Additional Comment on OMB Control Number 1615-0056 (N-470)

Submitted By Joseph P. Whalen on October 30, 2011

The Information Collection (IC) regarding the USCIS form N-470 published in the **Federal Register** on October 12, 2011, includes:

> "This information collection was *previously published as an extension* of a currently approved information collection in the **Federal Register** on August 12, 2011, at 76 FR 50237, for a 60-day public comment period. *Subsequently, USCIS decided to conduct a **comprehensive** revision* of Form N-470 instead of extending the current edition. USCIS invites members of the public who commented on the 60-day extension to submit their comments on the revised form." *(Emphasis added.)*

I am happy to take this opportunity to offer comments as to how I perceive the **proper purpose and use of** the revised form N-470 and **its controlling statute regulations.** In an effort to encourage and aid USCIS in embracing a more *comprehensive and integrated approach to its information collection activities*, I offer a *comprehensive and integrated comment* that *embraces the proper function and practical utility aspects of the standard information collection criteria*. In addition, it is hoped that this comment will help USCIS to *enhance the quality, utility, and clarity of the information to be collected*. USCIS may consider this submission in any of a variety of contexts including, but not limited to any of the following:

- as an unsolicited comment in the normal course of simply doing business, or
- as a *Petition for Rulemaking* under 5 USC § 553(e), or
- as a collateral comment on the recent AIR conference call, or
- as a small part of the current and on-going efforts towards Retrospective Regulatory Review, or
- as an invited comment on the form N-470 currently under review, or
- as a *Topical Amicus Submission* to AAO.

It makes no difference to me how USCIS classifies this comment as long as it does actually consider its substance and validity. The following suggested changes to the controlling regulations are offered in the spirit of ensuring that potential customers (LPRs and their U.S. employers) as well as their immigration attorneys and accredited representatives will be better informed. In addition, these clarifications are meant to inform the adjudicators in rendering *initial decisions* on the N-470 and associated N-400, as well as aid *adjudicators*, *second hearing officers*, and *appeals officers* in deciding *appeals or motions* through either the forms N-336 or I-290B.

Suggested Revisions[1] to: 8 CFR § 316.5 - Residence in the United States.

(d) *Application for benefits with respect to absences; appeal —*

(1) *Preservation of residence under section 316(b) of the Act.*

(i) An application for the residence benefits under section 316(b) of the Act to cover an absence from the United States for a continuous period of one year or more [must] be submitted to [USCIS] on Form N–470 with the required fee, in accordance with the form's instructions. **The application may be filed either before or after the applicant's employment commences, but must be filed before the applicant has been absent from the United States for a continuous period of one year**.

(ii) An approval of Form N–470 **under section 316(b) of the Act shall cover the spouse and dependent unmarried sons and daughters of the applicant who are residing abroad as members of the applicant's household** *during the period covered by the application.* The notice of approval, Form N–472, shall identify the family members so covered.

(iii) An applicant whose Form N–470 application under section 316(b) of the Act has been approved, but who voluntarily claims nonresident alien status to qualify for special exemptions from income tax liability, raises a **rebuttable presumption that the applicant has relinquished a claim of having retained lawful permanent resident status while abroad.** The applicant's **family members** who were covered under section 316(b) of the Act and who were listed on the applicant's Form N–472 will **also be subject to the rebuttable presumption** that they have relinquished their claims to lawful permanent resident status.

(2) *Preservation of residence [and presence] under section 317 of the Act.* An application for the residence and physical presence benefits of section 317 of the Act to cover any absences from the United States, whether before or after December 24, 1952, [may] be submitted to [USCIS] on Form N–470 with the required fee, in accordance with the form's instructions. The application **may be filed either before or after the applicant's absence** from the United States or the performance of the functions or services described in section 317 of the Act.

[1] Wholesale re-write begins at (d)(3). References in (d)(1) and (2) to the Service are replaced with [USCIS] along with other minor changes clearly denoted by highlighting..

[Completely new language follows, the preceding is mostly "*current*" language.]

(3) *Entitlement, approval, denial, and appeal.*

(i) *Entitlement to extended absence benefits.*

(A) *Advance Notice.* Under section 316(b) of the Act, the principal applicant must fulfill a statutorily-mandated prerequisite, continuous, uninterrupted, one-year period of physical presence and residence as an alien lawfully admitted for permanent residence (LPR) inside the United States **prior to departure abroad** for any other purpose. The principal applicant is required to put USCIS on notice of their intent to utilize the extended absence benefits in a future application for naturalization. Proper notice to USCIS is accomplished by filing the form designated for this purpose in subparagraph (1)(i) of this paragraph (d) prior to being absent from the United States for one continuous year for the qualified foreign employment assignment at which time the window of opportunity to place USCIS on notice will close. An LPR who fails to timely vest their interest in this benefit will lose entitlement to it.

(C) *CIA Exception*. As provided under section 316(c) of the Act, in the case of a person employed by or under contract with Central Intelligence Agency (CIA), the requirement in subsection 316 (b) of an uninterrupted period of at least one year of physical presence in the United States may be complied with by such person at any time prior to filing an application for naturalization.

(B) *Religious Vocation.* Under section 317of the Act, the principal applicant must fulfill a statutorily-mandated prerequisite, continuous, uninterrupted, one-year period of physical presence and residence as an alien lawfully admitted for permanent residence (LPR) inside the United States prior to filing an application for naturalization. The prerequisite one-year period may be fulfilled either before or after the extended absence. A principal applicant under this section of the Act is not required to file the application for extended absence benefits unless household members must also be covered.

(D) *U.S. Government Civilian Employees.* The granting of the benefits of section 316(b) of the Act shall not relieve the applicant from the requirement of physical presence within the United States for the period specified in sections 316(a) or 319(a) of the Act, except in the case of those persons who are employed by, or under contract with, the Government of the United States as civilian employees.

(E) *Burden Of Proof.* Regardless of the basis for invoking entitlement to extended absence benefits, the burden of proof shall remain upon every naturalization applicant to demonstrate full eligibility and qualifications for naturalization in accordance with the section of law that serves as a basis for that naturalization application during the actual naturalization proceedings. Even when the extended absence benefit application has been previously approved, the applicant for naturalization is not relieved of being fully eligible in every respect. An applicant for naturalization relying on the extended absence benefit is required to substantiate entitlement during the future naturalization proceeding through production of corroborating evidence.

(ii) Qualifying employment situations under section 316(b) of the Act include that of an LPR who:

(A) **is** employed by <u>*or*</u> under contract with--

(1) the Government of the United States as a civilian employee [<u>*exclusive of*</u> U.S. Military Service Members who are already covered under other statutory provisions], *or*

(2) an American Institution of Research (AIR) recognized as such by USCIS and listed on the USCIS website; **or**

(B) **is** employed by an *American firm or corporation* engaged in whole or in part in the development of foreign trade and commerce of the United States; **or**

(C) **is** employed by a *subsidiary of* an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States *more than 50*

per centum of whose stock is owned by an American firm or corporation; **or**

(D) **is to be** employed by a *public international organization* of which the United States is a member *by treaty or statute*. Consult the USCIS website for which organizations currently qualify. ***Provided***: This last LPR and *only* this last LPR is *prohibited from being employed by such organization **prior** to being an LPR.*

(iii) The **applicant** under paragraphs (d)(1) or (d)(2) of this section **shall be notified of USCIS' disposition** of the application in writing.

(A) *Approval*. A fully qualified applicant will be notified of their successful application in writing. Such notice will indicate which section of the Act applies to their particular situation and will name all covered members of the applicant's household. All approval notices will advise of potential negative consequences of disqualifying acts or circumstances arising post-approval that may invalidate that approval.

(B) *Provisional Approval.* If an applicant under section 316(b) of the Act has *not yet* fulfilled the continuous presence and residence requirement at time of approval, (s)he will be advised in writing of consequences of early departure in addition to the standard warning language provided to all applicants. All approvals are essentially provisional and may be invalidated through *material changes* after issuance of an approval notice.

(C) *Advisory*. All approval notices will contain standardized warnings as to negative consequences of post-approval disqualifying or invalidating actions or circumstances.

(1) An absence of one year or more will invalidate one's Permanent Resident Card as a valid travel document unless the LPR has obtained a re-entry permit.

(2) A re-entry permit is issued for a maximum standardized two-year validity period. Re-entry permits may not be renewed from abroad. If an absence will continue beyond the permit's validity period, the LPR *may* need to return to the U.S. to re-apply and submit biometrics.

(3) An LPR who stays abroad over one year without a re-entry permit may apply for a Returning Resident Visa (SB-1) through the U.S. Embassy or Consulate abroad. The possession of an Approval Notice pertaining to extended absence benefits is not a guarantee of success.

(4) An LPR whose Permanent Resident Card expires while abroad may have difficulty traveling back to the United States if not in possession of either a valid re-entry permit or Returning Resident Visa (SB-1). An Approval Notice pertaining to extended absence benefits is not a valid travel document.

(5) Any LPR returning to the United States, is subject to being deemed *"an alien seeking admission"* as described in section 101(a)(13) of the Act regardless of possession of a valid unexpired Permanent Resident Card, re-entry permit, Returning Resident Visa (SB-1), or an Approval Notice pertaining to extended absence benefits.

(6) Coverage will cease for any dependent who ceases to be a qualifying dependent household member. *For example,* an unmarried son or daughter age 21 or older ceases to be covered when (s)he: moves out of the household; *or* drops out of college or graduates *and* becomes employed abroad becoming self-sufficient; *or* marries-even if remaining domiciled with the principal applicant abroad. A child born to a dependent unmarried son or daughter does not automatically make the unmarried son or daughter independent. The *other parent* of such a child (principal's grandchild) does not become a covered dependent even if (s)he physically moves into the principal applicant's abode.

(7) End of qualified and covered employment will end coverage and entitlement to extended absence benefits. Continued absence beyond the end of covered employment will be treated in the same manner as an absence from the U.S. commencing on such date, *i.e., presumptive break in continuity of residence commences upon six months of continued absence.*

(8) Extended absence benefits do not extend to dependents independently from the principal applicant.

(9) Actions normally deemed to be a sign of abandonment of LPR status shall continue to raise a rebuttable presumption.

(10) A child born to the principal applicant and spouse or to another household member continues to be treated in accordance with section 211.1(b) of this chapter. After fulfilling requirements to attain LPR status for a newborn child that child may then be added as a covered dependent.

(D) *Denial*. If the application is denied, USCIS shall state the reasons for the denial in writing with specificity.

(E) *Appeal*. Any written denial notice shall inform the applicant of the right to re-apply, or to file a motion and/or appeal in accordance with the provisions of part 103 of this chapter.

Existing promulgation history:
[56 FR 50484, Oct. 7, 1991, as amended at 56 FR 50487, Oct. 7, 1991; 58 FR 49913, Sept. 24, 1993; 60 FR 6651, Feb. 3, 1995; 62 FR 10394, Mar. 6, 1997] Changes made by 76 FR 53798 Effective November 28, 2011, have no effect on this paragraph (d).

The added language explaining "entitlement" and clarifying that the prerequisite as to the one-year continuous uninterrupted period is a *prerequisite to departure* is essential to understanding how it really works. In this global economy, it is imperative to plainly inform the business community how to best utilize their LPR workers without harming them.

The *seemingly* substantial change to regulatory language in (d)(3) is not creating any new burden. It is merely clarifying and explaining in a straight-forward and more user-friendly manner the statutory requirements that have existed since December 24, 1952. The language contained in (d)(1) could be trimmed in light of suggested changes in (3). For instance, the substance (d)(1)(iii) could be added into the advisories in (3)(iii)(C).

Thank you for considering this comment and proposal.

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