

Admissions Issues for LPRs Who Were Unable to Timely Return Due to COVID-19

April 9, 2021

- Please reference the Policy for Boarding Legal Permanent Residents issued by the Customs & Border Protection (CBP) on March 5, 2021. The policy reminder includes boarding guidance for holders of unexpired valid permanent resident cards, re-entry permits (I-327), expired permanent resident cards, expired conditional residents, and SB-1 visas.
- Neither attorneys or clients should directly contact Regional Carrier Liaison Group (RCLG). Only airline carriers may contact the RCLG with relevant questions.

AILA's CBP, DOS, & the USCIS HQ Liaison Committees together have provided this resource to address reported issues, recommended options for clients impacted by boarding restrictions, and strategies to overcome airline boarding restrictions.

March 19, 2021

- The COVID-19 global pandemic has resulted in shifting patterns of travel restrictions imposed by various countries and common carriers worldwide. It has also resulted in reduced willingness by individuals to travel even if permitted, to avoid perceived higher risk areas, as well as inability to travel due to quarantine requirements or the individual or a family member contracting COVID-19. LPRs on ex-pat assignments abroad who were free to return to the U.S. may not have been able to return home due to host country restrictions against individuals traveling from the United States. This has resulted in extended absences from the U.S. for permanent residents (LPRs).

Legal Framework

- An LPR is an applicant for admission subject to inspection if, among other things, s/he has been outside the U.S. for a continuous period of more than 180 days or has abandoned or relinquished LPR status.¹ Further, the Form I-551 Permanent Resident Card is valid as a travel document for absences of up to one year.

Airline Boarding Restrictions: Absence Over One Year

- Certain airlines have been refusing to board LPRs who have been absent for over one year, even when the I-551 card remains facially valid under 8 CFR 211.3, which states:
- "An immigrant visa, reentry permit, refugee travel document, or a permanent resident **card shall be regarded as unexpired if the rightful holder embarked** or explained before the expiration of his or her immigrant visa, reentry permit, or refugee travel document, or with respect to a permanent resident card, **before the first anniversary of the date on which he or she departed from the United States.**"

Airline Boarding Restrictions: Expired, Lost, Stolen, Or Destroyed/Mutilated I-551

- Airlines may also deny boarding of certain LPRs who have expired I-551 cards. An unexpired I-551 card, immigrant visa, re-entry permit, or refugee travel document is usually required for admission pursuant to 8 CFR 211.1(a)(2), with exceptions for expired documents relating to extensions filed by removal of condition applications or government employees.
- If the LPR's I-551 card was lost or stolen and s/he has been absent for less than one year, the LPR must apply for a replacement card by filing Form I-90; this should also be filed if the I-551 card is expiring or expired. Notably, effective January 2021, USCIS receipt notices for Form I-90 feature language serving as evidence of the extension of work and foreign travel authorization.
- If the LPR has been outside the U.S. for less than one year with an unexpired Lawful Permanent Resident Card (I-551), or less than two years with a valid Re-Entry Permit (Form I-327) and does not have evidence of LPR status

(lost, stolen, or destroyed/mutilated), then the LPR may also be allowed to board by obtaining carrier documentation, also known as a boarding foil, before travel to the United States. A boarding foil alerts the airline that the traveler is an LPR and is allowed to board a flight to the U.S. Applicants seeking a boarding foil may file a Form I-131A, Application for Travel Document (Carrier Documentation). The I-131A is not applicable if the LPR does not meet this criterion. The determination of whether the LPR has been outside the U.S. for more than one year is made by looking at the time between their initial departure date and the date the fee payment for the I-131A with USCIS is made. As long as the application fee for the boarding foil is paid before the one-year mark, the boarding foil can be issued after the fact.

Strategies to Overcome Airline Boarding Restrictions

The following strategies can be explored to address issues with airline boarding restrictions.

1) Contacting CBP:

- a) Travelers can ask the airline to communicate with CBP's Regional Carrier Liaison Group ("RCLG") for assistance with their request to allow boarding. Please note that travelers (and their attorneys) cannot communicate directly with the RCLG. When asking the airline to communicate with the RCLG, it may be helpful to provide information that supports the position that the LPR has maintained U.S. residence, that the extended stay was for reasons beyond his/her control and demonstrates any prior attempts to return to the U.S. residence in support of the request. It is advisable to properly document the plans and efforts of the traveler to return to an unrelinquished U.S. address in the form of:
 - i) 1) canceled reservations, medical records, positive COVID tests, tax documentation, current cell phone bills, bank accounts; or,
 - ii) 2) any other verifiable document that may help establish the applicant's intention to return to the U.S.
- b) If the airline does not know how to contact the RCLG that serves its region, the CBP Port of Entry where the individual will be entering can be contacted to assist. In this scenario, an attorney can access the local CBP liaison for the port of entry who may be able to help.
- c) If the RCLG's guidance confirms the airline's refusal to board, other options include the LPR presenting him/herself at a US port of entry or applying for an SB-1 visa at a US consulate or embassy.

2) CBP Preclearance or Land Border: Waiver, Abandonment, or NTA

- a) CBP has the discretion to waive a required entry document under INA 212(d)(4). This is done at a port of entry on Form I-193 Application for Waiver of Passport and/or Visa. This application must be made at a port of entry, which means that in the situation of an airline's refusal to board, this strategy requires departing from a CBP preclearance inspection station or presenting the application for admission at a land border.
- b) See 8 CFR 211.1(b)(3): "If an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad believes that good cause exists for his or her **failure to present an unexpired immigrant visa, permanent resident card**, or reentry permit, the alien may file an application for a waiver of this requirement with the DHS officer with jurisdiction over the port of entry where the alien arrives. To apply for this waiver, the alien must file the designated form with the fee prescribed in 8 CFR 103.7(b)(1). ... In the exercise of discretion, the DHS officer who has jurisdiction over the port of entry where the alien arrives **may waive the alien's lack of an immigrant visa, permanent resident card, or reentry permit and admit the alien as a returning resident if DHS is satisfied that the alien has established good cause** for the alien's failure to present an immigrant visa, permanent resident card, or reentry permit. ..."
- c) Alternatively, CBP may issue a Notice to Appear (NTA) alleging abandonment. CBP should issue temporary proof of the LPR's status and may direct the LPR to deferred inspection for processing. Once in removal proceedings, the burden shifts to DHS to prove by clear and convincing evidence that the LPR has abandoned residence. Notably, CBP pre-inspection ports have stated generally that filing a Form I-90, Application to Replace Permanent Resident Card, is helpful and that the post can issue NTAs, but that referral to deferred inspection is more likely. Moreover, issuance of an NTA is unlikely unless the absence has been significantly longer than a year. Abandonment is

difficult for DHS-ICE to prove where the length of time is not egregious, and further, LPR abandonment cases are not a prosecution priority.

3) Issues with Land Borders

- a) CBP preclearance inspection ports are limited,⁷ but Canada & Mexico have restricted travel at land ports of entry to "essential" travel. Travel by permanent residents is regarded as essential travel. Accordingly, a LPR can present him or herself at a Land Border Port of Entry and request a waiver of a permanent resident card under 8 CFR 211.1(b)(3) if the facially valid permanent resident card is invalidated under 8 CFR 221.3.8.
- b) Permanent residents must present sufficient evidence of the reasons that prevented return to the U.S. Canada has additional restrictions, including a COVID test and 14-day quarantine.

4) Apply for SB-1, Returning Resident Visa

- a) An LPR returning to the U.S. after an absence exceeding one year without first securing a reentry permit can apply for an SB-1 Returning Resident visa by submitting Form DS-117, Application to Determine Returning Resident Status with supporting documentation. Consular operations are currently limited, making this strategy dependent on location and urgency of circumstances. The Foreign Affairs Manual describes the eligibility criteria for an SB-1 visa. The criteria are that the LPR is returning to his/her unrelinquished U.S. residence, the extended stay abroad was for reasons beyond his/her control, and that s/he was not responsible for the reasons for the stay abroad.
- b) Two consular officers must sign off on the approval of the Form DS-117, which makes it exceedingly difficult to obtain depending on circumstances and consular post. Consular officers have discretionary authority on approvals. Some consular officers consider any stay outside of the United States beyond two years to be grounds for an automatic denial, whereas at other posts, stays beyond four or five years can still obtain approvals.
- c) Generally, consular officers want to see that the departure from the U.S. was sudden and abrupt and that the applicant has evidence of attempts at returning or maintaining ties to the U.S.. This can include the following:
 - i) A round trip ticket that had to be abruptly changed due to unforeseen circumstances
 - ii) Continued employment in the United States
 - iii) Filing U.S. tax returns
 - iv) Maintaining property ownership of a physical residence in the United States.
- d) Consular officers will often consider the following as evidence of abandonment:
 - i) Extended or frequent absences from the United States even before the LPRs long departure
 - ii) A one-way ticket from the United States
 - iii) Disposition of property or business affiliations prior to departure
 - iv) Strong family/business/or property ownership or ties abroad
 - v) Failure to file U.S. tax returns, and
 - vi) Conduct while outside of the United States (such as employment, starting a family, running for office, or voting in foreign elections).
- e) For an overview of fees and requirements for SB-1 visas and country-specific instructions you can visit the DOS website. Some consular offices are reportedly being restrictive in their interpretation, and the existence of the COVID-19 pandemic alone may not suffice.

Conclusion:

- An attorney needs to carefully consult with the lawful permanent resident client and analyze the circumstances that prevented him or her from returning to the U.S. It is important to consider the time spent abroad, the country-specific conditions, the efforts initially contemplated to return home, and the evidence at hand to ultimately demonstrate an unrelinquished U.S. domicile.
- As in any case, the totality of the circumstances will determine the outcome, and none of the suggested strategies are exclusive. Accordingly, it is incumbent for the practitioner to tailor the strategy that best adapts to each client's reality.