

Domicile for Immigration and Federal Gift and Estate Tax Purposes—Is A Harmonious Rule Possible?

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When does a nonimmigrant alien establish a United States domicile and thus, a residence subjecting him to estate and gift tax? The authors find that the case law, in both the tax and immigration fields, gives only a partial answer to that question, identifying only the G-4 visa holder as capable of establishing a domicile. They recommend that regulation be promulgated to delineate whether and under what circumstances each category of nonimmigrant aliens may, if at all, establish a United States domicile.

INTRODUCTION

Can a nonimmigrant alien¹ or an undocumented² alien legally es-

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1. All aliens seeking admission to the United States are presumed to be immigrants and are so classified with the exception of those classes enunciated in section 101(a)(15) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15) (1982).

2. The term "undocumented" alien is used to describe aliens who are in the United States, but not within authorization of the law.

establish a "domicile"³ in the United States? The answer to this question may affect the interpretation given to section 212(c) of the Immigration and Nationality Act (INA).⁴ Section 212(c) permits a waiver of excludability for aliens lawfully admitted for permanent residence who temporarily proceed abroad⁵ and who are returning to a "lawful unrelinquished domicile of seven consecutive years."⁶

The interpretation and applicability of section 212(c) are also important to aliens because they are subject to United States gift and estate taxation if they are "domiciled" in the United States. Section 212(c) is also important in determining whether a nonresident alien can establish the necessary domicile⁷ to be subject to United States estate and gift tax jurisdiction on all property owned worldwide.⁸

This article explores the statutory and case law relating to "domicile" and visa classification for aliens who are not permanent residents or immigrants to the United States. This review establishes the criteria for determining whether, or under what circumstances, an alien may be legally able to establish domicile for purposes of estate and gift taxation.⁹

BACKGROUND

Domicile and the Estate and Gift Tax

An individual is a United States resident for estate and gift tax purposes if he has his domicile in the United States.¹⁰ Generally, "A person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of later removing therefrom. Residence without the requisite intention to remain indefinitely will not suffice to constitute domicile"¹¹ One who has established such domicile and is therefore a resident alien is taxable

3. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (1971) provides a general definition of domicile as follows:

- (1) Domicil is a place, usually a person's home, to which the Rules of Conflicts of Laws sometimes accord determinative significance because of the person's identification with that place
- (2) Every person has a domicil at all times and at least for the same purpose, no person has more than one domicil at a time.

4. 8 U.S.C. § 1182(c) (1982).

5. *But see* Francis v. INS, 532 F.2d 268 (2d Cir. 1976) (discussed *infra* at text accompanying notes 48-52).

6. Immigration and Nationality Act, § 212(c), 8 U.S.C. § 1182(c) (1982).

7. A resident for estate tax purposes is a person who, at the time of his death, had his domicile in the United States. Treas. Reg. § 20.0-1(b) (1983). Similarly, a resident for gift tax purposes is one who, at the date of the gift, had his domicile in the United States. Treas. Reg. § 25.2501-1(b) (1983).

8. *See* Treas. Reg. § 20.2031-1(a) (1983); Treas. Reg. § 25.2501-1(a)(1) (1983).

9. One may alternatively characterize this analysis as an exploration of the viability of the "legal disability" doctrine. *See infra* text accompanying notes 17-25.

10. Treas. Reg. § 20.0-1(b) (1983); Treas. Reg. § 25.2501-1(b) (1983).

11. Treas. Reg. § 20.0-1(b)(1) (1983).

on his worldwide estate¹² at the same rates as United States citizens.¹³

A nonresident alien's liability for gift and estate taxes¹⁴ is limited to property situated in the United States.¹⁵ Thus, the possession or lack of a United States domicile may have very significant tax consequences to the individual.¹⁶

The "Legal Disability Doctrine"—The Original Principle

In Revenue Ruling 74-364,¹⁷ the Internal Revenue Service (IRS) ruled that a French citizen admitted to the United States on a G-4 visa was not domiciled in the United States even though he resided here and intended to reside here permanently.¹⁸ The ruling concluded that the terms of the decedent's stay in the United States as limited pursuant to section 101 of the INA¹⁹ "created a legal disability that rendered him incapable of forming the intention necessary for the establishment of a domicile here."²⁰ The *Restatement (Second) of Conflict of Laws* also enunciates the principle that a domicile of choice may be acquired only by a person who is legally capable of

12. See Treas. Reg. § 20.2031-1(a) (1983); Treas. Reg. § 25.2501-1(a)(1) (1983).

13. See Treas. Reg. § 20.2001-1(a) (1983) (the gross estate tax computation is made irrespective of citizenship).

14. Treas. Reg. § 20.2101-1 (1983); Treas. Reg. § 25.2511-3 (1983).

15. See Treas. Reg. § 20.2103-1 (1983); Treas. Reg. § 25.2511-1(b) (1983).

16. The following hypothetical illustrates the significance and consequences of non-residence and residence status for purposes of the estate and gift tax: "X," a nonresident for estate and gift tax purposes, in anticipation of becoming a resident, transfers intangible property such as money, securities, and tangible property located abroad to an irrevocable trust whose beneficiaries include his children and himself. Such transfer in trust should not be subject to the United States gift tax since a gift of intangible property or tangible properties situated outside the United States by a nonresident alien is not a taxable gift. Treas. Reg. §§ 25.2501-1(a)(2), .2511(a) (1983). Furthermore, the property will not be subject to estate tax on the death of "X," even if he is a United States domiciliary at the time of his death since he is not an owner of the trust property at the time of his death, and the original gift was not attached to a gift for United States tax purposes. Treas. Reg. § 20.2101 (1983).

If "X" were a resident of the United States for gift and estate tax purposes at the time of this transaction, the transfer to the trust would be subject to the gift tax and the value of the gift property at the time of the gift would also be subject to the estate tax at his death.

17. Rev. Rul. 364, 1974-2 C.B. 321 (revoked by Rev. Rul. 363, 1980-2 C.B. 249).

18. Although it is not specifically stated, Revenue Ruling 74-364 would be applicable where the individual subjectively intended to reside here permanently, that implication is clear from the subsequent ruling, Rev. Rul. 363, 1980-2 C.B. 249, which, in reversing the previous ruling, makes reference to a hypothetical involving subjective intent to remain in the United States permanently.

19. 8 U.S.C. § 1101(a)(15) (1982).

20. Rev. Rul. 364, 1974-2 C.B. 321, 322.

changing his or her domicile.²¹ In other words, there must be a legal capacity to acquire such domicile.²²

The IRS was not breaking new ground in adopting this principle but was accepting what the *Restatement* portrays as a settled matter of law with clear applicability in the tax area. The IRS referred to *Seren v. Douglas*,²³ which considered whether a nonimmigrant alien student can be a domiciliary of Colorado:

We agree that the federal statutes in question did create a legal disability which would render Seren incapable of forming the intent required by state statute so long as he, in compliance with federal law, was here on a legal basis which bound him to not abandon his homeland.²⁴

The Revenue Ruling also cites *In re Gaffney's Estate*,²⁵ which applied the legal disability doctrine. The court held that a nonimmigrant alien could not be "an inhabitant" of New York so as to qualify as an administrator under local law. Although it is unclear whether the term "inhabitant" has a meaning interchangeable with "domicile," the IRS appears to accept that the legal disability doctrine is applicable.

Elkins & Lok: The Law Develops

After Revenue Ruling 74-364, rules of domicile and residence for estate tax purposes and the visa classification system mandated by the INA appeared to be in balance and harmony. A nonimmigrant, nonresident alien would be legally disabled from establishing domicile in the United States, regardless of his nonimmigrant visa classification,²⁶ but a resident alien would have no such restriction.

This harmony and symmetry was soon disrupted by two separate developments in the case law: the United States Supreme Court decision in *Elkins v. Moreno*,²⁷ and the series of cases interpreting section 212(c) of the INA²⁸ commencing with *Francis v. INS*²⁹ and culminating in the *Lok* decisions.³⁰

21. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 15(1) (1971).

22. *Id.*

23. 30 Colo. App. 110, 489 P.2d 601 (1971).

24. *Id.* at 114, 489 P.2d at 603.

25. 141 Misc. 453, 252 N.Y.S. 649 (1931).

26. Rev. Rul. 364, 1974-2 C.B. 321 (revoked by Rev. Rul. 363, 1980-2 C.B. 249), did not make specific reference to other visa categories, but since this least-restricted of visa categories was subject to the "legal disability" doctrine, it was safe to conclude that the other categories, which were more restrictive with regard to the ability of the alien to intend to reside in the United States, would come under the legal disability doctrine.

27. 435 U.S. 647 (1978).

28. 8 U.S.C. § 1182(c) (1982).

29. 532 F.2d 268 (2d Cir. 1976).

30. See *infra* note 52; *Lok v. INS*, 548 F.2d 37 (2d Cir. 1977); *Lok v. INS*, 681 F.2d 107 (2d Cir. 1982).

Elkins and the IRS' Response

The Supreme Court in *Elkins v. Moreno*³¹ held that the respondents, two dependent children of an employee of a United Nations' representative, as G-4 visa holders,³² could establish the intent necessary for domicile despite their nonimmigrant visa status. The respondents brought a class action suit to challenge the University of Maryland's refusal to grant them an in-state tuition preference. The refusal was based on the university's conclusion that nonimmigrants are incapable of acquiring the requisite intent to reside permanently in the state.³³ The effect of a federal law restricting nonimmigrant aliens and the viability of the legal disability doctrine were not determined in the case because the Court concluded that Congress did not require G-4 aliens to maintain a permanent residence abroad or to leave the United States at a "date certain."³⁴

The Court noted the nonimmigrant visa classifications as outlined in section 101(a)(15) of the INA³⁵ are "by no means homogeneous with respect to the terms on which a nonimmigrant enters the U.S."³⁶ By including restrictions as to intent in the definition of some nonimmigrant classes "Congress must have meant aliens to be barred from these classes if their real purpose in coming to the U.S. was to immigrate permanently."³⁷ However, where Congress did not restrict in such a manner, Congress' silence was "deliberate" and therefore Congress, "while anticipating that permanent immigration would normally occur through immigrant channels, was willing to allow non-restricted and nonimmigrant aliens to adopt the U.S. as their domicile."³⁸ The Supreme Court concluded that a G-4 alien may develop "a subjective intent to stay indefinitely in the U.S. . . . without violating either the [INA], the Service's regulations, or the terms of his visa."³⁹

The IRS soon adopted the *Elkins* rationale, insofar as it applied to nonimmigrant aliens classified under the G-4 category. In Revenue Ruling 80-363 the Service determined that because a G-4 alien has the legal capacity to establish domicile within the United States, he

31. 435 U.S. 647 (1978).

32. 8 U.S.C. § 1101(a)(15)(G)(iv) (1982).

33. 435 U.S. at 650.

34. *Id.* at 664.

35. 8 U.S.C. § 1101(a)(15)(G)(iv) (1982).

36. 435 U.S. at 665.

37. *Id.*

38. *Id.* at 666.

39. *Id.*

or she is not legally disabled.⁴⁰ Revenue Ruling 74-364 was specifically revoked, with one limitation pursuant to section 7805(b) of the Internal Revenue Code,⁴¹ that the ruling would still apply to aliens who died prior to December 29, 1980, the date of publication of Revenue Ruling 80-363.⁴²

Significantly, Revenue Ruling 80-363 makes no reference to any of the other nonimmigrant visa categories or to the general viability of the legal disability doctrine. The *Elkins* Court also declined to rule specifically on the legal disability doctrine⁴³ or with respect to the other nonimmigrant visa categories.⁴⁴ Thus, a legal practitioner planning the tax estate of alien clients who may currently be, or who plan to be, in the United States under one nonimmigrant visa category or another has little guidance after Revenue Ruling 80-363.

SECTION 212(c), THE *Lok* CASES AND RAMIFICATIONS

The "lawful domicile" issue is relevant not only to tax planning but also to the treatment of aliens under section 212(c) of the INA. Congress enacted section 212(c)⁴⁵ to assist aliens who are permanent residents of the United States who would be subject to exclusion upon re-entering the country after a trip abroad. Since there is no statute of limitations on grounds of excludability,⁴⁶ the section aids these aliens by providing an ameliorative waiver of excludability to those who have already established themselves as permanent residents for a period of time. The provision reads:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) through (25) and paragraphs (30) and (31) of subsection (a).⁴⁷

In *Francis v. INS*⁴⁸ the Second Circuit held that an alien could

40. Rev. Rul. 363, 1980-2 C.B. 249.

41. I.R.C. § 7805(b) (1976).

42. Rev. Rul. 363, 1980-2 C.B. 249.

43. 435 U.S. at 663.

44. *Id.* at 664.

45. Immigration and Nationality Act, Pub. L. No. 82-414, § 212(c), 66 Stat. 163, 187 (1952) (codified as amended at 8 U.S.C. § 1182(c) (1982)).

46. Section 212(a) of the Immigration and Nationality Act enunciates 33 classes of excludable aliens ranging from those who are physically or mentally deficient, have had prior attacks of insanity, or are economically undesirable, to those who have previously committed crimes, been involved in narcotics, or are politically undesirable. 8 U.S.C. § 1182(a) (1982). Additional undesirable classes of deportable aliens are enunciated in section 241(a) of the INA. *Id.* at 1251(a).

As indicated, there is no statute of limitations for excludable or deportable offenses. See Gordon, *The Need to Modernize Our Immigration Laws*, 13 SAN DIEGO L. REV. 1, 5-6, 18-20 (1975).

47. 8 U.S.C. § 1182(c) (1982).

48. 532 F.2d 268 (2d Cir. 1976).

apply for section 212(c) relief in deportation proceedings as well,⁴⁹ to hold otherwise would violate the equal protection clause of the Constitution.⁵⁰ The Board of Immigration Appeals accepted the rationale of *Francis* and adopted its interpretation of section 212(c) nationwide.⁵¹ This set the stage to explore the issue of the precise extent and applicability of the phrase "a lawful unrelinquished domicile of seven consecutive years."⁵²

In *In re Lok*⁵³ the Board of Immigration Appeals confirmed its previous interpretation of section 212(c) originally announced in *In re S* -,⁵⁴ requiring that seven consecutive years of "lawful domicile" must accrue *subsequent to* lawful admission for permanent residence. On appeal, the Second Circuit continued its pioneering role with regard to interpretation of section 212(c), and held in *Lok v.*

49. *Id.* at 273.

50. *Id.* at 268.

51. See *In re Silva*, 16 I. & N. Dec. 26, 30 (1976), in which the Board adopts and accepts the *Francis* rule. There was some doubt as to whether the *Francis* ruling would be applicable in the Ninth Circuit until the Ninth Circuit's decision in *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981), specifically accepting the *Francis* doctrine. In *In re Bowe*, 17 I. & N. Dec. 488 (1980), the Board refused to apply *Francis* but certified its decision to the Attorney General. Prior to the Attorney General's decision, *Tapia-Acuna* was decided.

52. 8 U.S.C. § 1182(c) (1982).

53. There were three reported decisions of the Board of Immigration Appeals with regard to *In re Lok*: *In Re Lok*, 15 I. & N. Dec. 720 (1976); *In re Lok*, 16 I. & N. Dec. 441 (1978); and *In re Lok*, I.D. No. 2878 (BIA 1981). The relevant history of Lok's trek through the American courts began when Lok applied for a waiver under section 212(c) of the INA, 8 U.S.C. § 1182(c) (1983). The Administrative Law Judge (ALJ) denied the waiver on May 29, 1975, and the Board of Immigration Appeals (BIA) affirmed on July 30, 1976. *In re Lok*, 15 I. & N. Dec. 720 (1976). On judicial review, the Second Circuit reversed the BIA decision and remanded to the INS for determination of the question of whether Lok was a lawful domiciliary though not a permanent resident. *Lok v. INS*, 548 F.2d 37 (2d Cir. 1977). On June 13, 1978, the INS remanded the record to the ALJ for initial consideration of the issue framed by the Second Circuit and ordered the case be certified back to the BIA for review. *In re Lok*, 16 I. & N. Dec. 441 (1978). On remand, the ALJ again denied Lok's § 212(c) application. The BIA affirmed in a brief *per curiam* opinion dated Nov. 8, 1979, which was not designated for publication. Lok again filed for judicial review. The Second Circuit entered an order remanding the case to the BIA to re-examine the ALJ's decision to determine whether it agreed with the result, and to set forth its reasons. *Lok v. INS*, No. 80-4076 (2d Cir. 1980). In *In re Lok*, I. D. No. 2878 (BIA 1981), the Board adhered to its prior decision that Lok lacked the required domicile. Lok again filed a petition for review. The Second Circuit denied the petition in *Lok v. INS*, 681 F.2d 107 (2d Cir. 1982). The court held that the fact the INS and courts tolerated an illegal alien's presence in the country because of the possibility that he might obtain discretionary relief from the Attorney General did not legalize his intent to remain for purposes of accumulating the necessary seven years of lawful domicile entitling him to relief from deportation under § 212(c).

54. 5 I. & N. Dec. 116 (1953).

INS⁵⁵ that the terms "lawful unrelinquished domicile" and "lawfully admitted for permanent residence" could not be equated, and that an alien could possess "lawful domicile" in the United States without having been admitted for permanent residence.⁵⁶ The court further held that such domicile, established prior to obtaining residence, could possibly count toward the seven years required by section 212(c).⁵⁷

The Board of Immigration Appeals did not readily accept this interpretation as it had the Second Circuit's *Francis* decision and declined to apply the decision in cases arising outside the Second Circuit.⁵⁸ Soon thereafter, the Ninth Circuit in *Castillo - Felix v. INS*⁵⁹ supported the Board's interpretation that the lawful domicile referred to and intended by Congress in enacting section 212(c) began subsequent to obtaining permanent residence. Judge Wright, in writing for the majority, noted that few nonimmigrants could properly harbor an intent to remain permanently in the United States and thus maintain a lawful domicile.⁶⁰ Subsequently, the Fourth Circuit agreed with the Ninth Circuit and upheld the Board of Immigration Appeals' interpretation of this section.⁶¹ Apparently, the rationale of *Lok* is not going to gain general acceptance outside the Second Circuit. This lack of acceptance is not necessarily due to the Board's or other circuits' belief that it is impossible to establish a "lawful domicile" without permanent residence; rather, it is due to the belief that the enactment of section 212(c) was not intended to include domicile time before permanent residence in the count toward seven years.⁶²

In the Second Circuit, however, *Lok v. INS*⁶³ presents the possibility of obtaining lawful domicile while in nonimmigrant visa status. On remand the Board found that Lok did not have lawful domicile during the period of time prior to his obtaining permanent residence. He "came within the protection of formal Service policy as a consequence of his marriage whereunder he was permitted to remain in this country. . . until such time as he was eligible to apply for an

55. 548 F.2d 37 (2d Cir. 1977).

56. *Id.* at 40.

57. *Id.*

58. *In re Anwo*, 16 I. & N. Dec. 293, 296 (1977), *aff'd per curiam*, 607 F.2d 435 (D.C. Cir. 1979).

59. 601 F.2d 459 (9th Cir. 1979).

60. *Id.* at 464.

61. See *Chiravachardhikul v. INS*, 645 F.2d 248, 250 (4th Cir. 1981) (agrees with the Ninth Circuit stating: "We agree with the Ninth Circuit for it is incredible to hold that Congress would let stand the unvarying and constant reading of its enactment by the INS for over 26 years if that reading disregarded the Congressional intent.").

62. See generally, Comment, *Lawful Domicile Under Section 212(c) of The Immigration and Nationality Act*, 47 U. CHI. L. REV. 771 (1980).

63. 681 F.2d 107 (D.C. Cir. 1982).

immigrant visa."⁶⁴ Citing the definition of domicile quoted in *Anwo v. INS*,⁶⁵ that the individual "intends to reside permanently or indefinitely in the new location,"⁶⁶ the Board found that the alien's presence must be lawful "within the meaning of this country's immigration laws" for domicile to be "lawful." The Board concluded that Lok's stay was not lawful in this context, despite the fact that the INS had allowed a "protected" status so that he could complete the procedure for obtaining permanent legal residence in the United States.⁶⁷

The Board then cited *Elkins v. Moreno*,⁶⁸ concluding that while Lok was a nonimmigrant crewman he would have been unable to establish a lawful domicile. The Board stated:

In *Elkins v. Moreno*, the Supreme Court recognized that the intent to form a domicile in the United States is incompatible with the terms and conditions of an alien's admission as a nonimmigrant in the case of many of the nonimmigrant categories set forth in Section 101(a)(15) of the Act, including the nonimmigrant crewman classification. If the respondent complied with the terms of his admission and did not intend to remain in the United States beyond the fixed period of his temporary stay, then he was not "domiciled" in this country. Conversely, if he did intend to make the United States his permanent home and domicile, he violated the conditions of his admission and was not here "lawfully."⁶⁹

The Second Circuit affirmed the Board's finding in *Lok* and also supported the Board's view that "lawful domicile" was subject to termination upon a finding of deportability.⁷⁰

These decisions and developments leave us with a Second Circuit which is willing to accept the proposition that one who is not a permanent resident may establish a "lawful domicile" for purposes of section 212(c) and presumably for other purposes as well. Nevertheless, there has not been a case in which an alien has succeeded in establishing lawful domicile outside of section 212(c). We are also left with the Board of Immigration Appeals' finding which cites *Elkins* but appears to be vigorously applying the legal disability doctrine. We must now ascertain whether guidelines can be developed to determine which categories of aliens who are not permanent residents of the United States, can establish a domicile so as to be deemed residents of the United States for estate and gift tax

64. *In re Lok*, I.D. No. 2878, at 12 (BIA 1981).

65. 607 F.2d 435 (2d Cir. 1982).

66. *Id.* at 437.

67. *Id.*

68. 435 U.S. 647 (1978).

69. I.D. No. 2878, at 14 (citations omitted).

70. *Lok v. INS*, 681 F.2d 107, 110 (2d Cir. 1982).

purposes.

THE NONIMMIGRANT VISA CATEGORIES - A MECHANICAL APPLICATION OF *Elkins*

The starting point in an attempt to extrapolate guidelines for the nonimmigrant categories is the *Elkins* Court's analysis and conclusion as to G-4 visa holders. The basis of the Supreme Court's decision in *Elkins* was an analysis of INA section 101(a)(15),⁷¹ which lists in subsections (A) to (M) various categories of nonimmigrant visas.⁷² The Court found that "although non-immigrants can generally be viewed as temporary visitors" the classification is "by no means homogeneous."⁷³ "By including restrictions on intent in the definitions of *some* nonimmigrant classes, Congress must have meant aliens to be barred from these classes if their real purpose in coming to the U.S. was to immigrate permanently."⁷⁴ Further, the Court found nonimmigrants in these "restrictive" classes who sought to establish domicile were in violation of the status and could and would be deported.⁷⁵

G-4 aliens are admitted for an indefinite period so long as they are recognized by the Secretary of State to be employees or officers or immediate family members of such employees or officers of an international organization.⁷⁶ Since no particular restrictions are found within section 101(a)(15)(G)(iv), the category which covers international organization representatives, an intent of Congress is manifested to allow nonrestricted aliens such as these "to adopt the U.S. as their domicile."⁷⁷

The specially unrestricted nature of the G-4 visa holder is appar-

71. 8 U.S.C. § 1101(a)(15) (1982).

72. At the time of the *Elkins* decision, 8 U.S.C. § 1101(a)(15)(M) (1982) had not been enacted. The new section is an offshoot of the nonimmigrant-student category (subsection (F)) with a somewhat more restrictive regulatory framework. It reads as follows:

[A]n alien having a residence in a foreign country which he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him.

For all intents and purposes, the analysis applicable to subsection (F) is equally applicable to this category.

73. 435 U.S. at 665.

74. *Id.*

75. *Id.* at 665-66.

76. 8 C.F.R. § 214.2(g)(2) (1983).

77. 435 U.S. at 666.

ent from a reading of the applicable regulations. In accordance with 8 C.F.R. section 214.1(c), nonimmigrant aliens defined under 101(a)(15)(G)(iv) are exempt from the normal requirement of nonimmigrants to apply for extension of their stay while in the United States.⁷⁸ Furthermore, section 214.2(g)(1) states, "the determination by a consular officer prior to admission and the recognition by the Secretary of State subsequent to admission shall prima facie establish the classification of a nonimmigrant defined in Section 101(a)(15)(G) of the Act."⁷⁹ A G-4 is not limited as to his initial period of admission so long as he continues to be recognized by the Secretary of State.

Few restrictions are placed on a G-4's entry and stay in the United States. According to one section of the *Code of Federal Regulations*, an alien shall be classifiable under the provisions of section 101(a)(15)(G) of the Act if he establishes to the satisfaction of the consular officer that he is within one of the classes described in that section and that he seeks to enter, or pass in transit through, the United States in pursuance of his official duties.⁸⁰ No further restrictions as to his entry and stay are mandated by that or any other regulation.

These special rules indicate a "hands-off" policy which reflects congressional and executive respect for international convention. There is a basic recognition that persons coming to the United States in diplomatic and quasi-diplomatic capacities, although classifiable as nonimmigrants, require special treatment in consideration of "international comity and harmonious foreign relations."⁸¹ It is, therefore, understandable that the Supreme Court in *Elkins* could conclude that a G-4, while technically a "nonimmigrant" visa holder, was sufficiently unrestricted in his ability to stay in the United States and was capable of forming a subjective intent to stay here indefinitely without violating either the INA or the Service regulations.

The *Elkins* decision has statutory support for the conclusion that

78. 8 C.F.R. § 214.1(c) (1983) states in part: "The nonimmigrant alien defined in section 101(a)(15)(A)(i) or (ii) or (G)(i), (ii), (iii), or (iv) of the Act is admitted for as long as such alien continues to be so recognized by the Secretary of State, and is not required to obtain extension of stay."

79. 8 C.F.R. § 214.2(g)(1) (1983).

80. 22 C.F.R. § 41.50(a) (1983). Section 41 of Title 22 of C.F.R. consists of regulations promulgated by the Department of State with regard to nonimmigrant visa issuance.

81. C. GORDON & H. ROSENFELD, 1 IMMIGRATION LAW AND PROCEDURE, § 2.3(H) (rev. ed. 1982).

the G-4 visa holder is not restricted despite his classification as a "nonimmigrant." Section 102 of the INA⁸² specifically provides that designated principal representatives of foreign governments to international organizations, accredited members of their staff, and members of the immediate family of any such persons, are not subject to the normal immigration restrictions except for those provisions relating to reasonable requirements of passports and visas as a means of identification and documentation necessary to establish their qualifications.⁸³ They are exempt from all other exclusionary grounds provided by statute.

The G-4 applicant, once recognized by the Secretary of State and issued a visa by the consular officer, is presumed qualitatively and quantitatively eligible for that classification, and is admitted to the United States without restriction as to the duration of his stay. Moreover, the regulations do not establish any requirement as to the intent of the individual to depart from the United States, either as to his subjective intent or as to the duration of his stay.⁸⁴

An excellent student Comment in the *University of Chicago Law Review*⁸⁵ analyzes the conflict in circuits interpreting section 212(c). In an appendix the Comment draws some conclusions as to which other nonimmigrants might be capable of establishing a domicile in the United States.⁸⁶ Following the analysis of the *Elkins* Court, the commentator concludes that foreign government officials, their fami-

82. 8 U.S.C. § 1102 (1982).

83. 8 U.S.C. § 1102 (1982) states:

Except as otherwise provided in this chapter, for so long as they continue in the nonimmigrant classes enumerated in this section, the provisions of this chapter relating to ineligibility to receive visas and the exclusion or deportation of aliens shall not be construed to apply to nonimmigrants -

(1) within the class described in paragraph (15)(A)(i) of section 1101(a) of this title, except those provisions relating to reasonable requirements of passports and visas as a means of identification and documentation necessary to establish their qualifications under such paragraph (15)(A)(i), and, under such rules and regulations as the President may deem to be necessary, the provisions of paragraph (27) of section 82(a) of this title;

(2) within the class described in paragraph (15)(G)(i) of section 1101(a) of this title, except those provisions relating to reasonable requirements of passports and visas as a means of identification and documentaion [sic] necessary to establish their qualifications under such paragraph (15)(G)(i) and the provisions of paragraph (27) of section 82(a) of this title; and

(3) within the classes described in paragraphs (15)(A)(ii), (15)(G)(ii), (15)(G)(iii), or (15)(G)(iv) of section 1101(a) of this title, except those provisions relating to reasonable requirements of passports and visas as a means of identification and documentation necessary to establish their qualifications under such paragraphs, and the provisions of paragraphs (27) and (29) of section 82(a) of this title.

84. See generally 8 C.F.R. § 214.1(a), (c) (1983); 8 C.F.R. § 214.2(a) (1983); 22 C.F.R. §§ 41.40-41 (1983).

85. See Comment, *supra* note 62.

86. *Id.* at 797-802.

lies and their retinues (A-1, A-2, and A-3 nonimmigrants),⁸⁷ aliens who qualify to pass in transit to and from the United Nations Headquarters District (C-2 nonimmigrants)⁸⁸ and various representatives of NATO member states and their families and retinues (NATO-1 through NATO-5 and NATO-7 nonimmigrants),⁸⁹ would clearly be able to establish domicile along with the G visa holders referred to in the *Elkins* decision. These classes are unrestricted as to length of stay in the United States and as to the maintenance of a foreign residence.⁹⁰

Reasoning from the *Elkins* rationale, certain groups must clearly be precluded from seeking domicile in the United States given the severe restrictions placed upon their intended stay.⁹¹ Thus, temporary visitors for business or pleasure (B-1 and B-2 visa holders),⁹²

87. 8 U.S.C. § 1101(a)(15)(A)(i), (ii), (iii) (1982) provides:

(A)(i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government recognized de jure by the United States and who is accepted by the President or by the Secretary of State and the members of the alien's immediate family;

(ii) upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and

(iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families of the officials and employees who have a nonimmigrant status under (i) and (ii) above

88. 8 U.S.C. § 1101(a)(15)(C) (1982) provides in pertinent part:

" . . . or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the Headquarters Agreement with the United Nations"

89. 22 C.F.R. § 41.70 (1983) provides in part:

(A)(1) An alien shall be classifiable under the symbol NATO-1, NATO-2, NATO-3, NATO-4, or NATO-5 . . . if he establishes to the satisfaction of the consular officer that he is seeking admission to the United States under the applicable provision of the Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, or that he is a member of the immediate family of an alien classified under the symbol NATO-1, NATO-2, NATO-3, NATO-4, or NATO-5.

(c) An alien attendant, servant, or personal employee of an alien classified under the symbol NATO-1, NATO-2, NATO-3, NATO-4, NATO-5, or NATO-6, and the members of the immediate family of such attendant, servant, or personal employee, shall be classifiable under the symbol NATO-7.

90. See *supra* notes 87-89.

91. See Comment, *supra* note 62, at 799.

92. 8 U.S.C. § 1101(a)(15)(B) (1982) provides:

[A]n alien (other than one coming for the purpose of study or of performing skilled and unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a

students (F and M visa holders),⁹³ and exchange visitors (J visa holders),⁹⁴ would clearly be incapable of establishing residence.

The *Chicago Law Review* Comment delineates a third category consisting of treaty traders (E visa holders),⁹⁵ foreign media representatives (I visa holders),⁹⁶ intra-company transferees (L visa holders),⁹⁷ and fiances (K visa holders).⁹⁸ Nonimmigrants in this category are admitted only for a temporary stay, but are not required to

residence in a foreign country which he has no intention of abandoning and who is visiting the United States for temporary business or temporarily for pleasure

93. 8 U.S.C. § 1101(a)(15)(F) (1982) provides:

[A]n alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established college, university, seminary, conservatory, academic high school, elementary school or other academic institution or in a language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn

The text of 8 U.S.C. § 1101(a)(15)(M) (1982) is reproduced *supra*, note 72.

94. 8 U.S.C. § 1101(a)(15)(J) (1982) provides:

[A]n alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Secretary of State, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 212(j) of this title, and the alien spouse and minor children of any such alien if accompanying him or following to join him

95. 8 U.S.C. § 1101(a)(15)(E) (1982). This code section is reproduced *infra* at text accompanying note 104.

96. 8 U.S.C. § 1101(a)(15)(I) (1982) provides:

[U]pon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation and the spouse and children of such a representative if accompanying or following to join him

97. Subsection (L) of § 1101(a)(15) (1982) provides:

[A]n alien who, immediately preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him

98. 8 U.S.C. § 1101(a)(15)(K) (1982) provides:

[A]n alien who is a fiancée or fiancé of a citizen of the United States and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after entry, and the minor children of such fiancée or fiancé accompanying him or following to join him

intend to remain temporarily.

Thus, by mechanically applying and extrapolating from the standard and *Elkins*, three groups of nonimmigrant visa categories emerge. The first group, those clearly able to establish a domicile, consists of people in visa categories generally treated specially because of international diplomatic concerns.⁹⁹ We then have a second group that is clearly unable to establish domicile, as inferred from *Elkins*, because of specific restrictions as to their intent to remain in this country and to the length of their stay.¹⁰⁰ Finally, the hybrid third group appears to have elements of both the others.

Although the Comment's author appears to believe the visa categories in this so-called "hybrid" group have domiciliary capabilities,¹⁰¹ it is by no means certain. Analysis of the treaty-trader and investor categories (E-1 and E-2 visa holders) which are similar to the G and other diplomatic or quasi-diplomatic nonimmigrant visa classifications demonstrate this uncertainty.¹⁰²

Treaty Investors and Traders

Section 101(a)(15) provides in relevant part:

The term "immigrant" means every alien except an alien . . . within one of the following classes of nonimmigrant aliens—

. . .

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which

99. Comment, *supra* note 62, at 798.

100. *Id.* at 800.

101. *Id.* at 801.

102. These visa categories are made expressly applicable only to individuals who are citizens of countries having with the United States a treaty of commerce and trade which has such a visa provision. See *infra* text accompanying note 103. At the present time, the following countries have E-1 treaties with the United States: Argentina, Austria, Belgium, Bolivia, China, Colombia, Costa Rica, Denmark, Estonia, Ethiopia, Finland, France, Germany, Greece, Honduras, Iran, Ireland, Israel, Italy, Japan, Korea, Latvia, Liberia, Luxembourg, The Netherlands, Nicaragua, Norway, Pakistan, Paraguay, The Philippines, Spain, Sultanate of Muscat and Oman, Switzerland, Thailand, Togo, Turkey, United Kingdom and Great Britain, North Ireland, Vietnam, Yugoslavia. See DEPARTMENT OF STATE, 9 FOREIGN AFFAIRS MANUAL, pt. 2, § 41.40 (Exhibit 1)(1983). The above countries, with the exception of Bolivia, Denmark, Estonia, Finland, Latvia, Greece, Ireland, Israel and Turkey have E-2 treaties with the United States. *Id.* at § 41.41 (Exhibit 1).

he is actively in the process of investing, a substantial amount of capital

. . . .¹⁰³

Such treaty investor or trader is classifiable as a nonimmigrant. There is no specific restriction within the statute requiring that the individual have a residence in a foreign country which he has no intention of abandoning, such as is applicable to visitors for pleasure, students, and temporary workers. However, there is also no "hands-off" policy with regard to E visa holders as previously described with regard to the G-4 and similar categories.¹⁰⁴

Detailed immigration regulations require that an alien establish that he is a nonimmigrant treaty investor or trader in accordance with the provisions of the INA and that "*he intends to depart from the United States upon termination of his status.*"¹⁰⁵ Moreover, the regulations specifically limit the initial period of admission of an alien under the E visa category to one year.¹⁰⁶ Such a nonimmigrant "may" be granted extensions of his temporary stay in increments of "not more than one year."¹⁰⁷

In *In re Udagawa*,¹⁰⁸ the Board of Immigration Appeals accepted the State Department's regulatory conditions as a reasonable and appropriate construction of the INA. The Board confirmed that a nonimmigrant treaty investor must establish that "he intends to depart from the United States upon the termination of his status."¹⁰⁹

There are additional restrictions on the E visa holder not generally found with regard to other nonimmigrant visa categories, and certainly not applicable to G-4 visa holders. The regulations provide the one year limitation described above, and in addition, provide a special requirement that Form I-539 (the extension application) be submitted, as well as a properly executed Form I-126 (the Annual Report of Treaty Trader).¹¹⁰

103. 8 U.S.C. § 1101(a)(15)(E) (1982).

104. See *supra* notes 70-84 and accompanying text.

105. 22 C.F.R. § 41.41 (1983) (emphasis added).

106. 8 C.F.R. § 214.2(e) (1983).

107. *Id.*

108. 14 I. & N. Dec. 578 (1974).

109. *Id.* at 579.

110. 8 C.F.R. § 214.2(e) (1983) provides:

A trader or investor and his spouse or child who accompanied or followed to join him, who acquired nonimmigrant status on or after December 24, 1952, under section 101(a)(15)(E)(i) or (ii) of the Act shall apply for an extension of the period of temporary admission on Form I-539, and such trader or investor shall submit together therewith Form I-126, properly executed by him, with such additional documents as are required by that form.

It is noteworthy that provision is made with regard to the families of G-4 visa holders for the granting of employment authorization, whereas no such provision is made for the families of Treaty Investors. 8 C.F.R. § 214.2(g)(2) (1983) provides:

(2) *Employment.* The spouse, unmarried dependent son, or unmarried dependent daughter habitually residing with an officer or employee of an international organization, classified as a G-4 nonimmigrant under section 101(a)(15)(G)(iv) of the Immigration and Nationality Act, may be granted permission to accept or

The legislative history of the G and E visas serves to highlight the contrast between these two visa categories. *Elkins* has demonstrated that the liberal and unrestricted regulations relating to G-4 visa holders manifest an intent by Congress not to place a restriction on such a nonimmigrant's intent. Legislative history indicates this is clearly not the case with regard to the treaty investor or trader categories.

Prior to 1924, treaty merchants who came to the United States were admitted for permanent residence and were allowed full residence status if they continued to reside in this country, including the right of re-entry after a temporary absence and a right to apply for

continue employment in the United States if an application to do so has first been favorably recommended by an authorized representative of the Department of State and approved by the District Director of this Service as indicated below.

There is some dispute as to whether dependents of treaty traders may in fact be employed in the United States. Inconsistent instructions have been issued by the Acting Commissioner of the Immigration Service and a Consular Letter originating from London, England.

In a letter dated April 23, 1980, then Acting Associate Commissioner of Examinations, Andrew J. Carmichael, Jr. stated:

There is no provision in either law or regulation for authorizing employment for the dependents of "E" nonimmigrants while they hold that nonimmigrant classification. The Service, however, has chosen not to proceed against those who do work while the principal "E" nonimmigrant is maintaining status. This does not mean that they have been relieved of the necessity of complying with all of the provisions of section 245 of the Immigration and Nationality Act should they later apply for adjustment of status. Accordingly, the Service will continue to find that employment by the dependent of an "E" nonimmigrant is "unauthorized" and a bar to adjustment of status under section 245(c)(2) of the Act.

Letter of Acting Associate Commissioner, as summarized in 58 Interpreter Releases 420-421 (1981).

The American Embassy in London, England, has issued the following instructions:

The spouse and children (under 21) of a treaty trader will need visas as well. They may work in the United States, providing they hold visas as the spouse/children of a treaty trader. A separate visa application must be completed for each person. . . .

Letter from American Embassy, American Consul, London, England, (April 1981).

The Operations Instructions of the Immigration Service indicate as follows:

While the Service is not in a position to authorize the nonimmigrant E spouse and children of a treaty trader or treaty investor to accept employment, they shall not be deemed to have violated status if they do so; and so long as the principal E nonimmigrant is maintaining status, no action shall be taken to require their departure.

U.S. Department of Justice, Immigration and Naturalization Service, Operations Instructions, Regulations and Interpretations 214.2e, *reprinted* in C. GORDON & H. ROSENFIELD, *supra* note 81, at 23-364.1.

The inconsistencies in the above instructions and correspondences have yet to be resolved.

citizenship.¹¹¹ These treaty rights were equally applicable to family members.¹¹²

The Immigration Act of 1924 modified treaty rights and specifically limited treaty aliens to nonimmigrant status.¹¹³ The Immigration and Nationality Act of 1952, which continued nonimmigrant status for treaty traders, added the new class of treaty investors. The committee reports specify that the latter dispensation "is intended to provide for the temporary admission of such aliens who will be engaged in developing or directing the operations of a real operating enterprise and not a fictitious paper operation."¹¹⁴

Accordingly, *Elkins* appears to be distinguishable. Unlike the G-4, the E-1 or E-2 visa holder cannot develop subjective intent to stay indefinitely in the United States without violating the INA or the Service regulations. Thus, even if the visa holder formed the intent to remain in the United States indefinitely, he could be found *not* to have the legal capacity to establish domicile within the United States despite the *Elkins* ruling; a fortiori, the same is true with regard to the H, I, and L visa categories which have more restrictions generally than the E visa holder classification.¹¹⁵ Thus, a strong argument could be made for the proposition that there are really only two categories: Group I, consisting of the diplomatic and quasi-diplomatic classifications which could establish a "domicile" regardless of the legal disability doctrine, and Group II, all other nonimmigrant visa categories.

The conclusions of the foregoing analysis, however, are not particularly satisfying. The *Elkins* Court specifically declined to determine whether the legal disability doctrine has any viability.¹¹⁶ Within the context of the estate and gift tax, it might be appropriate to reject the legal fiction of the "legal disability" doctrine and apply a subjective test, or to develop specific regulatory guidelines with regard to establishing domicile in the United States.¹¹⁷

111. C. GORDON & H. ROSENFELD, *supra* note 81, at § 2.11(a)(1).

112. See *Lowe v. United States*, 230 F.2d 664 (9th Cir. 1956).

113. Ch. 190, 43 Stat. 153. See also *Lowe v. United States*, 230 F.2d 664 (9th Cir. 1956).

114. S. REP. NO. 1137, 82d Cong., 2d Sess. 20; H.R. REP. NO. 1365, 82d Cong., 2d Sess. 44, reprinted in U.S. CODE CONG. & AD. NEWS 1653.

115. See 8 U.S.C. § 1101(a)(15)(H), (I), (L) (1982); 8 U.S.C. § 1101(a)(15)(K) (1982).

116. *Elkins v. Moreno*, 435 U.S. 647, 663 (1978).

117. With reference to establishing "residence" for purposes of the income tax, a case-by-case determination must be made. The income tax regulations provide that an alien is a resident if he is actually in the United States and is not a mere transient. Treas. Reg. § 1.871-2(b) (1983). Transience is determined with reference to *intentions* concerning duration and nature of stay. *Id.*

AN ALTERNATIVE PROPOSAL—A RE-EXAMINATION OF THE
LEGAL DISABILITY DOCTRINE

Revenue Ruling 74-364, in stating the legal disability doctrine and its applicability to the estate tax, indicates that the acceptance by the decedent of the prescribed terms for his admission and stay in the United States as required by federal law and regulations "created a legal disability that rendered him incapable of forming the intention necessary for establishment of a domicile here."¹¹⁸ In other words, one cannot be here legally as a nonimmigrant (at least in certain categories)¹¹⁹ if one has established a domicile in the United States.

However, as stated in *Seren v. Douglas*,¹²⁰ "disability could, as a matter of fact and law, have dissolved upon the expiration of his student visa. At such time he could abandon his legal intent to return to his homeland and seek status as a permanent resident of the United States."¹²¹ Why can he not, in violation of his status, choose to abandon such intent earlier? He can in fact, and that is the weakness of the disability doctrine.

The Board of Immigration Appeals recognized this anomaly when it analyzed *Elkins v. Moreno* in *In re Lok*. The Board stated:

If the respondent complied with the terms of his admission and did not intend to remain in the United States beyond the fixed period of his temporary stay, then he was not "domiciled" in this country. Conversely, if he did intend to make the United States as his permanent home and domicile, he violated the conditions of his admission and was not here "lawfully."¹²²

We cannot simply ignore the alien's "subjective intent" and say that he has not established a domicile. On the contrary, his subjective intent should be taken into account which, if it were to come to the attention of an immigration official, should result in the cancellation of his temporary visa status.¹²³ In fact, any extrapolation from the

118. Rev. Rul. 364, 1974-2, C.B. 321.

119. Of course, the ruling is only referring specifically to G-4 visa category holders. *Id.*

120. 30 Colo. App. 110, 489 P.2d 601 (1971).

121. *Id.* at 114-15, 489 P.2d at 603.

122. *In re Lok*, I.D. No. 2878, at 14 (1981).

123. As a matter of administrative practice, it is an accepted line of inquiry to ascertain from an applicant for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255 (1982), when he decided to remain in the United States permanently. Should such intent predate the application for adjustment of status by any substantial period of time, the adjudicating officer is likely to conclude that the individual was in violation of status, particularly if there were several entries into the United States after such intent was fixed using the nonimmigrant visa.

G-4 visa holder's so-called ability to legally and "lawfully" establish a domicile appears to be misguided and fails to consider the distinguishing factor which accounts for this difference—the unique quasi-diplomatic character of the G-4.¹²⁴

An almost simplistic examination of the INA shows that all entrants to the United States are presumed to be immigrants¹²⁵ and will not be admitted as nonimmigrants unless they can establish to the satisfaction of the Secretary of State that they fit into one of the categories enunciated in section 101(a)(15).¹²⁶ This burden remains with the alien each time he departs from the United States and seeks to re-enter as a nonimmigrant.¹²⁷

It is a clear and long-standing rule of administrative law that a nonimmigrant alien visa holder who intends to remain in the United States permanently (and establish a domicile here) is ineligible or will be deemed ineligible for extensions of stay or new visas in that category.¹²⁸ The very filing of an application for "alien labor certifi-

124. See *supra* text accompanying notes 70-86.

125. Section 214(b) of the Immigration and Nationality Act provides: Every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 101(a)(15).

8 U.S.C. § 1184(b) (1982).

126. *Id.*

127. See 8 U.S.C. § 1184(a) (1982).

128. Both the State Department and the Department of Justice have specifically taken the position in writing that while the filing of a labor certification or a preference petition or otherwise evincing an interest in becoming a permanent resident is not an absolute bar to qualifying for a nonimmigrant visa, or for such nonimmigrant visa status, it does, at the very least, raise a valid area of inquiry.

The State Department as noted in an unclassified airgram, Number A-0444, February 12, 1979, which states as follows:

4. Intending Immigrants:

The issue of eligibility of NIV applicants who have registered for immigrant visas was discussed. There are many circumstances where an NIV registrant has a legitimate purpose for making a visit to the United States. Post a reminder that NIV registration is not ipso facto a ground for ineligibility. Each case must be judged in the light of the regulations and the circumstances. However, the consular officer must be assured that the applicant will depart from the United States after the purpose of the visit has been accomplished.

The State Department reiterated this policy in a cable to consular posts which was republished in U.S. Dept. of State, Bureau of Consular Affairs, 20 Visa Office Bulletin Vol. 5. In referring to (E) visa holders, the cable states:

[A]lthough unlike other nonimmigrants the Treaty Investor or Trader need not be coming "temporarily to the United States," but must have a "residence in a foreign country which he has no intention of abandoning . . ." the Consuls are still advised that the applicant must express "an unequivocal intent" to return to his country when his E-2 visa status ends.

See also, 56 *Interpreter Releases* 268 (1979); 59 *Interpreter Releases* 753 (1982).

In a letter to counsel dated August 27, 1981, Andrew J. Carmichael Jr., Associate Commissioner, Examinations of the Immigration and Naturalization Service, referring specifically to "H" or "L" nonimmigrants who are beneficiaries of labor certifications or preference petitions, indicates that although the filing of such petitions does not automat-

cation" with the Department of Labor or the filing of a preliminary petition with the INS in and of itself may seriously jeopardize the legal status of a nonimmigrant in the United States.¹²⁹

Thus, the Board of Immigration Appeals has not yet ruled that any nonimmigrant visa holder could have "lawful" domicile in the United States. It is not likely to extend *Elkins* beyond the G-4 or other such quasi-diplomatic visa categories. In the estate and gift tax area, the IRS must recognize that the group of potential domiciliaries created in *Elkins* is limited. To remain consistent, the IRS must also recognize that undocumented aliens who are truly domiciliaries of the United States *in fact*, cannot be so deemed because of the legal disability doctrine. As the Board of Immigration Appeals pointed out in *Lok*, an alien does not have lawful domicile even when the government specifically permits him to remain in the United States under voluntary departure status so that he might complete an application leading ultimately to the granting of permanent residence in this country.¹³⁰

It would seem more appropriate for the IRS to take the position, as it does with residents in the context of the income tax,¹³¹ that visa

ically preclude nonimmigrant status,

the foregoing interpretation does not mean that all, or even most 'H' or 'L' non-immigrants who are beneficiaries of labor certifications or preference petitions can qualify for extensions of stay. Indeed, the filing of a visa petition or labor certification request does raise a valid area of inquiry which must be pursued . . . Service policy remains that an extension of stay application (Forms I-539 or I-129B) must be adjudicated on the merits of each case and that the filing of a labor certification request or of an occupational preference petition does not automatically preclude favorable action on the application.

129. See *supra* note 128.

130. See *supra* text accompanying notes 63-66. The INS has a policy of allowing certain undocumented aliens (illegal aliens) to remain in the United States by continuing to extend the period of time within which they must voluntarily depart from the United States where a preference petition has been approved and an application for an immigrant visa is being pursued at an American Embassy. Thus, the INS allows the individual to remain in this "non-status" until he can conveniently leave the United States and immediately return as a permanent resident. See U.S. DEPT. OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS, REGULATIONS AND INTERPRETATIONS 242.5, 242.10 (1983).

131. An alien, by reason of his alienage, is presumed to be a nonresident alien for tax purposes, in accordance with Treas. Reg. 1.871-4(b) (1983). On the other hand, an alien in the United States for one year or more is presumed to be a resident for federal income tax purposes. Rev. Rul. 611, 1969-2 C.B. 150. See, e.g., *Escobar v. Comm'r of Internal Revenue*, 68 T.C. 304 (1977). See generally Grunblatt, *U.S. Taxation of Foreign Persons*, 37TH ANNUAL SYMPOSIUM OF THE AMERICAN IMMIGRATION LAWYER'S ASSOCIATION 216 (1983). At the present time, visa status does not determine residence for income tax purposes, so a case-by-case determination must be made. On June 30, 1983, H.R. 3475 was introduced in the United States Congress containing a provision which,

status is only a factor to be considered in determining whether domicile has been established. This position has also been seen in other contexts, particularly in state courts, where federal immigration status has not been deemed to be particularly relevant or significant to the issue of domicile.

In *Bustamante v. Bustamante*,¹³² the Supreme Court of Utah held that a nonimmigrant alien could be an "actual and bona fide resident"¹³³ of the state for purposes of its divorce statute, even though her status as a nonimmigrant was unlawful. The court concluded that issues of legality with regard to federal immigration status are not determinative with regard to establishing "domicile in a state for divorce purposes."¹³⁴ The court stated that "a visa is a document of entry required of aliens by the United States government and is a matter under control of the government. It has little relevance to the question of domicile."¹³⁵

The Court of Appeals of Oregon also rejected the legal disability doctrine with regard to divorce jurisdiction. It stated:

A rule such as husband suggests would require the application of a type of legal fiction for which we see no necessity. Wife lived in this state for nearly four years. Her visa has apparently been expired for most of that time. She has applied for a change of status so that she may remain in this country permanently. Whatever the disposition of that application, it appears from the record that she presently intends to remain in this state indefinitely.¹³⁶

Similarly, the California Court of Appeal criticized a State Board of Control regulation which defined a "resident of California" in terms of "domicile."¹³⁷ The court rejected the assumption that the *Restatement (Second) of Conflict of Laws* mandates a finding that an illegal alien cannot establish domicile:

The Board argues, though, that under the Restatement Second of Conflict of Laws Section 15(1), a domicile of choice may be acquired only by a person who is legally capable of changing his or her domicile and that neither Cabral or Vasquez were or are legally capable of changing their respective domiciles from Mexico to California because of their illegal entries into the United States. The Restatement, though, places no such limi-

for the first time, defines a resident and nonresident alien for United States income tax purposes. The proposed legislation defines an alien as a resident if such individual meets any of the following requirements: (i) the individual is a lawful permanent resident of the United States (green card status); (ii) the individual has an application for an immigrant visa (green card) pending at any time during the calendar year and was present in the United States for at least sixty (60) days during such calendar year; or (iii) the individual meets the "substantial presence test." H.R. 3475, 98th Cong., 2d Sess. (1983).

132. 645 P.2d 40 (Utah 1982).

133. *Id.* at 41.

134. *Id.* at 42.

135. *Id.*

136. *In re Marriage of Pirouzkhar*, 51 Or. App. 519, 626 P.2d 380, 384 (1981) (footnote omitted).

137. *Cabral v. State Board of Control*, 169 Cal. App. 3d 1012, 169 Cal. Rptr. 604 (1981).

tation on the legal capacity of any person to change his or her domicile.¹³⁸

The doctrine which prevailed before *Elkins* and Revenue Ruling 80-348, assumed that because of the legal disability doctrine a non-immigrant alien could not establish a domicile in the United States, was perhaps overly simplistic. Indeed, *Elkins* has carved out at least one exception to that rule¹³⁹ and perhaps is hinting that the whole doctrine has little utility.¹⁴⁰

CONCLUSION

Those who do tax planning for aliens are still not in a position to advise their clients whether they have or will establish a "domicile" in the United States based upon the nonimmigrant visas their clients may hold. Accordingly, the problem of how to resolve the resultant confusion still exists.

One approach is to adopt the view¹⁴¹ that the notion of legal disability definitely applies to some nonimmigrant visa categories, definitely does not apply to others, and may have applicability to several visa categories in the gray area. Alternatively, the Internal Revenue Service can remedy this situation by promulgating clarifying regulations. These regulations should set forth the presumptive ability of aliens in each of the various nonimmigrant visa statuses to establish a domicile in the the United States for gift and estate tax purposes. They should also set forth the relevant considerations and relative weight to be accorded to various factual circumstances which might affect an alien's domicile. Following the pattern of currently proposed legislation¹⁴² clarifying the United States income tax liability of aliens, such regulations could be useful guides to tax experts advising alien clients. Such regulations should have prospective effect only, so as not to prejudice aliens who have already taken action based upon a reading of existing law.

In any such regulatory system the L (intra-company transferee) and E (treaty trader or investor) categories, presently in the gray area, should be precluded from establishing domicile in the United States in the absence of a clear intention to do so. Holders of visas in these categories are aliens who, unlike the A (diplomatic) and G (semi-diplomatic or international organization) visa holders who the

138. *Id.* at 1016, 169 Cal. Rptr. at 607.

139. *Elkins v. Moreno*, 435 U.S. 647 (1978).

140. *Id.* at 648.

141. See *supra* text accompanying notes 85-100.

142. See *supra* note 131.

United States is obliged to accept under principles of international law, are aliens purposely encouraged to come to the United States in international trade. Treaty aliens, who are here pursuant to treaties approved by the United States Senate, come to conduct substantial trade or to direct the operations of businesses in which they have substantial investments.¹⁴³ Intra-company transferees are encouraged to come to direct the operations of new or existing American affiliates or subsidiaries of foreign businesses.¹⁴⁴ To hold that such aliens have established a domicile here, in the absence of a clear intention to do so, would be counter-productive to our efforts to encourage foreign businesses and aliens of substance to do business in this country. A similar policy has encouraged foreign press representatives, holders of I visa status,¹⁴⁵ to spend substantial periods of time in this country in order to promote United States' interests in the foreign media. The Internal Revenue Service should take note of the strong policy considerations underlying each of the various nonimmigrant visa statuses and find an appropriate method to furnish guidance to aliens on matters of United States tax domicile.

143. *See supra* text accompanying note 103.

144. *See supra* note 98.

145. *See supra* note 96.