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PUBLICATION

What Dual Citizens Should Know Before Renouncing Their United States Citizenship

Date: November 15, 2016

Original Newsletter(s) this article was published in: Blaneys on Immigration: November 2016

Introduction

The number of dual citizens who renounce their United States citizenship has risen almost every year since the enactment of the *Foreign Account Tax Compliance Act* ("FATCA") on March 18, 2010. FATCA requires foreign financial institutions to report on the non-U.S. financial accounts of United States citizens; this allows the Internal Revenue Service ("IRS") to identify U.S. citizens who have not reported their overseas assets.

In 2010, the number of U.S. citizenship renunciations was 1,534; in 2015, it rose to 4,279. This number has continued to rise despite the increased fee for renunciation of United States citizenship (from $450.00 USD to $2,350.00 USD), which the U.S. Department of State ("DOS") imposed on September 12, 2014 (the official notice erroneously stated that the higher fee would apply on September 6, 2014). Obviously, not all of these renunciations were caused by FATCA. However, it is likely that a significant number of cases were motivated by it.

The original purpose of FATCA was to identify unreported overseas financial accounts held by domestic U.S. taxpayers. However, it has also adversely affected other groups of individuals, including:

- Persons who were born in the United States but who have spent most of their lives residing abroad; and
- Persons who may have unknowingly acquired United States citizenship by law (such as birth abroad to a United States citizen parent).

Many of these individuals have never filed a U.S. tax return, although they may be legally required to do so. FATCA makes it easier for the IRS to identify these "accidental Americans"

(at least those who come to the attention of foreign financial institutions) and take enforcement action against them.

As a result of FATCA, many U.S. citizens are now seeking tax advice from a U.S. Certified Public Accountant ("U.S. CPA"). Although it is important for U.S. citizens to consult with a qualified U.S. CPA in order to determine the tax implications of a loss of United States citizenship, it is equally important to consult with a qualified U.S. lawyer on the potential immigration implications.

Relinquishment v. Renunciation

Relinquishment is a general term, which refers to a voluntary loss of United States citizenship, through the commission of one of the expatriating acts described in §349(a) of the *Immigration and Nationality Act* ("INA"). A formal renunciation at a U.S. consular post is listed in INA §349(a) as an expatriating act but it is only one of many possible ways that a U.S. citizen can lose their citizenship.

In some cases, it is possible to argue that a U.S. citizen has already lost United States citizenship many years ago, through the commission of an expatriating act other than renunciation. Although it is not always possible to argue prior relinquishment of United States citizenship, it is the preferred option. There are two reasons for this:

- An individual who successfully establishes that he or she relinquished United States citizenship many years ago (through some means other than renunciation) should be relieved of U.S. tax obligations in the subsequent years.
- An individual who has automatically relinquished United States citizenship (through some means other than renunciation) will avoid the potential immigration consequences that may arise in a formal renunciation case.

Requirements for Relinquishment of United States Citizenship

According to INA §349(a), a U.S. citizen will lose his or her nationality by *voluntarily* performing any of the listed expatriating acts *with the intention of relinquishing* United States nationality. The full list appears here but the most commonly encountered expatriating acts are:

- Obtaining naturalization in a foreign country on or after the age of eighteen;
- Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign country on or after the age of eighteen;
- Serving in the armed forces of a foreign country if: (1) those armed forces are engaged in hostilities against the United States; or (2) he or she serves as a commissioned or non-commissioned officer;
- Accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign country on or after the age of eighteen: (1) if he or she acquires the nationality of that foreign country, or (2) a declaration of allegiance is required for the office, post, or employment; or
- Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign country.

In order for a loss of U.S. citizenship to occur, the individual must have voluntarily performed one of the expatriating acts. In addition, the expatriating act must also have been performed with the express intention of relinquishing United States citizenship.

According to INA §349(b), whenever loss of United States citizenship is at issue, the burden of proof falls on the party claiming that the loss occurred, by a preponderance of evidence. In the words, if an individual wishes to establish a prior relinquishment of United States citizenship, he or she needs to present sufficient documentation to evidence that loss.

INA §349(b) states that a person who performs one of the expatriating acts described in INA §349(a) is presumed to have done so voluntarily, although this presumption may be rebutted by sufficient evidence. For example, there will be no loss of United States citizenship where the U.S. citizen can establish that he or she performed the expatriating act under circumstances involving duress, mistake, or incapacity.

Not only must the U.S. citizen have performed an expatriating act voluntarily, but he or she must also have intended to relinquish United States citizenship as a result of the expatriating act. The intention to relinquish United States citizenship is clear in the case of a formal renunciation but it is less certain when other expatriating acts are performed.

The presumption described in INA §349(b) applies only to the voluntariness of the expatriating act itself and not to the intention to relinquish United States citizenship. However, DOS applies a uniform administrative standard of evidence, which presumes that U.S. citizens intend to retain their citizenship when they:

- Obtain naturalization in a foreign state;
- Declare their allegiance to a foreign state;
- Serve in the armed forces of a foreign state not engaged in hostilities with the United States; or
- Accept non-policy level employment with a foreign government.

In other words, DOS will normally presume that there is no loss of citizenship when these specific expatriating acts are performed. However, this presumption may still be rebutted by an individual who wishes to demonstrate that he or she intended to relinquish United States citizenship. For example, an individual could establish their intention to relinquish United States citizenship by documenting:

- The basis for their reasonable belief that, by performing the expatriating act, they would lose their United States citizenship (i.e. they were mistakenly told by a lawyer that this would occur); and
- Their honest belief that they actually lost their United States citizenship after performing the expatriating act (i.e. they stopped using their U.S. Passport, voting in U.S. elections, and did not act in a manner consistent with someone who had retained United States citizenship).

Dual citizens who were born in the United States and who naturalized as Canadian citizens prior to 1973 should have a much easier time demonstrating that they intended to renounce their United States citizenship. This is because, until 1973, the Canadian oath of naturalization

contained language specifically stating that the applicant was relinquishing all prior citizenships. Although this would not be considered a formal renunciation under INA §349(a), the language of the oath would still be considered compelling evidence of the individual's intention to relinquish United States citizenship.

In *Ulin* v. *Canada*, a 1973 decision of the Federal Court of Canada, the renunciatory language contained in the oath of naturalization was found to be unconstitutional. After this decision, the renunciatory language was removed from the oath of naturalization. Therefore, cases involving a Canadian oath of naturalization taken after 1973 cannot rely on the language of the oath itself in order to demonstrate an intention to relinquish United States citizenship. However, as mentioned above, it is still possible to demonstrate this intention, through the submission of other evidence.

Renunciation of United States Citizenship

If it is not possible to argue a prior relinquishment of United States citizenship, a formal renunciation before a U.S. consular officer may be considered. Adult United States citizens have the right to formally renounce their citizenship as long as they have a proper understanding of the consequences of renunciation and they make the decision to do so voluntarily.

Unfortunately, a formal renunciation does not protect the United States citizen from prior U.S. income tax obligations, which makes it a less desirable option than arguing a prior relinquishment of citizenship. There are also a few negative consequences that may occur in the case of a formal renunciation.

According to INA §212(a)(10)(E), a United States citizen who officially renounces United States citizenship and who is determined by the U.S. Department of Homeland Security to have done so for the purpose of avoiding U.S. tax is inadmissible to the United States. Therefore, it is theoretically possible for former U.S. citizens to be barred from the United States because they renounced United States citizenship. However, it must be determined that they did so with the intention of avoiding U.S. tax obligations, which can be difficult to prove.

To the best of the author's knowledge, no one has been barred from the United States under INA §212(a)(10)(E). However, there is no way to be sure that the United States Government won't enforce INA §212(a)(10)(E) more strictly in the future. So a U.S. citizen who formally renounces United States citizenship now could find herself barred decades after the renunciation took place.

To protect against the INA §212(a)(10)(E), the author typically submits a sworn statement at the time of the renunciation, describing the non-tax reasons why the applicant has decided to renounce her United States citizenship. A sworn statement made at the time of the renunciation should carry considerable weight if the former citizen's intention is brought into question at some point in the future.

As a result of the *Brady Handgun Violence Prevention Act*, it is unlawful to sell firearms to persons for whom a finding of loss of nationality due to renunciation has been made. In other words, a former U.S. citizen who formally renounces United States citizenship cannot purchase a firearm in the United States. Of course, this will not be a significant issue for most applicants.

Also, as a result of the *USA PATRIOT Act* and the *Safe Explosives Act*, a former U.S. citizen who formally renounces United States citizenship cannot obtain a hazardous materials endorsement for a U.S. commercial driver's license. Again, this will not be a significant issue for most applicants.

The Process for Relinquishing/Renouncing United States Citizenship at a Consular Post

A dual citizen who wishes to formally relinquish or renounce their United States citizenship before a U.S. consular officer must request a special appointment with the American Citizenship Services Section at a U.S. consular post. Certain forms and documents must accompany the appointment request.

Unfortunately, there is a very long wait for these appointments, since relinquishments and renunciations are considered low priority cases. U.S. consular posts in Canada typically schedule these special appointments many months into the future.

At the appointment, if the U.S. citizen wishes to argue a prior relinquishment of United States citizenship, she may present her evidence at that time. On the other hand, if the U.S. citizen wishes to renounce United States citizenship, she will be interviewed by a consular officer to verify that she understands the consequences of the renunciation and is proceeding voluntarily.

According to the *Foreign Affairs Manual*, consular officers should schedule a second appointment for the actual oath of renunciation, presumably to allow the proposed renunciant to further reflect on their decision. However, in practice, the U.S. consular posts in Canada typically interview the applicant and administer the oath of renunciation during the same appointment.

As mentioned above, DOS increased the fee for renouncing United States citizenship from $450.00 USD to $2,350.00 USD on September 12, 2014. DOS also began charging the $2,350.00 USD fee for claims of prior relinquishment of citizenship on November 9, 2015.

U.S. consular officers do not have the authority to approve a request for a Certificate of Loss of Nationality ("CLN"). The final decision is made by the Office of American Citizen Services and Crisis Management in the Directorate of Overseas Citizens Services, Bureau of Consular Affairs of the Department of State.

Once this final approval is given, a CLN will be issued to the former U.S. citizen. If the loss of United States citizenship is based on a prior expatriating act, the CLN will be effective as of the date of that prior act. If it is based on a formal renunciation, the CLN will be effective as of the date of the oath of renunciation.

Conclusion

Since the loss of United States citizenship can result in both immigration and tax consequences, U.S. citizens should seek professional advice from a qualified U.S. immigration lawyer and U.S. CPA prior to taking any formal action.