

Expatriating Act - Are you actually American?

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Welcome!!!

I am Olivier Wagner. I have been operating 1040 abroad since 2012, preparing returns for Americans who live overseas helping them get into compliance.

I sometimes touch upon immigration questions along the way. I am here addressing expatriating acts and how that would influence your path to give up US citizenship.

Particularly, for those who already acquired a foreign citizenship.

While the law always stated that one needs intent to give up their U.S. citizenship, back then it was assumed that it was the case. The onus was on the citizen to prove that they meant to retain U.S. citizenship. Over the years the Department of State policy has changed such that one has to prove that their intent was to give up their U.S. citizenship.

A common scenario is someone moved to Canada in the 1960s - a lot of people did that in reaction to the Vietnam War they subsequently acquired Canadian citizenship. It was interesting is that back then neither Canada nor the U.S. allowed dual citizenship, as such it was pretty clear that they did so with the intent of relinquishing their U.S. citizenship.

They then stopped behaving as a U.S. citizen: stopped voting in U.S. elections or getting a U.S. passport. But they never obtained a Certificate of Loss of Nationality because it was already understood that they were no longer a U.S. citizen.

Then, in 2010, the U.S. passed FATCA obligating foreign banks to report information about their U.S. clients, and all of the sudden then they are put in this weird situation because they have a U.S. place of birth of having to convince the bank that they were not actually a U.S. citizen anymore. The bank of course would like to see a Certificate of Loss of Nationality that they don't have.

The INA lists various expatriating acts but the most common one is 1) acquiring a foreign citizenship 2) taking an oath of allegiance to a foreign state and 3) employment serving to a foreign country, especially if that's a decision making position or employment in the military.

Tax laws

It became interesting as the Internal Revenue Code started regulating people giving up U.S. citizenship, creating an exit tax on deemed disposition, form 8854.

Section 877 was passed in 2004 and Section 877A was passed in 2008. What's interesting is that these laws were passed applied to U.S. citizens at the time; if you perform an expatriating act before this date and therefore was not a U.S. person when this was passed logically these laws wouldn't apply to you.

Back to our hypothetical citizen, who stopped behaving as a U.S. citizen since 1978 but doesn't have a Certificate of Loss of Nationality and has been contacted by their bank, there are three options available:

- 1) Obtain a Certificate of Loss of Nationality
- 2) Do nothing

3) Renounce: file five years of tax returns, navigate exit tax issues, and file a dual-status return/form 8854

Obtain a Certificate of Loss of Nationality

This would involve making an appointment at the consulate to apply for a Certificate of Loss of Nationality. The upside is that it will be backdated to the date of the expatriating act. If that is before 2004, neither section 877 nor 877A would apply. that's the most desirable outcome.

The downside is that you indeed need to convince the consulate that you stopped being a U.S. citizen because when you perform the expatriating act, you did so with the intent of giving up your U.S. citizenship furthermore you stopped behaving as a U.S. citizen. If you applied for a U.S. passport or voted in a U.S. election even if it was a decade or two after the expatriating act, your chance of approval would drop to close to zero.

You won't be a covered expatriate because your expatriating act happened before all of these laws were passed. It used to be that there was no fee for a relinquishment, but now the fee of 2350 dollars is being matched for both renunciation and relinquishments, so that is no longer a reason to relinquish.

But aside from that cost, you would be free and clear, and you would have a document from the U.S. government confirming that you indeed are not a U.S. citizen.

Do nothing

The second alternative is to do nothing. you're not a U.S. citizen, you don't have to prove it to anyone you simply don't do anything.

One advantage is that it's free.

A disadvantage is that it lacks certainty: you have this position, you document it but you don't have a Certificate of Loss of Nationality, which would be the word of the U.S. government backing your position and certifying that they agree with you. If challenged you cannot guarantee that you would prevail and since we live in a FATCA world and banks might contact you to get information as to whether you're a U.S. person or not and therefore forward your information to the IRS or not.

It is true that there are ways to certify that you're not a U.S. citizen in the context of FATCA and therefore have your information not being sent to the IRS, in practice financial institutions might not agree with you if you simply self-certify.

Renounce: file five years of tax returns, navigate exit tax issues, and file a dual-status return/form 8854

The third option is to not try to convince the government that you gave up your U.S. citizenship at the time of the expatriating act and instead renounce, which would mean that you would give up your U.S. citizenship as of the date of the consulate appointment.

That means that you need to have filed five years of tax returns, in order to avoid covered expatriate

status, you understood the consequences of renouncing (exit tax) and that would mean that you would file form 8854.

It is straightforward: you don't need to convince of what your intent was and you will have an approval rate of close to 100 percent as an adult

A downside is the cost: It's the most costly course of action, as you would pay for the compliance cost, potential tax and you still have to pay the 2350 fee to the U.S. consulate.

I hope that it was useful. Feel free to contact me with any questions.

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