

## U.S. Citizenship and Immigration Services

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### Interpretation 318.4 Effect of claim of nonresident alien status for income tax purposes upon prior lawful admission for permanent residence .

Under the Internal Revenue laws and regulations, aliens are classified for income tax purposes as "resident aliens" or as "nonresident aliens." Resident aliens are, in general, taxed the same as United States citizens. Nonresident aliens, on the other hand, are granted special benefits under the income tax laws and are exempt from liability for income taxes on earnings which are derived from sources outside the United States. An alien who performs personal services outside the United States is considered as having received income from sources outside the United States even though he is paid for those services by an employer located in the United States.

An alien who has been admitted to the United States as an immigrant may nevertheless be treated under the income tax laws as a nonresident alien for tax purposes, or the alien himself may choose to acquire the status of a nonresident for tax purposes. The consequence of the acquisition of nonresident alien status for tax purposes may be the termination of immigrant status under the immigration laws. Whether that result follows is dependent upon the manner in which the alien became a nonresident.

There are two categories of immigrants who are considered to be, or who acquire the status of, nonresident aliens under the income tax laws and regulations.

(1) An immigrant admitted to the United States for permanent residence, or an alien whose status is adjusted to that of a permanent resident but who has no bona fide intentions of establishing residence in the United States at the time he is accorded status as a lawful permanent resident, is automatically classified under the income tax laws and regulations as a nonresident alien. That classification attaches notwithstanding that the alien has not made application for or otherwise requested that he be so classified, that he has not abandoned his immigration status as a lawfully admitted permanent resident, and that he is still considered as an immigrant under the immigration laws.

(2) An immigrant admitted to the United States for permanent residence, or an alien whose status is adjusted to that of a permanent resident, who upon admission or adjustment intends to and does establish residence in the United States, is automatically classified under the income tax laws and regulations as a resident alien. Such an alien retains his resident alien status until such time as he voluntarily elects to claim nonresident alien status under the tax laws and regulations. Such an election can be made only by satisfaction of the following two conditions:

(a) The alien's actual departure from the United States,

(b) coupled with an intention to abandon residence in the United States, or the intention to abandon residence must be formed after the alien has departed from the United States.

Section 101(a)(20) defines the term "lawfully admitted for permanent residence" to mean "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." This definition does not condition the exercise of the privilege accorded thereunder within any prescribed period after admission, nor does it provide for loss of the alien's status as an immigrant upon failure to exercise the privilege. An immigrant in category (1) may, therefore, retain and continue to enjoy the status of an alien lawfully admitted for permanent residence, notwithstanding that he is regarded as a nonresident alien under the income tax laws, unless and until he changes his status as an immigrant under the immigration laws by abandonment of that status. If, of course, such an alien's absences are prolonged and frequent, with relatively little time spent in the United States, the purpose and circumstances of his absences may compel the conclusion, on other than income tax considerations, that the alien is not entitled to the status or the benefits under the immigration laws which accrue to lawful permanent residents.

In contrast to the immigrant in category (1), the immigrant in category (2) is an alien who did, in fact, establish residence in the United States after admission to the United States for permanent residence, and thereafter made a voluntary election to claim nonresident alien status to enable him to qualify for special exemptions from income tax liability. In making such election, the alien acquired a status under the tax laws which is patently inconsistent with the continuance of status as a lawful permanent resident under the immigration laws, since eligibility for the status was available only to immigrants who had left the United States with intention to abandon residence. Abandonment of residence by an immigrant, for whatever reason or purpose, constitutes a change of status within the contemplation of section 101(a)(20) and extinguishes the status of a lawful permanent resident.

The fact that an alien within category (2) was granted the benefits of section 316(b) or of section 317, preserving continuity of residence in the United States for naturalization purposes, does not alter the conclusion that he no longer enjoys the status of a lawful permanent resident and, therefore, is ineligible for naturalization on that ground. Additionally, with the change of status, physical presence and residence already accumulated cannot be counted and new accumulations are not possible.

Where an immigrant in category (2), who is applying for a privilege or benefit under the immigration or nationality laws, claims that he was unaware or ignorant of the fact that, in electing to claim nonresident alien status under the tax laws, he would simultaneously terminate his status as a lawful permanent resident under the immigration laws; that in so electing he had no intention of abandoning either his residence in the United States or his status as an immigrant; and substantiates his claims by proof that he has filed a correct Individual Income Tax Return, Form 1040, with the Internal Revenue Service for each year for which nonresident alien status was claimed, he is considered as having acted upon a mistake of fact and of law and, therefore, as not having terminated his status as a lawful permanent resident under the immigration laws through the prior claim to nonresident alien status for tax purposes.