partners’ distributive share of a partnership’s income effectively connected with a U.S. trade or business, *See*, IRC § 864, 871(b) and 875.

²⁶ *See*, footnote 10.

Table 1. Components of the [LPR] Population Estimate: Jan. 2015 – 2019:

Components	2015	2016	2017	2018	2019
Emigration	3,190,000	3,290,000	3,400,000	3,490,000	3,600,000

²⁷ *See*, Taxpayer Bill of Rights as adopted in 2014 by the IRS [reported in the 2021 Annual Report to Congress (ARC): Prologue: Highlights of TAS Successes Throughout the Past Year, p. 29] and includes:

- The Right to Be Informed
- The Right to Quality Service
- The Right to Pay No More than the Correct Amount of Tax
- The Right to Challenge the IRS’s Position and Be Heard
- The Right to Appeal an IRS Decision in an Independent Forum
- The Right to Finality
- The Right to Privacy
- The Right to Confidentiality
- The Right to Retain Representation
- The Right to a Fair and Just Tax System

²⁸ *See*, I.R.C. § 6501(c)(3), which provides that the IRS may assess tax at any time in the future, no matter how many years have passed. It reads in its entirety as follows:

(3) No return

In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

[emphasis added]

²⁹ *See*, I.R.C. § 7701(b)(6)(A).

part of the conjunctive test is that “*such status has not been revoked (and has not been administratively or judicially determined to have been abandoned).*”³⁰ [emphasis added]

The authors view this language as clear and unambiguous in the sense that an individual who is not a U.S. citizen cannot satisfy the first test (even if the individual validly obtained a “green card” at some previous time in his or her life) upon abandoning, as a matter of law, his or her lawful permanent residency status by way of establishing a permanent residence outside of the U.S.

In such a case, the individual will no longer be “... *lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws...*” [emphasis added].³¹

Being accorded the privilege of residing permanently in the United States is a necessary requirement of the statute and the next test (the conjunctive requirement)³² only can come into play if the individual asserts he or she meets the first part of the conjunctive test, but fails the second part.

In such circumstances, the individual will not satisfy the income tax residency test with reference to Title 8.³³ These individuals could still satisfy a tax residency test if they meet either the “substantial presence test”³⁴ or the first-year election test.³⁵

You will note that the foregoing definition does not have a technical definition or reference to the term “green card” or “green card test” as it was enacted as part of the Deficit Reduction Act of 1984.³⁶ However, this is what it is commonly referred to in tax literature and in the Treasury Regulations as the “green card test.”

The House and Ways Committee report in 1984, accompanying the House bill, reads in part as follows:

*“The bill defines lawful permanent resident to mean an individual **who has 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,** if such status has not been revoked or administratively or judicially determined to have been abandoned. Therefore, an alien who comes to the United States so infrequently that, on scrutiny, he or she is no longer legally entitled to permanent resident status, but who has not*

³⁰ See, I.R.C. § 7701(b)(6)(B).

³¹ See, I.R.C. § 7701(b)(6)(A).

³² See, I.R.C. § 7701(b)(6)(B).

³³ See, I.R.C. § 7701(b)(1)(A)(i).

³⁴ See, I.R.C. § 7701(b)(1)(A)(ii).

³⁵ See, I.R.C. § 7701(b)(1)(A)(iii).

³⁶ Pub. L. No. 98-369, sec. 138, 98 Stat. at 672.

officially lost or abandoned that status, will be a resident for tax purposes.”³⁷ [emphasis added]

The authors are of the view that the previously cited statement in the House and Ways Committee Report “... *an alien who comes to the United States so infrequently that, on scrutiny, he or she is **no longer legally entitled to permanent resident status, but who has not officially lost or abandoned that status, will be a resident for tax purposes** ...*” is a non-sequitur.

The first sentence explains the requirement of having been lawfully accorded the privilege of residing permanently in the U.S. The second sentence then talks about someone who has lost or abandoned that status. Why would anyone without the ability to even enter the United States (*no longer legally entitled to permanent resident status*) continue to be subject to U.S. taxation on their non-U.S. source income (taxed on their worldwide income)? The first paragraph in the legislative history also appears to be ambiguous and shows a lack of understanding of the Title 8 immigration laws when it states “... have not officially lost or surrendered the right to permanent U.S. residence”³⁸

There are no “official” acts required to lose permanent residency status as explained below. Also, there is no legal concept of “surrendering” the status that grants lawful permanent residency.³⁹ The House and Ways Committee seems to suggest that those LPRs who have emigrated from the U.S. (without any legal right to return) have rights similar to those afforded to U.S. citizens; hence, by principles of equity these emigrated LPRs should bear the same burden of worldwide income taxation as citizens? This is not accurate in the view of the authors.

In fact, an individual who formerly had lawful permanent resident immigration status, and leaves the U.S. for a period longer than one year may be placed or subjected to removal procedures, based on the discretionary determination of an immigration officer, subject to judicial review by the appropriate court of law.⁴⁰ In other words, a noncitizen who at some point in the past had the immigration status of permanent resident but later leaves the U.S. to establish a residence elsewhere, no longer enjoys the right to enter the U.S. at will.

The House and Ways Committee further explains:

“The committee believes that the aliens who have entered the United States as permanent residents and who have not officially lost or surrendered the right to permanent U.S. residence should be taxable as U.S. residents. These persons have rights that are similar to those afforded citizens

³⁷ H.R. Rep. No. 98-432 (1984). The House and Ways Committee report explanation is also cited by the Tax Court in *Topsnik v. Commissioner*, 143 T.C. 240 (2014).

³⁸ See *infra*, a more detailed discussion of legal abandonment of lawful permanent residency under Title 8 in footnotes 44 and 45.

³⁹ The immigration law as articulated by the USCIS Policy Manual and the case law references to “abandonment” (see footnotes 45) and “rescission”.

⁴⁰ See, 8 CFR § 211.1.

*(including the right to enter the United States at will); equity demands that they contribute to the cost of running the government as much as citizens.”*⁴¹

This portion of the legislative history is certainly more logical and more consistent with the statutory language, as it discusses individuals who have not lost their rights to lawful permanent residency.

IV. THE TREASURY REGULATIONS DEFINITION OF “UNITED STATES PERSON” VS. “NONRESIDENT ALIEN”

As explained above, the definition of who has “lawful permanent residency” for income tax purposes is based, in large part upon U.S. immigration law.⁴² The Immigration and Nationality Act defines permanent resident status as being lawfully accorded the privilege of permanently residing in the United States as an immigrant.⁴³ Furthermore, for immigration law purposes, this lawful permanent residency status requires that the person physically reside in the territory of the United States in a permanent form. See, for instance, the USCIS manual providing that: “Abandonment of LPR status occurs when the LPR demonstrates his or her intent to no longer reside in the United States as an LPR after departing the United States.”⁴⁴

Although a person may have multiple residences, residence in the United States must be a permanent one.⁴⁵

This paper discusses how the Treasury Regulations⁴⁶ (which were adopted from the 1984 tax law amendment) do not fully comport with the language of the 1984 statutory rules and do not address the 2008 statutory rules. They turn the conjunctive test found in the statute on its head, by not requiring the individual be “. . . lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the with the immigration laws...”⁴⁷ in order to be a resident for income tax purposes. Plus,

⁴¹ *Id.*

⁴² *See*, I.R.C. § 7701(b)(6)(A) and (B).

⁴³ *See*, 8 U.S.C. § 1101(a)(20).

⁴⁴ *See*, Policy Manual Volume 12 - Citizenship and Naturalization Part D - General Naturalization Requirements Chapter 2 - Lawful Permanent Resident Admission for Naturalization. <https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-2>

⁴⁵ *See*, 8 U.S.C. § 1101(a)(6), (13)(C) and (20), *See also*, the USCIS Policy Manual Volume 12 - Citizenship and Naturalization Part D - General Naturalization Requirements Chapter 2 - Lawful Permanent Resident Admission for Naturalization. <https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-2> -

Abandonment of LPR status occurs when the LPR demonstrates his or her intent to no longer reside in the United States as an LPR after departing the United States.[23] In addition, abandonment of LPR status by a parent is imputed to a minor child who is in the parent’s custody and control.[24] While LPRs are permitted to travel outside the United States,[25] depending on the length and circumstances of the trip abroad, the trip may lead to a determination that the LPR abandoned his or her LPR status.[26].

⁴⁶ *See*, Treas. Reg. § . § 301.7701(b)-1(b) which adopted the definitional rules of LPR in regulations issued in 1992 (57 FR 15242) and provides in part, “. . . Resident status *is deemed to continue unless it is rescinded or administratively or judicially* determined to have been abandoned.”[*emphasis added*].

⁴⁷ *See*, I.R.C. § 7701(b)(6)(A).

these 1992 Treasury Regulations do not consider current immigration laws regarding LPRs, including substantial statutory changes in 1996.⁴⁸

Specifically, after the enactment of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, it was made clear that United States citizens are protected from deportation and removal from the United States,⁴⁹ while, an individual with mere permanent residency status now has additional legal bases for being deported and removed out of the country by the expanded definition of what constitutes an “aggravated felony.”⁵⁰ or by way of establishing a permanent residence outside of the U.S. A United States citizen cannot be deported or removed from the United States even if she were convicted of an aggravated felony as defined in the statute. These two classes of individuals (citizens versus non-citizens) certainly have very different rights and risks not contemplated in the 1984 legislative history, since the immigration laws and risks of deportation to those with lawful permanent residency have changed subsequently.

If a noncitizen permanently leaves the United States, emigrates and takes up permanent residency in their home country or in any other country outside of the United States (as some 3M+ individuals have done annually for the last several years) they will no longer have the lawful privilege of returning and residing permanently in the United States.⁵¹

Nevertheless, Treasury Regulation Section 301.7701(b)-1(b) seems to provide that these individuals retain their “United States person” status (as a “resident alien”) for U.S. income tax purposes as they impose an additional requirement not found in the statutory language. This additional requirement is referred to as the “green card test” in the regulations⁵² and provides in relevant part as follows:

(1) Green card test. An alien is a resident alien with respect to a calendar year if the individual is a lawful permanent resident at any time during the calendar year. A lawful permanent resident is an individual who has been lawfully granted the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws. Resident status is deemed to continue unless it is rescinded or administratively or judicially determined to have been abandoned. [emphasis added]⁵³

It is this last sentence of these regulations that read into the statutory rule an additional requirement that is not found in the statute. The “green card – deemed to continue test,” provides that resident status continues until it is (i) rescinded, or (ii) administratively determined to have been abandoned, or (iii) or judicially determined to

⁴⁸ See, The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRAIRA”).

⁴⁹ See, 8 U.S.C. § 1252(b)(5).

⁵⁰ See, 8 U.S.C. § 1101(a)(43).

⁵¹ See, *Shyiak v. Bureau of Citizenship & Immigration Servs.*, 579 F. Supp 2d 900 (W.D. Mich. 2008); *Matter of Kane (PDF)*, 15 I&N Dec. 258 (BIA 1975); *Khodagholian v. Ashcroft*, 335 F.3d 1003 (9th Cir. 2003); and *Matter of Huang (PDF)*, 19 I&N Dec. 749 (BIA 1988).

⁵² Referred to herein by the authors as the “green card - deemed to continue conjunctive test.”

⁵³ See, Treas. Reg. § 301.7701(b)-1(b)(1).

have been abandoned. It is important to break down what each of these concepts mean under immigration law.

A. “Rescission” – LPR Status⁵⁴

First, USCIS describes the rescission process in its Policy Manual.⁵⁵ The rescission process is a formal one that requires various steps be taken by the USCIS, as described below:

“In order to rescind a person’s adjustment to lawful permanent resident (LPR) status, USCIS must serve the person through personal service⁵⁶ a Notice of Intent to Rescind (NOIR) within 5 years of the date of his or her adjustment.⁵⁷ Once the NOIR has been served, rescission action may proceed even beyond the 5-year time limit (in other words, the serving of the NOIR “stops the clock”)”⁵⁸

Nowhere in the tax statute is there any reference to the process of rescission of LPR status, and indeed requires the individual to have 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...”⁵⁹ in order to be a tax resident. The USCIS Policy Manual describes the purposes of rescission as:

“Rescission proceedings serve the goal of removing a person’s lawful permanent resident (LPR) status when USCIS determines that he or she was not eligible for adjustment of status at the time LPR status was granted. Rescission places the person in the same standing that he or she would have been in if USCIS had never granted adjustment of status....”⁶⁰

Hence, the individual never was eligible for LPR status in the first place and therefore could never have satisfied the statutory requirement of being “... lawfully accorded the privilege of residing permanently in the United States...”⁶¹ Of course, if an individual in this category has been residing principally in the U.S. she will satisfy the “substantial presence test” and still be a “resident alien,” just under a different rule.⁶²

Importantly, an individual can lose his or her LPR status without any rescission process undertaken by the USCIS by “abandonment” which is the most common route; as some 3M+ individuals simply emigrate and leave the U.S. per the statistics published by

⁵⁴ See, Treas. Reg. § 301.7701(b)-1(b)(1), last sentence.

⁵⁵ See, Policy Manual Volume 7 - Adjustment of Status Part Q - Rescission of Lawful Permanent Residence Chapter 3 - Rescission Process. <https://www.uscis.gov/policy-manual/volume-7-part-q-chapter-3>

⁵⁶ See, 8 CFR 103.8(a)(2).

⁵⁷ See, 8 CFR 246.1.

⁵⁸ See, footnote 55, Chapter 3 - Rescission Process.

⁵⁹ See, I.R.C. § 7701(b)(6)(A).

⁶⁰ See, footnote 55, Chapter 1 – Purpose and Background.

⁶¹ See, I.R.C. § 7701(b)(6)(A).

⁶² See, I.R.C. § 7701(b)(1)(A)(ii).

the DHS.⁶³ Maybe the regulations used the term “rescission” trying to capture the language in the statute of the status not being “revoked”?

B. Administratively ... Determined to Have Been Abandoned?⁶⁴

The second requirement added by the Treasury Regulations is that the LPR status has not been “... administratively... determined to have been abandoned.”⁶⁵ Here is where the authors view a serious lack of understanding in these tax regulations regarding the immigration concept of “abandonment”. It is not the federal government that causes the abandonment but rather the individual herself when they leave and emigrate out of the U.S.⁶⁶ To the extent this rule in the regulations is meant to capture the concept of action taken by the government, it ignores the first requirement of the statute - of being “... lawfully accorded the privilege of residing permanently in the United States...”⁶⁷ An individual who has abandoned her right to permanently reside in the U.S. ceases to meet this first requirement of the statute.⁶⁸ Again, this additional requirement in the regulations eliminates the first of the two part conjunctive test found in the statute.

C. Judicially Determined to Have been Abandoned?⁶⁹

The third additional requirement added by the Treasury Regulations is that the LPR status has not been “... judicially determined to have been abandoned.” The same can be said for this regulatory rule as has already been said for the two prior rules regarding rescission and administrative abandonment.

If the courts find an individual has abandoned her right to reside permanently in the U.S., the courts are necessarily confirming that an individual cannot meet the first statutory

⁶³ See, footnote 10.

⁶⁴ See, Treas. Reg. § 301.7701(b)-1(b)(1), last sentence.

⁶⁵ *Id.*

⁶⁶ See, footnote 44 and the factors identified in the USCIS Policy Manual, citing to various case law:

USCIS reviews multiple factors when assessing whether an applicant objectively intended to abandon his or her LPR status [See, *Khodagholian v. Ashcroft*, 335 F.3d 1003 (9th Cir. 2003). See *Matter of Huang (PDF)*, 19 I&N Dec. 749 (BIA 1988).] including:

- Length of absence from the United States [See, *Singh v. Reno*, 113 F.3d 1512 (9th Cir. 1997). See *Shyiaq v. Bureau of Citizenship and Immigration Services*, 579 F. Supp. 2d 900, 907 (W.D. Mich. 2008) (infrequent and short stays in the United States are insufficient as a matter of law to support retention of permanent resident status).];
- Purpose of travel outside the United States;
- Intent to return to the United States as an LPR [See, *Moin v. Ashcroft*, 335 F.3d 415 (5th Cir. 2003) (An LPR's reentry permit, in and of itself, does not prevent a finding that the noncitizen has abandoned her LPR status and is therefore inadmissible on seeking reentry).]; and
- Continued ties to the United States [See, 8 CFR 316.5(c)(2).].

⁶⁷ See, I.R.C. § 7701(b)(6)(A).

⁶⁸ See, footnote 66 describing various cases where the individuals had abandoned their status and hence had no right to continue to reside permanently in the U.S.

⁶⁹ See, Treas. Reg. § 301.7701(b)-1(b)(1), last sentence.

requirement in the first place.⁷⁰ They will not be “... *lawfully accorded the privilege of residing permanently in the United States...*”⁷¹

The way the regulations are drafted raise many interesting questions, including whether the U.S. government may impose worldwide income taxation upon noncitizens who have never had a right to vote⁷² nor who have any legal right to reside in the U.S.⁷³ or otherwise enjoy the benefits of the U.S. federal government or of citizenship?⁷⁴ If the noncitizen has no lawful right, under the U.S. immigration laws, to reside in the United States (which is the first statutory requirement of residency in this case), can the U.S. government even impose U.S. taxation on that individual on their worldwide income? It seems the individual will fail the first test – as she will not be “... *lawfully accorded the privilege of residing permanently in the United States...*”⁷⁵

The Treasury Department has succinctly identified this problem created by the current law in its study entitled “*Income Tax Compliance by U.S. Citizens and U.S. Lawful Permanent Residents Residing Outside the United States and Related Issues*” dated May 1998.⁷⁶ In that study, the Treasury Department noted as follows:

If ... a green card holder remains outside the United States for longer than the permitted period but does not attempt to re-enter the United States, no administrative or judicial proceeding will be undertaken regarding the validity of his or her green card. *Accordingly, the individual will technically remain subject to worldwide U.S. tax jurisdiction under current law, even though his or her green card might no longer be recognized as valid by INS or an immigration judge.* The Code and immigration laws could be harmonized so that the U.S. no longer exercises worldwide tax jurisdiction over individuals to the extent the immigration laws would no longer hold the green card to be valid if the individual attempted to use it for re-entry, and the individual is able to document that fact. *As noted above, worldwide taxation of green card holders is premised in part on the benefits available to such individuals. However, in the case of green card holders whose status as such would not be recognized as valid, the primary benefit associated with the status – the ability to re-enter the United States – is no longer present.*⁷⁷ [emphasis added]

⁷⁰ See, footnote 66 describing various cases where the courts found that the individuals had abandoned their status and hence had no right to continue to reside permanently in the U.S.

⁷¹ See, I.R.C. § 7701(b)(6)(A).

⁷² U.S. Const. amend. XV, § 1.

⁷³ See, footnotes 66-70

⁷⁴ See, footnote 46.

⁷⁵ See, I.R.C. § 7701(b)(6)(A).


⁷⁶ See report at <http://www.ustreas.gov/press/releases/reports/tax598.pdf>.

⁷⁷ *Id* at page 44.

The Treasury Regulations currently do not provide any guidance to individuals who have lost their LPR status as a matter of law; do not address those LPRs who no longer are “... accorded the privilege of residing permanently in the United States.”⁷⁸

Specifically, Treasury Regulation § 301.7701(b)-1(b) seems to ignore that an individual may abandon his LPR status under the Immigration and Nationality Act, voluntarily, by establishing a residence permanently outside of the U.S. beyond a “temporary visit abroad.”⁷⁹ This is true even if no form is filed with the appropriate immigration authorities.⁸⁰

Importantly, the name of this USCIS form is illustrative as it is entitled “*record of abandonment*”; referencing the acknowledgment of abandonment, not the act or legal event that causes abandonment. See, USCIS Form I-407 Record of Abandonment of Legal Permanent Status. This form simply shows the individual now has a record of her abandonment (without necessarily identifying any specific date):



**Record of Abandonment of
Lawful Permanent Resident Status**

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-407
OMB No. 1615-0130
Expires 07/31/2023

▶ **START HERE - Type or print in black ink.**

Part 1. Information About You

1.a. Alien Registration Number (A-Number)

▶ A-

1.b. Your Name Exactly As It Appears On Your Permanent Resident Card

2. USCIS Online Account Number (if any)

▶

Your Current Legal Name

Mailing Address Outside of the United States

9.a. In Care Of Name (if applicable)

9.b. Street Number and Name

9.c. Apt. Ste. Flr.

9.d. City or Town

9.e. Province or State

Indeed, USCIS Form I-407 works to acknowledge the abandonment already occurred in the past:⁸¹

⁷⁸ There is extensive case law interpreting what is permitted for an LPR to leave the United States on a temporary basis and not to be deemed to have abandoned their lawful permanent residency status. See, *Chavez v. Ramirez*, 792 F.2d 932, 937 (9th Cir. 1986) and *Khodagholian v. Ashcroft*, 335 F.3d 1003 (9th Cir. 2003). The statute permits an individual to have only a “temporary visit abroad” in order to satisfy the requirements for a “returning resident immigrant.” 8 U.S.C. §§ 1101(a)(27)(A), 1181(b).

⁷⁹ See, *Shyiak v. Bureau of Citizenship & Immigration Servs.*, 579 F. Supp 2d 900 (W.D. Mich. 2008); *Matter of Kane (PDF)*, 15 I&N Dec. 258 (BIA 1975); *Khodagholian v. Ashcroft*, 335 F.3d 1003 (9th Cir. 2003); and *Matter of Huang (PDF)*, 19 I&N Dec. 749 (BIA 1988).

⁸⁰ USCIS Form I-407 Record of Abandonment of Legal Permanent Status.

⁸¹ See, Part 1 Certifications on page 2 of 3 (two separate options – but referencing a past act) of Form I-407.

I knowingly, willingly, and affirmatively declare that I already abandoned my prior lawful permanent resident (LPR) status by leaving the United States intending to make my permanent home abroad and I did not retain my LPR status.

Part 1. Information About You (continued)

Documents Returned and Location of Submission

12.a. Permanent Resident Card Yes No

12.b. If you did not return your Permanent Resident Card, select the reason why and select and complete the certification statement.

Lost Stolen Mutilated Other

12.c. I certify, under penalty of perjury under the laws of the United States of America that I no longer possess my Permanent Resident Card for the reasons stated in this form, which I signed on (mm/dd/yyyy)

I knowingly, willingly, and affirmatively declare that I already abandoned my prior lawful permanent resident (LPR) status by leaving the United States intending to make my permanent home abroad and I did not retain my LPR status. I have since returned to the United States through a Port of Entry by being admitted as a nonimmigrant or by being paroled. I declare that I am submitting this Form I-407 to document that I abandoned my prior LPR status. I have reviewed the form and its instructions, and I have been informed, and I understand, that had I not previously abandoned my LPR status, that I would have a right to seek a hearing before an immigration judge to contest the abandonment of my LPR status. By signing and submitting this form, I knowingly, willingly, and affirmatively waive my rights, if any, to such a hearing.

AND/OR

Consent of Parents Custodial Parent, or Legal

The authors propose clarifications to Treasury Regulation § 301.7701(b)-1, to ensure that these noncitizens can provide a certification they have abandoned their lawful permanent residency status. Accordingly, as a matter of law, the individual will no longer be classified as a “resident alien” for federal income tax purposes with reference to the immigration law, Title 8.⁸² These individuals could still be a “resident” if she meet either the “substantial presence test”⁸³ or the first-year election test.⁸⁴

V. CONGRESS LATER CLARIFIED THAT LPRS MAY NOT BE RESIDENTS BY APPLICATION OF AN INCOME TAX TREATY

The Heroes Earnings Assistance and Relief Tax Act of 2008, added the flush language in the definitional section by explicitly providing that a LPR who is subject to a “tie-breaker” residency provision of an income tax treaty⁸⁵ shall cease to be treated as a LPR if three conditions are satisfied:

“An individual shall cease to be treated as an LPR of the United States if such individual commences to be treated as a resident of a foreign country under the provisions of a tax treaty between the United States and the foreign country, does not waive the benefits of such treaty applicable to residents of the foreign country, and notifies the Secretary of the commencement of such treatment.”⁸⁶

⁸² See, I.R.C. §§ 7701(b)(1)(A)(i).

⁸³ See, I.R.C. §§ 7701(b)(1)(A)(ii).

⁸⁴ See, I.R.C. §§ 7701(b)(1)(A)(iii).

⁸⁵ See, e.g., the United States Model Income Tax Convention of November 15, 2006, Article 4, paragraph 3 and subparagraphs a), b), c) and d).

⁸⁶ See, I.R.C. § 7701(b)(6) and the flush language therein.

The three requirements are (i) an applicable income tax treaty must apply, (ii) the LPR does not waive the benefits of the treaty, and (iii) notifies the IRS of the commencement of such treatment. This language added by Congress in 2008 provides further support for the proposal set forth by the authors in this paper. In other words, Congress expressly anticipated in statutory language that a LPR (even if she has not filed any particular immigration form as a “**Record of Abandonment**”) will not be a resident for federal income tax purposes by application of this more recent statutory rule. Importantly, the Treasury-IRS has not updated the old 1992 treasury regulations to incorporate this flush language of the revised statute. Now would be a good opportunity to update and clarify the regulations accordingly, particularly since millions of LPRs are affected annually as they emigrate out of the U.S.

What makes this flush language most interesting, is that the individual does not necessarily have to abandon her status to reside permanently in the U.S., but rather satisfy the various “tie breaker” rules set forth in the income tax treaty.

The flush language in Section 7701(b)(6) is based upon two underlying assumptions:

- (i) That pursuant to laws of a foreign country, an individual subject to an income tax treaty with the U.S. who is a LPR, may nonetheless be classified as a resident of that treaty country pursuant to that country’s domestic tax residency laws; and
- (ii) That individual who, pursuant to U.S. immigration laws, has [or may have] a valid immigration status as an LPR of the U.S., may nonetheless not be a resident of the U.S. for federal income tax purposes by application of the residence tie-breaker rules of the income tax treaty.

For example, Article 4(3)(a) of the U.S. Model Income Tax Convention of November 15, 2006⁸⁷ provides that:

*“3. Where, by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his status shall be determined as follows:
a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (center of vital interests);”*

Almost identical provisions are included in most all other income tax treaties entered into by the U.S.⁸⁸

⁸⁷ Available at <https://www.irs.gov/businesses/international-businesses/united-states-model-tax-treaty-documents>.

⁸⁸ See, e.g., the United States - Mexico Income Tax Convention of January 1, 1994; Article 4, paragraph 2 and subparagraphs a), b), c) and d). The closer connection test in paragraph a) is one “tie breaker”

Importantly, Congress has expressly identified its intention not to supersede the provisions of income tax treaties in this case with respect to the foreign country pursuant to that country’s domestic tax laws:

“The definition of resident alien contained in the bill could conflict with existing treaty obligations of the United States. That is, the definition in the bill could cause an alien to be a U.S. resident, while “tie-breaker” rules in an income tax treaty could indicate that the alien is a resident of the treaty partner (see, e.g., Article 4 of the U.S. Model Income Tax Treaty, and Article 4(2) of the U.S.-United Kingdom Income Tax Treaty). The committee does not intend to override treaties on this point; therefore, in such a case, the treaty definition will prevail, and such an alien will not be taxable as a resident of the United States.”⁸⁹

Logically, the application of the residence “tie-breaker” rules of an income tax treaty is conditioned upon an individual having “... lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the [U.S.] immigration laws . . .”).⁹⁰ If an individual has, as a matter of law, abandoned her immigration status such individual cannot meet the first prong of the statutory requirement with respect to Title 8, the immigration laws.⁹¹

VI. CONSTITUTIONAL VALIDITY OF TAXING NONRESIDENT ALIENS WHO, IN THE PAST, HELD THE IMMIGRATION STATUS OF LPRS?

A. Constitutional Basis of U.S. Citizenship-Based Taxation

The constitutional basis for citizenship-based taxation was established in 1924 by the Supreme Court in *Cook v. Tait*.⁹²

In *Cook v. Tait*,⁹³ the taxpayer was a U.S. citizen domiciled permanently in Mexico City (married to a Mexican national); the taxpayer owned property in Mexico and all of his income sources were also from Mexico. The U.S. citizen taxpayer argued that Congress lacked power to tax his Mexican source income because at the time he was domiciled in

test, but there are additional “tie breaker tests” typically found in the following three paragraphs, as is the case of the United States - Mexico Income Tax Convention:

b) if the State in which he has his center of vital interests cannot be determined, or if he does not have a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode;

c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national;

d) in any other case, the competent authorities of the Contracting States shall settle the question by mutual agreement.

⁸⁹ H.R. Rep. No. 98-432 (1984).

⁹⁰ See, I.R.C. § 7701(b)(6)(A).

⁹¹ *Id.*

⁹² 265 U.S. 47 (1924).

⁹³ *Id.*

Mexico City, and the income subject to tax was from sources without the U.S. The Supreme Court ruled against the taxpayer and held that:

“... the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, nor was not and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen.”⁹⁴

In other words, the Supreme Court justified Congress’s power to tax U.S. citizens residing overseas on the fact that the U.S. government affords certain rights and protections to its citizens and their property, wherever they may be found. The question of citizenship-based taxation has been broadly discussed by commentators, with some degree of controversy regarding its validity and convenience.⁹⁵

Here, we are not considering citizenship as a basis of taxation, but rather a different statutory rule tied to Title 8, the immigration law.

The U.S. Tax Court has considered one case of a noncitizen who argued he was not a resident, although taking various steps to actively maintain his LPR status.⁹⁶

There is an important distinction, of course, between U.S. citizens who reside overseas and noncitizens who reside overseas. The former enjoys the benefits of citizenship and the rights and obligations of voting in a democracy and the protection, of his or her assets and physical person wherever his or her assets might reside.⁹⁷ A noncitizen, however, who resides outside the United States and who has no legal right to reside in the United States, surely has no unique citizenship type rights or protections afforded by the federal government (neither for his assets nor his person whenever located outside the United States).⁹⁸

⁹⁴ *Id.*, 265 US 47, 56 (1924).

⁹⁵ See, Michael S. Kirsch, *Revisiting the tax treatment of Citizens abroad: reconciling principle and practice*; Florida Tax Review, Volume 16 (2014). See also, Allison Christians, *A Global Perspective on Citizenship-Based Taxation*, Michigan Journal of International Law, Volume 38 (2017). See also, Reuven S. Avi-Yonah, *The Case Against Taxing U.S. Citizens*, University of Michigan Law School, Public Law and Legal Theory Working Paper Series Working Paper No. 190 March 2010. See also, Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. Rev. 443 (2007).

⁹⁶ See, *Topsnik v. Commissioner*, 143 T.C. 240 (2014), where the Court addressed and upheld the 1992 Treasury Regulations discussed above. The analysis of the Court was highly factual, and discussed key facts including highlighting the relatively few days the taxpayer spent in Germany while arguing he was a resident of Germany. He was physically present in Germany for a total of 98 days in 2005, 92 days in 2006, 44 days in 2007, 40 days in 2008, and 14 days in 2009. Also, he was registered in Germany as a non-resident for tax purposes.

⁹⁷ See, Andrew Kent, *Citizenship and Protection*, 82 Fordham L. Rev. 2115 (2014).

⁹⁸ See *id.* at 2116, “Most political rights have always been reserved for citizens. [citing to Peter J. Spiro, *The (Dwindling) Rights and Obligations of Citizenship*, 21 WM. & MARY BILL R TS. J. 899 (2013)] **And in the immigration context, of course, citizenship can be crucial.**” [*emphasis added*] have always been reserved for citizens. 3 And in the immigration context, of course, citizenship can be crucial.” 2115 (2014).

B. The U.S. Taxation of LPRs in Light of *Cook v. Tait*

The basis for worldwide income taxation of LPRs and other noncitizens who also live in the U.S. can be similarly found in the fact that, while living in the U.S., these noncitizens are afforded certain constitutional rights and liberties that allow them to live and thrive within the territorial limits of the U.S.⁹⁹

One may conclude, therefore, that worldwide income taxation should cease when a noncitizen previously accorded the privilege to reside permanently in the U.S. (including an individual who does not meet the substantial presence test) leaves the U.S. and establishes her residence in a foreign jurisdiction. Such a noncitizen by operation of law no longer enjoys the rights and protections of the U.S. government, not even the right to enter into the U.S. at will.¹⁰⁰

Worldwide income taxation of a noncitizen, who at some point in the past had the immigration status of lawful permanent status, does not seem to be supported by the constitutional precedent set forth by the Supreme Court in *Cook v. Tate* because such noncitizens do not enjoy the same rights and protections that the U.S. government grants to its citizens.¹⁰¹

VII. ADDITIONAL IMMIGRATION LAW CONSIDERATIONS

U.S. citizens have the right to enter and leave the U.S. at will and may generally establish their residence overseas without limitation.¹⁰² That is not the case for LPRs.

⁹⁹ See *id.* at 2118, “A significant amount of subsequent U.S. Supreme Court doctrine establishes the constitutional rights of noncitizens present in the United States.” [citing e.g., *Plyler v. Doe*, 457 U.S. 202, 211–12 (1982) (illegal aliens under the Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (resident aliens under the Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (resident aliens under the First Amendment); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931) (foreign corporation with property in the United States under the Takings Clause); *Truax v. Raich*, 239 U.S. 33, 39 (1915) (resident aliens under the Equal Protection Clause); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (resident aliens under the Fifth and Sixth Amendments); *Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1886) (resident aliens under the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

¹⁰⁰ See *id.* at 2118–2119, “Immigration case law also shows the importance of territorial location. Before the twenty-first century, noncitizens outside the sovereign territory of the United States were held to lack any constitutional rights.”

¹⁰¹ See *id.* at 2115, “Chief Justice Earl Warren famously described citizenship as “man’s basic right” because “it is nothing less than the right to have rights.” [citing, *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting)].

¹⁰² There are certain limitations to select countries. For instance, the U.S. Department of State prohibits travel with a U.S. passport to North Korea. See, Travel Advisory April 18, 2022: North Korea – Level 4: Do Not Travel - <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/KoreaDemocraticPeoplesRepublicof.html> - “You cannot use a U.S. passport to travel to, in, or through North Korea without a special validation from the Department of State”. Also, Cuba is another country with limitations on travel for U.S. citizens. See, Congressional Research Service. Cuba: U.S. Restrictions on Travel and Remittances, Prepared by Mark P. Sullivan, Washington: Library of Congress, May 11, 2021.

As previously explained, pursuant to immigration laws and regulations, a LPR is required to reside within the territorial limits of the U.S. to maintain her status as LPR, and, therefore, may not move her permanent residence outside of the U.S. An individual who, in the past obtained the immigration status of LPR, but later moved to a foreign country and subsequently entered the U.S. for limited periods, for recreational or business purposes only, and who is clearly not domiciled in the U.S. anymore, is deemed to have abandoned her status as a matter of law.¹⁰³ An individual in those circumstances may, at any time, be denied entry to the U.S. and may be subjected to deportation proceedings.

Unlike U.S. citizens, upon re-entry to the U.S., LPRs are required to present a valid passport and an unexpired permanent residency card (*i.e.*, a “green card”).¹⁰⁴

Furthermore, if such an individual remains outside the U.S. for more than one year, he would be presumed to have abandoned his permanent residence and unable to freely reenter the US. If he refused to “voluntarily” sign a form I-407 and acknowledge abandonment of permanent resident status he would likely be placed in removal proceedings before an immigration judge so that the court could issue an order deeming his resident status terminated.¹⁰⁵ The only available means to protect against this presumed abandonment of resident status would be for the non-citizen to apply for a Reentry Permit, a cumbersome process which provides at best limited protection against loss of residence and which many immigration officers are completely unaware of.¹⁰⁶

The Foreign Affairs Manual and Handbook (“FAM”) of the U.S. Department of State¹⁰⁷ explains that:

*“An individual may have lost LPR status by voluntarily abandoning LPR status. The abandonment may be recorded via Form I-407, Record of Abandonment of Lawful Permanent Resident Status, or other document recording the abandonment, as described further below, but in many cases the LPR status will be considered abandoned even when no form has been filed.”*¹⁰⁸

Failure to obtain a re-entry permit results, as a matter of law, in the deemed loss of permanent residency status if a person’s absence from the U.S. is greater than one year, without considering sporadic or brief periods back in the U.S.¹⁰⁹

¹⁰³ *Mahmoud v. Barr*, 981 F.3d 122, 126 (1st Cir. 2020): “Retention or Abandonment of LPR Status: In most circumstances, an LPR is permitted to reenter the United States after traveling abroad, so long as he is “returning to an unrelinquished lawful permanent residence after a temporary visit abroad.” *Katebi*, 396 F.3d at 466 (quoting *Moin v. Ashcroft*, 335 F.3d 415, 418 (5th Cir. 2003)). If, however, the trip in question was not a “temporary visit abroad,” then the LPR will be deemed to have abandoned his permanent resident status”

¹⁰⁴ *See*, 8 CFR § 211.1.

¹⁰⁵ *See, Karimijanaki v. Holder*, 579 F.3d 710 (6th Cir. 2009) regarding the procedures associated with the Board of Immigration Appeals finding of abandonment.

¹⁰⁶ *Id* at footnote 104.

¹⁰⁷ Available at <https://fam.state.gov/>

¹⁰⁸ *See*, 9 FAM 202.2-8.

¹⁰⁹ *See*, 9 FAM 502.7-2.

To summarize, an individual who has the immigration status of lawful permanent resident is required to maintain his residence in the U.S., and his or her absences from the U.S. must be temporary, not reaching or exceeding six months.

Upon abandonment of the lawful permanent resident immigration status, an individual is no longer afforded any of the rights and protections that the U.S. government grants to its citizens. Worldwide income taxation of an individual who has abandoned his immigration status as a lawful permanent resident, therefore, seems to be inconsistent with the statute and the *Cook v. Tate* Supreme Court decision. How can Congress then have power to impose tax on the worldwide income of an individual who is not a citizen, or otherwise have a valid immigration status to return to the U.S.?

VIII. THE PROBLEM WITH TREAS. REG. § 301.7701(b)-1(b)

Treasury Regulation § 301.7701(b)-1(b) follows to an extent the rules and procedures provided for in immigration laws upon which an individual may lose his status as a lawful permanent resident.

The Regulation at issue assumes that the loss of status as a lawful permanent resident can only occur expressly, upon an individual's filing of certain forms with the immigration authorities, or upon termination of an administrative or judicial procedure initiated by the immigration authorities.

The same Regulation, however, fails to consider that the lawful permanent resident status is also considered abandoned, as a matter of law, even when no form has been filed or no procedure has yet been initiated by the immigration authorities.

An individual in that circumstance, no longer enjoys any of the rights and protections that the U.S. government grants to its U.S. citizens and may not enter the U.S. at-will. Equity, therefore, demands that former lawful permanent residents who have abandoned their lawful permanent resident status as a matter of law, by emigrating and living outside the United States without giving notice to the U.S. immigration authorities, be also classified as a "nonresident alien" for federal income tax purposes.

IX. PROPOSED ADDITIONS TO TREAS. REG. § 301.7701(b)-1(b).

As currently written, Treasury Regulation § 301.7701(b)-1(b) is problematic as it ignores changes in immigration law since the tax regulations were first adopted in 1992. It also does not address the flush language in the statutory definition added in 2008 applicable to individuals who reside in a country with an income tax treaty with the United States.

The authors propose that the following language be added to Treasury Regulation § 301.7701(b)-1(b):

“b) Lawful permanent resident

(1) Lawful permanent residency test. A noncitizen is a United States person with respect to a calendar year if the individual is a lawful permanent resident at any time during the calendar year. A lawful permanent resident is an individual who has been lawfully granted the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws. Resident status is deemed to continue unless it is rescinded, administratively or judicially determined to have been abandoned, or if the individual notifies in writing to the Treasury Department that they have abandoned their permanent residency and files nonresident tax returns (including Schedule OI reflecting the number of days of physical presence in the United States during the most recent three years) for the year of abandonment.

[...]

(4) Tax treaty override. An individual shall cease to be treated as a lawful permanent resident of the United States if: (i) such individual commences to be treated as a resident of a foreign country under the provisions of a tax treaty between the United States and the foreign country, (ii) does not waive the benefits of such treaty applicable to residents of the foreign country, and (iii) notifies the Secretary of the commencement of such treatment by filing a non-resident income tax return along with IRS Form 8833, Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b), reflecting the taxpayer as a dual-resident taxpayer who is disclosing a treaty-based return position as required by Treasury Regulations Section 301.7701(b)-7. The individual's tax residency shall change by application of this rule for the beginning of the fiscal calendar year for the tax year in which the nonresident tax return has filed here under.

Example 1. An individual was granted lawful permanent residency in the year 20X1 and resided principally in the United States for three calendar years (20X1, 20X2, 20X3) when she filed United States resident income tax returns (IRS Form 1040). As a Mexican national and former Mexican tax resident, she returned back to live principally in Mexico where she changed her domicile to Mexico City in the year 20X4 and has resided there for more than 280 days commencing in 20X4. Taxpayer filed Mexican resident tax returns for 20X4, did not waive the benefits of the U.S.-Mexico income tax treaty, and notified the Internal Revenue Service by filing Form 8833 as set forth above for the year 20X4. The individual ceased to be a lawful permanent resident as defined in the tax law (flush language of section 7701(b)(6)) as of January 1, 20X4.

These proposed additions to Treasury Regulation § 301.7701(b)-1(b), grant certainty to an individual who has abandoned her lawful permanent resident status and to the Internal Revenue Service in administering internal revenue laws regarding an individual's country of residence. Of particular importance is the requirement that, at the time of filing a nonresident tax return, the noncitizen recognizes having abandoned her lawful permanent resident status "as a matter of law" and must complete Schedule OI disclosing the number of days of physical residence inside and outside of the United States.

This proposal provides certainty that upon abandonment of his or her lawful permanent resident status an individual is no longer considered as a U.S. “resident alien” for income tax purposes under Title 26 with reference to Title 8. These individuals could still satisfy a tax residency test if they meet either the “substantial presence test”¹¹⁰ or the first-year election test.¹¹¹

¹¹⁰ *See*, I.R.C. § 7701(b)(1)(A)(ii).

¹¹¹ *See*, I.R.C. § 7701(b)(1)(A)(iii).