



ABSENCES AND CONTINUOUS RESIDENCE

Practice Advisory

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I. Introduction

Absences from the United States can affect an applicant's eligibility for naturalization in numerous ways. An absence may: (1) demonstrate abandonment of lawful permanent resident status; (2) break the statutory period for continuous residence; (3) cause a lack of sufficient physical presence in the U.S.; (4) affect the 3-month residence requirement in the applicant's district or state; and (5) may trigger issues of deportability. It is critical to analyze the effect of any absence through each of the five different analyses. In this practice advisory, we will focus specifically on how absences of varying lengths of time affect the continuous residence requirement.

Breaks in Continuous Residence

The general rule is that naturalization applicants must demonstrate that they continuously resided in the United States for the last 5 years immediately prior to applying for citizenship.¹ For applicants married to U.S. citizens, the continuous residence period is 3 years.² "Continuous" residence does not require that the person be physically present in the U.S. for every day, but that she maintains her dwelling place during that time. The Immigration and Nationality Act defines "residence" as a person's "principal, actual dwelling place."³ USCIS has incorporated this definition into their guidance on meeting the continuous residence requirement.⁴ Thus, just owning or renting property in the United States without actually living in the United States could create problems in demonstrating one's continuous residence under this definition.

When an applicant travels out of the country for a certain amount of time during the 5-year period, the applicant may break their continuous residence. Generally, USCIS evaluates the impact of an absence on continuous residence based on trips of different lengths:

1. Trips abroad for 6 months or less⁵;
2. Trips abroad for more than 6 months, but less than 1 year; and
3. Trips abroad for 1 year or more

1. Trips Abroad for 6 Months or Less

The general understanding is that trips abroad for 6 months or less do not disrupt continuous residence, and a survey of the ILRC's partners across the country verify that this has been their experience.⁶

It is important to note, however, that in July 2015, USCIS updated its Policy Manual to clarify that officers may still review whether multiple absences of less than 6 months may break continuous residence.⁷ The ILRC has seen one case where this issue led to a naturalization denial.

In this particular case, USCIS denied the applicant for lack of continuous residence even though the applicant was gone for less than 6 months. The applicant was employed by a U.S. company and worked abroad. On her application, she stated that she had a physical address abroad during a temporary work reassignment, although maintained ownership of a property in the United States during the same period.

The applicant provided evidence of ownership of multiple properties in the United States, bank statements, employment verification by a U.S. company, and tax payments during the relevant period. Yet, USCIS explained that she provided no evidence of “services maintained,” or that neither she nor her spouse occupied their United States-based property during her absence. USCIS contended that she failed to establish that she maintained a continuous residence address in the United States while she maintained a physical residence outside of the United States. In other words, the U.S. did not remain her principal dwelling place during her absence. In its decision, USCIS cited the updated section of its Policy Manual that states that officers will still assess whether multiple absences of less than 6 months will negatively impact meeting the residence and physical presence requirements for naturalization.⁸

Based on the rationale presented in this decision, it is possible that one interpretation of the USCIS Policy Manual is that if an applicant does not have a United States residence listed on her application for several months during the 5- year statutory period, the applicant will not be found to have continuous residence in the United States. This is because her principal dwelling place for those few months was not in the United States.⁹

It is important to note that ILRC’s survey of its naturalization partners revealed that none had seen a denial for trips of 6 months or less. Nonetheless, the following tips may help ensure that others do not face a similar denial for trips of 6 months or less¹⁰:

- List a concurrent United States residence:** If an applicant lists a foreign address in the naturalization application for any length of time, also include the applicant’s United States residence during the same period if applicable. Failure to include a United States address may signal that the applicant was living outside the country without a principle dwelling place in the U.S. (And could also flag a possible intent to establish a residence abroad, even for a brief period.) Encourage applicants to maintain a physical address in the United States during such planned absences.
- Argue USCIS acted Ultra Vires to the Statute:** Ultra vires is a defense that generally is used to argue that an actor took action that fell outside the scope of his or her legal authority. In this case, it could be used to assert that a decision is void because USCIS went beyond its legal power to issue a decision contrary to the law as set out in the statute; that is, the Immigration and Nationality Act (INA) (i.e., that trips of 6 months or less disturb continuous residence).

When would you argue ultra vires? This defense may be available in federal court *after* USCIS both denies an initial application and issues a denial notice after the reexamination.¹¹

What is the argument? USCIS is charged with implementing the laws set out by congress. Congress enacted the INA, and specifically the provisions of INA section 316(b), which specifies how absences from the United States impact establishing continuous residence. Any finding that determines a trip of 6 months or less breaks continuous residence goes against the language of the statute. Essentially, USCIS crossed the line from permissible statutory interpretation by the responsible agency to an *ultra vires* decision contrary to the clear intent of Congress.

INA § 316(b) only places limitations on trips of over 6 months. Under the statutory interpretation principle of “expressio unius” or “the inclusion of one thing implies the exclusion of the other,” INA § 316 expressly set forth certain periods that trigger a presumption of a break in continuous residence – trips over 6 months. If Congress wanted to limit trips of 6 months or less, it would have done so. Denying naturalization for lack of continuous physical presence for trips of 6 months or less, a period not explicitly addressed in the statute, would go against congressional intent. For USCIS to reach beyond the statute to include periods not mentioned is ultra vires to the statute and outstrips USCIS’s legal authority. In other words, USCIS exceeded the scope of its authority by coming to a decision that was contrary to the text of INA § 316.

2. Trips Abroad for More Than 6 Months, But Less Than 1 Year

The presumption is that trips of more than 6 months, but less than 1 year, disrupt an applicant's continuous residence.¹²

To overcome this presumption, an applicant should present evidence that the trip, although longer than 6 months, but less than 1 year, was indeed temporary and that the applicant retained ties with the United States throughout the relevant period. Evidence of all of the following would be important to provide to rebut the presumption: (1) continuing employment in the United States; (2) immediate family remaining in the United States during the applicant's time abroad; (3) retention of full access to the applicant's residence in the United States; and (4) that the applicant did not find a new job while abroad.¹³

Alvear v. Kirk, 87 F.Supp.2d 1241 (D. New Mexico, 2000), illustrates how specific the evidence of continuous residence may need to be to overcome the presumption. In *Alvear*, the court found that the applicant failed to overcome the presumption that his trips of longer than 6 months did not break his continuous residency even though Mr. Alvear provided evidence of multiple purchases of property in the United States, evidence of his children's birth and residence in the country, and his current residence in New Mexico. The court found this insufficient because Mr. Alvear did not indicate how long he lived at his current residence, and included no proof of his actual physical residence or principal dwelling place in the United States during the 5-year statutory period. Although Mr. Alvear could establish his physical presence in the United States during the statutory period, "he [did] not establish the whereabouts of his *actual* residence." *Id.* at 1243 (emphasis in original). Thus, if you think an absence of more than 6 months, but less than a year might cause the USCIS to deny for lack of continuous residence, it may be helpful to provide specific proof with exact dates of residence during the statutory period to overcome the presumption.

How long should an applicant wait before she can re-apply for naturalization if her absence of over 6 months, but less than 1 year disrupts her continuous residence?

The regulations do not provide a clear answer to this question. If USCIS finds that the applicant's trip of over 6 months, but less than 1 year, does break her continuous residence, neither the Policy Manual nor the regulations specify how long an applicant has to wait before reapplying. Some would argue that an applicant would have to wait 5 years after returning to the United States before she would be eligible for naturalization, while others believe an applicant should only wait until enough time passes that she no longer has an absence of more than 6 months during the statutory period of 3 or 5 years.

Without clear guidance, one option is for applicants to wait until enough time has passed so that they no longer have an absence of more than 6 months during the statutory period (i.e., 4 years, 6 months, and 1 day; or 2 years, 6 months, and 1 day, if applying as the spouse of a United States citizen).

Another less certain route is to argue for sensible statutory interpretation by comparing how the regulations treat absences of *1 year or more*. The USCIS Policy Manual and 8 CFR § 316.5(c)(1)(ii) state that if an applicant has an absence of *1 year or more*, the applicant only needs to wait **4 years and 1 day** (or 2 years and 1 day if applying as the spouse of a United States citizen) to apply.¹⁴

Courts are guided by the long-standing principle that "statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, . . . avoid an unjust or an absurd conclusion." *Lau Ow Bew v. United States*, 144 U.S. 47 (1892). Therefore, one could argue that applicants with absences of over 6 months, but less than 1 year should not have to wait longer to apply than their counterparts with absences of *over 1 year*. Accordingly, applicants with absences of over 6 months, but less than 1 year should also only have to wait 4 years and 1 day (or 2 years and 1 day if applying as the spouse of a United States citizen). Because different USCIS offices could have different interpretations, there is a chance that USCIS may find that the applicant reapplied too soon which may further delay the application.

3. Trips Abroad for 1 Year or More

Trips abroad of 1 year or more during the statutory period will always break an applicant's continuity of

residence. (Please note, however, that there are a number of exceptions to this rule. Those exceptions include absences because of participation in the United States armed forces, and absences created due to the applicant receiving misinformation by USCIS. Chapter 5, Section 5 of the ILRC's Naturalization and the U.S. Citizenship Manual provides a list of exceptions to disruptions of 1 year or more.)

Unlike with absences of over 6 months, but less than 1 year, USCIS will not consider evidence of employment, family residence, or access to the applicant's United States home to overcome the break of 1 year or more.

As mentioned above, a lawful permanent resident with a disruption of continuous residence of 1 year or more only needs to wait **4 years and 1 day** (or 2 years and 1 day if applying as the spouse of a United States citizen) after the date she returns to the United States to file her naturalization application.

Finally, any removal (or deportation) from the United States, or absence while under an order of deportation, exclusion, or removal, will terminate an applicant's status as a lawful permanent residence, and prevent the applicant from meeting the residence requirement for naturalization.¹⁵ There is an exception, however, for those in the armed services.¹⁶

End Notes

¹ INA § 316(a)(1). Please note that members of the U.S. armed forces may be eligible to naturalize with modified or waived continuous residence requirements. To learn more about the various exceptions to the 5-year rule, including the armed forces exception, please refer to Chapter 5, Section 3(C) of ILRC's Naturalization and U.S. Citizenship Manual.

² INA § 319. The naturalization applicant needs to have lived in the United States for three years as a lawful permanent resident prior to qualifying for naturalization, and must have been married to and living with her U.S. citizen spouse for at least three years, and the spouse must have been a U.S. citizen for the entire three years. Note that the statutory period is also three years for applicants who obtained status because they were battered or subjected to extreme cruelty by a United States citizen spouse or parent (INA § 319(a)).

³ INA § 101(a)(33).

⁴ 12 USCIS-PM D(3)(A) and (C).

⁵ Note that while INA § 316(b) clearly states that absences of "more than six months" are relevant to disruptions of continuous residence, the regulations confuse the matter by defining the same period as "between six (6) months and one (1) year." (8 CFR 316.5). In comparison, the USCIS Practice Manual states that the relevant period is "absences of more than 6 months but less than one year." Although 8 CFR 316.5 includes 6 months in its discussion of absences that are presumed to break continuous residence, we believe the regulations should be read consistently with the statute and the USCIS Policy Manual which are clear that a trip of 6 months does *not* disrupt continuous residence. See 12 USCIS-PM D(3)(C).

⁶ Although absences of 6 months or less usually do not endanger continuous residence, being abroad for any length of time, including for less than 6 months, could place the applicant in danger of abandoning her residence if she intended to move her home to another country. Therefore, it is important to analyze all trips of any length through each of the absences analyses. Please refer to ILRC's Naturalization and U.S. Citizenship Manual, Chapter 4, Section 7 for more information.

⁷ 12 USCIS-PM D(3)(C).

⁸ *Id.* ("An officer may also review whether an applicant with multiple absences of less than 6 months will be able to satisfy the continuous residence and physical presence requirements. In some cases, an applicant may not be able to establish that his or her principal actual dwelling place is in the United States or establish residence within the United States for the statutorily required period of time.") (citing 8 CFR 316.5(a)).

⁹ 8 CFR 316.5(a); 12 USCIS-PM D(3)(A) and (C).

¹⁰ One additional tip to consider is filing a Form N-470 if a client plans to relocate abroad temporarily for a short-term work assignment, if the relocation could last longer than 1 year. An approved N-470, Application to Preserve Residence for Naturalization Purposes, will preserve the client's residence for a future naturalization application. [This process is distinct from, and in addition to, obtaining a Reentry Permit (Form I-131), which does not prove that a person did not disrupt her continuous residence for naturalization.] Generally, the N-470 is only necessary for individuals who will be absent from the United States for 1 year or more. However, given the revised guidance in the Policy Manual, it may also protect those who planned to work abroad for longer than a year, but ultimately returned before the year ended. To qualify for the N-470, an applicant must demonstrate that their work falls into "certain employment purposes," such as working for the U.S. government, or an American company that engages in foreign trade of the United States, among other requirements. Please refer to ILRC's Naturalization and U.S. Citizenship Manual, Chapter 5, Section 5 for more details on preserving residence with an N-470. Although an N-470 may preserve residence, it does not relieve the applicant from meeting the physical presence requirement for naturalization, unless the applicant is employed by, or under contract with, the U.S. government. INA § 316(c).

¹¹ N-336 is the form to submit a request for a hearing on a naturalization decision, which is available at: <https://www.uscis.gov/n-336>.

¹² INA § 316(b); see also 12 USCIS-PM D(3)(C)(1).

¹³ 8 CFR § 316.5(c)(1)(i). The documents submitted should also include the address of the applicant's United States residence, and not a P.O. Box. *Abulkhair v. Bush*,

¹⁴ 12 USCIS-PM D(3)(C)(3); 8 CFR § 316.5(c)(1)(ii).

¹⁵ 8 CFR § 316.5(c)(3).

¹⁶ This provision does not apply to people who are applying for naturalization under special rules for people in the armed services. See INA §§ 328, 329.



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