Impossibility of Establishing Domicile for Temporary Visa Holders Under Current U.S. Law

SUMMARY

This memorandum highlights the significant legal barriers temporary visa holders face when attempting to establish domicile in the United States. Under current immigration laws and regulations, visa holders on nonimmigrant visas – such as students (F-1), temporary workers (H-1B), or intracompany executives (L-1A) – are generally prohibited from demonstrating an intent to remain in the U.S. permanently, which is a key requirement for establishing domicile. Such intent can even violate the terms of their visa.

Therefore, until these individuals navigate the complex and uncertain path to permanent residency[1], it is nearly impossible for them to establish domicile or engage in the property transactions required under HB17 and SB17. This legal conflict inherent in pertinent immigration regulations and the proposed legislations not only prevents visa holders from purchasing property but could also deter investment and settlement in Texas.

Legal Barriers to Domicile for Temporary Visa Holders

Under the definition of "domiciled" provided in recent legislative proposals, individuals must demonstrate *the intent to* reside in the U.S. indefinitely. However, temporary visa holders are inherently restricted in their ability to make such declarations due to the limited duration and conditional nature of their visas. Any claim of permanent intent to reside in the United States may actually constitute a violation of their visa terms.

For individuals holding temporary visas – such as students, scholars, and foreign workers – their legal domicile remains in their country of origin until they obtain a green card. Given that the green card process can take between 5 and 10 years (or even longer for Chinese nationals), establishing domicile in the U.S. remains a distant and uncertain prospect.

[1] The path to permanent residency is a long, arduous, and uncertain process. Indeed, many factors for the requirements of applying for permanent residence are beyond the temporary visa holder's control. For instance, a temporary visa holder must have the sponsorship of a qualifying employer before being eligible for applying for permanent residency, and sponsorship can be withheld at the sole discretion of said employer. Moreover, the permanent residency process may take more than a decade, especially for nationals coming from countries like China.

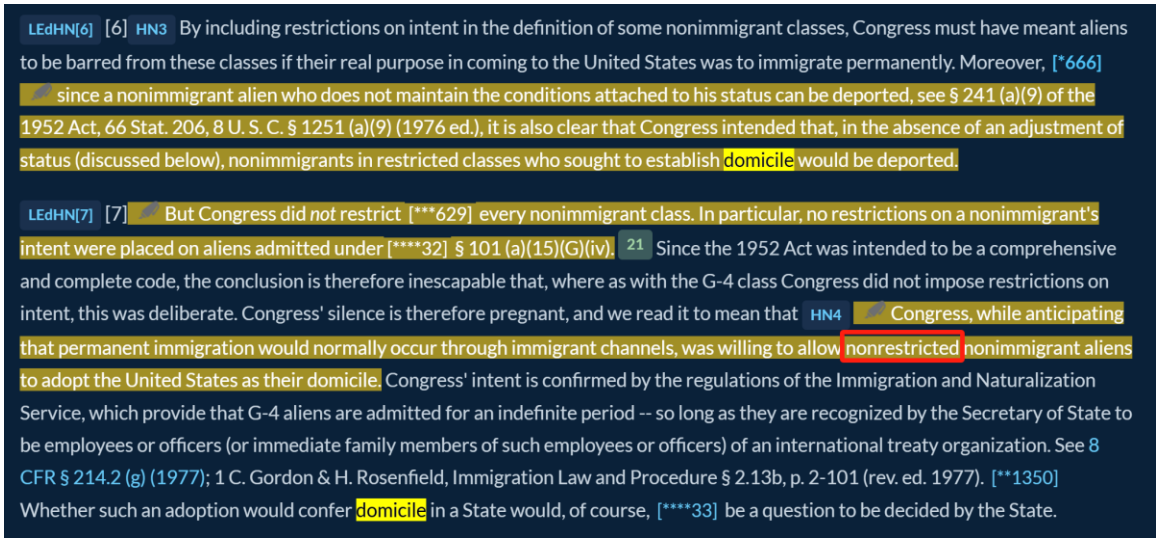
Relevant Legal Precedents and Analysis

1. Supreme Court Precedent – Elkins v. Moreno

In this case, the Supreme Court allowed state courts to determine whether a G-4 visa holder could establish U.S. domicile. While the Court noted that some unrestricted nonimmigrants might be able to adopt the U.S. as their domicile, it also made clear that restricted visa holders risk deportation if they assert such intent.

"Restricted nonimmigrant aliens" are those admitted to the U.S. for a temporary period but are subject to limitations on their activities and stay, such as tourists, students, or temporary workers, who are not allowed to engage in activities outside their visa category.

Therefore, temporary nonimmigrants under restricted classifications, such as F-1 Visa for students and H-1B Visa for temporary workers in specialty occupations, are unlikely to qualify as domiciled residents.



LEdHN[6] [6] HN3 By including restrictions on 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 United States was to immigrate permanently. Moreover, [*666] since a nonimmigrant alien who does not maintain the conditions attached to his status can be deported, see § 241 (a)(9) of the 1952 Act, 66 Stat. 206, 8 U. S. C. § 1251 (a)(9) (1976 ed.), it is also clear that Congress intended that, in the absence of an adjustment of status (discussed below), nonimmigrants in restricted classes who sought to establish domicile would be deported.

LEdHN[7] [7] But Congress did *not* restrict [***629] every nonimmigrant class. In particular, no restrictions on a nonimmigrant's intent were placed on aliens admitted under [****32] § 101 (a)(15)(G)(iv). 21 Since the 1952 Act was intended to be a comprehensive and complete code, the conclusion is therefore inescapable that, where as with the G-4 class Congress did not impose restrictions on intent, this was deliberate. Congress' silence is therefore pregnant, and we read it to mean that HN4 Congress, while anticipating that permanent immigration would normally occur through immigrant channels, was willing to allow nonrestricted nonimmigrant aliens to adopt the United States as their domicile. Congress' intent is confirmed by the regulations of the Immigration and Naturalization Service, which provide that 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 treaty organization. See 8 CFR § 214.2 (g) (1977); 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 2.13b, p. 2-101 (rev. ed. 1977). [**1350] Whether such an adoption would confer domicile in a State would, of course, [****33] be a question to be decided by the State.

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

2. The Intent Requirement

Domicile requires not just physical presence but also the intent to remain indefinitely. However, temporary visa holders live under uncertain circumstances. Loss of employment, visa denials, or expiration of status could abruptly end their stay. Because of these constraints, they cannot reasonably prove an intent to remain in the U.S. permanently.

"Residence" for purposes of subtitle B of the Code equates to domicile. Treasury Regulations Section 20.0-1(b)(1) provides, for the estate tax:

> ***Estates of Citizens or Residents.*** Subchapter A of chapter 11 of the Code pertains to the taxation of the estate of a person who was a citizen or a resident of the United States at the time of his death. A "resident" decedent is a decedent who, at the time of his death, had his domicile in the United States. The term "United States," as used in the Estate Tax Regulations, includes only the States and District of Columbia. The term also includes the Territories of Alaska and Hawaii before their admission as States. See Section 7701(a)(9). 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, nor will intention to change domicile effect a change in domicile unless accompanied by actual removal.

(*1 International Estate Planning §12 U.S. Legal Issues Affecting Foreign Individuals on Temporary Assignment to the United States*)

3. Legal Capacity Concerns

Even if a temporary visa holder genuinely intends to stay, courts may rule that they lack the legal capacity to establish domicile under their current immigration classification. This ambiguity has left legal experts divided, creating additional uncertainty.

> 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.

(*Wildes, L., & Grunblatt, D. (1983). Domicile for Immigration and Federal Gift and Estate Tax Purposes--Is a Harmonious Rule Possible. San Diego L. Rev., 21, 113.*)

4. Risk of Violating Visa Terms

Asserting an intent to remain in the U.S. indefinitely could constitute a violation of the terms of a nonimmigrant visa, especially those that explicitly require the holder to maintain a residence abroad.

> Foreign individuals on temporary postings to the United States will generally not become domiciled here and therefore will not be subject to U.S. estate, gift, or generation skipping transfer taxes ("transfer taxes"), except on real estate or tangible personal property located in the United States, and in the case of the estate tax (and in some cases, the generation-skipping transfer tax), certain intangible property deemed situated in the United States. This subject is discussed in *Chapter 3*. It is, however, possible for holders of a temporary nonimmigrant visa to form a subjective intent to be domiciled in the United States in violation of their visa terms and therefore to become subject to U.S. transfer tax on a worldwide basis.

(*1 International Estate Planning §12 U.S. Legal Issues Affecting Foreign Individuals on Temporary Assignment to the United States)*

Practical Implications of Legal Uncertainty

Due to the very nature of the legal restrictions placed upon their visas, temporary visa holders are effectively prohibited from even attempting to prove domicile in the U.S., which is required for certain rights such as property ownership under bills like HB 17. This creates a chilling effect – not only discouraging visa holders from attempting to invest or settle in Texas but also making sellers and real estate professionals wary of transacting with them due to potential legal liabilities.

Would you risk buying a house if it might lead to criminal charges? Would you sell to someone if you had to investigate their immigration status first? The uncertainty alone is enough to deter participation in the Texas real estate market – harming both individuals (on both sides of the transaction) and the broader state economy.

CONCLUSION

Current U.S. immigration law, legal precedent, and visa conditions create a nearly insurmountable barrier for temporary visa holders to establish domicile. As such, these individuals are legally excluded from property ownership and even leasing (renting) under legislation that ties these rights to domicile status. The chilling effect of this legal uncertainty could have far-reaching consequences for Texas' economy and reputation.

Key References

1. *Elkins v. Moreno*, 435 U.S. 647
2. *International Estate Planning §12* – U.S. Legal Issues Affecting Foreign Individuals on Temporary Assignment
3. Wildes, L., & Grunblatt, D. (1983). *Domicile for Immigration and Federal Gift and Estate Tax Purposes—Is a Harmonious Rule Possible?*, *San Diego Law Review*, 21, 113.