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# Who is a U.S. Person? Disparities between U.S. tax and immigration law

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This article is intended to provide an overview of the intersection of U.S. tax and immigration law in defining who is a U.S. person, and some of the pitfalls that result from the differing and often competing definitions under the two codes of law.

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## I. The increased importance of defining a U.S. Person, for tax law purposes

The question of who is a U.S. person has always been relevant for tax purposes because it determines who is subject to (a) U.S. income, gift and estate tax, (b) filing Foreign Bank Account Reports (FBARs), and (c) the "exit tax" under what is now Section 877A of the Internal Revenue Code (the "Code" or "I.R.C.").[1] The inquiry has become increasingly relevant, however, in the context of the Foreign Account Tax Compliance Act ("FATCA"),[2] as foreign banks and other financial institutions must make determinations as to the identity of the beneficial owners of accounts.

Under FATCA, foreign banks, brokerage firms, investment firms, and other "foreign financial institutions" must agree to report certain information on their U.S. account holders or else face withholding on certain payments made from U.S. sources beginning in July 2014. In many cases, the institutions' own governments (through intergovernmental agreements signed with the United States that implement FATCA) may require the determination in order to report on U.S. accounts.

In addition, the Department of Justice ("DOJ") recently announced a new program under which Swiss banks that are not currently the subject of a DOJ investigation may request a "Non-Prosecution Agreement" or "Non-Target Letter." In connection with this new program, the Swiss Financial Market Supervisory Authority intends to encourage all Swiss banks to send a letter to all U.S. individual and entity holders of accounts, further begging the question of who is a U.S. person for these purposes.

As an individual's immigration status may – but may not always – drive the determination of whether he or she is a U.S. person for tax purposes, this article summarises the various classifications comprising a "U.S. person" under U.S. immigration and tax law. It also provides several examples to illustrate some of the challenges posed by the disparate treatment of citizenship and residency under these different codes of law.

### A. United States citizenship and nationality

#### 1. U.S. person, for federal income tax purposes

In the case of an individual, the Internal Revenue Code defines a "United States person" as a citizen or resident of the United States.[3] It should be noted from the outset that having a valid U.S. passport may prompt further inquiry, but does not, by itself, determine a person's status as U.S. or foreign. Treasury Regulations Section 1.1-1(c) defines a U.S. citizen as every person born or naturalised in the United States and subject to its jurisdiction, and cites rules found in the Immigration and Nationality Act ("INA") for other rules governing the acquisition of citizenship.[4] Thus, the tax law defers to the INA for purposes of determin-


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ing who is a citizen. To that end, a well-regarded treatise notes that "it is well established that citizenship for taxation is congruent with citizenship under the nationality laws."[5]

### 2. U.S. citizen, for immigration law purposes

The tax law defers to the Immigration and Nationality Act on how to define U.S. citizenship. As a threshold matter, there is a technical distinction between a *citizen* of the U.S. and a *national* of the U.S. All citizens of the U.S. are nationals, but not all nationals are citizens. This distinction is important in not only recognising which persons are not U.S. citizens, but also in determining whether a U.S. national is considered, for tax purposes, a resident of the United States, and therefore a U.S. person. A U.S. national is a non-citizen who owes permanent allegiance to the U.S.[6] U.S. nationals include (1) a person born in an outlying possession of the U.S. on or after the date of its formal acquisition, and (2) a person born outside of the U.S., and its outlying possessions, to two U.S. national parents (non-citizen) who have had a residence in the U.S., or one of its outlying possessions, prior to the person's birth. These classifications are relevant to determining residence for tax purposes, because some U.S. nationals are born, and may continue to reside, within the United States and its possessions, while other U.S. nationals do not reside in the United States. Moreover, there are particular rules for young children of unknown parentage or mixed parentage,[7] but these rules are outside the scope of this discussion.

U.S. citizenship may be attained in one of three ways; citizenship at birth, derivative citizenship from a U.S. parent after birth, or naturalisation. U.S. citizenship at birth may be acquired for individuals born in the United States and abroad. Citizenship may be derived by the naturalisation of parents, or by a combination of factors, such as U.S. citizenship of one parent and acquisition of legal permanent residence by the child. Finally, legal permanent residents of the United States may apply to become U.S. citizens by meeting all of the requirements of the naturalisation process.

The rules governing the acquisition of citizenship at birth have changed numerous times in the past one hundred years, and determination of citizenship depends on the applicable law at the time of the individual's birth. A detailed recounting of the changes in law is beyond the scope of this article. Currently, U.S. citizenship is acquired automatically *at birth* for[8]:

- a person born in the U.S., and subject to its jurisdiction;
- a person born in the U.S. to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe, provided that the granting of citizenship shall not affect the right of such person to tribal or other property;
- a person born outside of the U.S. and its outlying possessions of parents both of whom are citizens of the U.S. and one of whom has had *a residence* in the U.S. or one of its outlying possessions, prior to the birth of such person;
- a person born outside of the U.S. and its outlying possessions of parents one of whom is a citizen of the U.S. who has been physically present in the U.S. or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the U.S.;
- a person born in an outlying possession of the U.S. of parents one of whom is a citizen of the U.S. who has been physically present in the U.S. or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;
- a person of unknown parentage found in the U.S. while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States; and
- A person born in Puerto Rico after January 13, 1941, and subject to the jurisdiction of the U.S.

In addition to these rules, there are also special programs that have historically been in place for persons born in the Canal Zone or Republic of Panama[9], the Virgin Islands[10], or Guam,[11] which are beyond the scope of this discussion.

In some instances, an individual may be born in the United States, but is not a U.S. citizen. For example, sons and daughters of diplomats do not acquire citizenship if born in the U.S. because they are not "subject to the jurisdiction of the United States" under the Fourteenth Amendment.[12] Diplomats are ambassadors, public ministers, career officials, and employees accredited by a foreign government and recognised by the United States, who are in the United States on official business.

Derivative citizenship vests automatically upon the occurrence of certain relevant conditions or factors. The details of these conditions are beyond the scope of this discussion.

Finally, naturalisation is the process by which legal permanent residents attain U.S. citizenship. Bear in mind that U.S. citizenship is a discretionary *privilege* granted by Congress. The following is a partial list of naturalisation requirements pertinent to this discussion:[13]

- lawful admission as a legal permanent resident of the United States;
- continuous residence, not to be confused with physical presence, in the United States as a legal permanent resident for at least five years immediately preceding the filing of the petition for naturalisation (three years for spouses of United States citizens);
- physical presence within the United States as a legal permanent resident for an aggregate total of at least one half of the period of residence; and
- continuous residence in the United States from the date of filing the petition for naturalisation until actual admission to citizenship.

The continuous residence and physical presence requirements of naturalisation are of particular interest and importance, for both immigration and tax purposes. It is important to note that residence does not signify the same concept under tax and immigration laws, and is also calculated differently for tax and immigration purposes. Typically, problems with continuous residence and physical presence arise when the legal permanent resident applicant has had a lengthy absence, or multiple absences, from the United States. The particulars regarding fulfilling continuous residence and physical presence, for immigration purposes, are beyond the scope of this discussion.

## B. Tax resident and legal permanent residence

### 1. Resident, for federal income tax law purposes

The harmony between tax law and immigration law is less evident when it comes to defining a resident. Code Section 7701(b)(1) defines a resident individual as any lawful permanent resident of the United States (the so-called "green card test") or any alien individual who satisfies the "substantial presence" test.[14] An individual's resident status under the first prong (the green card test) is determined exclusively by immigration status; the individual's time spent in the United States is immaterial. As further described in the regulations, "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."[15]

Resident status is deemed to continue unless it is rescinded or administratively or judicially determined to have been abandoned.[16] Importantly, for income tax purposes, a lawful permanent resident cannot unilaterally abandon his or her resident status without some form of administrative or judicial intervention." In this vein, it is important to note that the expiration of a green card is *not by itself* a form of administrative or judicial intervention.[17]

An individual meets the substantial presence test with respect to any calendar year if that individual was present in the United States on at least 31 days during the calendar year, and the sum of the number of days on which that individual was present in the United States during the current year and the two preceding calendar years equals or exceeds 183 days, using a multiplier formula, where days from the current year have a multiplier of 1, days from the first preceding taxable year have a multiplier of 1/3, and days from the second preceding calendar year have a multiplier of 1/6.[18] Generally, this test is simplified as the "183 day rule." Under this formula, the greatest number of days that can be spent in the United States in consecutive years without triggering resident status is 121.

Thus, a foreign individual who is present in the United States for 183 days or more in a calendar year is a U.S. person for U.S. federal income tax purposes. Generally, if the 183-day threshold is met, the individual is a resident for the entire year. However, in the first and last year of U.S. residence, there are special rules. In the first year, the individual's residence does not begin until the first date when the individual was actually present in the United States.[19] For the last year of residency, an alien individual is not treated as a resident for any portion of a calendar year if that portion of the year is after the last day on which the individual was present in the United States, the individual had a closer connection to a foreign country than to the United States during that portion of the year, and the individual is not a resident of the United States at any time during the following calendar year.[20]

There are some instances, based on the multiplier formula, where an individual can spend less than 183 days in the United States and still be a resident under the substantial presence test due to high day counts in prior years. If that individual can establish he or she has a "tax home" in a foreign country and a "closer connection" to that foreign country, then the individual will not be considered a resident for that year.[21] In addition, an alien may qualify as a tax resident of a foreign country under the "tie-breaker" rules of an income tax treaty between that country and the United States. There are notable exceptions from the general tax residency rules for certain classes of individuals, such as students, teachers, and those suffering from medical disabilities.[22]

Complicated rules govern the tax status of a resident alien who splits his time between the United States and another country, remains in the U.S. only briefly following a longer period of residence, departs the United States to the possible prejudice of the IRS,[23] or interrupts what would otherwise be long-term U.S. residence. We also note that the rules allow for dual status for individuals in any given year – that is, an individual may be a nonresident for part of the year, and a resident for the remainder. Such rules are beyond the scope of this discussion.[24]

> "A legal permanent resident of the United States must be able to show that he has the intention to live and reside permanently in the United States"

### 2. Legal permanent resident, for immigration law purposes

A legal permanent resident is a foreign national who has been granted admission[25] to the U.S. based on his or her eligibility for, and the immediate availability of, an immigrant visa.[26] Legal permanent residence status is evidenced by the Permanent Resident Card, informally referred to as a "green card." Status as a legal permanent resident differs from that of nonimmigrant status, such as an H-1B or L visa holder, because it allows an individual to live in the United States permanently, rather than on a more temporary or employment-related status.

A legal permanent resident bears several responsibilities and duties in maintaining status and if desired, subsequently establishing eligibility for U.S. citizenship via the naturalisation process. The issue of maintaining legal permanent residence typically arises when a permanent resident seeks readmission to the United States after a visit abroad or when he or she enters into a particular tax status or situation.

Under tax law's green card test, legal permanent residents are easily classified as U.S. persons with evidence of their status, usually the Permanent Resident Card itself. However, legal permanent residence status can be lost or revoked by the United States Citizenship

and Immigration Service ("USCIS"), and often due to problems with the legal permanent resident's residence patterns in the United States. These residence patterns are important for both tax and immigration law purposes; too little residence in the United States, perhaps in a mistaken attempt avoid tax liabilities, could jeopardise a legal permanent resident's status and eligibility for naturalisation.

One of the many factors affecting maintenance of legal permanent residence status is the individual's manifested intent with respect to this status. A legal permanent resident of the United States must be able to show that he or she has the intention to live and reside permanently in the United States, despite the need or desire for journeys outside of U.S. borders. When reentering the U.S. after a trip abroad, it must be shown to border immigration officials[27] that the trip abroad was temporary and that the individual is returning to an unrelinquished permanent residence in the U.S. This intent requirement is often a source of tension between a legal permanent resident's desire to maintain status while also avoiding certain undesired tax liabilities.

Immigration agencies employ three main considerations in evaluating the intent of a legal permanent resident with respect to his or her travels:

- The purpose of the individual's departure from the U.S. – suitable reasons for a trip abroad may include an employment opportunity, education or professional training, or employment abroad, when assigned by a U.S. employer.
- The existence of a fixed termination date for the visit abroad – USCIS does not require that an individual necessarily have an exact date of return, as long as the individual's intent remains that of a lawful permanent resident.
- The individual's intent, as demonstrated by objective factors, to return to the U.S. as a place of permanent employment or as an actual home. This includes filing status on U.S. tax returns or other IRS documents.

A legal permanent resident's subjective intent must be discernible from objective manifestations of conduct. One important factor is the continued payment of United States taxes as a tax resident for each year in which the individual claims lawful permanent resident status. When a legal permanent resident remains out of the United States for a substantial period of time and does not file income tax returns, there are a number of government agencies that may choose to intervene and revoke the individual's legal permanent resident status.

### C. Loss of U.S. citizenship or legal permanent residence

#### 1. Expatriation, for U.S. tax purposes

In general, the loss of citizenship or permanent resident status in the case of certain individuals will be considered expatriation for tax purposes that can trigger application of an exit tax under I.R.C. Section 877A. One aspect of tax expatriation that is little-known to many U.S. persons living abroad is that formal steps must be taken to expatriate for tax purposes – as opposed to for immigration purposes only. In order to formally expatriate for tax purposes, a "long-term resident" or citizen must abide by relatively newly-issued rules governing tax expatriations, which apply to individuals who cease to be long-term permanent residents or relinquish their citizenship on or after June 17, 2008.[28] Thus, even if an individual takes steps to renounce his citizenship for immigration purposes, for example, without the corresponding tax steps, that individual would still be responsible for filing tax returns as a U.S. person.[29]

In the case of a citizen, he or she is treated as relinquishing citizenship on the earliest of four dates: (1) the date the individual renounces his or her nationality before a diplomatic or consular officer of the United States, provided the renunciation is subsequently approved by the issuance to the individual of a certificate of loss of nationality by the State Department; (2) the date the individual furnishes to the State Department a signed statement of voluntary relinquishment of U.S. nationality confirming the performance of an act of expatriation under the INA; (3) the date the State Department issues a certificate of loss of nationality to the individual; or (4) the date a court of the United States cancels a naturalised citizen's certificate of naturalisation.[30] Note that (3) and (4) above would appear to be incongruent with the concept of the *individual* relinquishing his or her citizenship – being as though that individual's citizenship is effectively stripped away by the government – but note that the government can only do so if the individual performed some voluntary act, described in the immigration section on loss of citizenship, below, which can be interpreted to be the affirmative relinquishment. In short, "the government took my citizenship away" does not appear to be a very convincing argument to avoid application of the exit tax underI.R.C. § 877A.

A long-term resident ceases to be a lawful permanent resident if (A) the individual's status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with immigration laws has been revoked or has been administratively or judicially determined to have been abandoned, or (B) the individual (1) 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, (2) does not waive the benefits of the treaty applicable to residents of the foreign country, and (3) notifies the Secretary of the Treasury of such treatment on Forms 8833 and 8854.[31] Note that 877A and Form 8854 do not apply to a legal permanent resident who is *not* a so-called "long-term resident," which is defined below.

Those considering expatriation should be aware that Code Section 877A imposes a mark-to-market regime on certain expatriates (called "covered expatriates"), meaning their assets are treated as sold on the day before the expatriation date at their fair market values. Thus, assuming the individual otherwise falls within the mark-to-market regime of Code Section 877A, he or she is liable for the gain on the deemed asset sale, minus an exclusion amount of about $600,000. Special rules apply to tax deferred compensation of a covered expatriate and certain trust distributions post-expatriation.[32] In addition, special rules apply to certain expatriates for estate and gift tax purposes. These gift and estate tax rules are particularly harsh, and impose a tax on the recipient of a gift or bequest by a covered expatriate, without use of the unified credit.[33]

An "expatriate" for purposes of Code Section 877A is any U.S. citizen who relinquishes his or her citizen-

ship and any long-term resident of the United States who ceases to be a lawful permanent resident of the United States, within the meaning of Code Section 7701(b)(6).[34] A "long-term resident" is an individual who is a lawful permanent resident of the United States in at least 8 taxable years during the period of 15 taxable years ending with the taxable year that includes the expatriation date.[35] The mark-to-market regime applies only to a "covered expatriate," who is an expatriate who: (1) has an average annual net income tax liability for the five preceding taxable years ending before the expatriation date that exceeds a specific amount (currently exceeding $150,000); (2) has a net worth of $2 million or more; or (3) fails to certify, under penalties of perjury, compliance with all U.S. federal tax obligations for the five taxable years preceding the taxable year that includes the expatriation date.[36] This certification is made on Form 8854, and must be filed by the due date of the taxpayer's federal income tax return for the taxable year that includes the day before the expatriation date.

There are some exceptions to being a covered expatriate in the case of certain citizens. One exception is if an individual became a citizen of the United States at birth, as well as a citizen of another country, and has been a resident of the United States for ten years or less during the 15-taxable year period ending with the expatriation year. Another exception applies to an individual who relinquishes his or her U.S. citizenship by the age of 18.5, and that individual has been a resident of the United States for ten years or less before the date of relinquishment. Practically speaking, this second exception is difficult to accomplish, since it gives the citizen all of six months to relinquish.

There is a separate requirement for tax clearance for departing aliens to obtain what is generally referred to as a "sailing permit" or "tax clearance certificate" from the IRS prior to departing the United States.[37] Although in theory required, such permits are rarely obtained, and require quite a bit of effort on the alien's part: the rules require that aliens go before the IRS prior to departure and produce evidence of their expected taxable income for the year, file a form (IRS Form 1040-C), and pay any as-yet unpaid tax for the year of departure. The Form 1040-C does not replace a final-year income tax return for a long-term resident who expatriates; it is a mechanism for the IRS to collect tax prior to the departure of the individual. It should be noted that filing of the 1040-C is not limited to "long-term residents," whereas the expatriation rules (and the filing of Form 8854), discussed above, apply only to citizens and long-term residents.

**2. Loss or renunciation of U.S. citizenship and legal permanent residence, for immigration purposes**

*(a). Citizenship*

A United States citizen may lose citizenship voluntarily through an act of expatriation, or be denaturalised by revocation of citizenship by the U.S. government. Any U.S. citizen may surrender his or her citizenship by voluntarily performing any of the following with the intention of relinquishing citizenship:[38]

- taking an oath of allegiance to a foreign state, or naturalising in a foreign state, after the age of 18;
- entering or serving in the armed forces of a foreign state engaged in hostilities against the U.S. or serving in any foreign army as a commissioned or non-commissioned officer;
- accepting, serving in or performing duties of any office, post or employment of a foreign government;
- making a formal renunciation of U.S. citizenship before a diplomatic or consular officer on a U.S. Department of State form or making a formal written renunciation whenever the U.S. is in a state of war; or
- committing an act of treason against, or attempting by force to overthrow, or bearing arms against the U.S.

The burden of proof in showing abandonment of U.S. citizenship lies with the United States, which must prove by a preponderance of the evidence that an individual has lost citizenship by *voluntarily* engaging in any of the actions listed above *with* the intent to abandon citizenship. In order to prove intention to relinquish citizenship, the U.S. government will evaluate an individual's conduct under a totality of the circumstances.

> "[I]ndividuals concerned about maintaining their legal permanent residence should consult immigration counsel."

In addition to acts of expatriation, there are several grounds for denaturalisation that may result in the loss of citizenship, including membership in subversive, communist, or anarchist organisations,[39] concealment of material evidence or willful misrepresentation in connection with a naturalisation application,[40] illegal procurement of naturalisation,[41] subversive activities,[42] or failure to comply with military service conditions.[43] These acts are outside the scope of this discussion.

*(b). Legal permanent residence*

A legal permanent resident may lose status in a number of ways, including, but not limited to, status violations, public charge and other economic reasons, security and political grounds, fraud, unlawful voting, and criminal grounds. These are also grounds for removal and, when triggered, result in immigration proceedings to remove the legal permanent resident from the United States. There are a limited number of ways an individual may avoid removal once placed in proceedings, so, in order to maintain lawful status, it is

important to be aware of the myriad grounds of removal as soon as legal permanent residence status is obtained.

Generally speaking, a legal permanent resident may lose lawful status if:

- he or she was inadmissible[44] at time of entry to the U.S. or at time of filing of Adjustment of Status;
- he or she is currently present in the U.S. in violation of any of the laws of the Immigration and Nationality Act;
- he or she abandons legal permanent resident status;
- he or she aided and/or abetted a person to enter or try to enter the U.S. in violation of law;
- he or she has committed marriage fraud;
- he or she is a public charge;
- he or she has engaged in criminal and/or terrorist activity;
- he or she has falsified documents or made a false claim to U.S. citizenship;
- he or she has voted in violation of any federal, state, or local constitutional provision;
- he or she has committed a crime of moral turpitude, as determined by immigration law;
- he or she has committed an aggravated felony, as defined by immigration law;
- he or she has committed any drug-related offenses;
- he or she has committed any firearms violations; or
- he or she has been convicted of domestic violence, child abuse, and other miscellaneous crimes.

Please note that this list is not exhaustive. Individuals concerned about how their activities may impact their legal permanent resident status should consult immigration counsel to obtain advice about their particular situation. As previously discussed in this article, abandonment of legal permanent resident status may occur through the failure to maintain connections to the United States, such as (i) home ownership or payment of rent, (ii) U.S.-based bank accounts, (iii) frequent visits to the U.S. if temporarily working abroad, (iv) family members in the U.S., (v) business or employment connections in the U.S., or (vi) a driver's license and (vii) pension accounts.

Additionally, USCIS specifically warns that the filing of a nonresident income tax return by a legal permanent resident raises a rebuttable presumption that the person has abandoned his legal permanent residence status.[45] However, ultimately, the U.S. government bears the burden of proving by clear, convincing, and unequivocal evidence that the person has in fact abandoned legal permanent residence status. Once the U.S. government presents clear, convincing, and unequivocal evidence that a nonresident income tax return was filed, the legal permanent resident must then demonstrate that he or she has not abandoned status.[46] This presumption can be overcome by any credible evidence that makes the issue of abandonment a genuine question of fact. Upon evidence supporting intention to retain legal permanent resident status, the U.S. government again bears the burden of proving abandonment, and may not rely on the presumption. Again, the determination of loss of legal permanent residence is fact-specific and complex; as such, individuals concerned about maintaining their legal permanent residence should consult immigration counsel.

Still, even if a legal permanent resident is able to present credible evidence to rebut the presumption of abandonment, he may not wish to do so, because a legal permanent resident is a resident alien for income tax purposes.[47] As discussed above, a legal permanent resident who wishes to file income tax returns as a nonresident must show that his status has been "rescinded or administratively or judicially determined to have been abandoned."[48]

### D. U.S. person, as defined for other federal tax purposes

#### 1. U.S. person for federal estate tax purposes

U.S. estate tax is imposed on any decedent who is a U.S. citizen or resident of the United States.[49] "Resident," however, has a different meaning for estate tax purposes. For estate tax purposes, a resident decedent is a person who, at the time of death, had a domicile in the United States.[50] Two essential elements of domicile for this purpose are actual residence and an intent to remain indefinitely.[51] The residence test for estate tax purposes is thus more subjective than the income tax test, and is determined by the factual evidence and intent of the taxpayer.

#### 2. U.S. person for FBAR purposes

The requirement for individuals to file an FBAR is also based on a "United States person" definition, which, for the most part, mirrors the income tax definition. 31 C.F.R. § 1010.350(b) defines "United States person" as a citizen of the United States or a resident, based on the Section 7701(b) income tax definition. There is one difference: for purposes of defining the "United States," the income tax definition does not include possessions and territories, whereas the FBAR version does.[52]

#### 3. U.S. person for FATCA purposes

FATCA is based on the same U.S. person definition found in the Internal Revenue Code, but one must take a rather circuitous route through the regulations to get there. Under FATCA, participating foreign financial institutions are required to report to the IRS (or their own governments) on "United States accounts."[53] The regulations define a U.S. account as any financial account maintained by a foreign financial institution that is held by one or more "specified U.S. persons" or U.S. owned foreign entities.[54] A "specified U.S. person" is any U.S. person other than over a dozen carve-outs relevant to entities, but not individuals.[55] Finally, a "U.S. person" is defined in Treasury Regulations Section 1.1471-1(b)(132) by means of a cross reference to section 7701(a)(30), which is the same definition described above in the federal income tax section. A "U.S. owned foreign entity" is a foreign entity with one or more "substantial U.S. owners."[56] A "substantial U.S. owner" is a specified U.S. person owning more than 10% of the relevant entity.[57]

### E. Pitfalls: illustrative cases of disparate treatment under the differing schema of law

The scenarios below describe some of the complications that arise from the tensions between immigration and tax law.

### 1. Failure to maintain legal permanent residence status where the Legal Permanent Resident Card appears valid on its face

Suppose a married couple, A and B, acquire legal permanent residence in 2004, through a previously filed employer-sponsored application. Their Legal Permanent Resident Cards, not to be confused with the status itself, expire in 2014. Shortly, after obtaining legal permanent residence status, A loses his or her job. The couple remains in the United States for two years following the grant of their legal permanent residence, but A is unable to find employment during this time. A decides to move back to his or her home country. A finds employment in his or her home country, and visits the United States only once over the next three years. B makes regular visits back and forth between the two countries. While in the home country, the couple maintains bank accounts and investment accounts. At the end of each tax year for the last three years, the couple has filed joint federal income tax returns, but do not report home country-source income on the return.

Although, on its face, A's Legal Permanent Resident Card appears to be valid, A has arguably not been sufficiently physically present in the United States to maintain his or her legal permanent resident status, and thus risks being disallowed entry as a legal permanent resident into the United States on his or her next visit. Moreover, as a parenthetical, a Legal Permanent Resident Card is not a valid entry document if the legal permanent resident remained outside of the United States for more than 1 year.[58]

Because no administrative action has been taken against A, and A has not actively expatriated for federal tax purposes, he or she is still a U.S. person for tax purposes. Therefore, until A's legal permanent residence is formally abandoned, and until A files Form 8854 with the IRS, A is obligated to file a Form 1040 as a legal permanent resident of the United States. In addition, A and B must include *worldwide* income on their joint return – not only U.S.-source income. That A has earned home country income during a time when he or she has jeopardised his or her status as a legal permanent resident has no bearing on his U.S. tax reporting, prior to formal tax expatriation.

### 2. Expired Legal Permanent Resident Card without formal expatriation for tax purposes

Suppose that A's Legal Permanent Resident Card has an expiration date of June 15, 2013. An expired Legal Permanent Resident Card is not a valid entry document to enter the United States. In such an instance, A may need to apply for a special immigrant visa at a U.S. consulate abroad, which would allow A to be admitted to the United States as a legal permanent resident. The special immigrant visa is discretionary. However, absent formal expatriation for tax purposes, A would continue to be considered a U.S. person, and therefore, be obligated to file U.S. tax returns and pay tax on his or her worldwide income.

### 3. Surprise U.S. Taxpayer: parents acquired citizenship for child at birth; child has never been to the U.S. and has never acquired a U.S. passport.

Suppose A, born abroad to one U.S. citizen parent and one alien parent, is now 40 years old and has never lived in the U.S. A only recently discovers that he derived U.S. citizenship from his U.S. citizen parent. A has never applied for a U.S. passport. Because A is technically a U.S. citizen, having never renounced his citizenship, A should have been filing U.S. tax returns. He now faces a U.S. tax compliance problem – should he seek amnesty through an IRS offshore voluntary compliance program? Is there a simple way for him to come into U.S. tax compliance? Unfortunately, the best path for someone in this situation is dependent upon many factors and there is no one solution that will work for any "surprise" U.S. taxpayer. A may be eligible for a relatively streamlined compliance program, but only if he would owe little or no U.S. tax, which, in turn, depends on whether he has U.S. source income and whether he lives in a country with which the United States has a comprehensive income tax treaty. Please note that the Reed Amendment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 provides that any individual, who is a former citizen of the United States, who officially renounces United States citizenship, and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States, is inadmissible.

## Conclusion

This article and the above examples only scratch the surface of complicated scenarios that emerge due to the immigration and tax laws' disparate treatment of defining a U.S. citizen or resident. U.S. persons transacting business and living abroad should expect to receive inquiries into their status that are more detailed than in the past, due to heightened U.S. regulation and other countries' participation in FATCA intergovernmental agreements. Individuals who have reason to believe that they, or a family member, may be a U.S. citizen or legal permanent resident are advised to contact immigration counsel for confirmation of such status. Upon confirmation of such status, the individual is advised to seek tax counsel in connection with the complicated tax compliance issues that are likely to arise.

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**NOTES**

[1] All references to the Code or I.R.C. are references to the Internal Revenue Code of 1986, as amended.

[2] Passed as part of the Hiring Incentives to Restore Employment Act of 2010 (P.L. 111-147).

[3] I.R.C. § 7701(a)(30).

[4] These rules are discussed further, below, in the section entitled "Legal Permanent Resident, for Immigration Purposes."

[5] Isenbergh, Joseph. U.S. Taxation of Foreign Persons and Foreign Income. 4th ed., at ¶ 2.2.

[6] INA § 101(a)(22).

[7] INA § 308(3)-(4).

[8] INA § 301(a)-(h).

[9] INA § 303.

[10] INA § 306.
[11] INA § 307.
[12] *Wong Kim Ark*, 169 U.S. 649, 682 (1898).
[13] Other factors include (1) residence for at least three months within the state in which the petition for naturalisation is filed, (2) ability to read, write, and speak ordinary English, (3) knowledge and understanding of the fundamentals of the history and government of the United States, and (4) good moral character, attachment to the principles of the Constitution, and proper disposition to the good order and happiness of the United States.
[14] Note that this definition does not apply for purposes of estate and gift taxes. This discussion is limited to the income tax definition and application. The estate and gift tax definition is discussed below.
[15] Treasury Regulations Section 301.7701(b)-1(b)(1).
[16] Treas. Reg. Section 301.7701-1(b)(2).
[17] See example [2], *infra*.
[18] *See* I.R.C. § 7701(b)(3).
[19] I.R.C. § 7701(b)(2)(A)(iii).
[20] I.R.C. § 7701(b)(2)(B).
[21] *See* I.R.C. 7701(b)(3)(B). *See also* Isenberg, Joseph. U.S. Taxation of Foreign Persons and Foreign Income. 4th ed. At ¶ 6.16-6.19.
[22] *See, e.g.,* I.R.C. § 7701(b)(3)(D), and (b)(5).
[23] *See* Code Section 6851 and Isenbergh at ¶ 6.34.
[24] For further information, see IRS Publication 519, U.S. Tax Guide for Aliens.
[25] Admission to the U.S., for immigration purposes, is a lawful entry after inspection and authorization by immigration officials. See INA § 101(13)(A).
[26] INA § 245(a)
[27] Specifically, officials from Customs and Border Protection, a division of the Department of Homeland Security.
[28] Note, the rules are different for individuals losing long-term permanent resident status or citizenship prior to June 17, 2008, but we will not discuss those rules here.
[29] *See* IRS Form 8854 instructions.
[30] Code Section 877A(g)(4).
[31] Notice 2009-85, Section 2.
[32] *See* Code Section 877A(d)-(f).
[33] *See* Code Section 2801.
[34] Code Section 877A(g)(2). *See also* Notice 2009-85, 2009-45 I.R.B. 598 (Oct. 15, 2009).
[35] Code Section 877(e)(2).
[36] Code Sections 877A(g)(1) and 877(a)(2). *See also* Notice 2009-85, Section 2.
[37] *See* Code Section 6851.
[38] INA § 349(a), 8 U.S.C. § 1481(a).
[39] INA § 340(c).
[40] INA § 340(a).
[41] INA § 340(e).
[42] INA § 340(a).
[43] INA §§ 328, 329.
[44] "Inadmissibility" is an immigration term of art signifying a formal application for legal entry into the United States. In order to be lawfully admitted into the United States, an applicant must not trigger any of the grounds of inadmissibility, or must be eligible for a waiver of those grounds, at the discretion of the Attorney General.
[45] The Effect of Filing Nonresident Income Tax Returns on an Alien's Status as a Lawful Permanent Resident, HQ 70/11-P, HQ 70/33-P (Office of the General Counsel, May 7, 1996).
[46] 8 C.F.R. § 316.5(c)(2).
[47] 26 U.S.C. § 7701(b)(1)(A)(i)
[48] 26 C.F.R. § 301.7701(b)-1(b)(1).
[49] Code Section 2001(a).
[50] Treas. Reg. § 20.0-1(b).
[51] *Id.*
[52] *See* Treas. Reg. Section 301.7701(b)-1(c)(2)(ii), versus 31 C.F.R. 1010.100(hhh)
[53] Section 1471(b).
[54] Treas. Reg. Section 1.1471-5(a)(2).
[55] Treas. Reg. Section 1.1473-1(c).
[56] Treas. Reg. Section 1.1471-5(c)
[57] Treas. Reg. Section 1.1473-1(b).
[58] Instead, the legal permanent resident should have applied for a Reentry Permit prior to leaving the United States for an extended absence. A Reentry Permit allows a legal permanent resident to apply for admission to the United States upon returning from abroad during the permit's validity, which is up to two years.