Immigration Law

Proposed H-1B Visa Reform: What Should Employers Know?


BIGSTOCK

BY MARK KOESTLER AND TED RUTHIZER

The Senate's Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 (S.744, also called BSEOIMA) is the comprehensive immigration bill recently passed by the Senate by an overwhelming vote of 68 to 32. Aided by a confluence of strong lobbying by business, family, religious and other groups, the bill enjoyed widespread bipartisan support.

The fate of the bill in the House is far more uncertain, with significantly more opposition being voiced in that chamber. While the sections providing the undocumented population a path to citizenship have garnered the bulk of the attention of the public's attention, BESOIMA would make many significant changes to the H-1B category affecting all employers who rely on the H-1B visa status to bring talented professionals (officially called "specialty occupation workers") to our country.

A Snapshot of the H-1B Visa

The H-1B "specialty occupation" visa category is used by employers to hire professionals in a wide variety of fields, including scientists, engineers, lawyers, accountants, economists, researchers, architects, computer professionals, and many others. For an individual to qualify for H-1B status, a U.S. employer must offer a position that normally requires at least a U.S. Bachelor's degree (or its foreign equivalent) in a specific field. And the employer must pay the H-1B worker either at the actual wage level it pays to all other similarly qualified employees for the same job, or at the prevailing wage level (i.e., average wage) paid by all employers for similar positions in the same geographic area, whichever of the two is greater. The idea behind these wage provisions is to prevent U.S. employers from hiring less expensive foreign labor since an H-1B petition can't be approved if the employer will undercut the U.S. wage structure. And for the past 23 years this requirement has been in place, it has largely succeeded. We know this because of the very small number of complaints that have been brought in which the employer is found to have violated the wage requirements of the immigration law.

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The Immigration Act of 1990, which was the last major overhaul of our legal immigration system, limited the annual allotment of H-1Bs to 65,000. In the years since 1990, as a result of legislative changes, the annual limit was raised to 115,000 and later as high as 195,000. But because of a sunset provision in the law, in 2005 the cap dropped back to the original 65,000 limit (plus an additional 20,000 for individuals who earned an advanced degree in the United States). This number has proved woefully inadequate to meet the demand, and the cap has been reached ever since 2005. The FY 2014 quota for the entire year was exhausted in less than one week's time, when filings were permitted to be made on April 1, 2013.

The H-1B status has never in its long history required a test of the U.S. labor market (other than for a limited category of heavy users, called H-1B Dependent Employers). Rather, the H-1B was created to provide U.S. employers with the ability to find the most talented professionals without regard to whether a U.S. worker might meet the minimum requirements for a position.

BESOIMA would change all of that by establishing new recruitment requirements that are likely to prove burdensome at the least, and quite possibly unworkable in many cases, as discussed below.

Highlights of Proposed Changes

Increase in H-1B Quota (Standard and U.S. Master's Caps). BESOIMA raises the standard H-1B cap from 65,000 to 115,000 the first year after enactment, and the 115,000 would then would serve as a floor. The H-1B allotment maxes out at 180,000. During each year, the cap can be raised by as many as 50,000 numbers, dependent on how many numbers have been used on certain milestone dates. If the base cap (which does not include the milestone increases) is not exhausted by the end of the fiscal year, it will be lowered the following year by as many as 20,000 numbers, depending on usage. Regardless of usage, the cap cannot be raised if the national occupational unemployment rate for "Management, Professional, and Related Occupations" averages 4.5 percent or greater over an established 12 month period.

The extra 20,000 H-1Bs currently allotted to U.S. Master's (and higher) degree holders, over and above the standard cap of 65,000, will be increased to 25,000, but at a heavy price., Only persons holding advanced U.S. degrees in the science, technology, engineering, and mathematics (STEM) fields of computer and information sciences, engineering, mathematics and statistics, biological and biomedical sciences, and physical sciences will be eligible for this extra allotment. No longer will holders of J.D., M.B.A. and Ph.D. degrees in the social sciences or the humanities be able to take advantage of these extra numbers.

On the whole, the increase in numbers is welcome news, given that U.S. Citizenship and Immigration Services (USCIS) received over 124,000 H-1B petitions for FY 2014, far in excess of the current quota of 85,000. But the BESOIMA » Page 12

Families Face Obstacles to Accompanying Non-Immigrant Professionals to the U.S

BY DAVID GRUNBLATT AND PRAVEENA SWANSON

On June 26, 2013, the U.S. Supreme Court in *United States v. Windsor* struck down §3 of the Defense of Marriage Act (DOMA) as unconstitutional, making way for same-sex married couples to receive benefits under federal law.

Two days later, the first gay married couple received notice that their marriage-based green card case had been approved, demonstrating that the Obama administration would not delay in its implementation of this game-changing decision. Celebrated as a win for equality, the DOMA decision is also an immigration milestone for bi-national couples in the United States. Interestingly, while the decision highlights the obstacles same sex couples face when one spouse is a United States citizen and the other is a foreign national, it is not only same sex couples who face impediments when seeking visas to live and work in the United States. The current immigration system even makes it difficult for spouses, children, and household members accompanying their family or partner to the United States.

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Congress has attempted to address this serious **"work authorization" gap** for the forgotten spouse of the highly qualified foreign worker.

Problems faced by Spouses Accompanying Non-Immigrant Professionals to the United States. The U.S. employment-based immigration system is rooted in the traditional family model where there is one primary breadwinner or "principal applicant," and the "wife" is viewed simply as a "dependent" that follows her husband.[1] In fact, it was not until 1952 that women who were U.S. citizens or permanent residents could petition for their foreign-born husbands.[2] Remnants of this outdated immigration scheme continue to linger. Today, if a foreign national professional seeks a non-immigrant visa to live and work in the United States, the immigration framework will allow for his/her spouse to accompany the "principal" to the United States. However, only a few visa categories will actually allow the dependent spouse to work in the United States, resulting often in wasted talent, frustrated spouses, and families with one income. For many foreign worker professionals, these out-of-touch U.S. immigration policies make the United States an unattractive destination.

"The Land of Opportunity, really?" I have a visa, but I can't work? All the non-immigrant employment visa classifications allow for spouses to join the principal worker in the United States through the duration of the principal's work visa. Thus, diplomats and foreign government representatives in the A and G classifications; Treaty Traders, Treaty Investors and Australian Treaty Nationals in » Page 11


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

BY MICHAEL W. GALLIGAN AND IRA C. OLSHIN

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

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

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

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

U.S. income tax residents, aside from U.S. citizens, include (1) lawful permanent residents (i.e., holders of U.S. green cards) and (2) people who meet the "substantial presence" test under Internal Revenue Code (IRC) §7701(b)(1)(A)(ii). Under the "lawful permanent residence" test, a foreign national is generally considered resident in the United States from the day he/she first enters the United States with a U.S. green card until the day that resident status is revoked by the immigration authorities or judicially determined to have lapsed. During the period that a foreign national maintains permanent resident status, he/she is considered to be a U.S. tax resident for income tax purposes (and subject to worldwide U.S. income taxation) even if living outside the United States.

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

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

Residency for U.S. estate and gift tax purposes is determined by one's "domicile." The key is whether a foreign national is residing currently in the United States and has no "definite present intention of later » Page 12

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By LAURA E. NEISH and KEISHA STANFORD

Supreme Court Tackles Aggravated Felonies in 'Moncrieffe'

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This spring, in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), the U.S. Supreme Court waded again into the murky intersection between immigration and criminal law, ruling that a noncitizen convicted of a marijuana distribution offense is not an "aggravated felon" for purposes of the Immigration and Nationality Act (INA) if the conviction fails to establish either remuneration or more than a small amount of the drug.

The result in *Moncrieffe* seems intuitively correct: The petitioner was found in possession of the equivalent of two marijuana cigarettes and sentenced to probation—hardly the portrait of a "felon," much less a dangerous drug trafficker subject to mandatory deportation under the INA. But little is intuitive when federal immigration law meets state penal statutes that align imprecisely with the INA's "aggravated felony" definition. In *Moncrieffe*, the court found that the petitioner's actual conduct was irrelevant to the determination of whether he had been convicted of an aggravated felony. Instead, the court focused solely on the terms of the state statute of conviction, reaffirming the "categorical approach" first adopted in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005). *Moncrieffe* provides some clarity on the immigration consequences of minor drug convictions, but does not resolve the uneasy overlap between the INA and state criminal statutes. For counsel advising noncitizens on the immigration consequences of a criminal conviction, application of the categorical approach to state penal laws remains far from black and white.

The petitioner in *Moncrieffe* is a legal permanent resident of the United States who has resided in the country since he was three years old. In a 2007 traffic stop, police found 1.3 grams of marijuana in his car. Moncrieffe pleaded guilty to possession of marijuana with intent to distribute, a violation of Ga. Code Ann. §16-13-30(j)(1) (2007), for which he was required to complete five years of probation. The federal government sought to deport Moncrieffe as an aggravated felon, arguing that the state marijuana conviction was punishable as a felony under the Controlled Substances Act (CSA), 21 U.S.C. §841(a). The immigration judge adopted the government's argument, and the Board of Immigration Appeals and the U.S. Court of Appeals for the Fifth Circuit upheld the decision. The Fifth Circuit specifically rejected *Moncrieffe*'s reliance upon §841(b)(4) of the CSA, which provides that marijuana distribution is punishable only as a misdemeanor if the offense involves a small amount of marijuana for no remuneration.

In a 7-2 decision, the Supreme Court reversed the appeals court's ruling, holding that if a conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, it is not an aggravated felony. In reaching its conclusion, the court reaffirmed the strict application of the categorical approach for determining whether a particular conviction constitutes an aggravated felony. Under this approach, the court looks "'not to the facts of the particular case,' but instead to whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony."[1] In other words, the crime is viewed "in the abstract," not in light of the facts underlying the conviction. A state crime is a "categorical match" with a federal offense only if a conviction under the state law "necessarily involved" facts that would constitute a violation of the federal offense.[2] Thus, for drug trafficking offenses, for example, a state drug offense must (1) "necessarily" proscribe conduct that is an offense under the CSA and (2) the CSA must "necessarily" prescribe felony punishment for that conduct. Under the categorical approach, the court must presume that a defendant's conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense.[3]

To determine whether Moncrieffe's conviction constituted an aggravated felony, the court looked to 21 U.S.C. §841(a)(1), which makes it a federal crime to "possess with intent to…distribute…a controlled substance," including marijuana, §812(c). However, while a violation of §841(a)(1) may be punished as a felony, federal law permits the same violation to be punished as a misdemeanor, under §841(b)(4), if the violation is for distributing a small amount of marijuana for no remuneration.[4] Conviction under the Georgia statute for possession with intent to distribute marijuana, according to the court, "does not reveal whether either remuneration or more than a small amount of marijuana was involved."[5] Accordingly, the court concluded that because Moncrieffe's Georgia marijuana conviction did not "necessarily" involve facts that correspond to an offense punishable as a felony under the CSA, Moncrieffe was not convicted of an aggravated felony.

The court specifically rejected a "hypothetical approach" in which the court would "examine whether conduct could have been punished as a felony had [it] been prosecuted in federal court." The court also rejected the government's proposal to place the burden on the noncitizens to establish that their marijuana convictions involved only a small amount of marijuana and no remuneration. Similar arguments for "minitrials" or "post hoc investigation into the facts of predicate offenses" had been previously rejected by the court as impractical and overburdensome to immigration courts.[6]

Moncrieffe is the latest in a series of Supreme Court decisions underscoring "[t]he importance of accurate legal advice for noncitizens accused of crimes."[7] Criminal convictions frequently carry immigration consequences, and as the court has recognized, "'[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'"[8] Because there is no right to counsel in immigration proceedings, advice from a criminal defense attorney may be the only advice a noncitizen facing criminal charges receives.

Perhaps nowhere is this advice more important than in the case of noncitizens charged with crimes that may—or may not—be classified as aggravated felonies. Congress created the term "aggravated felony" in the Anti-Drug Abuse Act of 1988 (ADAA), which made the commission of an aggravated felony a deportable offense.[9] The term "aggravated felony" was introduced in an effort to control drug crimes. Subsequently, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[10] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[11] both greatly expanded the category of crimes that qualify as aggravated felonies. While a conviction for a less serious offense may render a noncitizen subject to deportation, he or she can still apply for certain types of discretionary relief, such as cancellation of removal or political asylum.[12] But if the conviction is for an aggravated felony, such remedies are unavailable. The practical effect of a conviction for an aggravated felony is mandatory deportation, regardless of the circumstances of the conviction, the noncitizen's ties to the United States, or any other extenuating factors.

'Moncrieffe' provides some clarity on the **immigration consequences of minor drug convictions**, but does not resolve the **uneasy overlap** between the INA and state criminal statutes.

A crime's classification as an aggravated felony is thus of paramount importance to a noncitizen facing a criminal trial or considering a plea bargain. In *Padilla v. Kentucky*, heard in 2010, the Supreme Court imposed an obligation on defense counsel to provide correct legal advice when the deportation consequences of a criminal conviction are clear. Where the immigration consequences of a particular plea are plain from a straightforward reading of the relevant text of the INA, counsel renders ineffective assistance by failing to advise his or her client of the immigration consequences of his or her plea.[13] New York courts have recognized that failure to warn a client that a guilty plea will result in mandatory deportation may be ineffective assistance.[14]

But the immigration consequences of a conviction may be difficult to ascertain, particularly when a state criminal statue is concerned. The INA contains no comprehensive list of aggravated felonies. Instead, the statute identifies certain categories such as drug trafficking and offenses involving "moral turpitude."[15] Certain federal statutes are explicitly identified as aggravated felonies, but for state statutes, the determination rests on whether the state conviction falls within the federal definition.

Moncrieffe is unlikely to bring about major changes in the Second Circuit's aggravated felony analysis of New York penal statutes. *Moncrieffe* makes clear that a conviction for criminal sale of marijuana in the fifth degree, N.Y. Penal Law §221.35, is not an aggravated felony for immigration purposes.[16] The Second Circuit had reached the same conclusion in *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008), where it also applied the categorical approach to conclude that a conviction pursuant to a similar New York statute "could have been for precisely the sort of nonremunerative transfer of small quantities of marihuana that is only a federal misdemeanor under 21 U.S.C. §841(b)(4)."[17] The circuit's classification of other lower-level drug offenses is likely to remain unchanged.[18]

Moncrieffe does lend weight to the Second Circuit's determinations, under the categorical approach, that certain New York statutes are and are not aggravated felonies.[19] But many open questions remain. Although the *Moncrieffe* court confirmed the strict application of the categorical approach, it continued to recognize that it may be necessary to take account of federal sentencing factors when Congress has chosen to define the generic federal offense by reference to punishment.[20]

In addition, when a statute criminalizes different classes of criminal acts, some of which would be categorically removable offenses and some not, the statute is considered "divisible," and a "modified categorical approach" applies. Under the modified categorical approach, the court may look to judicially noticeable documents in the record of conviction to determine whether the noncitizen's conduct falls within one of the removable grounds.[21] The parameters of the doctrine remain unclear.[22]

Moncrieffe is unlikely to be the last word in the debate over which state convictions qualify as aggravated felonies. Noncitizens facing criminal charges that potentially meet the aggravated felony definition may best be served by the advice of both criminal law and immigration law specialists.

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1. 133 S. Ct. at 1680 (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)).
2. The Supreme Court outlined the categorical approach in *Taylor v. United States*, 495 U.S. 575 (1990). Under the approach, a court must identify the generic offense, then compare the elements of the offense of which the defendant was convicted to the generic offense. The court recognized an exception to the "categorical approach" only for a narrow range of cases where a jury was actually required to find all the elements of the generic offense. Later, in *Shepard v. United States*, the court confirmed the application of the categorical approach to cases in which the conviction was obtained by guilty plea (as opposed to trial). 544 U.S. 13, 17 (2005).
3. *Moncrieffe*, 133 S. Ct. at 1680.
4. The court did not address the definition of a "small amount."
5. *Moncrieffe*, 133 S. Ct. at 1681.
6. See, e.g., *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2588-89 (2010) (rejecting the government's argument that procedures governing determination of certain sentencing factors could "be satisfied during the immigration proceeding").
7. *Padilla v. Kentucky*, 550 U.S. 356, 363 (2010).
8. *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (citation omitted)).
9. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §7342, 102 Stat. 4181, 4469 (1988).
10. AEDPA, Pub. L. No. 104-132, 110 Stat. 1214, 1214 (1996).
11. IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).
12. A conviction for an aggravated felony has no effect on eligibility for deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, p. 20, 1465 U.N.T.S. 85; 8 C.F.R §1208.17(a) (2012).
13. 559 U.S. at 359.
14. See, e.g., *People v. Reynoso*, 88 A.D.3d 1162 (N.Y. App. Div. 3d Dept. 2011) (noting defendant's statement that "had he known that a plea of guilty would definitely lead to deportation, he…would have taken his chances a trial").
15. INA §212(a)(2)(A) (moral turpitude); INA §212(a)(2)(C) (drug trafficking).
16. See 133 S. Ct. at 1694 (citing N.Y. Penal Law §221.35).
17. 551 F.3d at 120. Employing the categorical approach, the court acknowledged that "[o]ne is 'guilty of criminal sale of marihuana in the fourth degree when he knowingly and unlawfully sells marihuana except as provided in section 221.35 of this article.'" *Martinez*, 551 F.3d at 119 (quoting N.Y. Penal Law §221.40). Citing to *People v. Starling*, 650 N.E.2d 387, 390 (N.Y. 1995), the court clarified that the definition of "sale" under New York law is a broad one that includes "any form of transfer of a controlled substance," whether or not the transfer was for money.
18. See *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008) (possession of a controlled substance in the seventh degree under NYPL 220.03 was not aggravated felony); *Pascual v. Holder*, 707 F.3d 403 (2d Cir. 2013) (conviction for third degree criminal sale of a controlled substance, NYPL §220.9(1), was aggravated felony).
19. See *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001) (felony DWI conviction under NY VTL §1192.3 not an aggravated felony); *Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003) (conviction for second degree manslaughter, NYPL §125.15(1), not an aggravated felony); *Gill v. INS*, 420 F.3d 82 (2d Cir. 2005) (attempted reckless assault under NYPL §120.05(4) not an aggravated felony—court noted that conviction is for a legal impossibility); *Morris v. Holder*, 676 F.3d 309 (2d Cir. 2012) (conviction for second degree assault, NYPL §220.9, was aggravated felony); *Brooks v. Holder*, 621 F.3d 88 (2d Cir. 2010) (conviction for criminal possession of a weapon in the second degree, NYPL §265.03(1)(b), was aggravated felony).
20. See *Carachuri-Rosendo*, 130 S. Ct. at 2581 (calling the generic federal offense "recidivist simple possession" even though such a crime is not actually a "separate offense," under the CSA, but rather an "amalgam" of offense elements and sentencing factors).
21. See *Dickson v. Ashcroft*, 346 F.3d 44, 48-49 (2d Cir. 2003).
22. See, e.g., *Wala v. Muskasey*, 511 F.3d 102, 109 (2d Cir. 2007) (assuming without deciding that Conn. Gen. Stat. 53a-103 was divisible and modified categorical approach applied); *Hoodho v. Holder*, 558 F.3d 184 (2d Cir. 2009) (noting open question in applicability of modified categorical approach).

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the E visa classifications; professional workers, temporary workers and trainees in the H visa classifications, representatives of foreign media in the I visa classification; exchange visitors in the J visa classification; intra-company transferees in the L classification; aliens of extraordinary ability in the O classification; athletes, entertainment groups and artists in the P classification; religious workers in the R visa classification; and Canadian and Mexican professionals in the TN classification may all bring their spouses into the United States.[3]

However, only the spouses of the A, G, E, J, and L visa holders may apply for employment authorization.[4] Even here, the regulatory scheme does not make it easy for them. Although the spouses are automatically entitled to employment authorization incidental to status, the spouse must file a formal application with U.S. Citizenship and Immigration Services after he/she has entered the United States in order to be granted an employment authorization document (EAD).

Congress has attempted to address this serious "work authorization" gap for the forgotten spouse of the highly qualified foreign worker. In 2002, Congress passed laws authorizing spouses of E-1/E-2 treaty traders/investors and spouses of L-1 intracompany transferees to engage employment in the United States. The new statutes provided for "open market" employment, without limiting the scope and nature of the authorized employment for the spouse.[5] The E and L visas are often marketed as "dual career" visas that allow both parties to work in the United States. The Committee on the Judiciary that recommended that L-1 visa dependents be allowed to work clearly understood the problem faced by U.S. employers and migrating families. In its commentary supporting the change in law, the Committee explained:

> [W]orking spouses are now becoming the rule rather than the exception in the United States and many…corporations are finding it increasingly difficult to persuade their employees to relocate to the United States. Spouses hesitate to forego their own career ambitions or a second income to accommodate an overseas assignment. This factor places an impediment in the way of these employers' use of the L visa program, and their competitiveness in the international economy.[6]

Dependent spouses of H-1B professionals and TN NAFTA professionals are glaringly excluded from work permission. While these visa categories represent commonly utilized U.S. work visa classifications, surprisingly, the derivative spouse is prohibited from working in the United States. The spouse will not obtain the opportunity to work legally unless a green card application is filed for the principal worker. The spouse can spend years in the United States doing volunteer work, going to school, or taking care of the kids. As a result, the H-4 dependent visa has been dubbed the "involuntary housewife visa."[7]

The S.744 bill, "Border Security, Economic Opportunity, and Immigration Modernization Act, passed by the U.S. Senate on June 27, 2013 would amend the Immigration Nationality Act (INA) to provide an avenue for H-4 spouses to apply for employment authorization. In the original version of the bill, the provisions limited H-4 work authorization to foreign spouses where the home country of the non-immigrant also provided reciprocal employment to spouses of U.S. citizens. In the final adopted version, the Senate instead provided that the State Department had discretionary power to rescind H-4 work authorization where there is a lack of reciprocity.[8] This statutory change is viewed as an important competitive advantage for employers recruiting within the highly skilled international talent pool. This reform amendment is also welcomed as an economic equality win for women.

What About the Children? The Immigration and Nationality Act defines children as unmarried persons under the age of 21. Children of non-immigrant visa holders coming to the United States to work may accompany the parent and also have permission to attend school here. However, none of the traditional non-immigrant work visa classifications provide the "child" permission to work in the United States. This is an absolute bar, which would include summer camp positions, part-time jobs after school, and even babysitting![9]

Outside the Nuclear Family: Parents, Adult Children, and Cohabitating Partners. It would seem that if you are outside the nuclear family but are a member of the household, you are out of luck. And for the most part, this is essentially true. If a parent or adult child, or that cousin that came to live with you five years ago and has never left, wants to accompany you to the United States, there is no specific visa provision available. Similarly, there is no special visa available for cohabitating partners, same sex or otherwise.

Instead the State Department directs that the B-2 visitors visa classification, with all of its limitations, is an appropriate classification for cohabitating partners, extended family members, and other household members not eligible for derivative status.[10] However, the maximum initial stay that can be requested is only one year, and as a practical matter these household members are often only admitted for six months. As a result, in order to remain in valid B-2 status, such household members usually find themselves in an endless cycle of reentry into the United States or filing extensions. This visitor's visa classification is limited as to length of time, but also as to activity since there is no provision to apply for employment authorization.

In July 2001, the State Department posted a detailed directive making it clear that the B-2 visitor visa classification was appropriate for cohabitating partners.[11] The State Department cable to consulates worldwide instructed that as long as the partner's primary purpose is to accompany a significant other who is temporarily working or studying in the United States, the partner's visit to the United States should be considered travel for pleasure, and as such, is consistent with the visitor visa. It underlined the principle that "extended stays can qualify as temporary," even though the cohabitating partner may be living in the United States for a much longer stay than the usual six month visitor. The State Department, in conjunction with the Department of Homeland Security, wanted to push the visitors visa classification to its limits in accommodating such "nontraditional" family members, but limited it still is. Other than not being able to work, B-2 family, partners, and household members may also not be permitted to apply for driver's licenses or social security numbers.

U.S. Citizens Living Abroad and Coming to the United States Temporarily Have the Same Problem. U.S. citizens living abroad who are bringing such household members into the United States have the very same problem that the non-immigrants face, and are also included in the State Department cable. What is most ironic is that the problem extends to the actual foreign spouses of U.S. citizens! The B-2 visitor visa is the only visa available for a foreign national spouse of an American living abroad, who comes on a two- or three-year assignment to the United States. The foreign national spouse is granted a mere extendable six-month visitor status in the United States, with no permission to work.[12]

What makes this even more ironic is that the U.S. citizen can instead apply for permanent residence in the United States (green card) on behalf of his or her foreign national spouse. Timing of such petitions from abroad can be unpredictable, spanning six to twelve months, making it difficult for U.S. citizens and families to coordinate relocation logistics to the United States. However, it is not unheard of for couples confronting this situation to feel that they are compelled to actually proceed and apply for resident status in the United States, even if they expect to depart the United States within several years, and ultimately abandon the green card.

Household Employees—Better Off Than Cohabitating Partners. Another anomaly is that household employees traveling with non-immigrants or American citizens to the United States are afforded B-1 business visitor status, but are granted an additional, coveted benefit of having permission to work in the United States.[13] Such household employees may apply for a formal employment authorization document during such periods while the family remains in the United States. This is an oddity, since the B visa is clearly not designed to serve as an "employment" visa category. It would appear that these household employees are performing "ordinary labor for hire" as compared to "intercourse of a commercial character" to which the visitor visa category is ostensibly limited.[14]

In addition, managing the stay and the employment authorization of the household employee is a daunting feat. First, one must prepare all the necessary documentation and apply for the B-1 visa at the U.S. Embassy. Then, when the family, accompanied by the domestic employee, enters the United States, he/she should be admitted for one year, but probably will be admitted only for six months. After entering the United States, the domestic employee has to then apply for an employment authorization document, which will be issued 80-90 days later, at which time he/she actually gains legal permission to begin working in the home of the employer. By the time the domestic employee receives her employment document, he/she is at the next phase of applying for an extension of visitor status and of renewing the employment authorization document. It's a never-ending, absurd cycle, which is practically impossible to keep up with, making it difficult to hire foreign workers for the family home.

Conclusion. There is little disagreement that the U.S. immigration system is broken and the debate as to Comprehensive Immigration Reform is hot and heavy. Some supporters of reform advocate that family unity should be a guiding principle in Congress' efforts to make change. In fact, S744 takes some steps forward in this regard for family-based immigration. Under the Senate version of the bill, spouses and children of lawful permanent residents would be considered "immediate relatives" eligible for green cards with no annual limits or backlogs. Currently, only applications of spouses and children of U.S. citizens are uncapped. On the other hand, families of non-immigrant professionals don't do so well. If Comprehensive Immigration Reform passes, the spouses of H-1B visa holders will now be able to work, but not the spouses of many other working non-immigrants. It will still be very difficult to attract talent to come to the United States temporarily when those extraordinarily gifted people who would add so much value to our country and to our economy find out how difficult it would be to bring their partners, parents, children, and household workers with them.

> None of the traditional non-immigrant work visa classifications provide the "child" permission to work in the United States. This is an **absolute bar**, which would include summer camp positions, part-time jobs after school, and even babysitting.

1. Sabrina Balgamwalla, "A Women's Place: Dependent Spouse Visa Holders and the Legacy of Coverture," University of Baltimore, Feb. 28, 2013.
2. Immigration Act of 1952 §101(a)(35).
3. See 8 C.F.R. §214.2(a),(e),(g),(h),(i),(j),(l)(o),(p), and (r); 8 C.F.R. §214.6(j).
4. See generally 8 C.F.R. §274.12(c).
5. Public Law 107-124 & Public Law 107-125, effective Jan. 16, 2002; U.S. Department of Justice, INS Memorandum, "Guidance on Employment Authorization for E & L Non-immigrant Spouses," Feb. 22, 2002.
6. H.R. Rep. No. 107-188, at 2-3 (2001), reprinted in 202 U.S.C.C.A.N. 1789, 1790.
7. Magdalena Bragun, "The Golden Cage: How Immigration Law Turns Foreign Women into Involuntary Housewives," 31 Seattle U. L. Rev. 937 (2008).
8. SEC. 4102. Employment Authorization For Dependents Of Employment-Based Nonimmigrants, of S.744 bill, Border Security, Economic Opportunity, and Immigration Modernization Act, passed by the U.S. Senate on June 27, 2013.
9. Diplomat children represent one exception. Such dependent children under the age of 21 or dependent children under 23 who are full-time students are allowed to apply for work authorization. 8 CFR §214.2(g)(2).
10. 9 FAM 41.31 N.14.4, Cohabitating Partners, Extended Family Members, and other household members not eligible for derivative status.
11. Department of State Cable, "B-2 Classification for Cohabitating Partners" (July 2001).
12. 9 FAM 41.31 N.14.3, Spouse or Child of U.S. Citizen Resident Alien.
13. 9 FAM 41.31 N.9.3, Personal/Domestic Employees.
14. *Matter of Neill*, 15 IN Dec. 331 (BIA 1975).

H-1B Visa

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proposals can be criticized as not going far enough. If the demand is so strong, why set a number that at its maximum is still 15,000 short of the H-1B quotas in the late 1990s and early 2000s? And why penalize holders of graduate-level degrees in fields other than the STEM professions? Many would argue that this is short-sighted and dismissive of the many benefits, cultural and financial, as well as economic, that H-1Bs bring to America.

New and Unprecedented H-1B Recruitment Requirements. As a tradeoff for an increase in the annual H-1B quota, employers will be required to recruit U.S. workers. By adding a recruitment requirement to the H-1B process, Congress is endangering the very reasons why the H-1B visa has been such a boon to our economy—speed, flexibility, and the ability to hire the best and the brightest employees, regardless of their citizenship status.

Fortunately, some of the sting of the recruitment requirements have been tempered by the amendment introduced by Senator Orrin Hatch, R-Utah, blessed by Senator Charles Schumer, D-N.Y., and other members of the "Gang of Eight," and approved by the full Senate. The bill as originally drafted would have required every employer to not only recruit for the position, but also would have required the employer to offer the position to a U.S. worker who is equally or better qualified than the H-1B applicant. And the original bill would have required that this recruitment be conducted not only for the initial filing, but also each time an extension request is filed.

Under the Hatch Amendment, the recruitment requirements have been softened to mandate that an employer (other than those designated as Skilled Worker Dependent Employers or as regular H-1B Dependent Employers) to post the job opening on the Labor Department website and that the employer also take "good faith steps to recruit United States workers…using procedures that meet industry-wide standards and offering compensation that is at least as great as that required to be offered to H-1B nonimmigrants…" The question arises as to what will happen if the employer is able to locate a qualified U.S. applicant through these mandated "good faith" efforts. We know that the employer will not be required to actually hire the qualified U.S. applicant, but what is left unsaid is whether the employer will be able to file the H-1B petition if its recruitment yielded qualified U.S. worker results and those qualified applicants are not offered the position. And who will review the good faith nature of the recruitment, and under what standards? If, for example, a law firm normally recruits at only one or two law schools for new associates, does that meet "industry-wide standards"? By imposing an unprecedented recruitment requirement, the Senate is opening up a veritable Pandora's box of burdensome and restrictive Labor Department and USCIS rules when those agencies write regulations to flesh out the statutory mysteries of what Congress intended by this recruitment requirement.

The Hatch Amendment, while softening the recruitment provisions for most H-1B employers, leaves alone more wide-reaching recruitment requirements for two distinct groups of H-1B employers. The Hatch Amendment would mandate that an H-1B Skilled Worker Dependent Employer (SWDE) or a Dependent Employer (DE) would be required to actually offer the H-1B position to a U.S. applicant who is "equally or better qualified for the job." An employer becomes an SWDE if it employs H-1B workers who make up at least 15 percent of the workforce in positions classified as professional by the Department of Labor (Job Zones 4 and 5). Under this test, many smaller entities will be swept up into the SWDE category by meeting the 15 percent threshold. For example, an employer with 25 professional employees will cross this line upon the hiring of only four H-1B professionals. The test for being designated a DE is different and involves a graduated scale that sets out categories of numbers of total employees against those holding H-1B status.[1]

A Tightening of Wage Protections. The bill changes how the Department of Labor calculates wages in its prevailing wage survey, the principal source of wages that employers and their immigration lawyers rely on to prepare the wage attestation (LCA) to establish that the foreign national will be paid at least the required wage. The bill will reduce the number of levels from four to three, with Level 1 representing the mean of the lowest ⅔ of wages (which in most cases would be significantly higher than the current Level 1 wage), Level 2 would be the mean of all wages, and Level 3 would be the mean of the highest ⅔ of wages. This change will exacerbate the problem shared by many employers of finding the current Level 1 wages to be above entry level market wages.

The bill will also require any wage surveys relied on by the employer, other than the Department of Labor's OES survey, be pre-approved for use by the Department of Labor. Additionally, these non-governmental surveys must have three levels, reporting the data in the manner detailed above. The bill will also penalize H-1B dependent employers, who will be required to pay at least the Level 2 wage.

Spouses of H-1B Become Eligible for Employment Authorization. Spouses of H-1Bs will be afforded the opportunity to apply for employment authorization, which will allow them to work for any employer they choose. This is a welcome change that will enable spouses of H-1B visa holders to be productive members of our society. The Hatch Amendment permits the Secretary of State to request that the Secretary of Homeland Security suspend employment authorizations to nationals of a foreign country that does not permit reciprocal employment to nationals of the United States.

Grace Periods and the Return of Visa Revalidation. Another welcome provision in S.744 addresses what happens when an H-1B employee is terminated. Specifically, the bill provides a 60 day grace period following the termination of an H-1B (much like the 60 day period currently enjoyed by F-1 students). During this period, applications for changes of status and extension could be filed, and the H-1B would be considered to be maintaining status. This will be extremely helpful in handling change of H-1B employer cases where an individual stopped working for the prior employer before the H-1B petition was filed by the prospective employer.

The bill also resurrects visa revalidation, a benefit which disappeared years ago, that allows an individual to renew a visa from within the United States. This would remove the uncertainty that many H-1B visa applicants experience (particularly those from India and China) when they return to their home country to renew their visas.

> The bill mandates for all **H-1B employers** to submit an **annual report to Department of Homeland Security** that will include copies of the W-2 issued to every H-1B employee for the prior year.

Reporting and Disclosure Requirements. The bill mandates for all H-1B employers to submit an annual report to Department of Homeland Security that will include copies of the W-2 issued to every H-1B employee for the prior year. Also, employers will be required to provide to the beneficiary of the LCA, within 30 days after filing the LCA, a copy of the original of all applications and petitions filed by the employer with Department of Labor or Department of Homeland Security for that beneficiary. The employer can redact financial or proprietary information.

Further Outsourcing Restrictions

The bill prohibits H-1B Dependent Employers from outplacement, outsourcing, leasing, or "otherwise contracting for services or placement of" H-1Bs. Non-H-1B dependent employers who outsource, lease, etc., will be required to pay a fee of $500 per outplaced worker. As these proposals are so complex, we will not address them further in this article.

Changes to the Department of Labor's Investigative Authority and Possible Penalties. Under BESOIMA, the Department of Labor is given brand new authority to review applications not only for completeness, but also for evidence of fraud or misrepresentation of material facts. In addition, the seven day period that the DOL has to adjudicate LCAs, will double to 14 days, slowing the overall process for H-1Bs. H-1B petitions may be filed without the certified LCA, but the petition cannot be approved until the certified LCA is filed.

The statute of limitations on complaints about LCA violations by aggrieved parties will double, from 12 to 24 months. Moreover, the DOL may initiate investigations without having to show any reasonable cause, and the agency will be authorized to act on anonymous tips. The bill also imposes a requirement that the DOL conduct annual compliance audits of every employer with more than 100 employees if more than 15 percent of those employees are H-1Bs.

Employers could be fined $2,000 (up from $1,000) for failing to meet any LCA conditions or making misrepresentations on the LCA form. Moreover, an employer could be held liable to any employee harmed by such violations for lost wages and benefits. If the failure to meet LCA conditions is willful, the employer could be fined $10,000 (up from $5,000).

Conclusion

The Senate Bill takes a positive step by providing more H-1B numbers, but this is outweighed by the very burdensome and onerous recruitment, wage determinations, and other requirements. If enacted, the H-1B changes will make the process slower and more difficult, and they will subject all U.S. employees to new record-keeping, audit, and other requirements that will make this status much less attractive to both employers and foreign national professionals.

1. The definition of an H-1B dependent employer has not changed under the bill. A company is considered H-1B dependent if it has 25 or fewer full-time equivalent employees (FTEs) in the United States, and employs more than seven H-1Bs; if it employs 26-50 FTEs, and more than 12 of them are H-1Bs; or if it has 51 or more FTEs, and 15 percent of them are H-1Bs.

Parenthetically, nonprofit institutions of higher education, nonprofit research organizations, and employers primarily engaged in the healthcare business who are petitioning on behalf of a physician, nurse, physical therapist, or a "substantially equivalent healthcare occupation" are not considered to be H-1B dependent regardless of the number of H-1B employees. Also, in determining the number of H-1B employees for the dependent calculation, "intending immigrants" would not be counted as H-1Bs. An "intending immigrant" is defined as someone who intends to live and work permanently in the United States as demonstrated by an a pending or approved labor certification, or a labor certification application pending for longer than one year, that was filed by an employer that, during the year before filing the labor certification, has filed an immigrant visa petition for 90 percent of those for whom a labor certification application has been filed. Labor certification applications pending for more than one year are treated for this calculation as if the employer filed an immigrant petition.

Residence

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removing therefrom."[2] The immigration concept of "permanent residence" and the tax concept of domicile clearly overlap but are not perfectly coincident, leaving open the possibility that at least a small minority of green card holders who may not be living all the time in the United States may not be subject to U.S. estate and gift tax on a worldwide basis.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. 8 C.F.R. §316.5(c)(2).

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

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

7. INA §214(h) (8 U.S.C. 1184(h)).

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

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

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