

CORRESPONDENCE

The following materials contain copies of certain correspondence with the General Accounting Office, Internal Revenue Service, Department of the Treasury, Department of State, Immigration and Naturalization Service, and Department of Justice (Tax Division) in connection with the Joint Committee staff research for this review. Memoranda prepared by the Congressional Research Service at the request of the Joint Committee staff are also contained herein. Tax return information that is subject to the disclosure requirements of Code section 6103 and certain other information have been redacted from the correspondence.

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Congress of the United States
JOINT COMMITTEE ON TAXATION
Washington, DC 20515-6458

December 7, 1999

Honorable David M. Walker
Comptroller General of the United States
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Comptroller Walker:

In August 1996, the Internal Revenue Code (the "Code") was modified to address issues related to tax-motivated expatriation, as part of the Health Insurance Portability and Accountability Act of 1996 ("HIPA").¹ In addition, in September 1996, the immigration laws were changed to restrict the ability of tax-motivated expatriates to reenter the United States, as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the "1996 Immigration Act").² House Ways and Means Committee Chairman Bill Archer has requested the staff of the Joint Committee on Taxation ("Joint Committee staff") to undertake a review of these rules. In particular, the Joint Committee staff has been requested to: (1) review whether the expatriation rules under the Code and related rules restricting visas for tax-motivated expatriates have been applied by the Administration in the manner intended by Congress, (2) review whether these rules have been effective in deterring tax-motivated expatriation, and (3) provide recommendations on ways to improve such rules if our review indicates that the existing rules have not been effective.

We have been requested to provide the results of our review by May 31, 2000.

In connection with this review, the Joint Committee staff requests the U.S. General Accounting Office (the "GAO") to review the following general areas.

- Whether the Internal Revenue Service (the "IRS") has procedures in place (and the extent to which such procedures are followed) that ensure adequate compliance and enforcement of the tax-motivated expatriate rules relating to income taxation;

¹ For example, HIPA included several amendments to the tax-motivated expatriation rules of sections 877 and 2107, and added a new section 6039G (relating to certain information reporting requirements).

² Division C of the Omnibus Consolidated Appropriations Act, 1997, sec. 352, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

Congress of the United States
JOINT COMMITTEE ON TAXATION
Washington, DC 20515-6456

Honorable David M. Walker
Comptroller General of the United States
General Accounting Office
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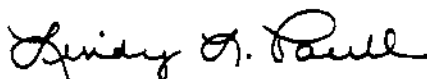
- Whether the IRS has procedures in place (and the extent to which such procedures are followed) that ensure adequate compliance and enforcement of the tax-motivated expatriate rules relating to estates, gifts, and trusts;
- How the private letter ruling process is being used by taxpayers and the IRS to determine the application of the expatriation rules; and
- Whether the State Department and the Immigration and Naturalization Service have procedures in place (and the extent to which such procedures are followed) (1) that ensure adequate compliance and enforcement with the 1996 Immigration Act relating to expatriates and (2) to coordinate with the IRS and/or the Attorney General's office relating to whether the expatriation was tax motivated.

The Joint Committee staff, pursuant to section 6103(f)(4) of the Code, requests that the GAO conduct the work as outlined in this letter. We expect that your designated representatives will have access to all IRS files, records, and returns necessary to complete this work for the Joint Committee staff. We recognize that other Congressional committees and Members of Congress may ask to be briefed on the progress of your work. We do not object to such briefings; however, we would like to be notified in writing of any such briefings and be given the opportunity to attend. (Of course, these briefings may not include disclosure of tax return information.) Although section 6103 access is necessary to conduct this review, your report should not contain any information subject to section 6103 disclosure restrictions. If this appears to present difficulties in fulfilling our request, please contact me as soon as possible so that we can further discuss this issue.

Due to the report deadline, the Joint Committee staff requests that you provide your final response prior to March 30, 2000. In addition, we ask that you supply this information as it becomes available. All information needs or delivery should be coordinated through Rick Grafmeyer, who may be reached at (202) 225-3621.

We appreciate your assistance in this matter and look forward to working with you.

Sincerely,



Lindy L. Paull
Chief of Staff



Memorandum

March 31, 2000

TO : Joint Committee on Taxation
Attention: Deirdre James

FROM : William J. Krouse
Analyst in Social Legislation
Domestic Social Policy Division

SUBJECT : **Issues Related to Excluding Tax-motivated Expatriates Under Section 212(a)(10)(E) of The Immigration and Nationality Act**

This memorandum examines issues related to implementing Section 212(a)(10)(E) of the Immigration and Nationality Act. This provision makes former U.S. citizens inadmissible for entry into the United States if the Attorney General determines they renounced their U.S. citizenship (expatriated) in order to avoid taxation by the United States.

Background

The Immigration and Nationality Act of 1952 (INA: 8 U.S.C. § 1101 et seq.) is the main body of law governing immigration to the United States. Section 103 of the INA gives primary responsibility for the administration and enforcement of immigration law to the Attorney General. Most of that authority is delegated to the Commissioner of the Immigration and Naturalization Service (INS). Section 104 of the INA also gives a large amount of responsibility for the administration and enforcement immigration law to the Secretary of State as it relates to the duties and functions of consular officers. With limited exceptions, any alien seeking to enter the United States is required to present valid documentation as required by the Attorney General in regulation.¹ Usually, such documentation includes a passport and visa. Immigrant and nonimmigrant visas are issued to eligible aliens by U.S. consular officers abroad. Any alien seeking entry into the United States must apply for admission at a designated international port of entry.

¹Section 212(d)(4)(B) of the INA gives the Secretary of State and the Attorney General the discretionary authority to waive documentary requirements for admission. These requirements are often waived on the basis of reciprocity. For further information on nationals for whom the Attorney General has waived nonimmigrant documentary requirements, see Sections 212.1(a) and (b) of 8 *Code of Federal Regulations*. The Visa Waiver Pilot Program also authorizes the Attorney General to waive certain nonimmigrant visa requirements.

During both the visa and admission processes, aliens must satisfy the consular and immigration officer that they are not inadmissible under any of the grounds outlined in Section 212(a) of the INA. Grounds for inadmissibility are currently divided into 10 categories: 1) health-related grounds; 2) criminal and related grounds; 3) security and related grounds; 4) public charge proscription; 5) labor certification requirements and qualifications for certain immigrants; 6) illegal entrants and immigration violators proscription; 7) documentation requirements; 8) ineligibility for citizenship; 9) aliens unlawfully present; and 10) miscellaneous.

Among the miscellaneous grounds of inadmissibility is Section 212(a)(10)(E), which makes any former U.S. citizen who renounced citizenship to avoid taxation in the United States ineligible for admission into the United States. This provision was added to the INA by Section 352 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA; Division C of P.L. 104-208). It is important to note that this provision is not retroactive; it only applies to persons who renounced their citizenship on or after September 30, 1996 — the effective date of IIRIRA. Also, while there is no waiver of the “tax-motivated expatriation” ground for inadmissibility for an immigrant visa, there is a waiver for a nonimmigrant visa under current law.

Early on, however, observers noted that the implementation of Section 212(a)(10)(E) would be “beset with operational complications,” for this provision charged the Attorney General with the *sole* responsibility for making determinations whether persons renounced their citizenship to avoid taxation in the United States. Observers noted that to make such determinations, at least three agencies would need to be involved. Those agencies include the Department of State’s Bureau of Consular Affairs, the Department of Treasury’s Internal Revenue Service (IRS), and the INS.²

Thus, the narrow statutory construction of Section 212(a)(10)(E), by giving the Attorney General the sole responsibility for making these determinations, has led to operational problems that have affected the implementation of this law. To date, not a single person has been excluded from entry into the United States for renouncing U.S. citizenship to avoid taxation.³

Formal Renunciation of Citizenship Before Consular Officers

The Department of State is responsible for determining the nationality and citizenship status of a person located outside the United States. Section 349(a) of the INA enumerates the specific acts that can trigger loss of citizenship, if such acts were voluntarily performed with the intent of relinquishing U.S. citizenship. Such acts include 1) obtaining naturalization in a foreign state; 2) taking oaths of allegiance to a foreign state; 3) entering into military service in a foreign state; 4) accepting policy-level foreign government employment; 5) making a formal renunciation of nationality before a diplomatic or consular

²October 21, 1996 State Department Cable to all diplomatic and consular posts (no. 96-State-219622), reprinted in “State Dept. Instructs on New Voting and Renunciation of Citizenship Grounds of Exclusion,” *Interpreter Releases*, v. 73, October 28, 1996, p. 1504.

³Both INS and DOS officials confirmed this fact with the author.

officer; 6) making a formal written renunciation of nationality to an officer designated by the Attorney General during wartime; or 7) if convicted of treason and subversion.

While case law regarding expatriation is lengthy and complicated, the leading Supreme Court case holds that U.S. citizens cannot be found to have expatriated themselves (i.e., voluntarily abandoned the United States, becoming the citizen of another country, by performing one of the acts enumerated in Section 249(a) other than taking an oath of renunciation), unless they did so intending to relinquish U.S. citizenship (*Vance v. Terrazas*, 444 U.S. 252, 1980). Over time, administrative authorities have become increasingly reluctant to infer intent to relinquish citizenship from otherwise expatriating acts. Consequently, for purposes of implementing Section 212(a)(10)(E), excluding tax-motivated expatriates, Section 349(a)(5), whereby a person formally renounces their citizenship to a consular officer, is the only provision that denotes conclusively that U.S. citizenship was renounced voluntarily and with clear intent and is, therefore, applicable to this discussion.

Consular officers are at times called upon to administer "Oaths of Renunciation" under Section 349(a)(5). According to State's *Foreign Affairs Manual*, there are three requirements for an oath of renunciation of U.S. citizenship. The oath of renunciation must 1) be taken in the presence of a diplomatic or consular officer, 2) be taken outside of the United States, and 3) be in the precise form prescribed by the Secretary of State. The consular officer must be satisfied that the person desiring to renounce U.S. citizenship is a U.S. citizen. Evidence of a person's U.S. citizenship is usually a matter of record in the form of a U.S. passport. Also, consular officers are required to take steps to establish that the renunciation is voluntary. As part of this process, the intending renunciant must read and sign a statement of understanding. In addition, an oath of renunciation is signed in triplicate by the renunciant and the officer. A Form FS-348 "Certificate of Loss of Nationality (CLN)" is prepared by the consular officer in quadruplicate, a copy of which is issued to the renunciant (expatriate).⁴

Under current law, State provides IRS with information about persons who renounce their U.S. citizenship.

Expatriates and the Internal Revenue Service (IRS)

Prior to enacting the Illegal Immigration Reform and Immigrant Responsibility Act, the 104th Congress enacted the Health Insurance Portability and Accountability Act of 1996 (HIPA; P.L. 104-191), which also includes provisions designed to discourage tax-motivated expatriation. HIPA included a provision that amended the Internal Revenue Code (IRC) at Section 877. This provision applies to both U.S. citizens who renounce or relinquish their citizenship and to legal permanent residents (immigrants) who abandon their U.S. residency for tax purposes. Under this provision, there is an irrebuttable presumption that an individual who has expatriated has a principal purpose of avoiding U.S. taxation if either their average annual net income tax for the five taxable years ending before the date of the expatriation is greater than \$100,000 (the "tax liability test"), or the net worth of the individual is \$500,000 or more (the "net worth test").

⁴"Loss and Restoration of U.S. Citizenship, Part 1200," *Foreign Affairs Manual*, v. 7, as reprinted in *Immigration Law and Procedure*, v. 17, (Matthew Bender) p. 135- 170.

It is of interest to note that the test under Section 877 (IRC) is that tax-motivation be "one of the principal purposes" for expatriation; whereas, under Section 212(a)(10)(E) (INA), the test for inadmissibility is that tax-motivation be "the purpose" of expatriation. Consequently, the test is more inclusive under Section 877 than under Section 212(a)(10)(E). In addition, Section 212(a)(10)(E) only applies to former citizens and not to legal permanent residents who have abandoned their residency in the United States to avoid taxation (albeit a more difficult determination), leading some observers to suggest that there is a disparity in the law.⁵

As required by HIPA, IRS publishes a list quarterly in the *Federal Register* of the names of persons who have renounced their U.S. citizenship (expatriates) and who, by having renounced citizenship, may have done so to avoid taxation and may meet tax liability or net worth tests under Section 877(a). The IRS, however, does not make a preliminary determination based upon its records whether these expatriates meet either test and, thus, would be inadmissible into the United States. Consequently, these lists include expatriates whose motivation may not have been tax avoidance, and whose exclusion might be an embarrassment to the United States.

[***REDACTED INFORMATION***]

⁵"Tax Problems for Departing Aliens," by David M. Hudson, *Immigration Briefings*, no. 97-03, March 1997, p. 36.

[***REDACTED INFORMATION***]

⁶The Visa Waiver Pilot Program authorizes the Attorney General to waive the visa documentary requirements for nationals from certain designated countries as temporary visitors for business or pleasure. For further information, see CRS Report 97-309, *Immigration: Visa Waiver Pilot Program*, by Ruth Ellen Wasem.

[*REDACTED INFORMATION***]**

Alternatives for Congress

Regarding the exclusion of tax-motivated expatriates, Congress has several options, including 1) Section 212(a)(10)(E) of the INA could be repealed in which case, one mechanism by which to enforce Section 877 would be eliminated (IRS could still take other actions against these persons under Section 877); 2) take no action and the Departments of Justice, State, and Treasury could be left to solve the operational problems related to excluding tax-motivated expatriates; or 3) Section 212(a)(10)(E) could be amended in such a way as to mandate closer cooperation between Justice, State, and Treasury in effecting the exclusion of tax-motivated expatriates.

Under the third option, one possibility is that the Department of State could inform persons intending to renounce their U.S. citizenship that they would be presumed to have renounced their citizenship for tax purposes unless they signed releases that would allow the IRS to make a preliminary determination based on tax records. Such releases could also include the requirement that the expatriates provide specific information such as their social security or tax identification numbers by which the IRS could more expeditiously locate the person's files. Following an IRS determination concerning the expatriates' motivations, State could then send official notification to the expatriates while their foreign addresses are still current. In addition, such a notification could be used to inform expatriates of a rebuttal process by which they could administratively contest IRS determinations, if such determinations showed tax-motivation. Failure to sign releases could result in an automatic presumption of tax-motivation, and, the expatriates' names and other personal information could be entered into the CLASS system.

If you should have any questions or need further assistance, please contact me at (202) 707-2225.



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

ASSISTANT SECRETARY

Lindy L. Paull, Esq.
Chief of Staff
Joint Committee on Taxation
Congress of the United States
Washington, DC 20515-6453

APR 07 2000

Dear Ms. Paull:

This is in response to your letter of March 9, 2000, in which you requested certain information regarding the interaction of the 1996 expatriation tax legislation and United States tax treaties. This letter follows the general format of your letter.

1. **List each U.S. tax treaty or protocol in force that conflicts (or potentially conflicts) with the 1996 expatriation tax rules.**

Income Tax Treaties

A list of the income tax treaties and protocols that conflict (or potentially conflict) with the 1996 expatriation tax rules is attached hereto as Appendix A.

The income tax treaties on the list fall into three general categories:

- 1) Treaties in which the saving clause preserves the right of the United States to tax its current citizens, with no specific mention of former citizens or former long-term residents. *See* Table A-1 of Appendix A.
- 2) Treaties in which the saving clause expressly preserves the right of the United States to tax its current citizens and, for a period of 10 years, former citizens if the loss of citizenship had as one of its principle purposes the avoidance of tax (with no specific mention of former long-term residents). *See* Table A-2 of Appendix A.
- 3) Treaties in which the saving clause expressly preserves the right of the United States to tax its current and former citizens, with no condition that the loss of citizenship was tax-motivated and no limitation on the number of years former citizens are subject to tax (but with no specific mention of former long-term residents). *See* Table A-3 of Appendix A.

Estate and Gift Tax Treaties

A list of the estate and gift tax treaties that conflict (or potentially conflict) with the 1996 expatriation tax rules is attached hereto as Appendix B.

The estate and gift tax treaties on the list fall into two general categories:

- 1) Treaties that do not explicitly preserve the right of the United States to tax former citizens or former long-term residents. *See* Table B-1 of Appendix B.
- 2) Treaties in which the saving clause expressly preserves the right of the United States to tax its former citizens for a period of 10 years if the loss of citizenship had as one of its principle purposes the avoidance of tax including, for this purpose, income tax (but with no specific mention of former long-term residents). *See* Table B-2 of Appendix B.

2. For each such treaty or protocol, describe each provision that conflicts with the 1996 expatriation tax rules.

Income Tax Treaties

In general, income tax treaties provide relief from double taxation when a resident of one country (the “residence country”) derives income arising in the other country (the “source country”). This is accomplished, in part, by limiting the source country’s taxing jurisdiction with respect to certain types of income. For example, income tax treaties generally reduce (sometimes to zero) the rate of tax that the source country can impose on passive income (e.g., dividends, interest, and royalties) derived by a resident of the other treaty country, prevent the source country from taxing capital gains derived by such a resident, prevent the source country from taxing business or personal services income of such a resident unless it is attributable to a permanent establishment or fixed base in the source country, and prevent the source country from taxing other income not explicitly mentioned in the treaty.

A potential conflict could occur when income or gains are derived by a former citizen or former long-term resident residing in a country with which the United States has a treaty. The 1996 legislation generally imposes tax at graduated rates, for a period of 10 years, on the U.S. source income (including gains from the sale of stock or debt issued by a U.S. person and gains from tangible personal property located in the United States) of a former citizen or former long-term lawful permanent resident whose loss of such status had as one of its principal purposes the avoidance of U.S. tax. In contrast, if a former U.S. citizen or former U.S. resident is not covered by a saving clause, treaties generally provide for a reduced rate or exemption from tax on U.S.-source passive income, an exemption from tax on capital gains, a limitation on taxing business or personal services income, and a restriction on taxing other income not otherwise mentioned in the treaty.

This potential conflict can be resolved by including within the scope of a treaty’s saving clause former citizens and former long-term residents whose loss of such status had as one of its principal purposes the avoidance of U.S. tax. Such a provision would allow the United States to apply the 1996 legislation as if the treaty did not exist. As discussed in response to Question 3, below, since 1996 the Treasury Department has successfully negotiated, and the Senate has

given its advice and consent to ratification to, nine income tax treaties or protocols that include such a provision in their saving clauses, thereby eliminating any potential conflict. See Table A-4 of Appendix A. Seven of these treaties already have entered into force, and two are awaiting entry into force.

Seventeen income tax treaties currently in force contain saving clauses that do not explicitly preserve the right of the United States to tax former citizens or former long-term residents. See Table A-1 of Appendix A. These treaties potentially conflict with the 1996 legislation with respect to both former citizens and former long-term residents.

Twenty-three income tax treaties currently in force contain saving clauses that explicitly allow U.S. taxation of former citizens whose loss of citizenship was tax-motivated, but do not explicitly refer to former long-term residents. See Table A-2 of Appendix A. Twenty-one¹ of these treaties potentially conflict with the 1996 legislation with respect to former long-term residents. An additional potential conflict exists with the U.S.-Netherlands treaty, because that treaty provides that the saving clause does not apply to former U.S. citizens who are nationals of the Netherlands.

Eleven income tax treaties currently in force contain saving clauses that explicitly allow continued U.S. taxation of former citizens, with no explicit requirement that the expatriation be tax motivated. See Table A-3 of Appendix A. Ten² of these treaties potentially conflict with the 1996 legislation with respect to former long-term residents.

Estate and Gift Tax Treaties

As discussed in response to Question 3, below, the Treasury Department successfully negotiated a protocol to the U.S.-Germany estate and gift tax treaty, to which the Senate has given its advice and consent to ratification, that contains a saving clause that allows the United States, for a period of 10 years, to impose its estate and gift taxes on former citizens and former long-term residents whose loss of such status had as one of its principal purposes the avoidance of U.S. tax. This protocol, upon entry into force, will eliminate any potential conflict between the existing treaty and the 1996 legislation.

Twelve estate and gift tax treaties currently in force do not explicitly preserve the right of the United States to tax estates of, or gifts by, former citizens and former long-term residents. See Table B-1 of Appendix B. These treaties potentially conflict with the 1996 legislation with respect to both former citizens and former long-term residents.

Four estate and gift tax treaties currently in force contain saving clauses that explicitly allow U.S. taxation of estates of, or gifts by, former citizens whose loss of citizenship was tax-

¹ Because the treaties with Austria and Ireland entered into force after the enactment of the 1996 legislation, the 1996 legislation does not override those treaties with respect to former long-term residents. See Reports of the Senate Committee on Foreign Relations regarding the Austria treaty (Exec. Rept. 105-7) and the Ireland treaty (Exec. Rept. 105-13).

² Because the treaty with Switzerland entered into force after the enactment of the 1996 legislation, the 1996 legislation does not override those treaties with respect to former long-term residents. See Report of the Senate Committee on Foreign Relations regarding the Switzerland treaty (Exec. Rept. 105-10).

motivated, but do not explicitly refer to former long-term residents. See Table B-2 of Appendix B. These treaties potentially conflict with the 1996 legislation with respect to former long-term residents.

3. For each such treaty or protocol, describe the steps that have been taken to eliminate any conflicts with the 1996 expatriation tax rules. If no steps have been taken, describe the steps that will be taken by the Treasury Department to eliminate any such conflicts, including any plans to renegotiate these treaties and the projected timing of such renegotiations.

Income Tax Treaties

The Treasury Department has undertaken significant efforts to eliminate potential conflicts between the 1996 expatriation tax legislation and treaties. In the 3 ½ years since the legislation was enacted, the Treasury Department has successfully negotiated, and the Senate has given its advice and consent to, nine income tax treaties or protocols containing saving clauses that explicitly allow the United States to impose its expatriation tax laws with respect to both former citizens and former long-term residents.³ Seven of these treaties and protocols already have entered into force, and two are awaiting entry into force. See Table A-4 of Appendix A.

The Treasury Department currently is engaged in active income tax treaty negotiations with four countries. Three of these involve the renegotiation of treaties currently in force that potentially conflict with the 1996 expatriation tax legislation. Although the expansion of the saving clause in each of these treaties ultimately depends upon whether the United States and the other country can reach mutual agreement on all relevant issues, the Treasury Department intends to advocate the expansion of the provision in each renegotiation to incorporate the 1996 legislative changes. For additional discussion of the Treasury Department's current treaty policy regarding this issue, see the response to Question 5, below.

While the Treasury Department intends to advocate this expanded saving clause whenever it takes part in treaty negotiations, it would be extremely difficult to renegotiate all potentially conflicting treaties within the 10-year period referred to in the legislative history of the 1996 expatriation legislation. The renegotiation of a tax treaty requires a significant commitment of resources by both countries. Accordingly, the Treasury Department must prioritize its treaty renegotiations according to a variety of factors, including the relative significance of the issues to be addressed with its various treaty partners and potential treaty partners. The potential conflict between an existing treaty and the 1996 expatriation tax legislation is one such issue.

³ Two treaties (Ireland and Switzerland) currently in force that were signed after the 1996 legislation was enacted and to which the Senate gave its advice and consent to ratification in 1997 do not expand the saving clause to cover former long-term residents. Because substantially all negotiations had been completed for each of these two treaties by the time the 1996 legislation was enacted, the Treasury Department was unable to obtain agreement from the other country for this expansion.

Even if the Treasury Department sought to renegotiate a treaty to eliminate this potential conflict, numerous factors may limit its ability to do so.⁴ For example, a country with which the United States has a tax treaty is likely to view an agreement to expand the saving clause as a concession by that country, because the provision would expand the United States' ability to impose tax on a resident of that country. That country, if it were willing to agree to the expansion, would probably expect a concession from the United States in return. This is particularly likely because the issue would arise as a result of a treaty override by the United States.⁵ The concession expected from the United States may or may not be acceptable to the United States. In addition, the Conference Report to the 1996 legislation, which purports to withdraw the treaty override after 10 years following enactment of the legislation, could provide an incentive for treaty partners to delay negotiations on the issue until the override purportedly expires in 2006. Accordingly, even if the Treasury Department had the resources to renegotiate all of the income tax treaties that conflict (or potentially conflict) with the 1996 legislation, it is not certain that mutually acceptable agreements could be reached.

Estate and Gift Tax Treaties

The Treasury Department has successfully negotiated, and the Senate has given its advice and consent to, a protocol to the U.S.-Germany estate and gift tax treaty that contains a saving clause explicitly allowing the United States to impose its expatriation tax laws with respect to both former citizens and former long-term residents. That protocol currently is awaiting entry into force.

The Treasury Department currently is engaged in the active renegotiation of two other estate and gift tax treaties, both of which contain saving clauses that potentially conflict with the 1996 expatriation legislation. Although the expansion of the saving clause in each of these treaties ultimately depends upon whether the United States and the other country can reach mutual agreement on all relevant issues, the Treasury Department intends to advocate the expansion of the provision in each renegotiation to incorporate the 1996 legislative changes.

As noted above with respect to income tax treaties, the renegotiation of a tax treaty requires a significant commitment of resources by both countries, and a country with which the United States has a tax treaty is likely to insist on a concession by the United States in order to agree to an expansion of the saving clause. Accordingly, even if the Treasury Department had the resources to renegotiate all of the estate and gift tax treaties that conflict (or potentially conflict) with the 1996 legislation, it is not certain that a mutually acceptable agreement could be reached.

⁴ The difficulties involved in the renegotiation of U.S. treaties as a result of the 1996 legislation's treaty override were discussed in detail in the Statement of Leslie B. Samuels, Assistant Secretary (Tax Policy), Department of the Treasury, Before the Committee on Finance, United States Senate, dated July 11, 1995.

⁵ In this regard, the United States is widely perceived as overriding its treaty obligations more frequently than its treaty partners, a perception that has the potential to make it more difficult to obtain concessions from treaty partners and potential treaty partners.

4. Describe any specific disputes that have arisen (with taxpayers, treaty partners, or otherwise) in connection with any conflicts between the 1996 expatriation tax rules and a tax treaty or protocol. Describe each such dispute in detail and indicate whether and how the dispute was resolved.

We are not aware of any specific disputes that have arisen since the enactment of the 1996 expatriation tax law.

5. Describe the Treasury Department's policy with respect to avoiding conflicts on this issue for future tax treaties, including any Treasury Department plans to include appropriate provisions in any future tax treaties to avoid such conflicts.

The Treasury Department has included a saving clause provision in its Model Income Tax Convention, dated September 20, 1996, that is consistent with the 1996 expatriation tax legislation. The model treaty provision, which is written in reciprocal terms, would allow the United States to tax for 10 years, as if the treaty had not come into effect, former citizens and former long-term residents whose loss of such status had as one of its principal purposes the avoidance of tax.

The model treaty reflects the Treasury Department's current policy with respect to the saving clause provision. Accordingly, the Treasury Department intends to propose the inclusion of this provision in future tax treaty negotiations. The nine treaties listed in Table A-4 of Appendix A, to which the Senate has given its advice and consent to ratification, reflect the Treasury Department's success in incorporating this provision into recent treaties.

With respect to estate and gift tax treaties, the Treasury Department intends to propose the inclusion of an expanded saving clause consistent with the 1996 legislation in its two active treaty renegotiations, as well as any future treaty negotiations that may take place. As noted above, the Treasury Department succeeded in incorporating this provision into a protocol with Germany, to which the Senate has given its advice and consent and which is awaiting entry into force.

* * *

I hope that these responses to your questions are helpful. If you need additional information, please contact me or Philip R. West, our International Tax Counsel.

Sincerely,



Jonathan Talisman
Acting Assistant Secretary (Tax Policy)



DEPARTMENT OF THE TREASURY
WASHINGTON

ASSISTANT SECRETARY

MAY 5 2000

Lindy L. Paull, Esq.
Chief of Staff
Joint Committee on Taxation
Congress of the United States
Washington, DC 20515-6453

Dear Ms. Paull:

This is in response to your letter of March 31, 2000, to Commissioner Rossotti and me, in which you requested certain information regarding the 1996 expatriation tax legislation. I will address certain of your inquiries from the perspective of the Treasury Department. Commissioner Rossotti will address your other inquiries in a separate letter. The numbers in parenthesis refer to the question numbering in your letter.

Describe whether the IRS plans to establish a regulation project with respect to the 1996 expatriation rules and, if so, the projected timing of such a project. (Question 19)

The IRS published detailed notices in 1997 and 1998 regarding the 1996 expatriation tax law changes. See Notice 97-19, 1997-1 C.B. 394, and Notice 97-34, 1998-2 C.B. 29. These notices, upon which taxpayers may rely, provide extensive guidance to taxpayers regarding the general application of the statute, the anti-abuse rules contemplated by the statute, and the procedures for the ruling process contemplated by the statute.

As stated in these notices, the IRS intends to incorporate the guidance set forth in the notices into regulations. It is not anticipated that the regulations will differ significantly from the guidance set forth in the notices. No date certain has been established for the regulation project.

Provide any information (including anecdotal information) that indicates whether the 1996 expatriation tax rules have had a deterrent effect on tax-motivated expatriations. (Question 22)

Based on both publicly available sources and information received by the IRS in the course of the private letter ruling process, significant numbers of wealthy citizens have continued to expatriate since the expatriation tax laws were amended in 1996. Of particular note is that many of these individuals hold a substantial portion of their wealth in non-U.S. assets. As a result, even if these individuals were determined to have expatriated with a principal purpose of tax-avoidance, they would not be subject to significant taxation under sections 877, 2107, and 2501(a)(3).

Additional information regarding these individuals is provided in Commissioner Rossotti's separate letter.

Describe whether the thresholds under Code section 877(a)(2) (relating to statutory presumptions of tax avoidance) are appropriate or whether and how such thresholds should be modified. Also describe whether the conditions for not presuming tax avoidance under section 877(c) are appropriate or whether and how such conditions should be modified. (Question 30)

As discussed in more detail in response to Question 34, below, the Treasury Department believes that the problems inherent in the current law cannot fully be addressed through the mere modification of the existing regime. Nonetheless, if the existing regime is retained, the Treasury Department recommends that, due to the nature of expatriation cases, the determination of tax avoidance should be based exclusively on objective criteria.

While the 1996 legislation purported to make the tax motivation inquiry objective by incorporating "average tax liability" and "net worth" tests, it also established several preferred classes of former citizens whose tax-motivation is not determined by these objective standards as long as they submit a request for a ruling as to whether their expatriation was tax-motivated.¹ Ultimately, a former citizen in one of these favored classes who submits a ruling request will be subject to tax under the 1996 expatriation provisions only if the IRS determines (either in the context of the ruling request or upon a subsequent examination), based on all facts and circumstances, that the individual's expatriation was done with a principal purpose of tax avoidance, and a court upholds that determination. The need to make this inherently factual and subjective inquiry was one of the primary problems with the pre-1996 law. One way in which this problem could be eliminated is to remove the exceptions to the tax-liability and net worth tests. Not only would such a change eliminate a significant obstacle that the IRS would face in order to prevail in a court case, but it would also free up significant amounts of resources that the IRS has been required to dedicate to the ruling process under the 1996 legislation.

In the context of making the tax motivation inquiry wholly objective, an increase in both the average tax liability and net worth thresholds might be appropriate in order to focus resources on those attempting to avoid significant amounts of U.S. tax liability. In particular, the net worth test could be increased, since many individuals whose net worth is \$562,000 (the net worth threshold for calendar year 2000) may not have significant tax liabilities.

¹ At a minimum, the preferred classes of former citizens that are eligible to submit a request for a ruling should be significantly tightened. For example, the classes based on having citizenship in another country do not require the individual to actually move to that other country. Because most countries tax on the basis of residence, rather than citizenship, it is unlikely that the individual will be taxed by that other country if he does not reside there. Accordingly, the individual could move to a tax haven yet not be subject to the average tax liability and net worth tests as long as he submits a request for a ruling.

Of course, these changes would not remedy other significant problems inherent in the current law, such as the general lack of taxation on foreign assets and the administrative difficulties associated with attempting to track transactions for 10 years after the individual has cut his citizenship ties with the United States.

Describe in detail any problems that the Treasury Department or the IRS has encountered or believes exist with respect to the 1996 expatriation tax rules, including any problems associated with taxpayer compliance with, or the enforcement or effectiveness of, such rules. (Question 32)

Numerous problems inherent in the 1996 expatriation tax legislation significantly undermine its effectiveness and administrability. These problems include:

- It does not prevent tax avoidance by a patient expatriate who is willing to wait 10 years before selling his assets. This is particularly problematic because the expatriate may have the beneficial use of the assets during that 10-year period by borrowing against them.
- It generally does not tax an expatriate's gain on foreign assets, even though U.S. citizens are taxable on their worldwide assets
- It generally does not impose transfer tax on foreign assets, even though U.S. citizens are taxable on their worldwide gifts and estate. Moreover, it allows gift tax avoidance on U.S. assets if those assets are held through foreign corporations.
- With respect to certain favored classes of former citizens, it retains the pre-1996 law requirement that a subjective tax-avoidance motive be established.
- It raises significant administrative problems because it focuses on transactions that occur up to 10 years after expatriation and that may have little connection with the United States.

These problems are discussed in more detail in answers to the other questions.

Describe in detail the types of strategies or structures taxpayers use (or may use) to avoid the 1996 expatriation rules, including any structures or strategies used by taxpayers planning to expatriate to convert U.S. source assets to foreign source assets, and the effect, if any, of other Code provisions such as section 367 with respect to such strategies or structures. (Question 33)

There are numerous techniques available to avoid the 1996 expatriation tax rules. For example:

Borrowing During 10-Year Period: The 1996 expatriation tax law applies only for the 10-year period following an individual's loss of citizenship or long-term residence status. During that 10-year period following expatriation, an individual can borrow money using his assets as security. In this way, he can enjoy economic benefits associated with the assets, but will not be subject to tax under section 877. Once the 10-

year period ends, he can sell the underlying assets (including stock of a U.S. corporation) without paying U.S. tax on the gain.

Use of Foreign Corporations to Avoid Gift Taxes: Under the 1996 legislation, an individual can contribute assets (including U.S.-situated property) to a foreign corporation and then make a gift of the stock of that foreign corporation immediately after expatriating without incurring any U.S. gift tax liability. This technique works under the 1996 legislation even if the recipient of the gift is a U.S. person. This technique is particularly useful if the expatriate hold assets with a relatively high basis, so that the income tax consequences on the contribution are minimal.

Creation of Foreign Wealth: In general, the 1996 expatriation tax does not impose either income tax or transfer tax with respect to foreign assets. As a result, individuals who may be considering a future expatriation have an incentive to invest in foreign assets so that gain from, and transfers of, those assets will not be taxed following expatriation.

Describe what laws or procedures, if any, may need to be enacted, modified, or implemented to improve taxpayer compliance with, or the enforcement or effectiveness of, the 1996 expatriation tax rules, including any additional information or assistance from the State Department and the INS that would be helpful to the IRS in administering these tax rules. (Question 34)

The Treasury Department believes that most significant problems associated with the 1996 expatriation tax laws are inherent in the structure of the regime. For example, even if an expatriate is admittedly tax-motivated, no tax is imposed if the expatriate is patient, and no tax is generally imposed with respect to foreign assets (in contrast to the treatment of citizens who do not expatriate, who are subject to income and transfer taxes on their worldwide assets).

Moreover, under the 1996 law, the tax consequences to a tax-motivated expatriate may depend on transactions that occur up to 10 years after the individual left the United States and that have little, if any, connection to the United States. The administrative problems inherent in such circumstances may be significant, and it is doubtful that additional information or assistance from another U.S. government department or agency would be useful. For example, with respect to the estate tax rules under the 1996 legislation, it may be difficult for the IRS to obtain reliable information to help it identify whether a deceased expatriate owned stock of a foreign corporation that held U.S. assets, particularly if the stock is transferred to a non-U.S. person.

For these reasons, the Treasury Department does not believe that modification of the existing regime would significantly improve the effectiveness or administrability of the regime. Instead, the Treasury Department believes that a more appropriate, effective, and administrable method for taxing expatriates is that proposed in the Administration's FY 2001 budget. That proposal, by imposing tax at the time a wealthy expatriate leaves U.S. taxing jurisdiction, and by including foreign assets within the regime, would eliminate many of the problems inherent in the current law. Moreover, that proposal, by

focusing on gains that accrued while the expatriate was a U.S. person, is consistent with the general policy underlying the other mark-to-market proposals in the Administration's FY 2001 budget.

Nonetheless, if the existing regime is retained, changes could be made to improve certain aspects of the regime. For example, as discussed in more detail in response to Question 30 above, the tax-motivation inquiry could be made wholly objective by eliminating the exception for the preferred classes of citizens who can submit requests for rulings.

We note that the Administration's FY 2001 budget, in addition to proposing a mark-to-market tax regime for expatriates, included a proposal to better coordinate the tax law and the immigration law applicable to former citizens. Under this proposal, the admissibility to the United States of a former citizen would, in general, be conditioned on whether the former citizen filed a final tax return for the year of expatriation reporting his mark-to-market gains. The Treasury Department believes that specific coordination between the expatriation tax law and the immigration law is appropriate in the context of the budget proposal because the information to be furnished by the IRS to the INS (i.e., whether a former citizen filed a final tax return for the year of expatriation) would be objectively and readily determinable by the IRS. In contrast, the Treasury Department does not believe that this type of explicit coordination would be appropriate or administrable in the context of the 1996 expatriation tax regime, because the determination of compliance under the current regime depends on information that might not be readily available to the IRS (e.g., an individual's net worth and events occurring up to 10 years after the expatriation).

* * *

If there are other issues you would like us to address, or if you need additional information, please let me know.

Sincerely,



Jonathan Talisman
Acting Assistant Secretary (Tax Policy)

Department of the Treasury
Internal Revenue Service
Washington, DC, May 5, 2000

Ms. Lindy Paull
Chief of Staff
Joint Committee on Taxation
1015 Longworth House Office Building
Washington, DC 20515-6453

Dear Ms. Paull;

This is in response to your letter dated March 31, 2000, in which you requested certain information regarding the tax and immigration laws enacted in 1996 regarding tax-motivated expatriates. Acting Assistant Secretary Talisman will address some of those matters in a separate letter. I will address your inquiries from the perspective of the Internal Revenue Service. This letter follows the general format of your letter.

Pursuant to sections 6103(f)(2) and (f)(4)(A) of the Internal Revenue Code of 1986, this letter contains tax return information (which is underlined). Any disclosure of this information (even to the taxpayers involved) is subject to the limitations of section 6103.

1. Describe the experience of the Treasury Department and the IRS in monitoring compliance of U.S. citizens who renounce citizenship and certain U.S. residents who terminate U.S. residency (collectively, "expatriates") under code sections 877, 2107, 2501(a)(3) and 6039G as enacted in 1996 (the "1996 expatriation tax rules").

The IRS has been successful in obtaining agreements with the Department of State (DOS) and the Immigration and Naturalization Service (INS) for obtaining expatriate information.

The IRS has processes in place for receiving and reviewing the incoming data with a procedure to conduct a preliminary review of overall filing compliance. The IRS conducts a check of the average tax for the 5-year period prior to expatriation as part of this review. Through these efforts the IRS has identified 11 cases that are potentially not in compliance with IRC § 877. These cases are either in the process of being classified for examination, the examination process has been initiated, or steps to secure a delinquent tax return have begun. Of the 11 cases, 10 relate to tax year 1997 and 1 to tax year 1996.

It is noteworthy that 4 of the 11 cases were identified after the cases were selected for examination pursuant to normal classification procedures. This process may include high profile expatriates, but is not designed to monitor or target any taxpayer solely on the basis of renunciation of citizenship. The IRS has also provided guidance to

taxpayers concerning these provisions, including administering the ruling process contemplated by the statute.

Despite these efforts, the IRS has experienced, and expects to experience in the future, significant difficulties in administering this provision. For example, enforcement of the provision requires IRS to obtain information regarding transactions that take place outside the United States up to 10 years after an individual expatriates. The IRS anticipates significant difficulties may arise in monitoring such transactions, particularly when the former citizen may have limited contacts with the United States. In addition, the implementation of the 1996 expatriation tax law (including both the ruling process and the examination function) has been very labor intensive. Because the IRS has limited resources, the dedication of resources in this area must be balanced against other areas in which they might be utilized. Even if they were found to have expatriated for a principal purpose of tax avoidance, some taxpayers will not be subject to tax under IRC § 877, 2107, or 2501(a)(3) because they hold foreign assets that will not be subject to tax under these sections.

2. Describe the IRS procedures to enforce the 1996 expatriation tax rules, including any IRS procedures (written or otherwise) specifically applicable to expatriates.

Procedures are in place for the DOS to provide the IRS with copies of each Certificate of Loss Nationality (CLN) each month as they are received by DOS in Washington, D.C. The CLN is the official document signed by a Consular Officer recognizing an individual's loss of nationality. The CLN includes information such as the effective date of expatriation, dates of residency in the United States for the past three years, foreign residency address, and how U.S. citizenship was originally obtained.

When the IRS receives the CLN it is assigned to the Technical Section within the International District in the Office of the Assistant Commissioner (International) and the following actions are taken:

- The record is entered into a CLN database,
- The CLN package is reviewed to ensure that the expatriation information statement that is required by IRC § 6039G is included.
 - If the expatriation information statement is not included, a letter is mailed requesting the information and explaining penalties,
 - 60 days are allowed for response; if no response is received, the case is referred to a compliance unit for case development and further action as required.
- A check for return filing compliance for the 6 years prior to expatriation is completed,
- A determination is made as to when the first IRC § 877 related return would be due,

- Not later than 30 days after the close of each calendar quarter, the IRS publishes in the Federal Register the name of each individual losing United States citizenship (within the meaning of IRC § 877(a)) with respect to whom the IRS receives information during such quarter. This action is required by IRC § 6039G.
- Future filing is monitored to ensure filing compliance with IRC § 877,
- If required, audits are opened and conducted, and/or other appropriate action is taken.

The Private Letter Ruling Process

IRC § 877(c)(1) provides that a former citizen whose average income tax liability or net worth exceeds specified thresholds will not be conclusively considered to have had a principal purpose of tax avoidance if he is described within certain specified categories and if he submits a ruling request as to whether his loss of citizenship had for one of its principal purposes the avoidance of U.S. taxes. Notice 97-19, 1997-1 C.B. 394, as modified by Notice 98-34, 1998-2 C.B. 29, provides a similar procedure for certain specified categories of long-term residents.

In order to facilitate the letter ruling request process, the IRS published detailed guidance regarding ruling request submissions in these Notices. The Office of the Associate Chief Counsel (International) currently administers the ruling process. The ruling process is described in more detail below in response to subsequent questions.

3. In May 1998, the Treasury Department published a study entitled *Income Tax Compliance by U.S. Citizens and U.S. Lawful Permanent Residents Residing Outside the United States and related issues*. We request the following information regarding this study.

- a. The study states that "IRS, in conjunction with [the State Department], has established procedures [under section 6039G] by which information submitted to [the State Department] is forwarded to IRS. IRS and [the State Department] have established procedures [under section 6039G] by which the copies [of certificates of loss nationality] are forwarded to IRS." Provide copies of those procedures.**

Representatives of the IRS and the State Department met in November of 1996 and outlined the information that the IRS required. The State Department agreed to provide to the IRS on a monthly basis a copy of the complete CLN package, including the statement filed under section 6039G. Additionally, at that meeting, the State Department agreed to provide the IRS with copies of CLN packages for the retroactive period (February 6, 1995 through August 1996).

Although these procedures are not in written form, all of the requested information has been provided to the IRS in a timely manner. Because of the retroactive applicability of the legislation and the period required to publish guidance for expatriates IRS initially received a significant number of CLN packages that did not contain the required expatriation information statement. However, after publication of Rev. Proc. 97-19 in March 1997, approximately 95 percent of the CLNs have contained the required expatriation information.

b. The Study also states that the “IRS is currently establishing a process by which those individuals who do not provide the information statement required under section 6039G will receive a letter from IRS explaining the requirements and requesting information.” Please indicate whether such a process has been established. If so describe the process.

A review of the CLN package is conducted by the IRS to ensure that the expatriation information statement that is required by IRC § 6039G has been included. If the expatriation information statement is not included with the package, a letter requesting the information and explaining penalties for failure to provide the information is mailed to the expatriate. Sixty days is allowed for a response. If no response is received within 60 days, the case is referred to a compliance unit for case development and further appropriate action.

c. The study further states that “IRS, in cooperation with [the Immigration and Naturalization Service], has established a procedure by which [information regarding green-card holders whose status has been revoked or abandoned] is submitted to IRS. IRS will conduct a random sampling on a yearly basis with respect to this information and attempt to determine whether former lawful permanent residents have complied with their past U.S. tax obligations under section 877 of the code as amended.” Describe the procedure referred to above and provide information on the random samples conducted by the IRS to date, including the results of such random samples.

At the meeting in November of 1996, the IRS outlined the information the IRS required. The INS agreed to provide this information on an annual basis. It was further agreed that the information would be furnished to IRS by June of each year for the prior calendar year.

The IRS received the data for 1996 and 1997 in 1998 as a single package and received the data for 1998 in June 1999. The data that the IRS receives generally is for all individuals who gave up their green cards during the previous year. The IRS loads the data into a database and discards the records for individuals who do not meet the residence requirement of IRC § 877(e)(2). The IRS then conducts a statistically

valid sample of the remaining records, with separate samples being drawn for abandoned and revoked green cards.

For those in the abandoned green card status for 1999, there were 1,730 records for which the IRS received social security numbers after making the adjustments noted above. Of this total, the IRS conducted a filing compliance review of 67. The IRS found that this population was generally filing compliant.

For the taxpayers whose green cards were revoked,¹ the IRS had 18,202 records for which the IRS received social security numbers after making the adjustments noted above. Of this number, the IRS selected a sample of 205 for a filing compliance review. Of this sample, the IRS encountered numerous difficulties. Chief among these was invalid social security numbers, social security numbers/name mismatch (the last name on Social Security's records did not match the name the IRS had), and no record of filings.

4. Describe in detail any pending taxpayer controversies involving the present law expatriation tax rules (e.g., cases under audit or litigation).

Although there are open audits, the IRS currently has no controversies involving the present law expatriation tax rules, since no adjustments have been proposed as of this date.

There are approximately 4 open ruling requests in which the IRS concluded that the evidence supports a finding that an expatriation was motivated by a principal purpose of tax avoidance. The taxpayers do not agree and are either in the process of submitting additional information, scheduling an adverse conference, or considering whether to withdraw the ruling request.

5. Describe the procedures the IRS follows to identify potential cases of tax-motivated expatriation under the 1996 expatriation rules, including any procedures for monitoring public reports of high profile expatriates.

The IRS has covered its procedures for identification of expatriate taxpayers in its response to question 2, above. As to procedures for monitoring public reports of high profile expatriates, the IRS does not as a general business practice do this. News reports have often been found to be inaccurate, and contain biased information.

6. Describe the purpose or purposes for issuing Notice 98-34, including any

¹The records received from INS do not have a "revoked" category. However they do contain a category titled "deported", and the IRS has used this category for our response to the part of your question relating to revoked green card.

problems or difficulties, if any, in administering Notice 97-19.

Notice 98-34 was issued as a result of the experience of the Office of Chief Counsel in administering the advance letter ruling procedure under section 877(c). Notice 98-34 revised the list of information set forth in Notice 97-19 that a taxpayer seeking a ruling is required to submit. This revision, which reflected the experience gained by the IRS in determining which information was most relevant to the inquiry, was done in order to facilitate the collection of that information in the original submission package. In addition, Notice 98-34 narrowed the categories of former long-term residents eligible to submit rulings in order to ensure that only those former long-term residents with significant tax ties to another country were eligible to submit ruling requests.

Notice 98-34 also modified the ruling practice set forth in Notice 97-19. In considering the significant number of requests submitted under Notice 97-19, the IRS found that making a determination regarding tax avoidance in the context of an advance ruling presented difficulties due to the inherently factual and subjective nature of the inquiry. In many cases, the IRS was not able to make a definitive advance determination regarding a principal purpose of tax avoidance because the information submitted with respect to the advance ruling did not clearly establish the existence or lack of such a principal purpose.

This difficulty arose because the nature of the inquiry makes it difficult to render sound pre-audit determinations. In the context of a ruling request, the Office of Chief Counsel is required to make an inherently subjective determination of a persons' intent based on facts submitted by the individual. In the ruling process, the flow of information to the IRS is, to a great extent, controlled by the taxpayer and is not well designed for making factual determinations. Although the Office of Chief Counsel in the ruling process may ask for additional information and further documentation, it is not in a position to confirm the validity of information submitted by a taxpayer (e.g., by a subpoena for documents or the taxpayer's books and records), particularly because that information may consist of representations as to expected future events. These difficulties were compounded by the fact that the Office of Chief Counsel received over one hundred and fifty requests for rulings, severely burdening the office's resources.

Notice 97-19 provided that an expatriate eligible to submit a ruling would be subject to the conclusive determinations of the average annual income tax liability and/or net worth tests of section 877(a)(2) unless the individual obtained a favorable ruling, rather than merely submitted a request, that the individual's expatriation did not have for one of its principal purposes the avoidance of U.S. taxes. Thus, an expatriate would be adversely affected if the IRS, for the reasons discussed above, were unable to make a definitive determination in the context of an advance ruling as to the individual's subjective intent.

For these reasons, Notice 98-34 announced that, in those cases where the IRS is unable to make a determination in the context of an advance ruling as to the individual's subjective intent, the IRS will issue a ruling as to whether a taxpayer's timely ruling request was complete and submitted in good faith (a so-called "fully submit" ruling). Moreover, Notice 98-34 provided that as long as a timely request for ruling was complete and submitted in good faith, the conclusive determinations of the average annual income tax liability and/or net worth tests of section 877(a)(2) would no longer apply. As explained in response to Question 8, below, the IRS believes that this modified approach is supported by section 877(c)(1)(B), which provides that the conclusive determinations under section 877(a)(2) do not apply if an eligible individual "submits" a ruling request for a determination as to whether such loss had for one of its principal purposes the avoidance of U.S. taxes.

If an individual receives a "fully submit" ruling that does not rule as to the taxpayer's subjective intent, the individual could still be determined in the context of a subsequent examination to have expatriated with a principal purpose of tax motivation. Indeed, Notice 98-34 noted that information collected as part of the ruling process may be forwarded to the Office of Assistant Commissioner (International) to consider in any later examination of the individual's returns. Under such circumstances, the inquiry into this subjective matter is shifted from the Office of Chief Counsel, which is not well equipped to address such factual issues in an advance ruling process, to the examination function, which may be better equipped to handle such matters.

7. Notice 98-34 states that "making a determination regarding tax avoidance in an advance ruling presents difficulties due to the inherently factual and subjective nature of the inquiry." Describe the difficulty in making such a determination given the statutory presumptions of a tax avoidance purpose under Code sections 877(a)(2), 2107(a)(2)(A), and 2501(a)(3)(B).

The average annual income tax liability and net worth tests of IRC § 877(a)(2) (which are cross-referenced in sections 2107(a)(2)(A) and 2501(a)(3)(B)) do not have direct applicability to the tax-avoidance inquiry in the context of a section 877 ruling request. Section 877(a)(2) provides that an individual shall be treated as having a principal purpose of tax avoidance if either the average annual income tax liability or net worth tests is satisfied. However, section 877(c)(1) provides that section 877(a)(2) "shall not apply" if the individual is described in certain categories and the individual, within one year of expatriation, submits a ruling request for a determination as to whether the expatriation had a principal purpose of tax avoidance. Thus, once an eligible expatriate submits the ruling request (assuming it is complete and in good faith), the conclusive determinations of tax avoidance under section 877(a)(2) (as well as the cross-references in section 2107(a)(2)(A) and 2501(a)(3)(B)) do not apply, and the inquiry must focus on the individual's specific facts and circumstances.

The ruling process requires the IRS to make an inherently subjective determination of a person's intent based on facts submitted by the individual. Since people expatriate for many reasons, this determination requires the IRS to establish that any advantageous tax results of the expatriation was, in fact, one of the principal purposes for that individual's decision to expatriate. This leads to the legal question of whether an individual's non-tax purposes were so great that they reduce the tax purpose to a level beneath that of a principal purpose. For example, assume that a long-term resident who has a fatal illness relinquishes his green card to return to his country of origin to be with his family. However, the country of origin has no estate tax so the long-term resident will escape a substantial amount of U.S. estate taxes. As a further example, assume that a United States citizen who gained his citizenship through her mother's U.S. citizenship decides to expatriate. She has never lived in the United States, and has no U.S. based assets or income source. However, since the United States taxes on worldwide income, her expatriation would result in a reduction in U.S. income taxation. These type of fact patterns, as well as other complex patterns the IRS has seen, make it very difficult in specific cases to determine whether, as a legal matter, the individual had a principal purpose of tax avoidance.

The ruling process prescribed by section 877 and the related gift and estate tax provisions require determinations not normally made in a ruling process. Ordinarily, the Office of Chief Counsel does not rule on factual issues, as stated by Section 7.01, Rev. Proc 2000-1, 2000-1 I.R.B. 4, 21; Treas. Reg. § 601.201(d)(2). In the ruling process, the flow of information to the IRS is to a great extent controlled by the taxpayer and is not well designed for making factual determinations. Although the Office of Chief Counsel in the ruling process may ask for information and further documentation, it is not in a position to confirm the validity of information submitted by a taxpayer (e.g., by a subpoena for documents or the taxpayer's books and records).

8. Notice 98-34 states that the statutory presumptions of tax avoidance under Code sections 877(a)(2), 2107(a)(2)(A), and 2501(a)(3)(B) will not apply if the expatriate submits a complete ruling request in good faith. Describe the rationale and the authority for this position.

The position in Notice 98-34 is supported by section 877(c)(1)(B), which provides that the average annual income tax liability and net worth tests of section 877(a)(2) "shall not apply" to certain eligible individuals if:

within the 1-year period beginning on the date of the loss of United States citizenship, such individual submits a ruling request for the Secretary's determination as to whether such loss has for 1 of its principal purposes the avoidance of taxes under this subtitle or subtitle B.

Under this language, once an eligible individual submits the request, the tax liability and net worth tests of section 877(a)(2) no longer apply. Notice 98-34 requires the

submission to be "complete" and in "good faith" in order to preclude taxpayers from attempting to escape the conclusive determination of section 877(a)(2) by merely submitting a skeletal ruling request that does not contain sufficient information or by refusing to cooperate with the IRS' requests for additional relevant information.

9. Describe the action taken by the IRS with respect to expatriates who receive an adverse IRS ruling that the taxpayer expatriated principally to avoid taxes. For each such case, describe in detail the steps taken by the IRS, including whether the IRS initiates immediate auditing of income, estate, or gift tax returns.

When an adverse ruling is issued, a copy of the letter and the case file is received in the International District in the Office of the Assistant Commissioner (International). The first action taken is to update our database to reflect the fact that an adverse ruling was issued. Then the file is referred to the Technical section where the following action is taken:

- A compliance check for return filing compliance for 6 years prior to expatriation is completed.
- The file is reviewed to identify the facts on which the adverse ruling is based (e.g., avoidance of estate tax, income tax or both).
- A determination is made as to when the first IRC § 877 return is due.
- The file is monitored to ensure filing compliance.
- On an annual basis, a sample of these cases are selected for classification.
- If appropriate, examinations are opened on specific cases selected in the classification process.

10. Describe the criteria for determining whether an expatriate submitted a complete ruling request in good faith in accordance with Notice 98-34. Describe the action taken by the IRS in cases where the IRS rules that the expatriate submitted a complete ruling request in good faith (even though no substantive ruling is provided as to whether the individual's expatriation was tax-motivated). For each such case, describe in detail the steps taken by the IRS, including the steps taken by IRS field auditors and the IRS National Office to determine whether the individual expatriated principally to avoid tax.

Under IRC. § 877(c) tax avoidance is not conclusively determined under the tax liability and/or net worth tests of section 877(a)(2) if, within one year of expatriating, a taxpayer submits a request for a ruling that the taxpayer's expatriation did not have as a principal purpose the avoidance of U.S. taxes, and the taxpayer is either a dual citizen described in IRC. § 877(c)(2)(A), a long term foreign resident as described in IRC § 877(c)(2)(B), or an individual who renounces his United States citizenship before age 18½.

Notice 98-34 and Rev. Proc. 2000-1, 2000-1 I.R.B. 4, set forth procedures for submitting a request for a private letter ruling under IRC § 877(c). Upon receipt of the private letter ruling request, an attorney in the Office of Chief Counsel (International) examines the submission to determine whether the applicant satisfies the procedural requirements in Rev. Proc. 2000-1 and completely and in good faith answered each of the 23 questions required by Notice 98-34. These questions solicit relevant information regarding the taxpayer, including information regarding his assets, his past and expected future tax liabilities, and the circumstances surrounding his expatriation.

The Office of Chief Counsel may also request any other information reasonably required after its review of the submission. If the information submitted is incomplete, or if there is any other information reasonably required to make a determination, the attorney discusses the case with the reviewer, and, if the reviewer concurs, requests additional information from the applicant's representative. The submission is also examined to determine whether it was made in good faith. This is a subjective determination based on whether the information received is internally consistent and appears realistic and reasonable.

After a determination is made that a submission is complete and submitted in good faith, the request is examined to determine whether the IRS is able make a substantive determination in the context of the ruling process as to whether one of the principal purposes of expatriating was the avoidance of U.S. taxes. Under IRC § 877(f), a taxpayer has the burden of proving the absence of a principal purpose of tax avoidance if the IRS establishes that it is reasonable to believe that a taxpayer's expatriation will result in a significant reduction in taxes on his probable income.

In certain circumstances, it is clear that the facts establish the existence of a principal purpose of tax avoidance. For example, the submission might indicate that the taxpayer might significantly reduce taxes (including transfer taxes, which are not specifically referred to in section 877(f)) by expatriating, with no objective evidence of significant non-tax avoidance purposes. In some cases, it might be clear that no principal purpose of tax avoidance existed, either because the facts do not indicate a significant reduction in taxes, or because objective evidence is presented of significant non-tax avoidance purposes. In other cases, the facts submitted in the ruling process do not clearly indicate either the absence or existence of a principal purpose of tax avoidance. For example, it may be difficult in the context of a ruling request for the IRS to determine whether the "significant reduction" standard of section 877(f) is satisfied, since it depends on a taxpayer's representations as to future facts as well as the potential applicability of a foreign country's tax laws to those future events. Under such circumstances, the Office of Chief Counsel will issue a ruling that the request was complete and submitted in good faith but will not issue a substantive ruling.

The Office of Chief Counsel sends a copy of each private letter ruling issued, including "fully submitted" rulings, to the Examination Division in the Office of the Assistant

Commissioner (International). In addition, the taxpayer must file an income tax return for the year the private letter ruling is issued, whether or not there is any U.S. tax due, and must attach a copy of the private letter ruling to the return. The return and the attached copy of the private letter ruling serve to notify the IRS that the taxpayer is an expatriate who received a "fully submitted" ruling and is potentially subject to the tax consequences under IRC §§ 877, 2107, and 2501 provided there is evidence (including actual facts that may have occurred between the time of the advance ruling and the examination) that the expatriation was motivated by a principal purpose of avoidance of U.S. taxes.

11. Describe the circumstances in which an IRS ruling that the expatriate submitted a complete ruling request in good faith could be withdrawn or given no effect, including cases in which a subsequent IRS examination reveals additional facts that should have been disclosed with the original ruling submission.

If a private letter ruling concludes that an expatriate submitted a complete request in good faith, the ruling may subsequently be withdrawn by the IRS if it discovers that the actual facts are significantly different from those represented in the ruling request. For example, an individual might have represented he was going to reside in a certain country with a significant income tax on residents, but the IRS later discovers that he actually moved to a tax haven shortly after receiving the fully submit ruling.

12. Describe the situations in which the IRS may extend the ten year period under the 1996 expatriation rules, including the substitution under Notice 97-19 of the fifteen year period beginning five years prior to an individual's expatriation for the ten year period referred to in section 877(d)(4). Describe the criteria, rationale and authority for such extensions.

Section 877 makes a significant distinction between U.S. and foreign assets. In general, the former are taxable, while the latter are not. Accordingly, taxpayers have a strong incentive to convert U.S. assets to foreign source.

In an effort to minimize the ability of an expatriate to sanitize U.S. source income or gains by converting assets on a tax-free basis to non-U.S. source assets, IRC § 877(d)(2)(B) provides that, notwithstanding a non-recognition provision of the Internal Revenue Code, where property giving rise to U.S. source income or gain is exchanged in an otherwise tax-free transaction for property generating non-U.S. source income or gain during the 10-year period referred to in IRC § 877(a), such property will be treated as if sold for its fair market value on the date of the exchange, with the result that any gain will be recognized by the expatriate for the taxable year. IRC § 877(d)(2)(D) authorizes the IRS to prescribe regulations to substitute the 15-year period beginning five years prior to expatriation for the 10-year period referred to in IRC § 877(a), and to apply IRC § 877(d)(2) to all exchanges that occur during such 15 year period. Notice 97-19 announces the IRS' intention to exercise this authority to provide that the

exchange rules apply for the 15 year period before expatriation, rather than the 10-year period provided by IRC § 877(a). Accordingly, any transaction within such 15-year period resulting in exchange of property giving rise to U.S. source income or gain for property generating foreign source income or gain will be treated as an IRC § 877(d)(2) exchange. The inclusion of the five year period prior to expatriation is intended to prevent pre-expatriation planning to evade the purposes of IRC § 877(d)(2)(B).

In addition, IRC § 877(d)(2)(E) authorizes the IRS to prescribe regulations under which the removal of appreciated tangible personal property from the United States, as well as any other occurrence which, without the recognition of gain, would result in the conversion of income or gain from U.S. source to foreign source would be treated as an exchange. Notice 97-19 announces the IRS' intention to exercise this authority to provide that the appreciated tangible property rules apply for the 15-year period before expatriation, rather than the 10-year period provided by IRC § 877(a). In the case of removal of appreciated tangible personal property, Notice 97-19 indicates that only the removal of such property having an aggregate value in excess of \$250,000 during the 15-year period beginning five years prior to the date of expatriation will be treated as an IRC § 877(d)(2) exchange. This de minimis exception reflects a determination that the removal of property such as household effects with a value of less than \$250,000 was not a significant abuse that Congress intended to be addressed by IRC § 877. The inclusion of the five-year period prior to expatriation is intended to prevent pre-expatriation planning to evade the purposes of IRC § 877(a).

IRC § 877(d)(4) generally provides that when an expatriate contributes U.S. source property to a controlled foreign corporation and the individual would be a United States shareholder but for the individual's expatriation, then any income or gain on such property, or any other property that has a basis determined in whole or in part by reference to such property, received or accrued by the corporation during the 10-year period following expatriation shall be treated as received or accrued directly by the individual and not by the corporation. If the individual disposes of any stock in the corporation or other stock that has a basis determined in whole or in part by reference to such stock during the 10-year period referred to in IRC § 877(a) and while the contributed property is held by the corporation, the individual is taxable on the gain that would have been recognized by the corporation had it sold a pro rata share of the property immediately before the disposition. IRC § 877(d)(4)(D) announces the intention of the IRS to exercise this authority to prevent the avoidance of the purposes of IRC § 877(d)(4). As a result, the exchange rules apply for the 15-year period before expatriation, rather than the 10 year period provided by IRC § 877(a). The inclusion of the five-year period prior to expatriation was intended to prevent pre-expatriation planning to evade the purposes of IRC § 877(d)(4).

13. Describe the manner in which the IRS determines whether a nonresident alien (expatriate or otherwise) has made a lifetime gift of U.S. situated property or has died leaving U.S. situated property.

Gift Tax

A nonresident not a citizen must file a U.S. Gift Tax Return, Form 709, when gifts of U.S. situated property exceed the \$10,000 annual exclusion for any donee. Additions to tax may be imposed under IRC § 6651 for failure to timely file a gift tax return. In addition, an indirect method of identifying nonresident aliens who made gifts of \$100,000 or more to U.S. persons is through Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts. U.S. recipients of a gift or bequest after August 20, 1996, of more than \$100,000 from a foreign person must complete part IV of Form 3520. The IRS uses these returns to identify foreign donors and verify whether they are compliant with U.S. tax law. Discovering unreported gifts by nonresident alien expatriates has always been very difficult because gifts of intangible and tangible personal property are not easily tracked. The gift requires no transfer agent or recording of the transfer that could be used to identify the taxable transfer. Even where a gift of real estate is recorded with the Register of Deeds, it would be impossible for the IRS to monitor these records nationwide.

Estate Tax

A nonresident alien who dies with U.S. situs assets exceeding the value of \$60,000 is required to file a Form 706NA, U.S. Estate Tax Return for the Estate of a Nonresident Not a Citizen of the United States. Additions to tax may be imposed under IRC § 6651 for failure to timely file an estate tax return. Question 6 of Part III of Form 706NA asks whether the decedent lost his U.S. citizenship or residency within 10 years of death. Another method of identifying nonresident alien decedents who own U.S. situs property is through requests for Transfer Certificates, Form 5173. IRC § 2203 provides that where there is no executor or administrator appointed and acting within the United States, the term "executor", for purposes of determining obligations under the Internal Revenue Code, means "any person in actual or constructive possession of any property of decedent." In order for these individuals to protect themselves from possible personal liability for tax, such "statutory executors" may request a transfer certificate from the IRS. Treasury Regulation § 20.6325-1. Before the IRS will honor such a request, sufficient information for the IRS to make a determination of estate tax liability must be submitted. In those cases where the estate meets the filing requirements, the return must be filed and tax liability paid before a Transfer Certificate will be issued. Also, as discussed above, Form 3520 provides an indirect method for determining large bequests to U.S. persons from nonresident alien decedents.

Identifying individuals who are non-compliant and who are not detected by indirect methods of identification is difficult at best. This is particularly true if an expatriate dies owning stock of a foreign corporation that itself held US assets.

14. Describe to what extent, if any, the Treasury Department or the IRS has coordinated its enforcement efforts of the 1996 expatriation tax rules with other countries, including our treaty partners.

Pursuant to several tax treaties, the IRS receives routine exchanges of information from foreign taxing authorities. The information consists of inventories of U.S. assets reported to the foreign taxing authorities for succession tax purposes by estates of resident decedents. IRS personnel review these materials. If a case is open on the matter, the information is given to the examining attorney/agent. If no case is open but the information indicates that a return should have been filed with a tax due, inquiries are directed to the estate's fiduciaries or other representatives.

15. Describe to what extent, if any, information collected by the Department of State (the "State Department") or the Immigration and Naturalization Service (the "INS") with respect to expatriates is available to the IRS. Describe the usefulness of such information to the IRS and the difficulties, if any, in utilizing the information provided by the state Department or the INS in enforcing the 1996 expatriation tax rules.

As stated in 3a above, the IRS receives the complete CLN file from DOS. This file generally contains personal information about an individual's purpose for expatriation, how U.S. citizenship was obtained as well as the expatriation information statement required by IRC § 6039G and other information. The IRS has not experienced any difficulty using the information and has generally found it to be useful.

As stated in 3c above, in contrast to expatriating citizens, when a green card holder departs the United States, he/she is not required to provide a new (overseas) mailing address or a social security number. This results in the only address of record being the former U.S. address and no tax identification information on which to start research. These two factors present problems for the IRS in utilizing the data provided by the INS and make the data of limited value.

16. Describe what assistance the IRS has provided to the State Department and the INS to implement section 212(a)(10)(E) of the Immigration and Naturalization Act. Describe any difficulties encountered in providing information to the State Department and the INS and what steps have been taken to resolve those difficulties. Describe what law or procedures, if any, need to be changed or modified to enable the State Department and the INS to access the information needed.

A working level task group comprised of representatives from INS, DOS, Justice, Treasury and IRS has been formed to assist INS in implementing this section. Members of this group have met (either in person or through conference calls) on numerous occasions. Much of the activity has been to determine what INS's

information needs would be and how these needs could be met. Personnel in the Office of the Assistant Commissioner (International) and in the Office of the Associate Chief Counsel (International) have provided comments regarding INS' drafts of regulations under section 212(a)(10)(E) of the Immigration and Naturalization Act.

[***REDACTED INFORMATION***]

As contemplated by the statute, section 212(a)(10)(E) of the Immigration and Naturalization Act is to be implemented and administered by the Attorney General, who exercises authority over immigration law issues. It is our understanding that the INS is in the process of completing regulations providing detailed guidance regarding procedures under that statute.

[***REDACTED INFORMATION***]

18. Describe in detail any efforts by the Treasury Department or the IRS regarding enforcement of, or compliance with, the 1996 expatriation tax rules, including any information that has been obtained to date.

This question has been covered in detail in questions 2, 3, 5, 9 and 13.

19. Describe whether the IRS plans to establish a regulation project with respect to the 1996 expatriation rules, and if so, the projected timing for such project.

This question is addressed in Acting Assistant Secretary Talisman's separate letter.

20. Provide information regarding any Treasury Department or IRS studies or projects (public or nonpublic) on overseas taxpayers which could involve expatriates. For example, a report on the Internet described an IRS sampling of persons overseas applying for passport renewals. The IRS allegedly contacted these persons to determine how many were filing tax returns

The IRS has completed the project described below:

Passport Information Gathering Project

IRC § 6039E requires applicants for a U.S. passport to provide their social security numbers on the Passport application. Failure to provide this information can subject the individual to a \$500.00 penalty. To measure the effectiveness of this requirement, the IRS conducted a Compliance Information Project (CIP). The IRS took (for one quarter) the information provided to the IRS by the DOS regarding passport applicants and extracted only those who made application overseas, and failed to provide a social

security number. For this population (estimated to be 4,000 annually), a letter was mailed to 1,039 individuals. The results of this mailing were as follows:

- Number responding - 607
- Number providing SSN - 400
- Number not providing SSN – 207
 - Reasons for not providing SSN include:
 - Never had an SSN, born in United States to a Non-Resident, immigrated to current country of residence as child; or born overseas to a U.S. parent - 191
 - Lost SSN Card and forgot number, are contacting the Social Security Administration for a number – 16
- Letter from IRS returned undeliverable – 66

It is important to note the difficulty inherent in implementing projects aimed at expatriates. In particular, these individuals may no longer have any significant connection with the United States. Moreover, their tax liability under sections 877, 2107, and 2501(a)(3) may depend on transactions that have little, if any, connection to the United States (and therefore would generate no U.S. information reporting), and that occur up to 10 years after the individual's expatriation.

21. Describe whether the IRS has considered including a question on IRS Form 709 (relating to gift tax returns) regarding whether a taxpayer has relinquished U.S. citizenship or terminated U.S. residency within the last ten years. If so, please indicate the rationale for not including such a question.

The IRS has considered adding an expatriation question on Form 709. However, the IRS has concluded that adding the question would have minimal compliance benefit in relation to the increased tax burden placed upon resident alien and resident citizen filers. The number of gift tax returns filed by nonresident citizens and nonresident aliens is approximately 200 annually. Since the expatriate population is a very small fraction of this filing population, few positive responses would be expected. It is also likely that if an expatriate files a gift tax return, she/he is already in compliance with the law.

[*REDACTED INFORMATION***]**

The IRS does not keep statistics in the normal course of business as to the effect of the 1996 legislative changes compared to the prior law. However, it is the IRS's understanding, based on both publicly available sources and information received in the course of the private letter ruling process, that significant numbers of wealthy

citizens have continued to expatriate since the expatriation tax laws were amended in 1996.

Numerous wealthy former citizens have submitted requests for rulings under section 877(c). Of particular note is that many of these individuals hold a substantial portion of their wealth in non-U.S. assets. As a result, even if these individuals were determined to have expatriated with a principal purpose of tax-avoidance, they would not be subject to significant taxation under sections 877, 2107, and 2501(a)(3).

[*REDACTED TAXPAYER INFORMATION***]**

Public reports also cite examples of wealthy citizens who have recently expatriated. For example, a magazine article noted that in the first quarter of 1999 expatriates included "J. Paul Getty's grandson Tara Getty, 31; Jacob Stolt-Nielsen, 36, son of shipping magnate Jacob Stolt-Nielsen, Jr.; and Joseph J. Bogdonovich, Jr., son of the Star-Kist mogul." Other news articles noted that Ernest J. Olde, founder of Olde Financial Corp., surrendered his citizenship shortly before the sale of his company in 1999 for \$850,000,000.

A brief search of the internet also identified numerous web sites discussing the use of expatriation as a tax planning vehicle. For example, one web site asserted that "[w]e are aware of increased levels of interest in this planning technique. . . . Without question some of these individuals are also at least partially interested in escaping U.S. worldwide taxation of their income and estate."

23. Provide the number of individuals that currently are assigned to administer compliance with the 1996 expatriation tax rules.

Currently, the International District of the Office of the Assistant Commissioner (International) has 1 Tax Examiner, 2 Revenue Agents, and 1 Management Analyst assigned to review each CLN received, publish the quarterly listing in the Federal Register, and perform any compliance activity required at the current level. In addition, resources are expended by Revenue Agents who work expatriate cases that were identified through our normal classification process.

The Office of Associate Chief Counsel (International) currently has seven docket attorneys and two immediate branch reviewers assigned to process requests for rulings under IRC § 877(c)(1). This group is not solely dedicated to processing IRC § 877(c) rulings because of the large amount of other legal work in the Office of Associate Chief Counsel (International). An Assistant Chief Counsel and an Associate Chief Counsel also review work in this area as needed.

24. Provide the number and type of individual income tax returns filed by overseas taxpayers (expatriates or otherwise) for each year of the most recent

ten year period for which information is available, including the type of tax return in the 1040 series. Provide the number of examinations completed by the Office of Assistant Commissioner (International) or other relevant IRS offices of such returns for each of the most recent five years.

The tables below indicate the number and types of returns filed by overseas taxpayers for the most recent seven tax years. The IRS currently only maintain seven years worth of data.

Tax Year 1993

TYPE OF RETURN	# OF RETURNS FILED
1040 PC	7,074
1040 EZ	98,286
1040 EZ (TELEFILE)	4,602
1040 A	114,058
1040	405,055
1040 SS	37
1040PR	25
1040 NR	305,933

Tax Year 1994

TYPE OF RETURN	# OF RETURNS FILED
1040 PC	3,003
1040 EZ	94,525
1040 EZ (TELEFILE)	3,552
1040 A	102,060
1040	392,476
1040 SS	56
1040PR	37
1040 NR	328,387

Tax Year 1995

TYPE OF RETURN	# OF RETURNS FILED
1040 PC	7,722
1040 EZ	89,072
1040 EZ (TELEFILE)	2,907
1040 A	81,857
1040	408,078
1040 SS	40
1040PR	21
1040 NR	345,651

Tax Year 1996

TYPE OF RETURN	# OF RETURNS FILED
1040 PC	11,533
1040 EZ	99,292
1040 EZ (TELEFILE)	107
1040 A	103,179
1040	442,454
1040 SS	75
1040PR	17
1040 NR	352,365

Tax Year 1997

TYPE OF RETURN	# OF RETURNS FILED
1040 PC	14,061
1040 EZ	101,027
1040 EZ (TELEFILE)	118
1040 A	89,817
1040	469,174
1040 SS	64
1040PR	24
1040 NR	415,386

Tax Year 1998

TYPE OF RETURN	# OF RETURNS FILED
1040 PC	13,158
1040 EZ	90,802
1040 EZ (TELEFILE)	9
1040 A	74,070
1040	400,199
1040 SS	44
1040PR	28
1040 NR	337,996

The number of examinations completed on returns filed by individual overseas taxpayers for the past five years are as follows:

Fiscal Year ending 1995	1,860
Fiscal Year ending 1996	1,605
Fiscal Year ending 1997	1,533
Fiscal Year ending 1998	1,041
Fiscal Year ending 1999	1,003

25. Provide for the most recent five years the audit coverage rates for (a) individual taxpayers residing overseas (expatriates or otherwise), and (b) individual taxpayers residing within the United States.

Audit Coverage for individual taxpayers residing overseas

	1995	1996	1997	1998	1999
Individual, overall average	.20	.16	.14	.11	.10

Audit Coverage for individual taxpayers residing within the United States

	1993	1994	1995	1996	1997
Individual, overall average	0.92	1.08	1.67	1.67	1.28

The audit rate for overseas taxpayers is significantly lower than for US taxpayers because of decreased manpower and resources devoted to the former, and the diversion of manpower and resources to special projects and other programs.

26. For each of the last five years, provide the number of taxpayers that have filed income tax returns under section 877, estate tax returns under section 2107, and gift tax returns under section 2501(a)(3).

This information is not readily available. The IRS as a matter of business practice does not systematically mark or code tax returns by IRC section or taxpayer classification.

27. For each of the last five years, provide the number of income tax returns (on IRS Form 1040NR) and estate tax returns (on IRS Form 706NA) that indicate that the taxpayer expatriated or the decedent died (as the case may be) within ten

years of expatriating. For each such return, describe any action taken by the IRS to audit the returns for compliance with present-law expatriation tax rules.

This information is not readily available. The IRS as a matter of business practice does not systematically mark or code tax returns by IRC section or taxpayer classification.

28. Provide the number of information statements received annually pursuant to section 6039G and the number and amount of civil penalties assessed by the IRS for failure to comply with the information reporting requirements, including failure to provide a correct Social Security number.

IRS data indicates that 1866, or 64 percent, of the 2931 expatriates in the database have provided an information statement indicating whether they met the tax-motivation criteria. Because of the retroactive applicability of the legislation and the period required to publish guidance for expatriates IRS initially received a significant number of CLN packages that did not contain the required expatriation information statement. Ninety-five percent of the expatriates who did not provide the required information statement expatriated prior to the issuance of Notice 97-19 in March 1997. IRS continues to contact individuals for the proper information statements and will refer any non-responses to a compliance unit for appropriate action as required.

The IRS does not maintain information as to the number of taxpayers who have been subject to a penalty under IRC § 6039G(d). However, the penalty is a relatively small amount and difficult to collect from an individual who has severed all or most connections with the United States.

[*REDACTED INFORMATION***]**

30. Describe whether the thresholds under Code Section 877(a)(2) (relating to statutory presumptions of tax avoidance) are appropriate or whether and how such thresholds should be modified. Also describe whether the conditions for

not presuming tax avoidance under section 877(c) are appropriate or whether and how such conditions should be modified.

This question is addressed in Acting Assistant Secretary Talisman's separate letter.

31. Describe the potential consequences and issues involved if the IRS were to modify its ruling practice (as currently reflected under Notice 98-34) to no longer provide a ruling that an expatriate submitted a complete ruling request in good faith.

Section 877(c)(1)(B) provides that the average tax liability and net worth tests of section 877(a)(2) "shall not apply" if an eligible individual "submits" a ruling request for a determination as to whether such loss had for one of its principal purposes the avoidance of U.S. taxes. Thus, once an eligible individual submits the request, the conclusive determinations of section 877(a)(2) do not apply and the determination of whether the taxpayer had a principal purpose of tax avoidance depends on a subjective inquiry into the actual facts and circumstances surrounding the expatriation. This result follows from section 877(c)(1)(B), regardless of whether the IRS makes the subjective determination in the context of an advance ruling request or in the context of a subsequent examination. Accordingly, a change in the IRS' ruling practice to no longer provide "fully submit" rulings would not in and of itself restore the conclusive determinations of section 877(a)(2).

The elimination of the "fully submit" category of rulings would, however, create significant administrative difficulties for the IRS. As described more fully in the answer to Question 6, it is difficult to make sound fact-intensive determinations in the context of an advance ruling process, particularly when the determination involves inherently subjective issues and the available resources to handle the large number of ruling requests is limited. The issuance of a "fully submit" ruling under the circumstances set forth in response to Question 10 enables the issue to be handled by the IRS examinations function, which is better able to address inherently factual inquiries.

33. Describe in detail the types of strategies or structures taxpayers use (or may use) to avoid the 1996 expatriation rules, including any structures or strategies used by taxpayers planning to expatriate to convert U.S. source assets to foreign source assets, and the effect, if any, of other Code provisions such as section 367 with respect to such strategies or structures.

This question is addressed in Acting Assistant Secretary Talisman's separate letter.

34. Describe what laws or procedures, if any, may need to be enacted, modified, or implemented to improve taxpayer compliance with, or the enforcement or effectiveness of, the 1996 expatriation tax rules, including any additional

information or assistance from the State Department and the INS that would be helpful to the IRS in administering these tax rules.

This question is addressed in Acting Assistant Secretary Talisman's separate letter.

I hope this information is helpful. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Charles O. Rosotti



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 8, 2000

Ms. Lindy L. Paull
Chief of Staff
Joint Committee on Taxation
U.S. House of Representatives
1015 Longworth House Office Building
Washington, DC 20515

Dear Ms. Paull:

This responds to your letter, dated April 13, 2000, asking the Tax Division for information on two subjects pertaining to the Tax Division's role in implementing § 212(a)(10)(E) of the Immigration and Nationality Act (INA) (8 U.S.C. § 1182(a)(10)(E)): our involvement, if any, in implementing the statute and our ability to make the tax-avoidance determination required by the statute.

As noted in your letter, § 212(a)(10)(E) of the INA, provides that "[a]ny alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States is excludable." We are aware that, since the statute was enacted, the Immigration and Naturalization Service (INS), the Internal Revenue Service (IRS), the Treasury Department, and the State Department have been grappling with problems of implementation. Due to our concern about the statute's requiring a "determination by the Attorney General" that a renunciation of citizenship was tax motivated, the Tax Division participated in some discussions relating to enforcement of § 212(a)(10)(E). The topics addressed were the areas of responsibility for enforcing the statute, appropriate interpretation of the statute, and problems of enforcement.

This statute is an immigration statute. A taxpayer-expatriate's protest of INS' determination that the taxpayer should be excluded from re-entry is not within the categories of matters over which the Tax Division has jurisdiction. 28 C.F.R. § 0.70. As the determinations would be made in the context of an attempted re-entry to the United States after some form of expatriation, whether formal renunciation or some lesser expatriating act, oversight and enforcement is the responsibility of the INS, based on information received from the State Department and the IRS (consistent with the restrictions of Internal Revenue Code § 6103), and in accordance with the statutes governing immigration in Title 8 of the United States Code. Consequently, the interagency discussions concluded that the "front line" efforts at

enforcement are the responsibility of the INS. In fact, INS has coordinated its responsibilities with those of the State Department and the IRS, and has drafted implementing regulations that it expects to publish for comment shortly. The Tax Division's function is to review INS' draft to assure that the tax avoidance discussion in the regulations is consistent with the positions taken by the Division in tax litigation.

With regard to the Tax Division's role in determining whether a renunciation of citizenship was tax-motivated, the attorneys of the Division, in the course of litigating cases referred to the Division, either at the trial or appellate levels, often litigate the question whether a taxpayer has acted for the purpose of tax avoidance. The cases involving the packaging of losses to take advantage of the installment sale provisions of the Internal Revenue Code and Treasury Regulations are recent examples (*see, ASA Investorings Partnership v. Commissioner*, 201 F.3d 505 (D.C. Cir. 1999)). Accordingly, the Tax Division has institutional expertise, generally speaking, with litigation involving tax-avoidance and tax-motivated transactions. As a rule, these cases are very fact-intensive, and for litigation in the trial courts we generally have the benefit of an IRS investigative file and can make extensive use of available discovery tools. The obstacles to the Tax Division's assisting in enforcement of § 212(a)(10)(E) by making the tax avoidance determination are, however, several.

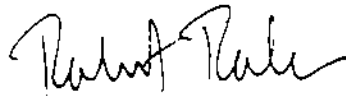
As noted, disputes over re-entry to the United States are not within the scope of the Tax Division's jurisdiction. 28 C.F.R. § 0.70. The Tax Division is not an investigatory body but is essentially a government law firm comprised of prosecutors and civil litigators. Almost exclusively, the Division's responsibilities involve handling cases arising from investigations by the IRS or, occasionally, the FBI or some other investigatory body or agency. It is our view that the investigation and preliminary analysis leading up to the Attorney General's determination should be conducted in the first instance by an investigatory agency. Because the Tax Division is staffed and geared toward litigating cases in court, it does not expect to provide day-to-day assistance to the INS in administering the INS re-entry program. It is more consistent with the Division's jurisdiction to confine its involvement to assuring that implementation of § 212(a)(10)(E) does not adversely impact on tax issues arising in litigation. Of course, if INS asks for assistance after implementing regulations are issued, the Tax Division is, as always, amenable to discussing the kind of assistance requested and the extent to which the request can be accommodated.

Ms. Lindy Paull
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In conclusion, litigation involving transactions where the issue is tax-avoidance is certainly within the Tax Division's area of expertise. Because the Division does not have any operational responsibility over the enforcement of § 212(a)(10)(E), however, it has viewed its role in its implementation as primarily advisory.

We hope this information is helpful and responsive to your request.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Raben", written in a cursive style.

Robert Raben
Assistant Attorney General



Memorandum

May 10, 2000

TO : Joint Committee on Taxation
Attention: Lindy Paul

FROM : Marie B. Morris
Legislative Attorney
American Law Division

SUBJECT : Does Date of Loss of Citizenship or Permanent Resident Status Have to
Coincide for Tax and Immigration/Nationality Law Purposes?

This is the first of two memoranda requested on your behalf relating to proposed changes in the taxation of persons giving up United States citizenship. For purposes of this memorandum, the terms “loss of citizenship”, “expatriation,” and “loss of nationality” are used interchangeably.

Background

Under current immigration law, a citizen of the United States may voluntarily relinquish citizenship by performing any of a number of acts with the intent of giving up U.S. citizenship. Some of these acts include being naturalized in a foreign country, taking an oath of allegiance to a foreign country, serving as an officer in the armed forces of another country, and making a formal renunciation before a diplomatic or consular officer of the United States in a foreign country in the manner prescribed by the Secretary of State. See 8 U.S.C. § 1481(a). Although the statute and some cases presume that loss of citizenship is automatic when one of the acts listed in the statute occurs,¹ usually the United States is not on notice that such an act has occurred until the individual notifies a diplomatic or consular officer of the United States of the act and indicates that the act was done with the intention of relinquishing U.S. citizenship. Normally, after receiving notification, the Department of State prepares a Certificate of Loss of Nationality [CLN] which indicates that citizenship was lost effective as of the date of the act.

Under current tax law, citizenship is determined according to immigration/nationality law. Any individuals losing U.S. citizenship after the enactment of P.L. 104-191 in 1996, are required to furnish a statement (usually to the Department of State) at the time they

¹ Gordon, Mailman, Yale-Loehr, 7 IMMIGRATION LAW AND PROCEDURE, REVISED EDITION, §100.02[5][a] at 100-45 through 100-48.

renounce their citizenship or at the time they furnish a certificate of voluntary relinquishment of U.S. nationality to the Department of State. Internal Revenue Code [IRC] § 6039G. The 6039G statement, which is furnished on Form 8854, is to include, among other things, the taxpayer's identification number, mailing address, country of citizenship, date of expatriation, and, for certain individuals, a statement of net worth. The penalty for failure to file Form 8854 is imposed for each year of the 10-year period after the date of expatriation that the form is not filed. The penalty for each year is the greater of \$1,000 or 5% of the tax required to be paid under IRC § 877.

Under IRC § 877, any individual giving up U.S. citizenship who has a net worth of \$500,000² or who had an average annual net income tax liability in excess of \$100,000³ for 5 taxable years before the date of loss of citizenship is presumed to be giving up citizenship for tax avoidance purposes. IRC § 877 imposes a special alternative tax for ten years after an individual gives up citizenship (or permanent residence status) for tax avoidance purposes. IRC § 2107 imposes the U.S. estate tax on nonresident decedents dying with taxable estates if, within the 10-year period ending on the date of death, the decedent lost U.S. citizenship. IRC § 2501 imposes a gift tax on the taxable transfer of intangible property by gift if the donor had lost U.S. citizenship within the 10 years prior to the gift. If the individual requests a ruling, either prior to or within one year after loss of citizenship, the statute permits a number of exceptions to this presumption. Some of the exceptions include becoming a citizen of one's birth country, one's spouse's birth country, or one's parent's birth country.

Under a transition rule included in P.L. 104-191 §511(g)(3)(A), former citizens who performed certain expatriating acts, including being naturalized in a foreign country after reaching age 18, take an oath of allegiance to a foreign country after attaining age 18, serving in the armed forces of a foreign country under certain conditions, and serving in the government of a foreign country (but not including renouncing U.S. citizenship before a diplomatic or consular officer of the United States), who did not furnish the State Department with a signed statement of voluntary relinquishment of U.S. citizenship before February 6, 1995, confirming the performance of the expatriating act, may find the 10-year period extended in their cases. Under the transition rule, the 10-year period begins when the individual furnishes the statement of voluntary relinquishment to the State Department. Those who can prove to the satisfaction of the IRS that they lost U.S. citizenship prior to February 6, 1994, are subject to the prior version of IRC § 877.

Question

Because CLNs can be issued with a retroactive effective date and because the Form 8854, Expatriation Information Statement, may not be filled out in full or on time, the question has been raised whether there would be any constitutional or international law problems with treating an individual as a United States citizen for tax purposes until the individual has both performed an expatriating act under 8 U.S.C. § 1481(a) and provided the information required by IRC § 6039 to the Internal Revenue Service. The requirement of

² This statutory amount is adjusted for inflation. The 2000 amount is \$562,000.

³ The 2000 inflation-adjusted amount is \$112,000.

both an expatriating act and notice to the IRS is referred to as “the proposal” in this memorandum. Presumably, if an individual’s expatriating act was based on renunciation of citizenship under § 1481(a)(5), the dates of the act and the providing of the information would coincide. If applied to current law, such a definition would essentially prevent the start of the 10-year periods under IRC §§877, 2107, and 2501 until after the individual had done something to relinquish citizenship and notified the IRS of the fact. The question does not preclude a change in existing tax law.

Analysis

Constitutional law. Because the United States is essentially a “nation of immigrants,” we have long had an interest in immigrants being able to renounce citizenship in the country they left and being able to enjoy full citizenship in the United States. In connection with public outcry against the British treatment of naturalized Irish-American citizens arrested in Ireland⁴, Congress enacted a July 27, 1868 statute, 15 Stat. 223, the preamble to which recognized that the

“right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; . . . Therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.”

Although this language was adopted in connection with immigrants giving up citizenship in another country, it is presumed that the same policy applies to those desiring to give up United States citizenship. Unfortunately, we do not know of any Supreme Court decisions involving people desiring to give up citizenship. The Supreme Court decisions in this area of law have involved the United States trying to strip citizenship from a person who wanted to remain an American citizen. Since the enactment of the Immigration and Nationality Act Amendments of 1986, P.L. 99-653, United States law has required that renunciation of American citizenship be a voluntary act. This reflects the decision of the Supreme Court in *Afroyim v. Rusk*, 387 U.S. 253 (1967), a 5-4 decision holding that an individual keeps his citizenship unless he voluntarily relinquishes it. *Vance v. Terrazas*, 444 U.S. 252 (1980), upheld the power of Congress to impose evidentiary standards governing the loss of citizenship. The evidentiary standards upheld in that case are similar to those under existing immigration law, 8 U.S.C. § 1481(b), which provides:

Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 . . . the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be

⁴ Gordon, Mailman, Yale-Loehr, 7 IMMIGRATION LAW AND PROCEDURE, REVISED EDITION, §100.02[1][b] at 100-9.

presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

Since *Vance v. Terrazas* confirms that Congress has the power to impose reasonable evidentiary standards on the loss of citizenship, it seems unlikely that there would be a problem with imposing reasonable evidentiary standards, such as those contained in the proposal. Two tax cases decided by Courts of Appeals suggest that an evidentiary standard might help resolve certain tax disputes, but, in certain circumstances, it might be inequitable for the government to refuse to recognize loss of citizenship. *United States v. Rexach*, 558 F.2d 37 (1st Cir. 1977) and *United States v. Matheson*, 532 F.2d 809 (2nd Cir. 1976), cert. denied 429 U.S. 823 (1976), involved situations where in order to collect back taxes the government asserted that an individual was a citizen when the individual claimed to have lost citizenship by performing certain acts.⁵ In each case, the court examined the facts. If the individual had performed other acts consistent with being a citizen, such as filing tax returns, applying for a U.S. passport, traveling on a U.S. passport, or registering a yacht as an American, the individual would be estopped from claiming that she had lost American citizenship. If the individual had received benefits of citizenship, the equities favored the imposition of U.S. taxes. If the United States had done something that was inconsistent with the individual's being a citizen, e.g., forcing the individual to surrender a passport because she was not a citizen, then the United States was not entitled to claim that the individual was subject to U.S. taxes on equitable grounds. *Rexach* involved income taxes, and the taxpayer was found to have been a citizen for some years in question and a noncitizen for other years. The court stated that it would be unconscionable to allow the taxpayer to be dunned for taxes to support the government during years that she was denied its protection. 558 F.2d at 43.⁶ *Matheson* involved estate taxes, and the taxpayer was found to have been a dual national until the date she died.

A couple of Tax Court decisions seem to indicate that the proposal may be a de facto rule in Tax Court decisions, absent inconsistent behavior by the U.S. government. *Vriniotis v. Commissioner*, 70 T.C. 298 (1982), involved a naturalized U.S. citizen who retired to Greece, indicating to his family, but not to the U.S. government, that he intended "to remain there permanently." When he died, the State Department issued a "Report of Death of an American Citizen." The report indicated that his passport had been canceled and destroyed, but that his naturalization certificate had not been surrendered. Based on lack of any evidence of renunciation of citizenship, and a presumption against loss of citizenship in the

⁵ Both *Rexach* and *Matheson* involved years when expatriation law was in flux because at times performing an "expatriating" act had been sufficient to result in automatic loss of citizenship. After *Afroyim v. Rusk*, it was unclear whether those who had lost citizenship automatically, but involuntarily, were retroactively made citizens.

⁶ Compare this to *Rexach v. United States*, 390 F.2d 631 (1st Cir. 1968), cert. denied 393 U.S. 833 (1968), involving the husband of the decedent in the other *Rexach* case. The taxpayer asked to have a CLN, which had been granted at his request, cancelled. The court ruled that he became liable for taxes for the years he was retroactively made a citizen. Even though the government may not have offered him its protection during the 2 or 3 years he was temporarily a noncitizen, the government had done nothing which estopped it from claiming taxes for those years.

absence of direct evidence, the Tax Court held that the decedent died a dual American-Greek citizen, subject to U.S. estate taxes.

In *Dacey v. Commissioner*, T.C. Memo 1992-187, the taxpayer moved to Ireland in 1980. Dacey, author of *How to Avoid Probate*, applied for and received a U.S. passport in 1980 and in 1985. In order to receive a passport, one must declare that one is a U.S. citizen, has not sworn allegiance to a foreign state, and has not made a renunciation of nationality. Ireland issued Dacey a passport in 1986. In 1988, Dacey formally renounced his U.S. citizenship before a U.S. vice consul in Ireland. The facts in the case do not indicate the effective date of the CLN. Income and self-employment taxes for tax years 1981-1985 were at stake. Dacey claimed to have sent the State Department a letter in 1981 renouncing U.S. citizenship. The State Department had no record of receiving such a letter, but the Tax Court said, even assuming that such a letter had been sent and received, it did not comply with the statutory evidentiary requirements which require compliance with State Department regulations. The Tax Court held that Dacey did not lose his U.S. citizenship until he complied with the procedures in 8 U.S.C. § 1481 in 1988. The court noted that being issued a passport by Ireland was not evidence of renunciation of U.S. citizenship because it might only be evidence of dual citizenship, but in any case, 1986 was after the tax years in question.

There is some precedent in existing law for the divergence of the tax and nationality law definitions of citizenship. Section 511(g)(3)(A) of P.L. 104-191 contains a transition rule for individuals who committed a potentially expatriating act prior to the effective date of the Act (February 6, 1995), but who did not notify the State Department of their intent to expatriate until after the effective date. Under the transition rule, individuals claiming exemption from IRC § 877 (expatriation for tax avoidance purposes) must file a form 1040NR for the year they notify the State Department and include certain information. The 10-year period in IRC § 877 does not begin running until the date that the State Department is notified. In a sense, the proposal would simply make the transition rule permanent policy.

We are unaware of any constitutional law challenges to this transition rule, but the prior law version of IRC § 877 imposing U.S. taxes for 10-years after expatriation on those who could not prove that loss of citizenship was not motivated by tax-avoidance purposes was upheld against equal protection and due process challenges in *Di Portanova v. United States*, 690 F.2d 169, 231 Ct. Cl. 623 (1982).

A subsidiary constitutional law concern might be raised by an effective date provision. It has been suggested that if the proposal were enacted, even with a date of enactment effective date, it would have retroactive effect on those who claim to have lost nationality prior to the effective date of the law. We do not think that this is a serious constitutional concern. The Supreme Court has held that Congress has the power to enact retroactive tax legislation in situations where the taxpayer is on notice that he may be subject to some kind of tax on the activity or transaction. The most recent Supreme Court case, *United States v. Carlton*, 512 U.S. 26 (1994), upheld a retroactive estate tax increase. That decision and others contain warnings that retroactive tax increases may not always survive constitutional challenge, but in most instances Congress is able to articulate rational and serious reasons for enacting tax legislation with a retroactive effect or effective date. (The date is usually more important than the effect.) Since the enactment of P.L. 104-191, on August 21, 1996, which itself had a retroactive effect date of February 6, 1995, citizens have been on notice that they have tax obligations if they choose to expatriate and that their 10-

year period might not start running until Form 8854 is filed with the IRS. The proposal would not impose a vastly different tax regime which might come as a surprise to expatriating citizens.

International Law concerns. International law recognizes the right of all persons to leave any country, including their native country, subject to limited restrictions. The Universal Declaration of Human Rights adopted by the United Nations General Assembly on December 10, 1948, recognizes a right to physically leave the country, "emigration," and a right to give up citizenship, "expatriation." Article 13(2) provides "Everyone has the right to leave any country, including his own, and to return to his country." Article 15(2) provides, "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Article 12 of the International Covenant on Civil and Political Rights contains a similar right to leave any country and provides that this right should not be subject to any restrictions except those which are provided by law, are necessary to protect national security or public order, and are consistent with other rights recognized in the Covenant. The United States recognizes both the right to emigrate and the right to expatriate.

The International Covenant recognizes that some restrictions may be placed on the right to emigrate, and the Universal Declaration suggests that non-arbitrary restrictions may be imposed on the right to expatriate. The question is whether the proposal to deem a person a U.S. citizen for tax purposes until the IRS is made aware of the expatriation would be an arbitrary infringement of the right to expatriate. Intuitively, it does not seem that requiring actual notification of expatriation would be a substantial or arbitrary bar to the right of expatriation. In general, it seems fair that citizens be asked to pay U.S. taxes as long as they are citizens and that the government has the right to presume that citizens continue to be citizens until they notify the government that they are claiming to have lost citizenship. Presumably, the U.S. continues to tender benefits of citizenship to its citizens until it becomes aware that they have renounced U.S. citizenship. Perhaps there are some individuals who are unaware of their U.S. citizenship⁷, and it may be inequitable to require such individuals to renounce a status when neither they nor the government have knowledge of such status. Although, as a general policy, the proposal seems to be a reasonable way to prevent expatriation from being used as a method of tax avoidance, if it is possible that it could operate in an arbitrary or discriminatory way or could operate in conjunction with other provisions of tax law to discourage or punish expatriation, the proposal could raise international law concerns.

As noted in the previous section of this paper, the transition rule provided by the P.L. 104-191, § 511(g)(3)(A) may provide some precedent for requiring expatriating citizens to provide notice before they are treated as beginning their period of expatriation. We are unaware of any constitutional or international law challenges to this provision.

⁷ Department of Treasury, Office of Tax Policy, INCOME TAX COMPLIANCE BY U.S. CITIZENS AND U.S. LAWFUL PERMANENT RESIDENTS RESIDING OUTSIDE THE UNITED STATES AND RELATED ISSUES (May 4, 1998) refers to "unknowing" citizens, including those born outside the U.S. who are unaware of the identity, much less the U.S. citizenship of a biological parent. The report suggests that equity may require that such an individual be given a certain amount of time to renounce U.S. citizenship after having been made aware of its existence without being subject to a tax regime from which the individual received no benefits.



Memorandum

May 10, 2000

TO : Joint Committee on Taxation
Attention: Lindy Paul

FROM : Marie B. Morris
Legislative Attorney
American Law Division

SUBJECT : Constitutionality of Proposed Exit Tax

This is the second of two memoranda requested by your staff in connection with proposals to change the way U.S. citizens who choose to give up their citizenship might be taxed. This memorandum explores the constitutionality of the Administration and the Rangel proposals to impose a mark-to-market capital gains exit tax on those who are U.S. citizens for tax purposes. As we understand it, the Joint Committee studied a similar proposal in 1995 (the study hereinafter is referred to as *Issues*).¹

Summary of Two Proposals

The Administration's proposal contained in the fiscal year 2001 budget would repeal the current expatriation tax provisions for individuals and in their place impose a mark-to-market exit tax on unrealized gains existing at the time of expatriation, without regard to the expatriate's subjective motivation. The proposal would also treat certain gifts made by an expatriate to U.S. persons as taxable income to the recipient.

Treasury explained the proposal as follows:

The proposal would simplify the taxation of expatriates by repealing the current regime and imposing a one-time tax on accrued gains at the time of expatriation, regardless of the taxpayer's subjective motivation for expatriating. The proposal would provide certain rules and exclusions similar to those provided in the Senate amendment to the Health Insurance Portability Act of 1996 (H.R. 3103). In addition, if an expatriate subsequently makes a gift or bequest to a U.S. person, the proposal would treat the gift as gross income to the U.S. recipient, taxable at the

¹ Staff of the Joint Committee on Taxation, *Issues Presented by Proposals to Modify the Tax Treatment of Expatriation*, JCS-17-95 (June 2, 1995) [hereinafter "*Issues*"]. The Senate-passed version of H.R. 831 (104th Congress) contained such a provision, but the enacted law, P.L. 104-7, did not. Section 6 of the law requested the Joint Committee staff to study issues presented by these proposals.

highest marginal rate applicable to gifts and bequests. Finally, the proposal would amend the Reed Amendment to coordinate it with the tax proposal, thereby improving the enforceability of both the tax proposal and the Reed Amendment.

The proposal would apply to individuals expatriating on or after the date of first committee action.²

The Reed Amendment is an amendment to the Immigration and Nationality Act that bars those who have given up U.S. citizenship for tax avoidance purposes from entry into the United States.

In October 1999, Representative Rangel introduced H.R. 3099. According to Mr. Rangel's summary of the bill, the bill would impose a tax on the unrealized appreciation in the value of an expatriate's assets. The amount of that tax would be determined as if the expatriate had sold his assets for their fair market value on the date that he expatriated. To the extent that those assets were capital assets, the preferential capital gains tax rates would apply. The bill would exempt the first \$600,000 (\$1.2 million for a married couple) of appreciation from the tax. It would also exempt U.S. real property interests and interests in retirement plans. The expatriate would be provided an election to defer the tax with interest until the property was sold.

The bill would eliminate the ability to avoid estate and gift taxes through expatriation by imposing a tax on the receipt by U.S. citizens of gifts or bequests from expatriates. The proposed tax would not apply in circumstances where the gift or bequest was otherwise subject to U.S. estate or gift taxes. In addition, the tax would be reduced by any foreign estate or gift tax paid on the gift or bequest.

The bill would eliminate the ability to expatriate on an informal basis. It would require a formal renunciation of citizenship before an individual could avoid tax as a U.S. citizen.

Generally, the bill would apply to individuals formally renouncing their citizenship after the date of action by the Committee on Ways and Means. The provisions designed to prevent avoidance of estate and gift taxes would apply to gifts and bequests received after such date.

Unlike the Treasury proposal, the Rangel-Matsui proposal does not appear to repeal existing IRC § 877.

Constitutional Issues Presented

The constitutional and international law issues implicated by these proposals were ably explored by the staff of the Joint Committee on Taxation in 1995.³ The issues raised in that report should be raised in any discussion of these proposals: 1) Does *Eisner v. Macomber*, 252 U.S. 189 (1920), which held that it was unconstitutional to impose an income tax on

² General Explanations Of Clinton Administration's Fiscal Year 2001 Revenue Proposals, And Excerpts From President Clinton's FY 2001 Budget Submitted To Congress Feb. 7, 2000, as reprinted in Tuesday, February 8, 2000 *BNA Daily Tax Report* at

³ *Issues*, n. 1 *supra*, at 77-116.

unrealized income, present an obstacle to imposing an exit tax such as those described in the Administration's budget or in H.R. 3099? 2) Would an exit tax violate any equal protection requirement in the Constitution because it would tax American citizens who are renouncing their citizenship differently than it would tax those who are not? 3) Does the proposal violate any due process requirements in the Constitution that the government not deprive persons of property without due process of law?

We agree with the conclusions reached in the *Issues* report and are unaware of any recent constitutional case law or scholarly discussions which would contradict those conclusions. 1) Although *Eisner v. Macomber* has not be overturned, it is probably a relic of history rather than a valid statement of constitutional law. This is especially true in light of the number of tax code provisions in existing law which require taxpayers to recognize "deemed income" or "constructively received" income, or to explicitly require certain gains to be "marked to market."⁴ 2) Equal protection considerations for federal tax legislation come within the ambit of the due process clause. When a protected class does not appear to be involved, there is no heightened scrutiny of the legislation. In other words, if there is a rational basis for the legislation, Congress is viewed as having wide latitude to create classifications and distinctions in tax legislation. 3) Although the Supreme Court often reserves its right to find tax legislation "so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property,"⁵ it has not found any federal tax statutes to violate the due process clause since the early 1930s.⁶ Those statutes that were found to be fundamentally unfair usually were found to be so because of their retroactive application, because a taxpayer could not have been on notice that particular actions would be subject to tax, or because it disturbed the taxpayer's interest in "finality and repose."⁷

Conclusions

Issues correctly found the possible application of the exit tax scheme to those retroactively continued as U.S. citizens for tax purposes to be the point most vulnerable to constitutional challenge. The changes made to IRC § 877 in 1996, the reporting requirements, the possible 10-year liability for U.S. taxes under existing law, and the public discussion of these issues since 1995 may weaken the arguments against unfairness and lack of notice in many cases, however. As *Issues* pointed out, taxation is a way of apportioning the costs of government among those who bear its burdens. It does not strike us as fundamentally unfair for the government to presume that an individual who continues as a citizen ought to share in the burdens of that government until the government is put on notice that the individual is no longer a citizen.⁸ The 1996 legislation put expatriating individuals

⁴ *Issues*, 86-87.

⁵ *Brushaber v. Union Pacific RR*, 240 U.S. 1 at 24-25 (1916).

⁶ *Nichols v. Coolidge*, 274 U.S. 531 (1927), invalidated the retroactive application of the first estate tax law; *Untermeyer v. Anderson*, 276 U.S. 440 (1928), invalidated the retroactive application of the first gift tax law; and *Heiner v. Donnan*, 285 U.S. 312 (1932), invalidating inclusion of certain gifts in the taxable estate.

⁷ *United States v. Carlton*, 512 U.S. 26, 37-38 (1994).

⁸ We have not examined the arguments for proposing similar rules for long-term residents, (continued...)

on notice that it is in their interest to promptly notify the government of their loss of citizenship.

Although working from summaries is fraught with dangers, we believe that the Administration proposal calls for replacing existing IRC § 877 with an exit tax effective for all those relinquishing citizenship on or after the date of first committee action. Generally, limited retroactivity for the period of time it takes to get legislation through the legislative process does not raise due process concerns. In some expatriates' cases, this trade off between 10 years of additional U.S. tax liability and a one-time exit tax may result in lower costs. For others, the opposite would be true. Existing law does not tax those who are not expatriating for tax avoidance purposes, while the Administration proposal would tax everyone expatriating who possesses over \$600,000 in assets. The expatriates lacking a tax avoidance purpose have a stronger expectation of no change in the law than do those potentially subject to current IRC § 877. In addition, those who think they lost citizenship years ago and are not expatriating for tax avoidance purposes may be less likely to be well advised (and therefore be on notice of possible tax law changes).⁹ Careful consideration should be given to whether it is fair to impose such a tax retroactively on the non-avoiders.

We believe that the exit tax in the Rangel proposal is supposed to be on top of the tax in IRC § 877. If this is correct, the Rangel proposal would impose a new exit tax on everyone expatriating while continuing the existing regime for those who expatriate with tax avoidance purposes. The same objections that might be raised against the Administration proposal might be raised against the Rangel proposal as well. In addition, the arguments that the Rangel exit tax is a new tax, and the arguments that it is not fair to impose a new tax retroactively, seem stronger. This is not to say that imposing such a tax retroactively for a limited period would necessarily be found unconstitutional, but it raises more questions about the fairness of retroactive imposition than does the Administration proposal.

International Law Considerations

Issues notes that the U.S. asserts about the broadest jurisdiction to tax citizens, non-citizen residents, and expatriates of any country. It suggests that a non-confiscatory exit tax would not raise any insurmountable international law concerns and, in fact, might align the U.S. practice with that of some western nations, such as Canada and Australia, more than does our current 10 years of additional taxes regime. To the extent that the exit tax is in addition to our current tax system, our assertion of tax jurisdiction will be seen as that much more outside the world norm.

⁸ (...continued)

but it strikes us that retroactively treating long-term residents who some time ago returned to their home country as never having left the U.S. tax system is problematic.

⁹ On the other hand, they can remain outside the tax system by never appearing before a government official to obtain a Certificate of Loss of Nationality.



COMMISSIONER

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

May 16, 2000

Ms. Lindy Paull
Chief of Staff
Joint Committee on Taxation
1015 Longworth House Office Building
Washington, DC 20515-6453

Dear Ms. Paull:

This is in response to your letter dated May 11, 2000, in which you requested additional information regarding the 1996 expatriation tax laws.

Pursuant to sections 6103(f)(2) and (f)(4)(A) of the Internal Revenue Code of 1986, this letter contains tax return information (which is underlined). Any disclosure of this information (even to the taxpayers involved) is subject to the limitations of section 6103.

1. In your responses to Questions 1, 2, 3(b), 9 and 10 of the March 31 letter, you described various IRS processes, actions, or steps with respect to enforcing, and monitoring compliance of expatriates under the 1996 expatriate tax rules. Describe when and for which specific cases the IRS implemented these various processes, actions, or steps. With respect to Questions 9 and 10 of the March 31 letter, also describe whether (and if so, when) the IRS (i) has assessed any tax liability after issuing an adverse ruling, or (ii) has subsequently determined that an individual expatriated principally to avoid tax after issuing a fully submit ruling.

The Private Letter Ruling Process

Notice 97-19, 1997-1 C.B. 394, which sets forth procedures for submitting a request for a private letter ruling that an individual's expatriation did not have for one of its principal purposes the avoidance of U.S. taxes, was issued on March 10, 1997. Notice 98-34, 1998-2 C.B. 29, which modified the expatriation ruling procedures, was issued on July 6, 1998. The first private letter ruling under Notice 97-19 was issued on March 18, 1997, to _____. The first private ruling issued under the procedures of Notice 98-34 outlined in Question 10 was on November 4, 1998, to _____

The practice of sending copies to the Assistant Commissioner (International) of all private letter rulings issued under I.R.C. § 877(c)(1) has been in place since the first ruling was issued on March 18, 1997. The practice of sending a copy of the case file to

the Assistant Commissioner (International) after issuance of an adverse ruling has been in place since the first adverse ruling was issued on April 22, 1999, to _____. The practice of notifying and sending the case file to the Assistant Commissioner for cases in which the applicant withdrew a ruling request has been in place since the first withdrawn request on October 27, 1997, involving _____ and _____.

Although this response highlights certain cases, we have processed over 160 private letter ruling requests since March 1997. We would be happy to provide you with details of these cases at your request.

Operational Process

As discussed in our prior letter, the IRS has implemented numerous programs and/or processes under the 1996 expatriation tax laws. The programs and/or processes were implemented at various times as shown below:

- November 1996: Agreement reached on receiving information with the Department of State.
- December 1996: Agreement reached on receiving information with the Immigration and Naturalization Service.
- December 1996: Database for capturing Certificate of Loss Nationality (CLN) forms implemented. This database collects information contained on and attached to the CLN, including the expatriation information statement required by IRC §6039G.
- January 1997: Began publishing the quarterly listing of expatriates in the Federal Register. The first publication related to the quarter ending December 31, 1996.
- January to May 1998: Developed and implemented the following processes:
 - Review of average tax for 5 year period prior to expatriation.
 - Return filing compliance check for 6 year period prior to expatriation.
 - In-depth review of the data received from INS, which resulted in a decision to only work a sample in detail.
 - Process to capture copies of filed tax returns annotated with "Expatriate Return" at the top of the return.
- August 1999: Proposal to establish a Compliance Improvement Project (CIP) to determine levels of compliance with the expatriation tax laws. The proposal was approved in November 1999.
- Letter developed and approved for mailing to individuals who failed to provide the information statement required by IRC §6039G. First letters mailed January 2000.

The processes listed above are used to filter the large volume of data down to the few items worthy of audit. However, it should be noted from our response dated May 5, 2000, that we also identify audit worthy cases in our regular classification process, and that we have concerns with the administrability of the 1996 expatriating tax rules.

The IRS has not yet been able to identify any post-expatriation tax liabilities for persons who have received adverse rulings. This is due, in part, to the lag time inherent in the examination cycle (as noted above, the first adverse ruling was issued in 1999). It is important to note, however, that a significant number of expatriates who have received adverse rulings hold significant portions of their wealth in the form of foreign assets or trust assets that are not taxable under the 1996 expatriation tax law. Accordingly, it is not expected that the IRS could assess significant tax liabilities with respect to these persons. Additional details regarding this problem were set forth in our May 5 response to Question 22 of your March 31 letter. The IRS has not yet made a determination that an individual expatriated principally to avoid tax after issuing a fully submit ruling.

2. Question 3(c) of the March 31 letter requested information about information exchanges between the INS and the IRS. Your response states that "[t]he IRS loads the data into a database and discards the records for individuals who do not meet the residence requirement of I.R.C. § 877(e)(2)." However, the GAO recently reported to the Joint Committee staff that "IRS does not use the data [from INS] to track expatriates because the data do not distinguish former long term residents from other former green card holders and generally do not include tax identification numbers." In addition, the Treasury Department's May 1998 report on income tax compliance by U.S. citizens and U.S. lawful permanent residents residing outside the United States, stated: "the information currently provided by INS to IRS is not sufficient in itself for IRS to determine whether the former green card holder may be subject to continued U.S. taxation under section 877 of the Code as amended by the Act."

Describe whether the IRS is able to use INS records to identify whether a person is a former long-term resident. If so, identify when the IRS began to use such information and when the IRS began to maintain and use a database for former long-term residents. Identify what percentage of the information obtained by the IRS from the INS lacks social security numbers, and describe what the IRS does with the information from the INS that does not contain social security numbers.

The IRS has made significant efforts to utilize the information obtained from the INS. From January to May 1998 we conducted an in-depth review of the data received in order to determine the most appropriate and efficient way to analyze it. As a result of that review, and because of the large volume of records received, the IRS decided to focus on processing only a sample of the records to determine overall filing compliance. Analyses took place in 1998 and again in 1999.

The IRS receives a large volume of data from the INS. For example, approximately 123,000 records were received in 1999. The data received from the INS contains both the individual's original entry date as well as the most current arrival date. In order to reduce the number of records to be processed, the IRS uses this information to help identify whether an individual was a lawful permanent resident for at least 8 years, and

thus is likely to be a long-term resident under section 877(e)(2). The information does not, however, conclusively answer whether an individual is a long-term resident under section 877(e)(2) because, for example, he could have been treated as a resident of a foreign country pursuant to a tax treaty during some of those years. This initial determination is conducted without regard to whether the record contains a social security number (SSN).

Once records that are most likely to reflect long-term resident status are selected through this process (approximately 70,000 in 1999), the IRS attempts to link the records with specific taxpayer records through the SSN in order to determine filing compliance. (For 1999, for example, we received SSNs from only 33% (approximately 23,000) of those persons who were most likely to have been long-term residents.) Because of the large volume involved, a sample is selected to determine filing compliance. For the records selected where no SSN has been provided we conduct labor-intensive manual research to attempt to locate the individual's SSNs. If an SSN is located we continue the research to determine the level of compliance. This process involves securing the individual's tax return from a Service Center and physically reviewing the attached documents.

As evidenced by this experience, the process of checking for filing compliance by former lawful permanent residents under IRC §6039G and 877 is time consuming and resource intensive. For similar reasons, it is difficult to use this data to identify whether particular persons may be subject to tax under the 1996 expatriation tax law, particularly because a significant number of records do not contain SSNs and may not contain current overseas mailing addresses.

3. Question 14 of the March 31 letter requested information about coordinated enforcement efforts with respect to the 1996 expatriate rules with other countries, including treaty partners. Your response states that the IRS receives routine exchanges of information from foreign taxing authorities pursuant to tax treaties. Describe when and for which specific cases the Treasury Department or the IRS has requested information from another country concerning an expatriate subject to the 1996 expatriate tax rules.

At this time, the IRS has not yet utilized exchange of information procedures under a treaty to solicit information regarding a citizen who we believe has expatriated to avoid tax pursuant to the 1996 expatriation tax law. However, we shall take full advantage of this capability at the appropriate time.

I hope this information is helpful. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Charles O. Rossotti

Charles O. Rossotti



United States Department of State

Washington, D.C. 20520

May 18, 2000

Mr. Oren Penn
Joint Committee on Taxation
U.S. Congress

Dear Mr. Penn:

Reference is made to your telephone conversation with Mr. Luke Bellocchi of my staff concerning the numbers of approved Certificates of Loss of Nationality (CLN) approved by this office in 1995, 1996 and 1997.

We currently record information on each CLN that we approve. That information includes the name of the expatriate, the section of nationality law under which the loss occurred, and the name of the mission at which the CLN was produced. In the distant past, we had collected statistics on the annual numbers of CLNs for provision to the Immigration and Naturalization Service (INS) at their request. INS discontinued their request for this information sometime in the 1980's. While we continued to collect the information for some time after, this practice was discontinued after 1994 because it did not serve any specific need of which we were aware. Thus, we are unable to provide a yearly breakdown of CLNs approved for the years 1995, 1996 and 1997.

I regret that there is no practical method to produce yearly breakdown of CLNs for the years 1995, 1996 and 1997. If you have any questions regarding this matter, please contact Luke Bellocchi at 202-647-6478.

Sincerely,

Edward A. Betancourt

Edward A. Betancourt
Director
Office of Policy Review and Interagency Liaison



U.S. Department of Justice
Immigration and Naturalization Service

Office of Congressional Relations

425 I Street N.W.
Washington, D.C. 20536

MAY 23 2000

Lindy L. Paull
Chief of Staff
Joint Committee on Taxation
1015 Longworth House Office Building
Washington, D.C. 20515

Dear Ms. Paull:

This is in response to your April 13, 2000 letter requesting information that would help your review of existing tax and immigration laws and procedures related to section 212(a)(10)(E) of the Illegal Immigration and Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which deems inadmissible to the United States individuals who have renounced their citizenship to avoid taxation. Your letter requested a response by April 28, 2000 due to the time-sensitive nature of your review. Please accept my apology for not meeting that deadline. The numerous questions posed in your letter required collaboration between several different offices within Immigration and Naturalization Service (INS). The following is an item-by-item response to your questions.

- 1. Provide a general description of the various types of visas available to individuals who wish to enter the United States, including eligibility criteria and the length of time that an individual may remain in the United States under each type of visa.**

The various types of visas available to individuals who wish to enter the United States permanently include family-based, special immigrant, and employment-based immigrant visas. The various types of visas available to individuals who wish to enter the United States temporarily include employment-based, visitor for pleasure or business, exchange-program, academic student, vocational student, fiancée, foreign government official, representative of international organization, foreign information media, continuous transit, crewmember, informant, and treaty trader and investor nonimmigrant visas. The eligibility criteria and the length of time that an individual may remain in the United States under each type of visa varies widely, and is beyond the scope of this letter. See INA sections 101(a)(15), 201, 203 and 204, and 8 CFR, Parts 204 and 214. For more information, please contact Kevin J. Cummings in the INS Headquarters Office of Adjudications, Residence and Status Branch, at 202-305-3175.

2. Describe the procedures to determine if an individual has remained in the United States beyond the time permitted under his or her visa.

The procedures to determine if an individual has remained in the United States beyond the time permitted under his or her visa depend upon whether the individual was admitted for a "date-certain" period or for "duration of status" (D/S). When an individual has been admitted for a "date certain" or D/S period, this information is noted on his or her Form I-94 Arrival/Departure Record. The Form I-94 is issued to either "date-certain" or D/S visa holders upon their arrival at a port of entry (POE). When an individual remains in the United States beyond the date listed on his or her Form I-94, that individual begins to accrue unlawful presence in the United States as of that date. In contrast, when an individual has been admitted to the United States as a D/S nonimmigrant, unlawful presence begins to accrue as of the date that the INS finds a status violation while adjudicating a request for another immigration benefit, or the date that an Immigration Judge finds the status violation during proceedings.

3. With regard to former U.S. citizens, provide information regarding the types of visas for which they may be eligible, and the nature of any records regarding their movement into or out of the United States and/or the length of their stays.

Former U.S. citizens may apply for all types of nonimmigrant or immigrant visas for which they are eligible, provided that they are not inadmissible under any of the grounds listed in section 212(a) of the Immigration and Nationality Act (the Act). If a former U.S. citizen is inadmissible under one or more of the grounds listed in section 212(a) of the Act, he or she must apply for and be granted a waiver of the applicable ground(s) of inadmissibility, if available.

If a former U.S. citizen entered the United States as a nonimmigrant subsequent to losing U.S. citizenship, the INS will maintain that individual's admission and departure records in the Nonimmigrant Information System (NIIS). Former U.S. citizens who are found inadmissible under section 212(a)(10)(E) of the Act will most likely seek admission to the United States only as nonimmigrants.

In order to enter the U.S. as a nonimmigrant, a former U.S. citizen who is subject to section 212(a)(10)(E) of the Act will need to secure a waiver of inadmissibility under section 212(d)(3) of the Act. The Act does not provide for any waivers for such former U.S. citizens seeking immigrant visas or adjustment of status to that of a LPR. Therefore, a former U.S. citizen found inadmissible under section 212(a)(10)(E) of the Act is ineligible to receive a waiver if he or she seeks an immigrant visa or adjustment of status to LPR.

- 4. Describe in detail the circumstances under which an individual may enter the United States without a visa (e.g., the Visa Waiver Pilot Program, Canadian residents, etc.), the amount of time such individuals may remain in the United States, and the nature of any records that are kept with respect to such individuals. List the countries and the factual scenarios under which such entry would be permitted.**

Because this question is rather broad in nature, we have summarized the information requested in the numbered paragraphs that follow. We hope that this abbreviated summary of individuals and/or groups admitted to the United States without a visa will be helpful to you.

1) The particulars of the Visa Waiver Pilot Program (VWPP) can be found at section 217 of the Act and 8 CFR, Part 217. Additional information relevant to the VWPP can be found in chapter 15.7 of the INS Inspector's Field Manual (IFM). The information listed in all chapters of the IFM is extensive, and well beyond the scope of this letter. However, at the request of the Joint Committee such information can be provided by fax if desired.

2) Guam Visa Waiver Program - Section 212(l) INA, 8 CFR 212.1(e), and IFM Chapter 15.8. Recipients are issued a Form I-94 for 15 days.

3) Canadian citizens - 8 CFR 212.1(a) - All Canadian nonimmigrants are exempt from presentation of a visa except treaty trader/investor and fiancée nonimmigrants. Recipients are admitted for whatever period of time each classification allows. Canadian visitor admissions (and most of those listed below) are normally not documented upon entry, so the INS has no record of their entry. Aliens entering under classifications requiring additional supporting documentation, such as academic students, temporary workers and trainees, exchange visitors, intracompany transferees, vocational students, aliens of extraordinary ability, athletes, artists, entertainers, international cultural exchange program workers, religious workers, and North American Free Trade Agreement Workers are issued a Form I-94, and of course, any petitions are maintained by the Service.

4) British subject resident in Canada or Bermuda - 8 CFR 212.1(a) - Landed immigrants in Canada from commonwealth countries are treated virtually the same as Canadian citizens above.

5) Bahamian nationals or British subject resident of Bahamas who are inspected by a U.S. immigration officer in the Bahamas prior to embarkation are also admitted without a visa. 8 CFR 212.1(a). For documentation purposes, these individuals are treated the same as Canadians above.

6) British subjects residing in, and arriving directly from, the Cayman Islands or Turks and Caicos Islands who present a current certificate from the Clerk of Court of the Cayman Islands indicating no criminal record are admissible without a visa. For documentation purposes, they are treated the same as Canadians above.

7) British, French, or Netherlands nationals and nationals of certain other Caribbean islands who are coming as agricultural workers to the Virgin Islands. 8 CFR 212.1(b)(1)

8) Nationals of British Virgin Islands coming solely to visit U.S. Virgin Islands. 8 CFR 212.1(b)(2).

9) Bearers of Mexican diplomatic or official passport (and family) entering for 6 months or less for a purpose other than an official government assignment to the United States. 8 CFR 212.1(c-1).

10) Mexican crewmen employed on commercial aircraft owned by Mexican company authorized to engage in commercial transportation into the United States. 8 CFR 212.1(c).

11) Aliens entering pursuant to the International Boundary and Water Commission Treaty. 8 CFR 212.1(c-2).

12) Citizens of Freely Associated States - 8 CFR 212.1(d), IFM Chapter 15.13.

13) Aliens entering without visa (TWOV) in immediate and continuous transit through the U.S. - Section 233(c) INA, 8 CFR 212.1(f), IFM Chapter 15.6. Issued Form I-94T. Must normally depart within 8 hours or specified first available transportation, escorted by airline personnel. Certain nationalities may not TWOV at all (8 CFR 212.1(f)(3)), and certain ones must reside in certain countries to be eligible (8 CFR 212.1(f)(2)).

14) Alien members of U.S. Armed Forces who are not LPRs - 22 CFR 41.1(a).

15) Armed services personnel entering under NATO travel orders - 22 CFR 41.1(e).

16) American Indians born in Canada having at least 50% American Indian blood - Section 289 INA.

5. Provide the number of waivers of inadmissibility granted by type and by year for each of the last three years. Describe any guidelines that may exist in granting these waivers.

The INS currently maintains statistics regarding the number but not type of inadmissibility waivers granted. For fiscal years 1998, 1999 and as of March 31st for 2000, we have granted 14,938, 11,264 and 4,979 waivers, respectively. During this same period we denied 2,455 waivers (FY 98), 1,866 waivers (FY 99) and 956 waivers (as of March 31st in FY 2000).

The fact that an applicant is statutorily eligible to apply for a waiver does not mean that the waiver will actually be granted. Waivers are by their nature discretionary. Therefore, in each case, the adjudication of a waiver application involves a careful balancing of all negative and positive factors presented.

6. **Describe the circumstances and the number of persons entering on the basis of parole (temporary entry while a determination of admissibility is made), the procedures and time frames for making a determination of admissibility, and the number of entries denied.**

Parole is authorization to physically proceed into the United States under specific safeguards and controls, and is not intended to circumvent the admission and waiver process. Rather than parole an alien into the United States, the INS also has the option of allowing an alien to withdraw his or her application for admission, or of placing an alien in either expedited or non-expedited removal proceedings. The Attorney General is empowered to admit temporarily aliens even if they are statutorily inadmissible on a case-by-case basis for urgent humanitarian reasons or significant public benefit.

With regard to the proposed rule for section 212(a)(10)(E) of the Act, an alien's parole (if granted for either of the aforementioned reasons) would involve a deferred inspection, which means that following the issuance of parole, the INS would require the alien to appear for subsequent processing at a district office. Such cases are usually resolved within two weeks. The most recent statistical information regarding paroles for deferred inspection is from fiscal year 1996, when there were 7,952 individuals paroled for deferred inspection. In fiscal year 1998, the INS denied 428,545 entries due to inadmissibility. In fiscal year 1999, the INS denied 420,015 entries due to inadmissibility; and as of March 31st in fiscal year 2000, the INS denied 210,071 entries due to inadmissibility.

7. **Describe in detail the nature of any records regarding the movement of LPRs ("green card holders") or other resident aliens into or out of the United States, the circumstances under which such status could be revoked or relinquished, and the procedures required for such revocation or relinquishment. In your description, describe how such records are retrieved, e.g., by social security number, name, or other identifier.**

Although lawful permanent residents (LPRs) are inspected upon their arrival at U.S. ports of entry, generally no records are kept regarding the movement of these individuals into or out of the U.S. However, if upon arrival an inspector determines that an LPR has violated any law, he or she is typically referred to secondary inspection for a further determination. As a result of this process, the alien may be denied admission to the United States and placed into removal proceedings. Attempted entries of LPRs with known or suspected criminal record are tracked via the INS Lookout System. Additionally, if an LPR is absent from the U.S. for more than 1 year, he or she may be deemed at inspection to have abandoned their LPR status if not in possession of a re-entry permit.

If a review of the LPR's passport shows a pattern of long absences from the U.S., he or she will likely be sent to secondary inspection at the port of entry. If the inspecting officer determines that an LPR is actually living abroad and has abandoned his or her permanent resident status, then the alien may be asked to complete a Form I-407, Abandonment by Alien of Status as an LPR. If the alien declines to voluntarily relinquish his or her status, they may be placed in removal proceedings and have an opportunity to present their case before an

immigration judge. If such aliens are encountered inside the United States when applying for another immigration benefit, and an INS officer determines that based on their past absences from the U.S., they actually reside in another country, the alien may be placed in removal proceedings.

Electronic records maintained by the INS concerning LPRs are typically retrieved by name, alien registration number, and date and place of birth. At times, records may also be located through a search involving use of a social security number.

8. **We understand that the Immigration and Naturalization Service maintains computer databases that contain records of LPRs whose status has been revoked or has been administratively or judicially determined to have been abandoned. Describe the contents of the databases, how such records are retrieved (e.g., by social security number, name, or other identifier) and whether this information is shared with or accessible by the Internal Revenue Service.**

AND

9. **Describe the contents and use of the INS Nonimmigrant Information System (NIIS), the Treasury Enforcement Computer System (TECS), and the CIS (CIS) or their successor systems. Describe how these databases track resident and nonresident aliens, including time spent within and outside the United States, and whether the Internal Revenue Service or Department of Treasury Tax personnel have access to this information.**

The INS maintains electronic records relevant to LPRs in our Central Index System (CIS). These records are retrieved by using the LPR's alien registration number. The information contained in the CIS is not shared with the IRS, nor is the CIS accessible by the IRS. The content of the CIS includes the alien's date of birth, the country of origin, and the date that the INS determines that the alien abandoned residence, if applicable. If a Social Security Number is provided by the alien and keyed into the system, the CIS will contain that as well. In such a case, the INS can access the alien's information through use of a Social Security Number. If an alien's Form I-94 control number is entered, the CIS will also contain that information.

The INS' Nonimmigrant Information System (NIIS) tracks only nonimmigrants: it is primarily accessed by a combined name, date of birth, or country of birth query, but the alien's Form I-94 control number can also be used to access the system. NIIS tracks admission and departure dates of nonimmigrants, as well as each nonimmigrant's stated destination in the United States. As noted previously, with limited exceptions, LPR arrival and departure records are not tracked by any INS computer system. Neither the IRS nor the Department of Treasury tax personnel have access to the NIIS or CIS.

Finally, in order to provide the Joint Committee with the most in-depth and accurate information on the Treasury Enforcement Computer System (TECS), we encourage you to contact the U.S. Customs Service, which maintains the TECS.

10. **Describe what INS immigration records, if any, contain social security numbers, and to what extent such records are retrievable or organized by social security number? If social security numbers are not collected, retrievable, or otherwise used, explain why.**

The INS' CIS will show a social security number only if such a number was provided by the alien and keyed into the system. The INS Computer Linked Application Information Management System 3 (CLAIMS-3) will also show a social security number where it was provided by the alien and keyed into the system. Generally, the INS computer systems are based on alien numbers, arrival/departure numbers, or application or petition receipt numbers.

[*REDACTED INFORMATION***]**

Since the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act on September 30, 1996, the INS has held several interagency meetings in an effort to reach consensus regarding the implementation of INA 212(a)(10)(E). Attendees at the interagency meetings included representatives from the Department of State's (DOS) Office of Overseas Citizenship Services and Visa Office, the Internal Revenue Service (IRS), the Department of Treasury Office of International Tax Counsel, and the Department of Justice Tax Division.

The current INA 212(a)(10)(E)-project coordinator within the INS Headquarters Adjudications Office assumed his duties in April 1999. Since that time, the project coordinator has met with attendees of the interagency meetings on several occasions, and hosted numerous teleconferences, to discuss the logistics involved in setting up a system for enforcement of INA 212(a)(10)(E).

Disclosure of confidential taxpayer information by the IRS to other agencies (primarily the DOS and the INS) has always been problematic. The statute, as written, requires the Attorney General to determine whether or not a former U.S. citizen has renounced citizenship for the purpose of avoiding taxation. However, the Attorney General does not have access to confidential taxpayer information. Without assistance from the IRS, such a determination by the Attorney General would be extremely difficult to make, and would also be potentially subject to legal challenges.

During initial interagency meetings, there was much discussion regarding what constitutes "officially renouncing" U.S. citizenship. Clearly, the DOS handles most renunciation cases. It also issues Certificates of Loss of Nationality (CLN's) confirming the loss of an individual's U.S. citizenship. In this regard, the DOS' main function is to determine whether or not a particular individual intended to renounce his or her U.S. citizenship. However, the DOS is not necessarily concerned with why the person might be inclined to renounce their citizenship.

Other discussions focused on who on behalf of the Attorney General should actually determine when renunciation was undertaken to avoid taxation. Some suggested that the DOJ Tax Division should act on the AG's behalf, which would not be contrary to the statute. The INS could then adopt the determination of the Tax Division. The idea of a technical amendment requiring the DOS to make adopt this function was also proposed. However, access to confidential taxpayer information by the Secretary of State or the Attorney General remained a major road block in either scenario.

In a letter dated January 16, 1998, from the Deputy Assistant Secretary of International Tax Affairs to the INS General Counsel, the IRS expressed its willingness to work with the INS to formulate a taxpayer consent form which could be requested of former United States citizens to allow for the release of confidential taxpayer information to the INS/DOS.

[*REDACTED INFORMATION***]**

[*REDACTED INFORMATION***]**

several options were considered. These options included having the expatriate complete a questionnaire designed to determine his or her motivation for renouncing citizenship, relying upon the list of expatriates published by the Secretary of the Treasury in the Federal Register, or creating a "watch list" of former U.S. citizens. Each of these options was determined to be impractical.

Interpretation of section 877 of the Internal Revenue Code (IRC) is also a controversial issue for the three coordinating agencies. The Health Insurance Portability and Accountability Act (HIPA), enacted on August 21, 1996, amended section 877 of the Internal Revenue Code. IRC 877 relates to former U.S. citizens who are presumed to have expatriated with the principal purpose of avoiding taxes. Under 26 USC 6039G, which was part of HIPA, the Secretary of the Treasury must publish in the Federal Register, on a quarterly basis, the names of expatriates that the Secretary has determined fall within the scope of IRC 877(a), which relates to individuals who will be treated as having expatriated principally to avoid taxation.

The INS and the IRS disagreed on what 26 USC 6039G means. It is the INS position, based upon the clear wording of 26 USC 6039G, that the Secretary of the Treasury is required to publish only the names of those expatriates who renounced citizenship principally to avoid taxation (within the meaning of IRC 877(a)). The IRS referenced the legislative history and stated that this indicates that they are required to publish the names of *all* expatriates from whom it receives expatriate information statements.

Apparently all parties were initially reluctant to rely upon the IRC 877 criteria to determine tax avoidance for the purposes of section 212(a)(10)(E) enforcement. The reason for this is that the IRS, more often than not, does not make a definitive determination as to whether or not an expatriate is presumed subject to IRC 877, and they certainly do not do so immediately upon receiving the information statements and CLN from the DOS. The INS and the IRS have since agreed upon a mechanism by which INA 212(a)(10)(E) will be enforced, and the two agencies have agreed to execute a Memorandum of Understanding (MOU) which will effectively "spell out" the roles each agency will play in the implementation. The INS has been advised that the MOU is currently in the drafting stage within IRS.

A final "problem" that arose between DOS and INS is the interpretation of what it means to "officially renounce" U.S. citizenship. DOS is of the opinion that "officially renounce[s]" means *only* a formal renunciation of U.S. citizenship before a U.S. consular officer abroad, in accordance with section 349(a)(5) of the Act. However, it is the position of INS that "officially

renounce[s]" means any one of several potentially expatriating acts currently listed in section 349(a) of the Act, or any act defined as an expatriating act in any other statute that Congress may enact in the future. However, the expatriating act must have been performed voluntarily and with the intent to expatriate. If the expatriating act is subsequently confirmed by the issuance of a CLN by the DOS, the INS maintains that the person has "officially renounced" U.S. citizenship.

An advance electronic copy of the proposed regulation for implementation of section 212(a)(10)(E) has been provided to the Department of Justice Office of Policy Development (DOJOPD). A copy of the letter from DOS reflecting that agency's view regarding what it means to "officially renounce" U.S. citizenship has also been provided to DOJOPD. Both the DOS and the INS have agreed to accept the DOJOPD's position on this issue as final.

Despite extensive discussions involving the DOJ, the INS, the IRS and the DOS, no final regulation to implement section 212(a)(10)(E) of the Act has yet been promulgated. We are unable at this time to provide you with a draft of this proposed regulation. However, at your request, we would be happy to brief the Joint Committee on Taxation staff on the INS' view of the proposed regulation.

12. **Provide by year the number of persons, if any, that have been found inadmissible as a result of section 212(a)(10)(E) of the Act since its enactment on September 30, 1996. For any persons found inadmissible, provide the number of waivers granted, if any.**

To date, no persons have been found inadmissible under section 212(a)(10)(E), since final regulations relative to this provision have not yet been promulgated.

[*REDACTED INFORMATION***]**

[*REDACTED INFORMATION***]**

*****REDACTED INFORMATION*****

Aliens who are found inadmissible under section 212(a)(10)(E) of the Act may apply for a nonimmigrant waiver under section 212(d)(3)(A) or (B) of the Act. See 8 CFR 212.4 for a description of the waiver criteria. Waivers are discretionary in nature, and the adjudication of each request for a waiver involves a delicate balancing of both the favorable and unfavorable factors relevant to the particular case. The mere fact that an alien meets the threshold requirements that enable he or she to apply for a waiver of inadmissibility does not establish that favorable discretion should be exercised on the alien's behalf.

14. Describe how the Immigration and Naturalization Service defines the phrase "officially renounces United States citizenship" for purposes of section 212(a)(10)(E) of the Act.

Section 349 of the Act identifies several ways in which a person may renounce his or her citizenship. One way is by making a "formal renunciation" before a consular officer abroad. The proposed rule makes it clear that this is not the only form of expatriation that may render a former citizen inadmissible under section 212(a)(10)(E) of the Act. Section 212(a)(10)(E) of the Act refers to an official renunciation, which is not necessarily the same as a "formal" renunciation under section 349(a)(5) of the Act.

Section 349 of the Act defines the specific acts that, if performed voluntarily and with the intent to expatriate, result in loss of U.S. nationality. Each of these acts has the same legal consequence. For example, a person may renounce his or her citizenship after their 18th birthday if they accept an office, post or employment with a foreign government voluntarily and with the intent to expatriate. While the person has not made a "formal renunciation" as described in section 349(a)(5) of the Act, the described action is just as "official" as a formal declaration before a consular officer. In any event, a person's renunciation of U.S. citizenship will not be considered official unless the DOS has issued a confirming CLN.

The INS is reluctant to create a "loophole" that would permit citizens who seek to renounce citizenship to avoid taxation to escape legally mandated immigration consequences. For this reason, the proposed rule specifies that a citizen who performs any of these acts of expatriation with the intent to expatriate will be considered, for purposes of section 212(a)(10)(E) of the Act, to have "officially renounce[d]" U.S. citizenship. The same principle applies to any act defined as an expatriating act in any other statute that Congress may enact. This interpretation of section 212(a)(10)(E) of the Act is consistent with the IRS code. The text of 26 U.S.C. 877 does not distinguish among different means of expatriation. It is clear from 26 U.S.C. 6039G(c)(2) and (3) that *any* expatriating act can make a former citizen subject to the presumption under 26 U.S.C. 877 that the former citizen expatriated to avoid taxation. The proposed rule, therefore, interprets the "officially renounces" element of section 212(a)(10)(E) of the Act in light of these related provisions.

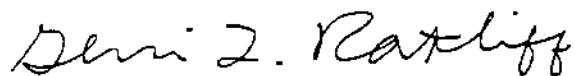
15. Describe any studies or projects (public or nonpublic) that have examined compliance with section 212(a)(10)(E) of the Act.

The INS is not aware of any public or private studies examining compliance with section 212(a)(10)(E) of the Act, except for the General Accounting Office study and report.

I hope you find our answers helpful. Should you need clarification of anything provided in this response or have additional questions, please feel free to contact me or my office any time.

Sincerely,

FOR THE COMMISSIONER

A handwritten signature in cursive script that reads "Gerri L. Ratliff".

Gerri L. Ratliff
Acting Director
Congressional Relations



United States Department of State

Washington, D.C. 20520

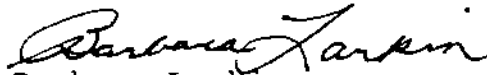
MAY 24 2000

Dear Mr. Vice Chairman:

This is in response to your letter of April 13 to the Department requesting information regarding our efforts to implement section 212(a)(10)(E) of the Immigration and Nationality Act. That section pertains to denial of visas and entry to persons who have renounced U.S. nationality for purposes of tax avoidance. Our answers to your questions are enclosed. We have also enclosed additional materials relevant to question 13.

We hope you will find this information useful. We would be pleased to continue to work with you to insure the effective implementation of this important provision of the Immigration and Nationality Act.

Sincerely,


Barbara Larkin
Assistant Secretary
Legislative Affairs

Enclosures:

1. Answers to questions.
2. Volume 9 Foreign Affairs Manual, Sections 41.1, 41.2 and 41.3 - laws, regulations and interpretative notes.

The Honorable
Bill Archer,
Vice Chairman, Joint Committee on Taxation,
House of Representatives.

Enclosure 1

Q1: Describe in detail the records relating to the relinquishment of an individual's U.S. citizenship that are maintained by the Department of State. Describe to what extent information from such records is shared with the Internal Revenue Service (IRS). Describe what laws prevent the IRS access to such information. Describe what laws or procedures, if any, may need to be changed to enhance access to such information by the IRS.

A1: When it comes to the attention of a consular officer at an overseas Foreign Service mission that an individual has possibly committed an expatriating act with the intention of relinquishing U.S. citizenship, the officer prepares a Certificate of Loss of Nationality (CLN) (FS-348) and submits it to the Department of State pursuant to Section 358 of the Immigration and Nationality Act (INA). If approved, the Department of State's Passport Services retains the original CLN and forwards a copy to both the Internal Revenue Service (IRS), as well as to the Immigration and Naturalization Service (INS).

Q2: Section 212(a)(10)(E) of the Immigration and Naturalization Act (INA) deems inadmissible former U.S. citizens whom the Attorney General determines renounced their citizenship for tax avoidance purposes. Describe in detail the steps the Department of State has taken to implement section 212(a)(10)(E) of the INA, including any difficulties that have been encountered in implementing to provision. Describe what laws or procedures, if any, may need to be modified or promulgated to facilitate enforcement of the provision.

A2: To date the Department's attempts to implement INA section 212(a)(10)(E) have been confined to discussions with INS regarding the formulation by that agency of implementing regulations pursuant to which this section may be enforced and to the addition of appropriate codes to our lookout system, "CLASS", so that when this section is fully implemented we will be able to identify aliens found inadmissible based upon tax avoidance. Because under the requirements of the statute the Attorney General (INS), and not the Department, is responsible for making the determination of whether an alien is inadmissible for tax avoidance, the Department cannot proceed further at this time.

*****REDACTED INFORMATION*****

As noted above, the Department of State does not make and does not plan to make determinations that renunciation is done for tax avoidance. The statute requires the Attorney General (INS) to make such determinations.

*****REDACTED INFORMATION*****

[***REDACTED INFORMATION***]

Q5: Describe how the Department of State defines the phrase, "officially renounces United States citizenship" for purposes of section 212(a)(10)(E) of the INA.

A5: The Department of State "defines 'officially renounces United States citizenship' for purposes of section 212(a)(10)(E) of the INA" to mean the formal renunciation of nationality as set out in section 349(a)(5) of the INA.

Q6: Describe whether the Department of State is bound by IRS determinations as to tax avoidance presumptions, including cases in which individuals contest such IRS determinations.

A6: See answers to questions 3 and 4, above.

Q7: Describe the circumstances or cases in which the Department of State relies (or has relied in the past) on another agency to determine whether an individual is inadmissible.

A7: There are many instances in which the Department of State, and the INS, rely or have relied on determinations of other agencies or bodies in applying grounds of inadmissibility. The health related provisions of 212(a)(1) are applied based upon medical determinations of physicians acting pursuant to regulations promulgated by the Secretary of Health, Education and Welfare (Center for Disease Control). Criminal grounds of inadmissibility in 212(a)(2) are applied based upon court conviction records. Determinations on drug trafficking, terrorism, espionage and other grounds found in 212(a)(2) and (3) are based largely on records of other agencies. Labor certification grounds in 212(a)(5) are based upon the absence of appropriate documentation from the Department of Labor. For the purposes of 212(a)(8), draft evasion determinations were, and desertion determinations are, based upon Selective Service and military records. Inadmissibility under 212(a)(10)(D) for unlawful voting is based upon Federal, State and local voting records.

Q8: For nonimmigrants, describe the criteria for waivers of inadmissibility and the length of time such waivers are valid.

A8: The Department has recently provided the Committee with a copy of the existing criteria for nonimmigrant waivers taken from the Foreign Affairs Manual (FAM), (9 FAM 40.111, notes).

Q9: Describe any projects or studies that indicate what country or countries expatriates become nationals and/or residents.

A9: In recent years, the Department of State's Bureau of Consular Affairs has maintained a record of all individuals who have expatriated themselves under the provisions of section 349 of the INA. This record reflects the Foreign Service post that prepared the CLN. In most instances, the expatriating act is committed in the country of the individual's other (i.e., non-U.S.) nationality.

Q10: Provide the number of persons, if any, that have been found inadmissible as a result of section 212(a)(10)(E) of the INA since its enactment on September 30, 1996. For any persons found inadmissible, provide the number of waivers granted, if any.

A10: To date, for the reasons stated in answer 4 above, no persons have been found inadmissible as the result of section 212(a)(10)(E). Consequently, no waivers have been granted.

Q11: Provide the number of expatriates since September 30, 1996 that have obtained visas.

A11: The Department cannot supply this figure since in the absence of regulations to implement 212(a)(10)(E) we have not tracked visa issuance to renunciants. Nevertheless, once it is implemented we will be able to assist INS in making determinations of inadmissibility regarding those aliens who renounced their US nationality after the date on which 212(a)(10)(E) became effective and prior to the effective date of the INS regulation. We can place the names of all such renunciants in the lookout system as being potentially ineligible. That action would prevent them from entering the United States without coming to the attention of INS for the purpose of review of their immigration status. It will also prevent renewal of their visa without such a review.

Q12: Identify the countries that require an individual to give up his or her U.S. citizenship in order to become a national or resident of such country.

A12: The following list, which is not necessarily a definitive one, sets forth the countries that require individuals to relinquish their U.S. citizenship in order to acquire host country nationality: Austria; Belarus; Denmark; Finland; Georgia; Germany; the Netherlands; Norway, Moldova; Sweden; Indonesia; the Bahamas; Costa Rica; Haiti; Honduras; Nicaragua; Peru; Suriname; Papua New Guinea; Solomon Islands; South Korea; Vanuatu; Botswana; Mozambique; Namibia; Zimbabwe; Kuwait; Qatar; and Saudi Arabia. The Department of State has been advised by a number of its missions abroad that the extent and circumstances under which this requirement is enforced varies from country to country.

Q13: Identify the countries from which an individual can legally enter the United State without a visa and the method by which this is done.

A13: There are many categories of aliens who may enter the United States without visas as the result of law, treaty, bilateral agreement or emergency or other administrative discretion. The major categories include, Canadian nationals, certain Mexican nationals, NATO personnel on official duty, nationals of the 29 countries participating in the Visa Waiver Pilot Program (VWPP) pursuant to INA section 217, certain residents of Canada or of islands contiguous to the United States, aliens from almost all countries who are in "transit without visa" status (brief stopover in the US for connecting flight to foreign country, etc.), foreign military personnel invited to the United States by US military authorities (usually for large military exercises), aliens granted individual waivers in emergent circumstances by joint action of consular and INS personnel. Enclosed with this letter are the portions of the FAM containing the laws, regulations, procedures and foreign country information pertinent to entry into the United States without a visa.

Q14: Describe to what extent the Department of State could require an expatriating citizen to provide a social security number or other tax identifying information as part of the process of expatriation. Describe what limitations might apply to the type or scope of information provided or to IRS access to such information.

A14: The Department of State asks the renunciant to provide his/her social security or taxpayer identity number on the statement setting forth his/her average net tax liability and net worth. This document is attached to the CLN that is forwarded to IRS. It must be emphasized, however, that many individuals who expatriate themselves have a very tenuous nexus to the U.S. and have never resided here. As a result, it is not uncommon for these individuals not to have either a social security or taxpayer identity number.

9 FAM 41.0

9 FAM 41.1 EXEMPTION BY LAW OR TREATY FROM PASSPORT AND VISA REQUIREMENTS

(TL:VISA-47; 8-30-91)

Nonimmigrants in the following categories are exempt from the passport and visa requirements of INA 212(a)(7)(B)(i)(I), (i)(II):

(a) Alien members of the U.S. Armed Forces.

(TL:VISA-135; 2-29-96)

An alien member of the U.S. Armed Forces in uniform or bearing proper military identification, who has not been lawfully admitted for permanent residence, coming to the United States under official orders or permit of such Armed Forces. (Sec. 284, 86 Stat. 232; 8 U.S.C. 1354.)

[Amended by 61 FR 1834, Jan. 24, 1996.]

(b) American Indians born in Canada.

(TL:VISA-2; 8-30-87)

An American Indian born in Canada, having at least 50 per centum of blood of the American Indian race (Sec. 289, 66 Stat. 234; 8 U.S.C. 1359.)

(c) Aliens entering from Guam, Puerto Rico, or the Virgin Islands.

(TL:VISA-2; 8-30-87)

An alien departing from Guam, Puerto Rico, or the Virgin Islands of the United States, and seeking to enter the continental United States or any other place under the jurisdiction of the United States (Sec. 212, 66 Stat. 188; 8 U.S.C. 1182.)

(d) Armed Services personnel of a NATO member.

(TL:VISA-2; 8-30-87)

Personnel belonging to the armed services of a government which is a Party to the North Atlantic Treaty and which has ratified the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, signed at London on June 19, 1951, and entering the United

States under Article III of that Agreement pursuant to an individual or collective movement order issued by an appropriate agency of the sending state or of NATO (TIAS 2846; 4 U.S.T. 1792.)

(e) Armed Services personnel attached to a NATO Headquarters in the United States.

(TL:VISA-2; 8-30-87)

Personnel attached to a NATO Headquarters in the United States set up pursuant to the North Atlantic Treaty, belonging to the armed services of a government which is a Party to the Treaty and entering the United States in connection with their official duties under the provisions of the Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty (TIAS 2978; 5 U.S.T. 875.)

(f) Aliens entering pursuant to International Boundary and Water Commission Treaty.

(TL:VISA-2; 8-30-87)

All personnel employed either directly or indirectly on the construction, operation, or maintenance of works in the United States undertaken in accordance with the treaty concluded on February 3, 1944, between the United States and Mexico regarding the functions of the International Boundary and Water Commission, and entering the United States temporarily in connection with such employment (59 Stat. 1252; TS 994.)

9 FAM 41.1 Related Statutory Provisions

INA 212(a)(7)(B)(i)

(TL:VISA-47; 8-30-91)

(a) Except as otherwise provided in this Act, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States:...

(7) DOCUMENTATION REQUIREMENTS.—

...(B) NONIMMIGRANTS.—

(i) In general.- Any nonimmigrant who is (I) not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period, or

(II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission, is excludable.

[Amended by Pub. L. 101-649, Sec. 601(a), 104 Stat. 5074; 8 U.S.C. 1182; November 29, 1990.]

INA 212(d)(7)

(TL:VISA-47; 8-30-91)

(7) The provisions of subsection (a) (other than paragraph (7)) shall be applicable to any alien who shall leave Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States. Any alien described in this paragraph, who is excluded from admission to the United States, shall be immediately deported in the manner provided by section 237(a) of this Act.

[Amended by Pub. L. 101-649, Sec. 601(d), 104 Stat. 5076; 8 U.S.C. 1182; November 29, 1990.]

INA 284

(TL:VISA-2; 8-30-87)

Nothing contained in this title shall be construed so as to limit, restrict, deny, or affect the coming into or departure from the United States of an alien member of the Armed Forces of the United States who is in the uniform of, or who bears documents identifying him as a member of, such Armed Forces, and who is coming to or departing from the United States under official orders or permit of such Armed Forces: Provided, That nothing contained in this section shall be construed to give to or confer upon any such alien any other privileges, rights, benefits, exemptions, or immunities under this Act, which are not otherwise specifically granted by this Act.

INA 289

(TL:VISA-2; 8-30-87)

Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.

Article III, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, signed at London on June 19, 1951, in part

(TL:VISA-2; 8-30-87)

Paragraph 1

1. On the conditions specified in paragraph 2 of this Article and subject to compliance with the formalities established by the receiving State relating to entry and departure of a force or the members thereof, such members shall be exempt from passport and visa regulations and immigration inspection on entering or leaving the territory of a receiving State....

Paragraph 2

2. The following documents only will be required in respect of members of a force. They must be presented on demand:

(a) personal identity card issued by the sending State showing names, date of birth, rank and number (if any), service, and photograph;

(b) individual or collective movement order, in the language of the sending State and in the English and French languages, issued by an appropriate agency of the sending State or of the North Atlantic Treaty Organization and certifying to the status of the individual or group as a member or members of a force and to the movement ordered. The receiving State may require a movement order to be countersigned by its appropriate representative....

Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty

(TL:VISA-2; 8-30-87)

Article 2

Subject to the following provisions of this Protocol, the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces shall apply to Allied Headquarters in the territory of a Party to the present Protocol in the North Atlantic Treaty area, and to the military and civilian personnel of such Headquarters and their dependents included in the definitions in sub-paragraphs (a),(b) and (c) of paragraph 1 of Article 3 of this Protocol, when such personnel are present in any such territory in connection with their official duties or, in the case of dependents, the official duties of their spouse or parent.

Treaty between the United States of America and Mexico respecting utilization of waters of the Colorado and Tijuana Rivers and of the Rio Grande, February 3, 1944, in part

(TL:VISA-2; 8-30-87)

Article 20

The whole of the personnel employed either directly or indirectly on the construction, operation or maintenance of the works may pass freely from one country to the other for the purpose of going to and from the place of location of the works, without any immigration restrictions, passports or labor requirements.

9 FAM 41.1 Notes

(TL VISA-2 8-30-87)

9 FAM 41.1 N1 Countries Signatory to NATO Agreements

For a listing of the parties to the North Atlantic Treaty, the NATO Status-of-Forces Agreement and the Protocol on the Status of International Military Headquarters, see 22 CFR 41.25 Notes.

9 FAM 41.1 N2 Documentation Required of Armed Services Personnel of NATO Members

Armed services personnel of NATO members entering pursuant to 22 CFR 41.1(d) and (e) must present on demand the following documents:

(a) the personal identity card issued by the sending state showing names, date of birth, rank and serial number (if any), service, and photograph;

(b) the individual or collective movement order, showing the movement ordered and the status of the individual or group as member(s) of a force.

9 FAM 41.1 N3 Dependents of Armed Services Personnel; Members of a Civilian Component and Their Dependents

The exemptions from passport and visa requirements provided in 22 CFR 41.1(d) and (e) for armed services personnel do not extend to the dependents of such members or to the members of a civilian component and their dependents. Such persons must apply for nonimmigrant visas and present valid passports. [See 22 CFR 41.25(e) and (d) NOTES, respectively, for classification.]

9 FAM 41.1 N4 Definitions Contained in the Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty

[See 22 CFR 41.25 N3.]

9 FAM 41.1 N5 Definitions Contained in the NATO Status-of-Forces Agreement

[See 22 CFR 41.25 N4.]

**9 FAM 41.1 N6 Visa Issuance to Aliens Entitled to
Exemption From Visa Requirements**

[See 22 CFR 41.2 N8.]

9 FAM 41.2

Waiver by Secretary of State and Attorney General of passport and/or visa requirements for certain categories of nonimmigrants.

(TL:VISA-195; 06-18-1999)

(TL:VISA-47; 08-30-1991)

Pursuant to the authority of the Secretary of State and the Attorney General under INA 212(d)(4), the passport and/or visa requirements of INA 212(a)(7)(B)(i)(I), (i)(II) are waived as specified below for the following categories of nonimmigrants:

(a) Canadian nationals.

(TL:VISA-2; 08-30-1987)

A passport is not required except after a visit outside the Western Hemisphere. A visa is not required.

(b) Aliens resident in Canada or Bermuda having a common nationality with nationals of Canada or with British subjects in Bermuda.

(TL:VISA-2; 08-30-1987)

A passport is not required except after a visit outside the Western Hemisphere. A visa is not required.

(c) Bahamian nationals and British subjects resident in the Bahamas.

(TL:VISA-2; 08-30-1987)

A passport is required. A visa is not required if, prior to the embarkation of such an alien for the United States on a vessel or aircraft, the examining U.S. immigration officer at Freeport or Nassau determines that the individual is clearly and beyond a doubt entitled to admission.

(d) British subjects resident in the Cayman Islands or in the Turks and Caicos Islands.

(TL:VISA-2; 08-30-1987)

A passport is required. A visa is not required if the alien arrives directly from the Cayman Islands, or the Turks and Caicos Islands and presents a current certificate from the Clerk of Court of the Cayman Islands or the Turks and Caicos Islands indicating no criminal record.

(e) British, French, and Netherlands nationals and nationals of certain adjacent islands of the Caribbean which are independent countries.

(TL:VISA-2; 08-30-1987)

A passport is required. A visa is not required of a British, French or Netherlands national, or of a national of Antigua, Barbados, Grenada, Jamaica, or Trinidad and Tobago, who has residence in British, French, or Netherlands territory located in the adjacent islands of the Caribbean area, or has residence in Antigua, Barbados, Grenada, Jamaica, or Trinidad and Tobago, if the alien:

- (1) Is proceeding to the United States as an agricultural worker; or
- (2) Is the beneficiary of a valid, unexpired, indefinite certification granted by the Department of Labor for employment in the Virgin Islands of the United States and is proceeding thereto for employment, or is the spouse or child of such an alien accompanying or following to join the alien.

(f) Nationals and residents of the British Virgin Islands.

(TL:VISA-187; 03-30-1999)

(1) A national of the British Virgin Islands and resident therein requires a passport but not a visa if proceeding to the United States Virgin Islands.

(2) A national of the British Virgin Islands and resident therein requires a passport but does not require a visa to apply for entry into the United States if such applicant:

- (i) Is proceeding by aircraft directly from St. Thomas, U.S. Virgin Islands;
- (ii) Is traveling to some other part of the United States solely for the purpose of business or pleasure as described in INA 101(a)(15)(B);

(iii) Satisfies the examining U.S. Immigration officer at that port of entry that he or she is admissible in all respects other than the absence of a visa; and

(iv) Presents a current Certificate of Good Conduct issued by the Royal Virgin Islands Police Department indicating that he or she has no criminal record.

[Amended by 64 FR 7998, 2-18-99.]

(g) Mexican nationals.

(TL:VISA-177; 04-30-1998)

(1) A visa and a passport are not required of a Mexican national in possession of a border crossing identification card and applying for admission as a temporary visitor for business or pleasure from contiguous territory.

(2) A visa is not required of a Mexican national possessing a border crossing identification card and applying for admission to the United States as a temporary visitor for business or pleasure or in transit from noncontiguous territory.

(3) A visa and a passport are not required of a Mexican national who is entering solely for the purpose of applying for a Mexican passport or other official Mexican document at a Mexican consular office on the United States side of the border.

(4) A passport is not required of a Mexican national who is applying for a B-1/B-2 Visa/BCC and who meets the conditions for waiver of the passport requirement in section 41.32(a)(2)(iii).

(5) A visa is not of a Mexican national employed as a crew member on an aircraft belonging to a Mexican company authorized to engage in commercial transportation into the United States.

(6) A visa is not required of a Mexican national bearing a Mexican diplomatic or official passport who is a military or civilian official of the Federal Government of Mexico entering the United States for a stay of up to 6 months for any purpose other than on assignment as a permanent employee to an office of the Mexican Federal Government in the United States. A visa is also not required of the official's spouse or any of the official's dependent family members under 19 years of age who hold diplomatic or official passports and are in the actual company of the official at the time of entry. This waiver does not apply to the spouse or any of the official's family members classifiable under INA 101(a)(15)(F) or (M).

[Amended by 63 FR 19862, 4-7-98.]

(h) Natives and residents of the Trust Territory of the Pacific Islands.

(TL:VISA-2; 08-30-1987)

A visa and passport are not required of a native and resident of the Trust Territory of the Pacific Islands who has proceeded in direct and continuous transit from the Trust Territory to the United States.

(i) Aliens in immediate transit without visa (TWOV).

(TL:VISA-94; 09-30-1994)

A passport and visa are not required of an alien in immediate and continuous transit through the United States in accordance with the terms of an agreement entered into between the carrier and INS on Form I-426, Immediate and Continuous Transit Agreement Between a Transportation Line and United States of America, pursuant to INA 238(d) to ensure transit through and departure from the United States en route to a specified foreign country. The alien must be in possession of travel documentation establishing identity, nationality, and ability to enter a country other than the United States. This waiver of visa and passport requirement is not available to an alien who is a citizen of Afghanistan, Bangladesh, Cuba, India, Iran, Iraq, Libya, Pakistan, Sri Lanka or a citizen of the former Socialist Federal Republic of Yugoslavia which includes Bosnia, Croatia, Serbia, Montenegro, Slovenia, and Macedonia. This waiver of visa and passport requirements is also not available to an alien who is a citizen of North Korea ("Democratic peoples' Republic of Korea") or Vietnam ("Socialist Republic of Vietnam"), and is a resident of one of the said countries. It is, on a basis of reciprocity, available to a national of Albania, Bulgaria, Czechoslovakia, Estonia, the German democratic Republic, Hungary, Latvia, Lithuania, Mongolian People's Republic, people's Republic of China, Poland, Romania, or the Union of Soviet Socialist Republics, resident in one of those countries, only if he is transiting the United States by aircraft of a transportation line or signatory to an agreement with the Immigration and Naturalization Service on Form I-426 on a direct through flight which will depart directly to a foreign place from the port of arrival.

(j) Individual cases of unforeseen emergencies.

(TL:VISA-195; 06-18-1999)

Except as provided in paragraphs (a) through (i) and (k) through (m) of this section, all aliens are required to present a valid, unexpired visa and passport upon arrival in the United States. An alien may apply for a waiver of the visa and passport requirement if, either prior to the alien's embarkation abroad or upon arrival at a port of entry, the responsible district director of the Immigration and Naturalization Service (INS) in charge of the port of entry concludes that the alien is unable to present the required document

because of an unforeseen emergency. The INS district director may grant a waiver of the visa or passport requirement pursuant to INA 212(d)(4)(A), without the prior concurrence of the Department of State, if the district director concludes that the alien's claim of emergency circumstances is legitimate and that approval of the waiver would be appropriate under all of the attendant facts and circumstances.

[Amended by 64 FR 28915, 5-28-99.]

(k) Fiancé(e) of a U.S. citizen.

(TL:VISA-2; 08-30-1987)

Notwithstanding the provisions of paragraphs (a) through (h) of this section, a visa is required of an alien described in such paragraphs who is classified, or who seeks classification, under INA 101(a)(15)(K).

(l) Visa Waiver Pilot Program.

(TL:VISA-177; 04-30-1998)

(1) Notwithstanding the provisions of paragraphs (a) through (k) of this section, a visa is not required of any person who seeks admission to the United States for a period of 90 days or less as a visitor for business or pleasure and who is eligible to apply for admission to the United States as a Visa Waiver Pilot Program applicant.

Countries designated as pilot program countries under (l)(1) of this section, are: the United Kingdom (effective July 1, 1988); Japan (effective December 15, 1988); France and Switzerland (effective July 1, 1989); The Federal Republic of Germany and Sweden (effective July 15, 1989); Italy and The Netherlands (effective July 29, 1989); Andorra, Austria, Belgium, Denmark, Finland, Iceland, Liechtenstein, Luxembourg, Monaco, New Zealand, Norway, San Marino, and Spain (effective October 1, 1991); Brunei (effective July 29, 1993); Ireland (effective April 1, 1995); Argentina (effective July 8, 1996); Australia (effective July 29, 1996) and Slovenia (effective September 30, 1997).

[Amended by 62 FR 51031, 9-30-97.]

(m) Treaty trader and treaty investor.

(TL:VISA-33; 06-29-1990)

Notwithstanding the provision of paragraph (a) of this section, a visa is required of a Canadian national who is classified, or who seeks classification, under INA 101(a)(15)(E).

9 FAM 41.2 Related Statutory Provisions

INA 212(a)(7)(B), in part

(TL:VISA-47; 08-30-1991)

For the provisions of INA 212(a)(7)(B)(i), see 9 FAM 41.1 Related Statutory Provisions.

INA 212(d)(3), in part

(TL:VISA-159; 12-20-1996)

(3) Except as provided in this subsection, an alien....

(B) who is inadmissible under subsection (a) (other than paragraphs (3)(A)(i)(I), 3(A)(iii), 3(C), and 3(E) of such subsection), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General. The Attorney General shall prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of inadmissible aliens applying for temporary admission under this paragraph.

[Amended by Pub. L. 101-649, Sec. 601(D), 104 Stat. 5076; 8 U.S.C. 1182; Nov. 29, 1990; as amended by Pub. L. 102-232, Sec. 307(c), 105 Stat. 1754; 8 U.S.C. 1182; Dec. 12, 1991.] [Amended by Sec. 308(d) of Pub. L. 104-208, Sept. 30, 1996.]

INA 212(d)(4)

(TL:VISA-177; 04-30-1998)

(4) Either or both of the requirements of paragraph (7)(B)(i) of subsection (a) may be waived by the Attorney General and the Secretary of State acting jointly

(A) on the basis of unforeseen emergency in individual cases, or

(B) on the basis of reciprocity with respect to nationals of foreign contiguous territory or of adjacent islands and residents thereof having a common nationality with such nationals, or

(C) in the case of aliens proceeding in immediate and continuous transit through the United States under contracts authorized in section 233(c).

[Amended by Pub. L. 101-649, Sec. 601(D), 104 Stat. 5076; 8 U.S.C. 1182; Nov. 29, 1990.]

INA 212(d)(8)

(TL:VISA-177; 04-30-1998)

(8) Upon a basis of reciprocity accredited officials of foreign governments, their immediate families, attendants, servants, and personal employees may be admitted in immediate and continuous transit through the United States without regard to the provisions of this section except paragraphs (3)(A), (3)(B), (3)(C), and (7)(B) of subsection (a) of this section.

[Amended by Pub. L. 101-649, Sec. 601(d), 104 Stat. 5076; 8 U.S.C. 1182; Nov. 29, 1990.]

INA 212(l), in part

(TL:VISA-159; 12-20-1996)

(1) The requirement of paragraph (7)(B)(i) of subsection (a) of this section may be waived by the Attorney General, the Secretary of State, and the Secretary of the Interior, acting jointly, in the case of an alien applying for admission as a nonimmigrant visitor for business or pleasure and solely for entry and stay on Guam for a period not to exceed fifteen days, if the Attorney General, the Secretary of State and the Secretary of the Interior, after consultation with the Governor of Guam, jointly determine that—

(A) an adequate arrival and departure control system has been developed on Guam, and

(B) such a waiver does not represent a threat to the welfare, safety, or security of the United States or its territories and commonwealths.

(2) An alien may not be provided a waiver under this subsection unless the alien has waived any right—

(A) to review or appeal under this Act of an immigration officer's determination as to the admissibility of the alien at the port of entry into Guam, or

(B) to contest, other than on the basis of an application for asylum, any action for removal of the alien.

[Amended by Pub. L. 101-649, Sec. 601(D), 104 Stat. 5077; 8 U.S.C. 1182; Nov. 29, 1990.]

[Amended by Sec. 308(e) of Pub. L. 104-208, Sept. 30, 1996.]

INA 214(a), in part

(TL:VISA-47; 08-30-1991)

(a) No alien admitted to the United States without a visa pursuant to section 217 may be authorized to remain in the United States as a nonimmigrant visitor for a period exceeding 90 days from the date of admission.

[Added by Pub. L. 99-603, Sec. 313(B), 100 Stat. 3438; 8 U.S.C. 1184(a); Nov. 6, 1986.]

INA 217, in part

(TL:VISA-177; 04-30-1998)

(a) **ESTABLISHMENT OF PILOT PROGRAM.**—The Attorney General and the Secretary of State are authorized to establish a pilot program (hereinafter in this section referred to as the "pilot program") under which the requirement of paragraph (7)(B)(i)(II) of section 212(a) may be waived by the Attorney General, in consultation with the Secretary of State, and in accordance with this section, in the case of an alien who meets the following requirements:

(1) **SEEKING ENTRY AS TOURIST FOR 90 DAYS OR LESS.**—The alien is applying for admission during the pilot program period (as defined in subsection (e)) as a nonimmigrant visitor (described in section 101(a)(15)(B)) for a period not exceeding 90 days.

(2) **NATIONAL OF PILOT PROGRAM COUNTRY.**—The alien is a national of and presents a passport issued by a country which—

(A) extends (or agrees to extend) reciprocal privileges to citizens and national of the United States, and

(B) is designated as a pilot program country under subsection (c).

(3) **EXECUTES IMMIGRATION FORMS.**—The alien before the time of such admission completes such immigration form as the Attorney General shall establish.

(4) **ENTRY INTO THE UNITED STATES.**—If arriving by sea or air, the alien arrives at the port of entry into the United States on a carrier which has entered into an agreement with the Service to guarantee transport of the alien out of the United States if the alien is found inadmissible or deportable by an immigration officer.

(5) **NOT A SAFETY THREAT.**—the alien has been determined not to represent a threat to the welfare, health, safety, or security of the United States.

(6) **NO PREVIOUS VIOLATION.**—If the alien previously was admitted

without a visa under this section, the alien must not have failed to comply with the conditions of any previous admission as such a nonimmigrant.

(7) **ROUND-TRIP TICKET.**—The alien is in possession of a round-trip transportation ticket (unless this requirement is waived by the Attorney General under regulations).

(b) **WAIVER OF RIGHTS.**—An alien may not be provided a waiver under the pilot program unless the alien has waived any right—

(1) to review or appeal under this Act of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or

(2) to contest, other than on the basis of an application for asylum, any action for removal of the alien....

(f) **DEFINITION OF PILOT PROGRAM PERIOD.**—For purposes of this section, the term "pilot program period" means the period beginning on October 2, 1988, and ending on September 30, 1997.

[Amended by sec. 210 of Pub. L. 103-416, Oct. 25, 1994 and sec. 635(a) and (c) of Pub. L. 104-208, Sep. 30, 1996.]

(g) **DURATION AND TERMINATION OF DESIGNATION OF PILOT PROGRAM COUNTRIES.**—

(1) **IN GENERAL.**—

(A) **DETERMINATION AND NOTIFICATION OF DISQUALIFICATION RATE.**—Upon determination by the Attorney General that a pilot program country's disqualification rate is 2 percent or more, the Attorney General shall notify the Secretary of State.

(B) **PROBATIONARY STATUS.**—If the program country's disqualification rate is greater than 2 percent but less than 3.5 percent, the Attorney General shall place the program country in probationary status for a period not to exceed 2 full fiscal years following the year in which the determination under subparagraph (A) is made.

(C) **TERMINATION OF DESIGNATION.**—Subject to paragraph (3), if the program country's disqualification rate is 3.5 percent or more, the Attorney General shall terminate the country's designation as a pilot program country effective at the beginning of the second fiscal year following the fiscal year in which the determination under subparagraph (A) is made.

(2) **TERMINATION OF PROBATIONARY STATUS.**—

(A) **IN GENERAL.**—If the Attorney General determines at the end of the probationary period described in paragraph (1)(B) that the program country placed in probationary status under such paragraph has failed to

develop a machine-readable passport program as required by section (c)(2)(C), or has a disqualification rate of 2 percent or more, the Attorney General shall terminate the designation of the country as a pilot program country. If the Attorney General determines that the program country has developed a machine-readable passport program and has a disqualification rate of less than 2 percent, the Attorney General shall redesignate the country as a pilot program country.

(B) **EFFECTIVE DATE.**—A termination of the designation of a country under subparagraph (A) shall take effect on the first day of the first fiscal year following the fiscal year in which the determination under such subparagraph is made. Until such date, a national of the country shall remain eligible for a waiver under subsection (a).

(3) **NONAPPLICABILITY OF CERTAIN PROVISIONS.**—Paragraph (1)(C) shall not apply unless the total number of nationals of a pilot program country described in paragraph (4)(A) exceeds 100.

(4) **DEFINITION.**—For purposes of the subsection, the term “disqualification rate” means the percentage which—

(A) the total number of nationals of the pilot program country who were—

(i) excluded from admission or withdrew their application for admission during the most recent fiscal year for which data are available; and

(ii) admitted as nonimmigrant visitors during such fiscal year and who violated the terms of such admission; bears to

(B) the total number of nationals of such country who applied for admission as nonimmigrant visitors during such fiscal year.

[Amended by Sec. 635(c)(2) of Pub. L. 104-208, Sep. 30, 1996.]

Sec. 635(c) of Pub. L. 104-208

(*TL:VISA-177; 04-30-1998*)

(2) **Transition.**—A country designated as a pilot program country with probationary status under section 217(g) of the Immigration and Nationality Act (as in effect on the day before the date of the enactment of this Act) shall be considered to be designated as a pilot program country on and after such date, subject to placement in probationary status or termination of such designation under such section (as amended by paragraph (1)).

INA 233(c)

(TL:VISA-159; 12-20-1996)

(c) The Attorney General shall have power to enter into contracts including bonding agreements with transportation lines to guarantee the passage through the United States in immediate and continuous transit of aliens destined to foreign countries. Notwithstanding any other provision of this Act, such aliens may not have their classification changed under section 248.

[Renumbered by Pub. L. 104-208, Sep 30, 1996.]

INA 245, in part

(TL:VISA-112; 05-26-1995)

(a) The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence....

(c) Subsection (a) shall not be applicable to....

(4) an alien (other than an immediate relative as defined in section 201(b)) who was admitted as a nonimmigrant visitor without a visa under section 212(l) or section 217.

[Amended by Pub. L. 99-603, sec. 313(c), 100 Stat. 3438; 8 U.S.C. 1255(c); Nov. 6, 1986.]

INA 248, in part

(TL:VISA-159; 12-20-1996)

The Attorney General may, under such conditions as he may prescribe, authorize a change from any nonimmigrant classification to any other nonimmigrant classification in the case of any alien lawfully admitted to the United States as a nonimmigrant who is continuing to maintain that status and who is not inadmissible under section 212(a)(9)(B)(i) (or whose inadmissibility under such section is waived under section 212(a)(9)(B)(V)), except in the case of—....

(4) an alien admitted as a nonimmigrant visitor without a visa under section 212(l) or section 217.

[Amended by Pub. L. 99-603, sec. 313(D), 100 Stat. 3439; 8 U.S.C. 1258; Nov. 6, 1986 and Amended by Sec. 301(b)(2) of Pub. L. 104-208, Sept. 30, 1996.]

9 FAM 41.2 Notes

(TL:VISA-187; 03-30-1999)

9 FAM 41.2 N1 Waiver for Aliens Residing in Canada or Bermuda

9 FAM 41.2 N1.1 Common Nationality Includes Commonwealth Countries and Ireland

(TL:VISA-164; 4-25-97)

The waiver of passport and visa requirements provided by 22 CFR 41.2(b) for permanent residents of Canada or Bermuda who have a common nationality with Canadians or with British subjects in Bermuda, is considered to include citizens of all Commonwealth countries, as well as citizens of Ireland. [See 9 FAM 41.2 Exhibit I.]

9 FAM 41.2 N1.2 Stateless Alien Resident of Canada or Bermuda Not Entitled to Waiver

(TL:VISA-164; 4-25-97)

Permanent residents of Canada or Bermuda who are nationals of one of the countries listed in 9 FAM 41.2 Exhibit I may be granted a waiver of visa and passport requirements. An alien resident of Canada or Bermuda who is the bearer of a certificate of identity or other stateless person's document issued by the government of one of these countries may not benefit from the waiver.

9 FAM 41.2 N2 Waiver for British Subjects Attached to Canadian and British Government Organizations in Canada

(TL:VISA-164; 4-25-97)

British subjects and their families attached to Canadian or British Government organizations in Canada, including the military, though not "permanent residents," may be regarded as nationals of Canada and eligible for the waiver provided under 22 CFR 41.2(a).

9 FAM 41.2 N3 Conditions for Admission of Aliens Under Direct Transit Waiver

9 FAM 41.2 N3.1 Not All Aliens Eligible for Transit Without Visa (TWOV)

(TL:VISA-164; 4-25-97)

8 CFR 212.1(f) is the INS companion regulation to 22 CFR 41.2(i). The privilege of TWOV is not available to certain aliens and is available to certain others only on a limited basis. [See 9 FAM 41.2 Exhibit II.]

9 FAM 41.2 N3.2 Conditions for TWOV

(TL:VISA-164; 4-25-97)

The conditions under which TWOV will be authorized for aliens to whom the privilege of TWOV may be made available without limitation pursuant to 22 CFR 41.2(i) are set forth in INS regulations 8 CFR 214.2(c)(1). [See Exhibit 9 FAM 41.2 Exhibit III.]

9 FAM 41.2 N3.3 Guidelines for Interpretation of 8 CFR 214.2(c)

9 FAM 41.2 N3.3-1 Journey Continued Within 8 Hours

(TL:VISA-2; 8-30-87)

If an alien intends to transit the United States using the same conveyance throughout, the journey must be continued within 8 hours after arrival from foreign territory.

9 FAM 41.2 N3.3-2 Scheduled Stops

(TL:VISA-2; 8-30-87)

The number of times the same conveyance on which the alien is traveling makes scheduled stops after leaving the port of entry is irrelevant, as is the total elapsed time at subsequent stopovers.

9 FAM 41.2 N3.3-3 Change of Transportation

(TL:VISA-2; 8-30-87)

Should the alien find it necessary to transfer to connecting transportation to accomplish the trip, equipment may be changed no more than twice, and the total elapsed on-ground time spent in transferring must not exceed 8 hours. However, if there is no scheduled transportation in that 8-hour period, continuation of the journey thereafter on the first available transport is acceptable. Time spent at the point of entry and at stopovers, for reasons other than for change of equipment, need not be computed in determining whether TWOV is permissible.

9 FAM 41.2 N3.3-4 Scheduled Change of Transportation and 8-Hour Rule

(TL:VISA-2; 8-30-87)

If more than one conveyance is required for transit, the alien must be scheduled to leave the port of entry within 8 hours, and the total amount of time scheduled for stops at points where transfers of equipment occur must be less than 8 hours.

9 FAM 41.2 N3.4 Exception to 8-Hour Rule for Crew Members Joining Vessel or Aircraft

(TL:VISA-187; 03-30-1999)

An exception to the 8-hour rule is provided for crew members arriving in transit to join a vessel or aircraft. Such crew members arriving in transit *need not be in possession of a C-1 visa*. To qualify for admission in TWOV status, they must have valid D visas, and applicable clearances must have been processed.

9 FAM 41.2 N3.5 TWOV Not Applicable to Cruise Ship Passengers

(TL:VISA-187; 03-30-1999)

Passengers on cruise ships that call at U.S. ports for brief periods and then proceed abroad do not qualify for TWOV status.

9 FAM 41.2 N3.6 Liability of Carrier in TWOV Cases

(TL:VISA-164; 4-25-97)

A carrier bringing aliens to the United States under this provision may be subject to a civil penalty of \$2,000.00 if the alien does not comply with the terms of the regulations. Aliens under the bonded transit waiver may not, under any circumstance, change classification to another nonimmigrant status under INA 248.

9 FAM 41.2 N3.7 TWOV Procedure Does Not Justify Refusal to Accept Visa Application

(TL:VISA-33; 6-29-90)

The consular officer may not use the existence of the TWOV procedure to justify a refusal to accept an application for a transit visa.

9 FAM 41.2 N4 List of Signatory Transportation Lines

(TL:VISA-164; 4-25-97)

See 9 FAM 41.2 Exhibit IV for a list of carriers which have contracts, including bonding agreements, with the Attorney General pursuant to INA 233(c) regarding aliens who are being transported in immediate and continuous transit through the United States. [See also 9 FAM 41.2 Exhibit II for aliens of countries excepted from these contracts.]

9 FAM 41.2 N5 Natives and Residents of Trust Territory of the Pacific Islands Not Proceeding in Direct Transit to the United States

(TL:VISA-187; 03-30-1999)

A native and resident of the Trust Territory traveling to the United States, but not in direct and continuous transit from the Trust Territory, may be issued a nonimmigrant visa *without being charged the reciprocity fee. The visa may be valid for a period and number of applications for admission consistent with the traveler's needs. [See 9 FAM PART IV Appendix C under country concerned for the number of applications and validity of visa.] The applicant, however, must pay the MRV fee, which is currently \$45.00.*

9 FAM 41.2 N6 Parole Procedure Under INA 212(d)(5)

(TL:VISA-187; 03-30-1999)

Consular officers may answer questions about the relationship between the parole procedure and the regular visa procedure under the INA with a reference to INA 212(d)(5) *that* contains the statutory authority for the parole procedure. Consular officers shall not give more information in answer to inquiries from the general public, nor shall consular officers suggest parole to an alien or an interested party. In appropriate cases, consular officers may refer inquirers to INS. [See 9 FAM 42.1 N5.]

9 FAM 41.2 N7 Restrictions on British Virgin Islands Nationals Entering U.S. Virgin Islands Under Waiver

(TL:VISA-187; 03-30-1999)

a. A national of the British Virgin Islands, and resident therein, requires a passport, but not a visa if proceeding to the U.S. Virgin Islands.

b. A national of the British Virgin Islands, and resident therein, requires a passport, but does not require a visa to apply for entry into the United States if such applicant:

(1) Is proceeding by aircraft directly from St. Thomas, U.S. Virgin Islands;

(2) Is traveling to some other part of the United States solely for the purpose of business or pleasure as described in INA 101(a)(15)(B);

(3) Satisfies the examining U.S. Immigration officer at that port of entry that he or she is admissible in all respects other than the absence of a visa; and

(4) Presents a current Certificate of Good Conduct issued by the Royal Virgin Islands Police Department indicating that he or she has no criminal record.

9 FAM 41.2 N8 Visa Issuance to Aliens Entitled to Documentary Waiver

(TL:VISA-187; 03-30-1999)

An alien entitled to a waiver of documentation may apply for and receive the type of visa *that* would otherwise be waived. If a visa is issued notwithstanding the waiver, the consular officer shall make a notation on Form OF-156, indicating that the visa was issued at the request of the applicant.

9 FAM 41.2 N9 K Visa Alien Not Entitled to Nonimmigrant Visa Waiver

(TL:VISA-164; 4-25-97)

An alien qualifying for a K visa as the fiancé or fiancée of a U.S. citizen is not entitled to a waiver of the nonimmigrant visa requirement regardless of circumstances.

9 FAM 41.2 N10 Guam Visa Waiver Program

(TL:VISA-187; 03-30-1999)

The Guam Visa Waiver Program, as authorized by the Omnibus Territories Act of 1986 (Pub. L. 99-396), was implemented on October 1, 1988. The program allows citizens of designated countries to make a temporary visit to Guam provided that they:

- (1) Visit for business or pleasure for a period of not more than 15 days;
- (2) Travel aboard a participating airline;
- (3) Waive any right otherwise provided in the Act to administrative or judicial review, or appeal of an immigration officer's determination of admissibility; and
- (4) Do not apply for an extension of stay, adjustment of status, change of nonimmigrant status, or onward travel to another destination in the United States.

For INS regulations regarding the Guam Visa Waiver Program see 9 FAM 41.2 Exhibit V.

9 FAM 41.2 N11 Visa Waiver Pilot Program (VWPP)

(TL:VISA-187; 03-30-1999)

a. The VWPP was established by section 313 of the Immigration Reform and Control Act of 1986 (Pub. L. 99-603). It provided for the visa free entry of nationals of designated countries coming to the United States for tourism or business (B visa purposes) for a period not to exceed 90 days, provided they arrive on a participating carrier and are in possession of a round-trip or onward ticket.

b. The Immigration Act of 1990 (Pub. L. 101-649) removed the eight-country cap and extended the program for the original eight countries as well as any other countries designated by the Secretary of State and the Attorney General until September 30, 1994.

c. The Immigration and Nationality Technical Corrections Act of 1994 (Pub. L. 103-416) further extended the program through September 30, 1996 and created a probationary status for participating countries in the Visa Waiver Pilot Program.

d. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub. L. 104-208) eliminated the joint action requirement by amending the law to allow the Attorney General to act "in consultation with the Secretary of State" rather than "jointly with the Secretary of State" in designating the countries eligible to participate in the program. The program was further extended until September 30, 1997 and repealed section 217(f) which permitted countries to enter the program in probationary status.

e. *Public Law 105-173 of April 28, 1998, amended the Immigration and Nationality Act to modify and extend the VWPP through April 30, 2000.*

9 FAM 41.2 N11.1 Countries Eligible to Participate in VWPP

(TL:VISA-164; 4-25-97)

The VWPP waives the nonimmigrant visa requirement for admission of certain aliens into the United States for a period not to exceed ninety days. The Attorney General, after consulting with the Secretary of State, is authorized to designate those countries eligible to participate in the VWPP. A list of the countries currently eligible to participate in the VWPP is shown in 9 FAM 41.2 Exhibit VI.

9 FAM 41.2 N11.2 Eligibility Requirements

9 FAM 41.2 N11.2-1 General

(TL:VISA-187; 03-30-1999)

An alien who is a national of a participating VWPP country does not require a visa, provided the alien:

- (1) Is classifiable as a visitor under INA 101(a)(15)(B);
 - (2) Seeks to enter the United States for a period not to exceed 90 days;
 - (3) Possesses a valid passport issued by a VWPP designated country;
 - (4) Completes and signs Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form;
 - (5) Waives any right otherwise provided in the Act to administrative or judicial review or appeal of an immigration officer's determination of admissibility; and
 - (6) Waives any right to contest any action for deportation.
- (7) If arriving by air or sea, arrives on a carrier *that* has entered into an agreement with the INS to guarantee transport of the alien if found inadmissible or removable. [See 9 FAM 41.2 Exhibit VII for a list of signatory carriers.]

9 FAM 41.2 N11.2-2 Applicants Arriving by Air or by Sea

(TL:VISA-64; 4-25-97)

VWPP participants arriving by air must have:

- (1) A round-trip, non-transferable transportation ticket valid for a period of not less than one year;
- (2) Airline employee passes indicating return passage;
- (3) Individual vouchers;
- (4) Group vouchers for charter flights only; or
- (5) Military travel orders (which include military dependents) for return to duty stations outside the United States on U.S. military flights.

9 FAM 41.2 N11.2-3 Applicants Arriving at Land Border Ports-of-Entry

(TL:VISA-164; 4-25-97)

Any alien arriving at a land border port of entry must provide evidence of:

- (1) Financial solvency; and
- (2) A domicile abroad.

9 FAM 41.2 N11.3 Form I-94W Required

(TL:VISA-187; 03-30-1999)

Applicants for entry under the VWPP must complete Form I-94W, Visa Waiver Pilot Program Information Form, prior to arriving at the port of entry, and must undergo screening at the port of entry by the INS. Form I-94W makes clear that the waiver traveler surrenders the right to an exclusion hearing.

9 FAM 41.2 N11.4 Round-Trip Ticket

(TL:VISA-164; 4-25-97)

For purposes of the VWPP, a round-trip ticket means any non-transferable ticket, valid for a period of not less than one year, which takes the traveler out of the United States to an onward destination, including foreign contiguous territory or adjacent island, if he or she is resident there. If the traveler is not resident in contiguous territory or adjacent islands, the ticket must transport him or her to a foreign location outside contiguous territory or adjacent islands.

9 FAM 41.2 N11.5 Port of Embarkation for United States

(TL:VISA-187; 03-30-1999)

Participants in the VWPP may embark for the United States from anywhere in the world, *provided* they arrive aboard a participating carrier.

9 FAM 41.2 N11.6 Aliens Transiting United States

(TL:VISA-33; 6-29-90)

Qualified travelers may elect to use the VWPP instead of TWOV when transiting the United States.

9 FAM 41.2 N11.11 Maintenance of Status

(TL:VISA-164; 4-25-97)

An alien admitted to the United States under the VWPP:

- (1) Is admitted as a visitor for business or pleasure for a period not to exceed 90 days;
- (2) May not engage in activities inconsistent with status as a visitor;
- (3) Is not eligible for an extension of temporary stay in the United States;
- (4) Is not eligible for adjustment of status to that of a lawful permanent resident alien (other than as an immediate relative as defined under INA 201(b) or under the provisions of INA 245(i)); and
- (5) Is not eligible for change of nonimmigrant status.

9 FAM 41.2 N12 Canadian Citizens Seeking Admission as Treaty Traders or Treaty Investors

(TL:VISA-164; 4-25-97)

During the United States-Canada Free Trade Agreement negotiations, it was recognized that the E visa classification is extremely technical and sometimes quite complex. All parties agreed that the visa process was the best way to accord this classification. 22 CFR 41.2(m) removes the visa exemption for Canadian citizens who seek to enter the United States as treaty traders/investors under INA 101(a)(15)(E). Such Canadian citizens must apply for an E visa at a U.S. embassy or consulate. [See 9 FAM 41.51 Regs/Statutes and 9 FAM 41.51 Notes.]

9 FAM 41.2 N13 Canadian Citizens Seeking Admission Under NAFTA

(TL:VISA-164; 4-25-97)

Citizens of Canada seeking admission to the United States under the provisions of the North American Free Trade Agreement (NAFTA) are exempt from the visa requirement, unless seeking classification under INA 101(a)(15)(E). [See also 9 FAM 41.59 and 9 FAM PART IV Appendix P, Services for INS - NAFTA.]

9 FAM 41.2 N11.7 Side Trips Permitted Within 90-day Limit

(TL:VISA-164; 4-25-97)

Travelers participating in the VWPP must make their initial entry into the United States aboard one of the participating carriers. After their initial entry into the United States, temporary departure to, and return from, Canada, Mexico or adjacent islands by car or other carriers is permitted, as long as the total stay (in the United States, plus contiguous territory and adjacent islands) does not exceed 90 days.

9 FAM 41.2 N11.8 Nationality and Passport Requirements

(TL:VISA-187; 03-30-1999)

a. The traveler's nationality, not place of birth, determines entitlement to participate in the VWPP. Passports must reflect the nationality of a participating country. British passports must reflect "BRITISH CITIZEN", or be annotated with the phrase "HOLDER HAS THE RIGHT OF ABODE IN THE UNITED KINGDOM."

b. Bearers of official and diplomatic passports can use the VWPP, *provided* they are entering the United States for a B visa purpose. If they are coming for a(n) A or G purpose, including a temporary assignment of less than 90 days, the appropriate visa must be stamped in the passport.

9 FAM 41.2 N11.9 Aliens Requiring Waiver of Ineligibility

(TL:VISA-164; 4-25-97)

Persons for whom a waiver of ineligibility is required must apply for and receive a visa; they are not eligible to participate in the VWPP. Persons covered by the blanket waiver of INA 212(a)(1) for mentally retarded individuals can participate in the VWPP, if otherwise qualified, and accompanied by a responsible adult; the blanket waiver will be noted on Form I-94, Arrival-Departure Record, at the port of entry.

9 FAM 41.2 N11.10 Travelers Not to be Discouraged from Seeking Visas

(TL:VISA-187; 03-30-1999)

Although use of the VWPP is encouraged, travelers availing themselves of it *should be made aware of the risks involved and the surrendering of* certain rights. Consequently, they should not be discouraged from seeking normal visa services.

9 FAM 41.3

Waiver by joint action of consular and immigration officers of passport and/or visa requirements.

(TL:VISA-184; 01-22-1999)

(TL:VISA-47; 8-30-91)

Under the authority of INA 212(d)(4), the documentary requirements of INA 212(a)(7)(B)(i)(I), (i)(II) may be waived for any alien in whose case the consular officer serving the port or place of embarkation is satisfied after consultation with, and concurrence by, the appropriate immigration officer, that the case falls within any of the following categories:

(a) Residents of foreign contiguous territory; visa and passport waiver.

(TL:VISA-2; 8-30-87)

An alien residing in foreign contiguous territory who does not qualify for any waiver provided in section 41.1 and is a member of a visiting group or excursion proceeding to the United States under circumstances which make it impractical to procure a passport and visa in a timely manner.

(b) Aliens for whom passport extension facilities are unavailable; passport waiver.

(TL:VISA-47; 8-30-91)

An alien whose passport is not valid for the period prescribed in INA 212(a)(7)(B)(i)(I) and who is embarking for the United States at a port or place remote from any establishment at which the passport could be revalidated.

(c) Aliens precluded from obtaining passport extensions by foreign government restrictions; passport waiver.

(TL:VISA-47; 8-30-91)

An alien whose passport is not valid for the period prescribed in INA 212(a)(7)(B)(i)(I) and whose government, as a matter of policy, does not revalidate passports more than 6 months prior to expiration or until the passport expires.

(d) Emergent circumstances; visa waiver.

(TL:VISA-2; 8-30-87)

An alien well and favorably known at the consular office, who was previously issued a nonimmigrant visa which has expired, and who is proceeding directly to the United States under emergent circumstances which preclude the timely issuance of a visa.

(e) Members of armed forces of foreign countries; visa and passport waiver.

(TL:VISA-184; 01-22-1999)

An alien on active duty in the armed forces of a foreign country and a member of a group of such armed forces traveling to the United States, on behalf of the alien's government or the United Nations, under advance arrangements made with the appropriate military authorities of the United States. The waiver does not apply to a citizen or resident of Cuba, *Mongolia*, North Korea (Democratic People's Republic of Korea), Vietnam (Socialist Republic of Vietnam), or the People's Republic of China.

[Amended by 63 FR 48577; Sept. 11, 1998.]

(f) Landed immigrants in Canada; passport waiver .

(TL:VISA-9; 3-23-88)

An alien applying for a visa at a consular office in Canada:

- (1) Who is a landed immigrant in Canada;
- (2) Whose port and date of expected arrival in the United States are known; and
- (3) Who is proceeding to the United States under emergent circumstances which preclude the timely procurement of a passport or Canadian certificate of identity.

(g) Authorization to individual consular office; visa and/or passport waiver.

(TL:VISA-2; 8-30-87)

An alien within the district of a consular office which has been authorized by the Department, because of unusual circumstances prevailing in that district, to join with immigration officers abroad in waivers of documentary requirements in specific categories of cases, and whose case falls within one of those categories.

9 FAM 41.3 Related Statutory Provisions

INA 212(a)(7)(B)(i)

(TL:VISA-47; 8-30-91)

For provisions of INA 212(a)(7)(B)(i), see section 41.1 Related Statutory Provisions.

INA 212(d)(4)

(TL:VISA-9; 3-23-88)

For provisions of INA 212(d)(4), see section 41.2 Related Statutory Provisions.

9 FAM 41.3 Notes

9 FAM 41.3 N1 Transporting Undocumented Aliens to United States

(TL:VISA-47; 8-30-91)

Posts must inform carriers inquiring about transporting an undocumented alien that they would be subject to a fine unless such alien is within one of the categories listed in 22 CFR 41.2 or 41.3.

9 FAM 41.3 N2 Areas of Responsibility of Immigration Officers

(TL:VISA-47; 8-30-91)

Consular officers shall address requests for concurrence in waivers of passport and visa requirements to the immigration officer in charge, in care of the appropriate post as indicated in 9 FAM PART IV.

9 FAM 41.3 N3 Furnishing Information Concerning Waivers to Immigration Officers

(TL:VISA-47; 8-30-91)

a. Consular officers shall furnish the following information to immigration officers when requesting concurrence in waivers of passport and visa requirements:

- (1) Alien's full name with all aliases;
- (2) Date and place of birth;
- (3) Nationality;
- (4) Date and port of expected arrival in the United States;
- (5) Nonimmigrant classification;
- (6) Documents to be waived;
- (7) A brief summary of the emergent circumstances surrounding the case which must include information indicating that all of the requirements of the subparagraph of 22 CFR 41.3 under which the waiver is recommended have been met; and

(8) Name, address and telephone number of the person the alien intends to visit in the United States.

b. In cases falling within 22 CFR 41.3(e), consular officers shall also furnish the following information:

(1) Name, nationality and type of carrier, if any (for example, battleship, training vessel, or aircraft);

(2) The purpose of entry;

(3) Date and port of expected arrival in the United States, other ports of call in the United States, if any, and period of anticipated stay in each port, and

(4) Number, rank, if any, and nationality of members of group.

9 FAM 41.3 N4 Issuing Documents to Waiver Beneficiaries

(TL:VISA-47; 8-30-91)

In cases in which a waiver has been granted under 22 CFR 41.3, the consular officer shall give the alien concerned, or the leader of a group, a signed letter stating that a waiver has been granted under the provisions of INA 212(d)(4)(A) and including the name, title and location of the immigration officer who joined in the waiver. In cases of waivers granted pursuant to 22 CFR 41.3(a), the letter shall list all persons included in the waiver and show the date and place of birth and nationality of each alien and the function or position of each alien in the group. If the waiver covers more than one application for admission, the consular officer shall provide a copy of the letter for each application. The consular officer shall retain one copy of the letter in the consular files. If circumstances do not permit the issuance of a letter, the consular officer shall make a memorandum for the consular files including the items listed in N3 above. The consular officer shall request the immigration officer joining in a waiver under 22 CFR 41.3(d) to forward appropriate information to the immigration officer at the expected port of arrival in the United States.

9 FAM 41.3 N5 Issuing Visas to Aliens Entitled to Documentary Waiver

(TL:VISA-47; 8-30-91)

See section 9 FAM 41.2 N8.



COMMISSIONER

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OCT 24 2002

August 14, 2002

Ms. Lindy Paul
Chief of Staff
Joint Committee on Taxation
Washington, D.C. 20515-6453

Dear Ms. Paul:

I am responding to your letter dated June 28, 2002, asking for information on the tax and immigration rules enacted in 1996 relating to tax-motivated expatriation.

Under sections 6103(f)(2) and (f)(4)(A) of the Internal Revenue Code (the Code), this letter contains tax return information which is in the chart included in the response to Question #5. Disclosure of this information (even to the taxpayers involved) is subject to the limitations of section 6103.

1. Provide the number of former U.S. citizens who received certificates of loss of nationality for the years 2000, 2001, and 2002 (through June 30, 2002).

Through June 30, 2002, the number of former U.S. citizens who received certificates of loss of nationality (CLN) was:

<u>Year</u>	<u>Number</u>
2000	473
2001	319
2002	51

2. For 2000 and 2001, provide the number of former U.S. citizens who provided to the IRS an IRS Form 8854 or other information statement relating to their loss of nationality.

Through June 30, 2002, the number of former U.S. citizens who provided to the IRS a Form 8854 or other information statements on their loss of nationality was:

<u>Year</u>	<u>Number</u>
2000	402
2001	284
2002	43

3. For 2000 and 2001, provide the number of former U.S. citizens who provided an IRS Form 8854 or other information statement and who also (a) identified themselves as meeting one or more of the monetary thresholds under section 877(a)(2) of the Internal Revenue Code (the "Code"), or (b) included a social security number.

The number of individuals who provided a Form 8854 or other information statement and also (a) identified themselves as meeting one or more of the monetary thresholds under section 877(a)(2) of the Internal Revenue Code, or (b) included a social security number was:

<u>Year</u>	<u>Number</u>
2000	45
2001	31

4. For 2000 and 2001, provide the number of individuals who identified themselves as meeting one or more of the monetary thresholds under section 877(a)(2) of the Code and who submitted ruling requests to the IRS.

In 2000, 65 individuals identified themselves as meeting one or more of the monetary thresholds and requested rulings from the IRS. Of this number, 13 were former U.S. citizens and 52 were former long-term U.S. residents. In 2001, 77 individuals identified themselves as meeting one or more of the monetary thresholds and requested rulings from the IRS. Of this number, 31 were former U.S. citizens and 46 were former long-term U.S. residents.

5. The Joint Committee staff understands that the IRS previously identified 11 cases that are potentially not in compliance with the expatriation tax rules (10 cases relating to the 1997 tax year, and 1 case relating to the 1996 tax year). Describe the current status of these cases, and whether any of these cases has resulted in proposed adjustments or in the collection of tax. Also describe any other cases that the IRS has identified as potentially not in compliance with the expatriation tax rules, including the status and nature of such cases.

Status report on expatriate cases

KEY TO SOURCE:

EC = EXAM CLASSIFICATION

CC = REFERRAL FROM OFFICE OF CHIEF COUNSEL

EXP = FROM EXPATRIATE DATA BASE

CASES INCLUDED IN MAY 2000 REPORT

IRC
6103
b(3)

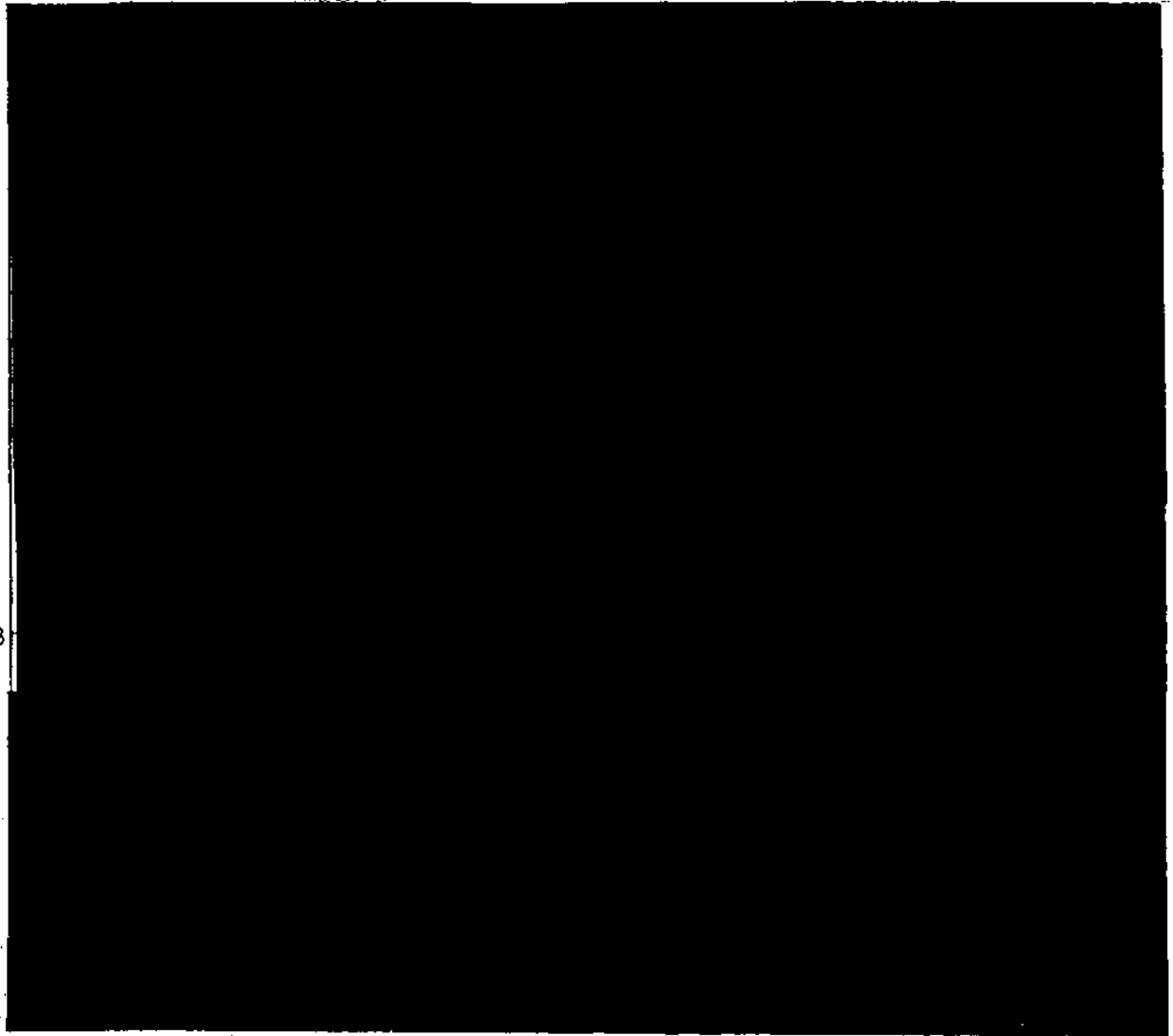


Chart contains taxpayer information protected under Section 6103 of the Internal Revenue Code.

IRC
6103
b(3)

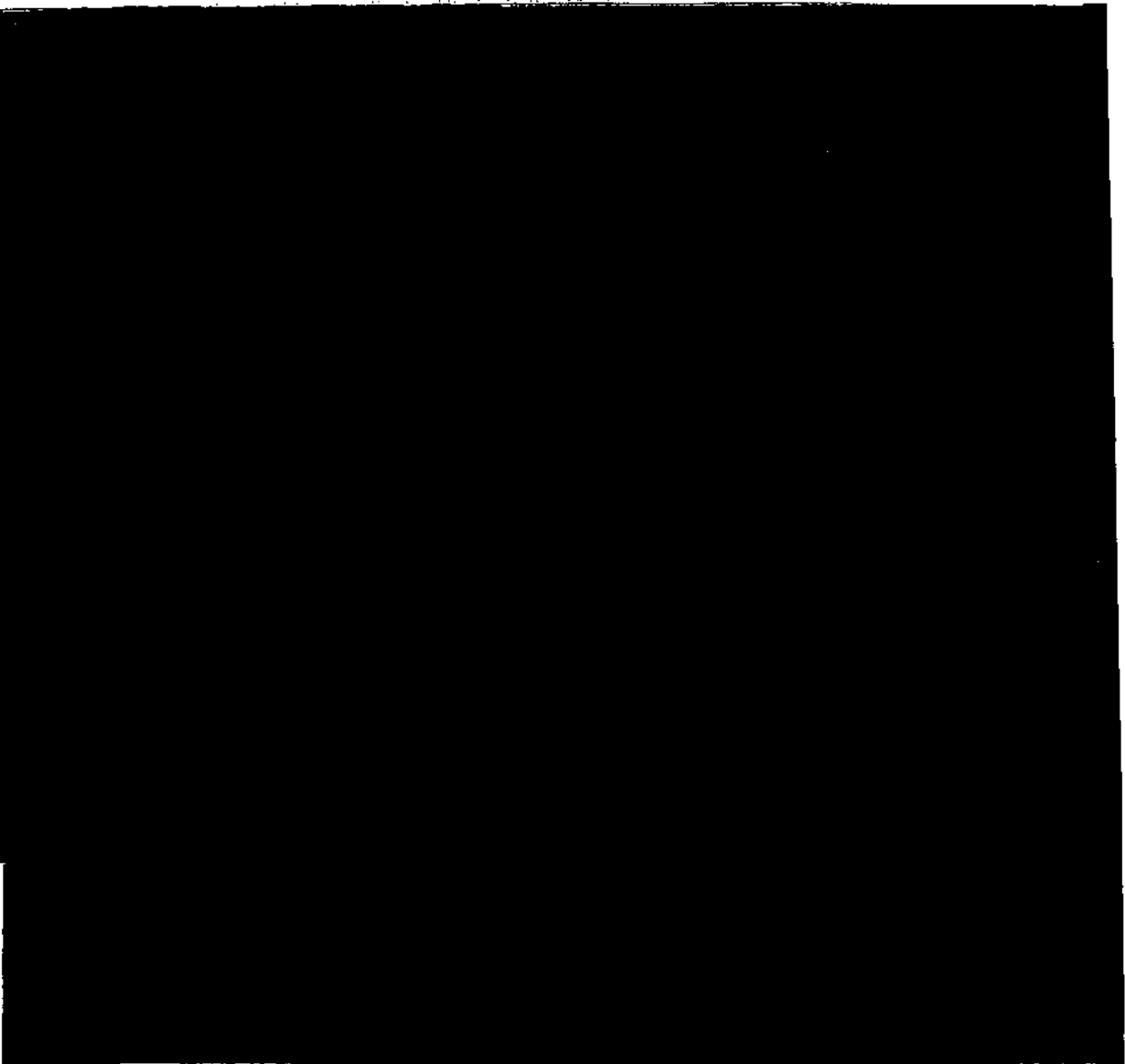


Chart contains taxpayer information protected under Section 6103 of the Internal Revenue Code.

IRC
6103
b(3)



Chart contains taxpayer information protected under Section 6103 of the Internal Revenue Code.

Cases Not Included in May 2000 Report

IRC
6103
(b)(3)

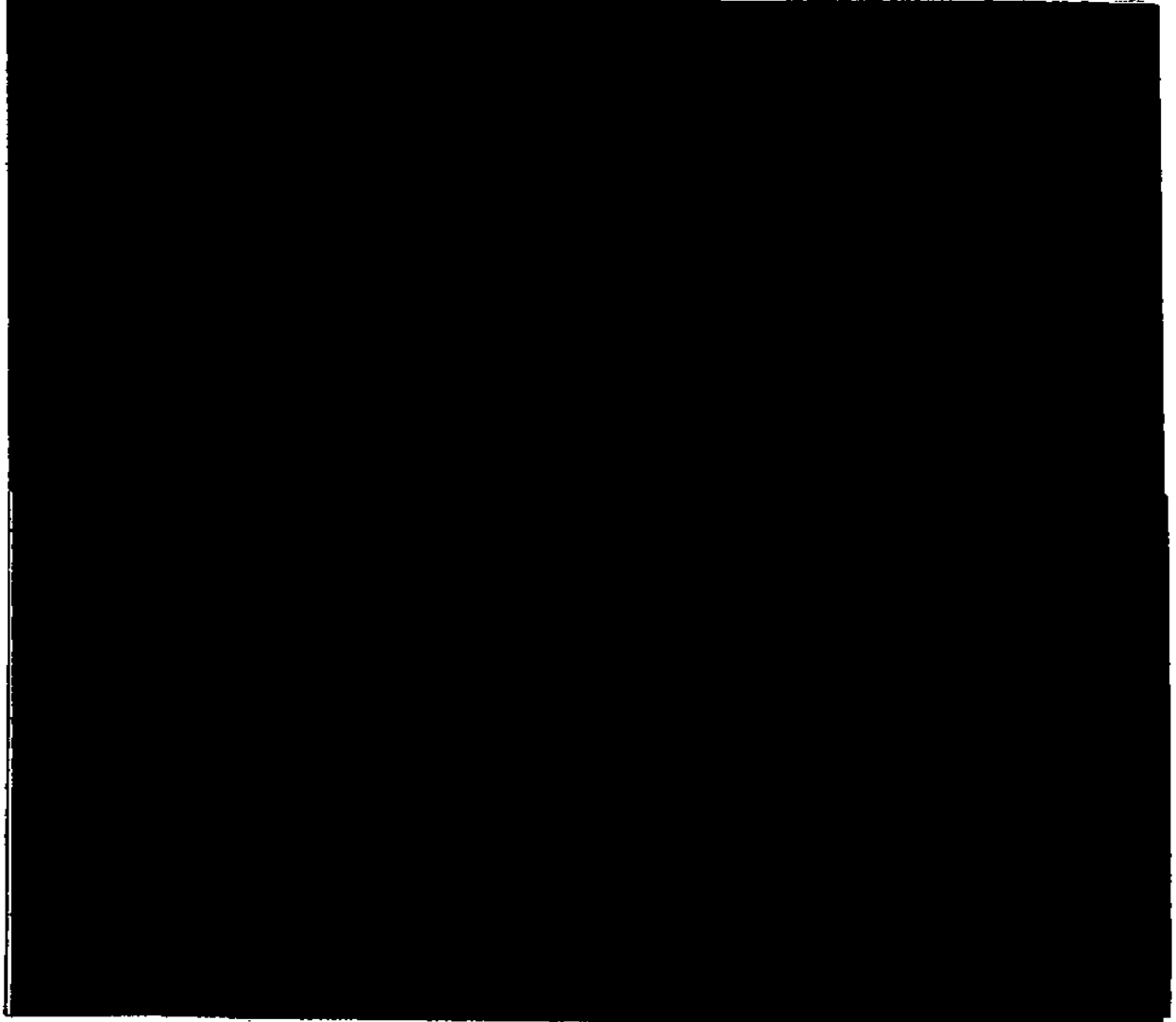


Chart contains taxpayer information protected under Section 6103 of the Internal Revenue Code

6. The Joint Committee staff understands that in January 2000, the IRS began sending notices to persons who failed to provide required information statements. Provide the number of notices that have been sent to persons who failed to provide required information statements, the number of penalties assessed and collected, and whether any information was obtained as a result of the notices.

We mailed approximately 125 letters to people who failed to provide required information statements. There were 74 responses to these letters, which brought the individuals into full compliance with the reporting requirements of section 6039G of the Code. No penalties were assessed against these individuals. For the individuals who did not respond to the letters, our compliance efforts were hampered by lack of social security numbers and our inability to properly identify the individuals. Because of the difficulty of assessing penalties in these cases, we focused our resources on other areas of noncompliance.

7. Describe whether IRS practices with respect to administering and enforcing the expatriation tax rules, based on Notice 97-19 and Notice 98-34 have changed since January 1, 2000, and if so, describe the nature of such changes and whether any further administrative guidance is expected to be issued.

The administration and enforcement of the expatriation tax rules, based on Notice 97-19 and Notice 98-34, have not changed in any significant way from the process described in my letters dated May 5, 2000 and May 16, 2000. I enclosed copies of these letters. A group of six attorneys and three reviewers in the Chief Counsel's office work the section 877 ruling requests and are responsible for a number of other international tax provisions. Centralizing the ruling process in a small group results in consistency in the evaluation procedure and in conclusions.

With one possible exception, we do not plan to issue additional administrative guidance in the near future. Section 877(e)(4) authorizes the Secretary of the Treasury to provide regulations exempting from the tax avoidance presumptions former long-term residents of the United States who are now expatriates. As the Chief Counsel's office gains experience with the various situations in which long-term residents become expatriates, it may provide exemptions for them from the presumptions and rulings process.

8. The Joint Committee staff understands that the IRS receives certain information from the Immigration and Naturalization Service ("INS") with respect to former green card holders. Describe any modifications or changes in administrative practices since January 1, 2000, with respect to the sharing of information between the IRS and the INS for the purpose of identifying individuals who are former long-term residents subject to the expatriation tax rules.

As I described in my letter to you dated May 5, 2000, the information exchange program with INS began in November 1996. The INS agreed to provide annually the information we requested. We received the data for 1996 and 1997 in 1998 as a single package and the data for 1998 in June 1999. We received the data for 1999 in 2000. The data we received was generally for all individuals who gave up their green cards during the previous year. We loaded this information into a database and discarded the records for individuals who did not meet the residence requirements of section 877(e)(2) of the Code. We then conducted a statistically valid sample of the remaining records, drawing separate samples for abandoned and revoked cards.

In 1999, the last year we sampled green card data from the INS, we had 1,730 records for individuals who had abandoned their green cards and for whom we received social security numbers. We conducted a filing compliance review of 67 of these records. We found this population was generally filing compliant. We also received from the INS 18,202 records for individuals whose green cards were revoked and for whom the IRS received social security numbers. Of this number, we selected a sample of 205 for a filing compliance review. We encountered numerous problems in using the data for revocations from 1996 - 1999, including:

- Invalid social security numbers
- Social security numbers/name mismatches (the last name on the Social Security Administration's records did not match the name on IRS records)
- No record of filings

Because the sample of individuals who abandoned their green cards was generally compliant and because of the considerable difficulties in using the data for individuals with revoked green cards, we decided to redirect our resources to other areas of noncompliance.

9. The Joint Committee staff understands that the IRS initiated a project in December 1999 to assess compliance with the expatriation tax rules by individuals who have supplied information concerning their net worth and their income tax liability. Provide a copy of the report associated with this project, or if not complete or available, describe what has been done with respect to this project, the current status of the project, and any results or conclusions that have been reached.

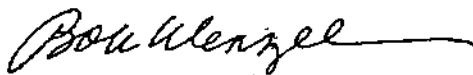
The compliance improvement program (CIP) project resulted in 11 examinations. We included these taxpayers in the list provided in the response to Question #5. Of the 11 cases, we have closed 8, and the examinations in the remaining 3 are still in progress. The CIP project was not renewed.

10. Provide the number and describe the nature of cases since January 1, 2000, in which the IRS has utilized exchange of information procedures under a tax treaty to solicit information regarding whether an individual may be subject to the expatriation tax rules.

We have not used the treaty exchange of information procedures to solicit information on whether particular individuals may be subject to the expatriation tax rules.

I hope this information is helpful. Please contact me at (202) 622-9511, if I can assist you further.

Sincerely,


Acting for  Charles O. Rossotti

Enclosures (2)



NATIONAL DIRECTOR
FOR LEGISLATIVE
AFFAIRS

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OCT 24 2002

SEP 16 2002

Ms. Lindy Paull
Chief of Staff
Joint Committee on Taxation
Washington, D.C. 20515

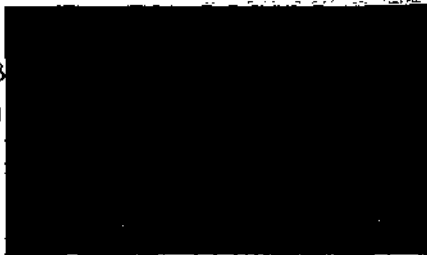
Dear Ms. Paull:

At the September 3, 2002 meeting with your staff, you requested additional information about the expatriates we selected for examination and identified in our response to question 5 of your June 28, 2002 letter.

Under sections 6103(f)(2) and (f)(4)(A) of the Internal Revenue Code (the Code), this letter contains tax return information. Disclosure of this information (even to the taxpayers involved) is subject to the limitations of section 6103.

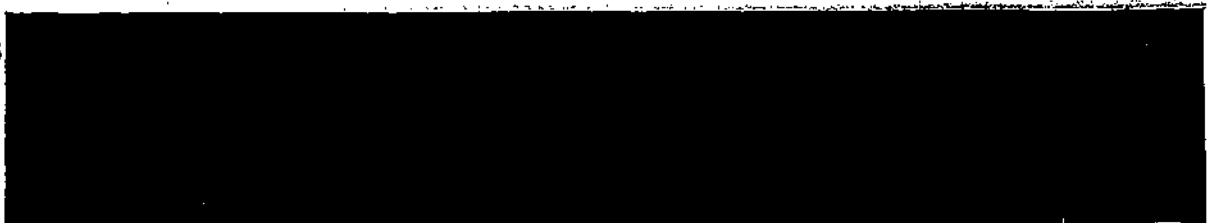
The following expatriates we selected for examination also requested private letter rulings from the IRS under section 877(c)(1) of the Code:

IRC
6103
b(3)



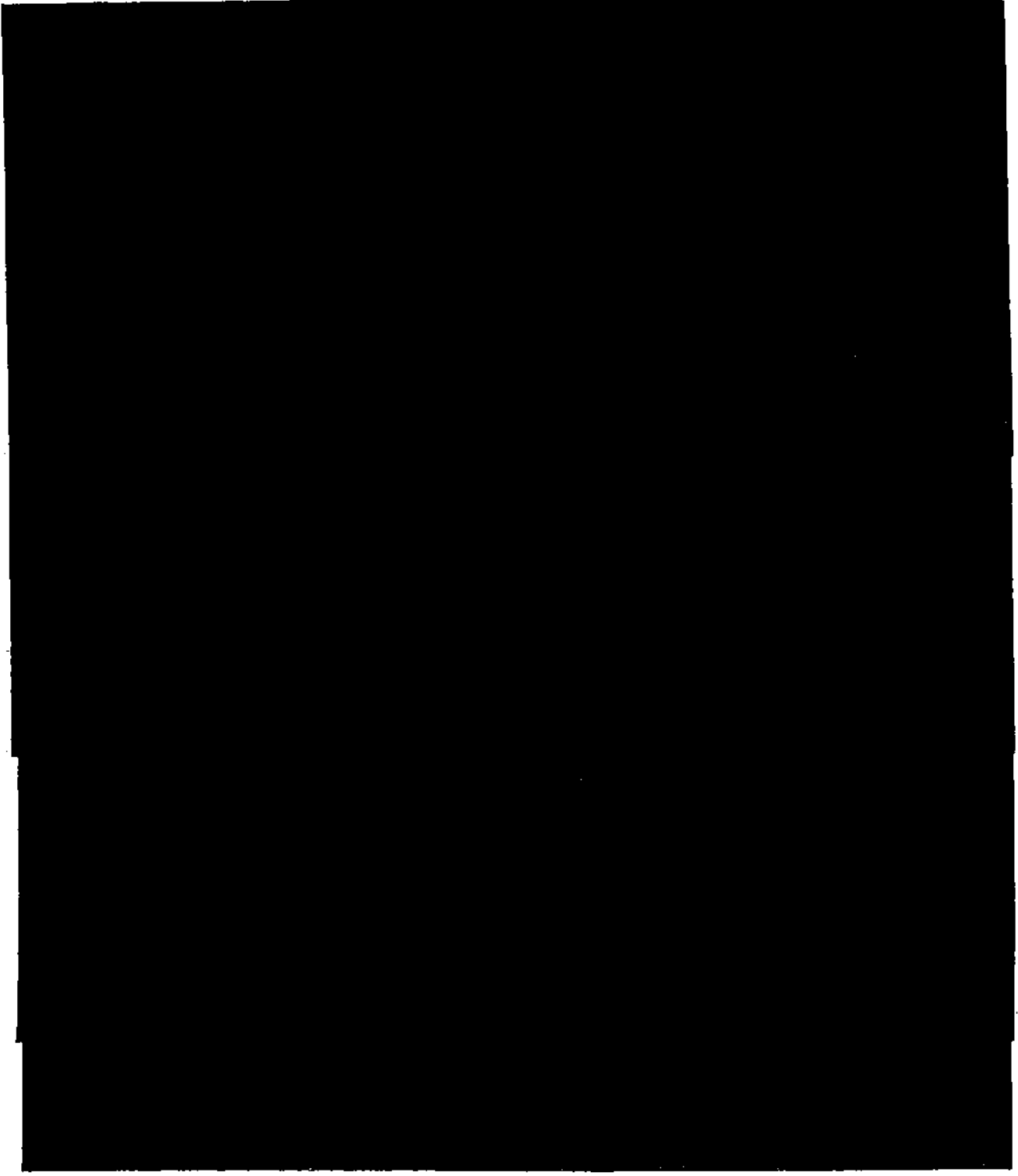
The following is information these individuals submitted in connection with their ruling requests.

IRC
6103
b(3)



IRC
6103
(b)(3)

IRC
6103
(b)(3)



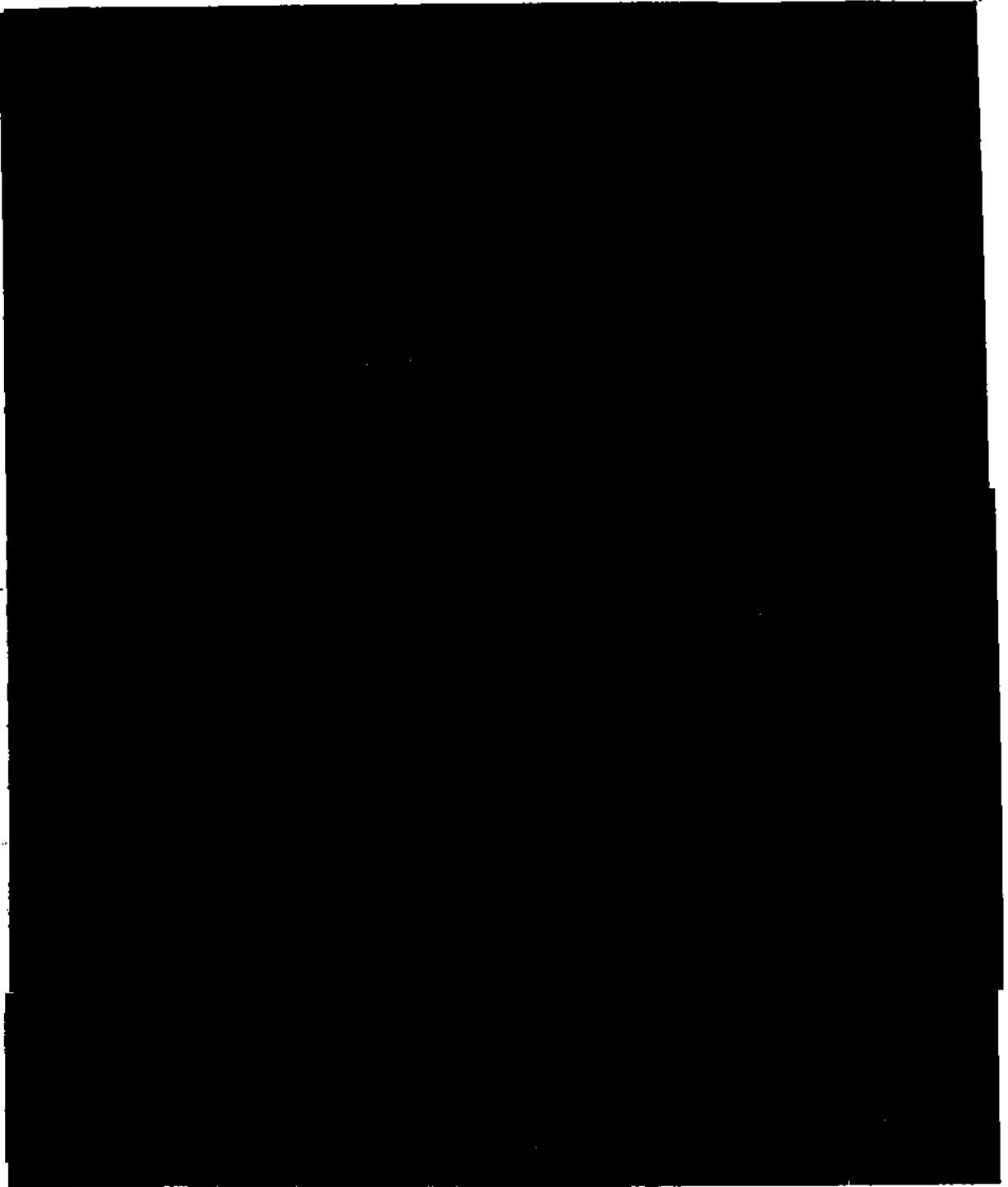
JRC
6103
(b)(3)

to the three amounts to the OIA.

IRC
6103
(b)(3)

IRC
6103
(b)(3)

IRC
6103
(b)(3)



IRC
6103
(b)(3)

IRC
6103
(b)(3)

I hope this information is helpful. Please contact Ed Williams at (202) 622-3268, if you need additional information.

Sincerely,



Floyd Williams



NATIONAL DIRECTOR
FOR LEGISLATIVE
AFFAIRS

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

September 20, 2002

Ms. Lindy Paull
Chief of Staff
Joint Committee on Taxation
Washington, D.C. 20515

Dear Ms. Paull:

I am providing you with additional information that you have requested in order to assist the staff in preparation of its expatriation study.

Enclosed is a document that describes the processing of expatriation cases. That document describes the process that was in place prior to the IRS reorganization, the process we follow today, and the process that we plan to implement.

IRC 6103
(b)(3)

Also enclosed, is additional tax information you requested regarding certain expatriation cases. These cases involve [REDACTED]

Under sections 6103(f)(2) and (f)(4)(A) of the Internal Revenue Code, this letter contains tax return information. Disclosure of this information (even to the taxpayers involved) is subject to the limitations of Code section 6103.

I hope this information is helpful to you. Please call me at (202) 622-4725, if we can be of additional assistance.

Sincerely,


Floyd L. Williams

Enclosures

[ENCLOSURES REDACTED IN THEIR ENTIRETY]



U.S. Department of Justice
Immigration and Naturalization Service

HQADN 70/21.1.24

Office of Congressional Affairs

425 I Street NW
Washington, DC 20536

OCT 8 2002

Ms. Lindy L. Paull
Chief of Staff
Joint Committee on Taxation
1015 Longworth House Office Building
Washington, D.C. 20515

Dear Ms. Paull,

This letter will serve as a formal response to your faxed letter dated July 15, 2002, in which you requested information from the Immigration and Naturalization Service (the INS) to assist you in updating and completing a draft report on the rules related to tax-motivated expatriation enacted in 1996. Your letter requested a response by July 26, 2002 due to the time-sensitive nature of your review. Please accept my apologies for the delay in responding. The answers to your questions are as follows.

1. The Joint Committee staff understands that, in the early part of 2000, the INS was in the process of publishing proposed regulations to implement section 212(a)(10)(E) of the Immigration and Nationality Act. Indicate when the regulations were issued and in what form, i.e., proposed, temporary or final. Describe the regulation including, but not limited to, the process used to determine that a person renounced his or her U.S. citizenship for tax-avoidance purposes, whether and how such a determination can be rebutted by the person seeking reentry, and the availability of and criteria for the waiver of inadmissibility under sections 212(d)(3)(A) or (B) of the Immigration and Nationality Act. Please provide a copy of the regulation.

In the early part of 2000, the Department of Justice (DOJ) forwarded the proposed regulation to the Office of Management and Budget (OMB) for clearance for publication. Since OMB did not clear that proposed rulemaking before the change of administration, the INS updated and resubmitted the proposed regulation to the Department for comments and clearance. In the course of Department and interagency review of the regulation, suggestions were made to

simplify the approach taken in the earlier drafts. In light of those discussions, the proposed rule is being restructured to establish a streamlined process for determining whether a former U.S. citizen's expatriation was tax-motivated. The INS, DOJ, Department of the Treasury, Internal Revenue Service (IRS), and the Department of State (DOS) have been working diligently to develop the regulations necessary to implement section 212(a)(10)(E) of the Act, and hope to publish a notice of proposed rulemaking some time during the next six months.

In establishing a streamlined process, the INS is drawing from the tax codes at 26 U.S.C. 877 relative to the tax consequences of expatriation. In some instances, certain acts or statements on the part of the former U.S. citizen will be sufficient, in and of themselves, to result in a finding of inadmissibility under section 212(a)(10)(E) of the Act. In other instances, the INS may need to consult with the DOS and/or the IRS to obtain the information needed to make an informed and accurate determination. With these considerations in mind, the proposed rule will also have to take into account the procedures that must be established to facilitate not only interagency data sharing, but also the release of confidential taxpayer information by the IRS to the INS.

Under the proposed rule, a former U.S. citizen will be inadmissible under section 212(a)(10)(E) of the Act if there is an indication in any signed statement that he or she planned to expatriate, was expatriating, or had actually expatriated, to avoid paying U.S. taxes. A former U.S. citizen who fails or refuses to submit any IRS forms required of all expatriates will be presumed inadmissible under section 212(a)(10)(E) of the Act. No further determination can be made until those forms have been properly filed.

Section 212(a)(10)(E) of the Act will also apply in those cases where the IRS issues a private letter ruling, as provided under 26 U.S.C. 877(c), that the former citizen expatriated with a principal purpose to avoid taxation. Similarly, a former citizen who withdrew a pending request for a private letter ruling, after the IRS indicated that the decision would not be in his or her favor, will be presumed inadmissible under section 212(a)(10)(E) of the Act, with no provision for rebuttal.

In addition, the proposed rule draws from the thresholds established with respect to net worth on the date of expatriation and the average annual net income tax liability for the 5 years preceding expatriation. These thresholds, at 26 U.S.C. 877(a)(2)(A) and (B), respectively, are set at \$500,000 and \$100,000, and are adjustable annually for inflation. If either of these two thresholds are met, the former U.S. citizen will be presumed inadmissible under section 212(a)(10)(E) of the Act, but may rebut this presumption if among any of the classes described at 26 U.S.C. 877(c).

Former U.S. citizens who are found inadmissible under section 212(a)(10)(E) of the Act may apply for a nonimmigrant waiver under section 212(d)(3)(A) or (B) of the Act, if they seek admission to the United States on a temporary basis. This waiver provision is broad and covers most grounds of inadmissibility, including section 212(a)(10)(E) of the Act.

Waivers are discretionary and involve a delicate balance of the underlying ground of inadmissibility and any other unfavorable factors against the equities. The general waiver procedures for nonimmigrants are found at 8 CFR § 212.4.

2. **Provide the number of persons, if any, who have been found inadmissible as a result of section 212(a)(10)(E) for 2000, 2001 and 2002 through June 30, 2002. Provide the number of waivers of inadmissibility granted by type for 2000, 2001 and 2002 through June 30, 2002. Describe the tracking system of individuals granted waivers and whether any changes in guidelines have occurred since 2000 and the nature of such change.**

Because the proposed regulation has yet to be published, no former U.S. citizens have been found inadmissible under section 212(a)(10)(E) of the Act since its enactment on September 30, 1996. The total number of waivers granted for all grounds of inadmissibility are as follows:

Type of Waiver	FY 00	FY 01	FY 02 (through May 02)
Visa/Passport	20,688	21,181	5,761
Non-Criminal	6,718	8,819	5,874
Criminal	4,415	4,864	3,968
TOTAL	31,821	34,864	15,603

The INS maintains a Computer Linked Application Information Management System (CLAIMS), which indicates whether an individual alien has been granted a waiver of inadmissibility in the course of pursuing an immigration benefit, such as admission or adjustment of status. For non-criminal waivers, however, the INS currently does not maintain statistics regarding the number of waivers of inadmissibility granted by type.

As part of a larger project, the INS is consolidating many of the forms currently used to apply for various criminal and non-criminal waivers under a new Form I-724 series. Because each form in the series will address separate grounds of inadmissibility, the INS will be able to compile more accurate statistics on the number of waivers sought for each ground of inadmissibility, as well as the number of approvals and denials.

3. **Provide the circumstances and number of persons entering on the basis of parole (temporary entry while a determination of admissibility is made) since January 2000.**

There are several different types of parole. Under section 212(d)(5) of the Act, the Attorney General may, in his discretion, and on a case-by-case basis, parole any individual into the United States temporarily, for urgent humanitarian reasons or significant public benefit. An individual whose inspection is deferred pending a determination of inadmissibility is also deemed to be paroled. From January 1, 2000, through April 30, 2002, 25,114 individuals were paroled for deferred inspection.

4. **The Joint Committee staff understands that, although lawful permanent residents ("green card holders") are inspected upon their arrival in U.S. ports of entry, no records historically were kept regarding the movement of lawful permanent residents or other resident aliens into or out of the United States. Describe whether a system has been put in place to track the movement of green card holders or other resident aliens into or out of the United States. Describe the system used and procedures for retrieving records to such individuals (e.g., by social security number, name, or other identifier).**

Historically, there has not been any statutory requirement that the INS track the movement of lawful permanent residents (LPRs) in and out of the United States. However, in connection with the implementation of section 402 of the Enhanced Border Security and Visa Reform Act of 2002, the INS plans to propose that LPR arrivals and departures be tracked at air and seaports beginning on January 1, 2003. ADIS, the Arrival/Departure Information System, will be the repository and retrieval mechanism for the arrival/departure data on all aliens, including LPRs. The LPR's Alien Registration Receipt Number will serve as the identifier for retrieving the record.

5. **The Joint Committee staff understands that the INS maintains computer databases that contain records of green card holders whose status has been revoked or has been administratively or judicially determined to have been abandoned. Describe whether any changes have occurred since January 1, 2000, with respect to the maintenance of such databases.**

The INS maintains a computer database, the Central Index System (CIS), which contains records of lawful permanent residents whose status has been revoked or has been administratively or judicially determined to have been abandoned. INS Service Center Operations reports no CIS maintenance changes since January 1, 2000.

Ms. Lindy L. Paull

Page 5

6. The Joint Committee staff understands that the INS' Central Index System reveals a social security number only if such number was provided by the alien and "keyed" into the system, and that the INS' computer systems are based on alien numbers, arrival/departure numbers, application or petition receipt numbers. Describe any changes in procedure since January 2000 for determining whether immigration records contain social security numbers.

The Service Center Operations Branch of the Immigration Services Division at INS Headquarters reports that there have been no changes in procedure since January 2000 relative to whether immigration records contain social security numbers.

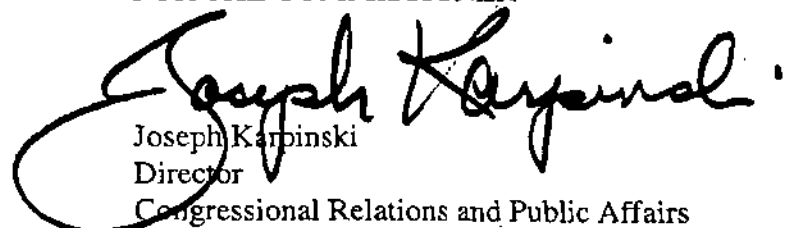
7. The Joint Committee staff understands that, as of January 2000, no studies or projects (public or nonpublic) had been conducted by the INS or any other agency (except for the General Accounting Office) that examined compliance with section 212(a)(10)(E) of the Immigration and Nationality Act. Please identify any studies or projects conducted by the INS, or if you are aware, studies or projects conducted by another Federal agency, that have examined compliance with this provision since January 2000.

The INS is unaware of any studies or projects (public or nonpublic) that have been conducted by any Agency to examine compliance with section 212(a)(10)(E) of the Immigration and Nationality Act since January 2000 (other than the General Accounting Office.)

I hope that you find the answers to your inquiry responsive. If you need additional information, please let me know.

Sincerely,

FOR THE COMMISSIONER


Joseph Karpinski
Director
Congressional Relations and Public Affairs



NATIONAL DIRECTOR
FOR LEGISLATIVE
AFFAIRS

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OCT 10 2002

OCT 24 2002

Ms. Lindy Paull
Chief of Staff
Joint Committee on Taxation
Washington, D.C. 20515-6453

Dear Ms. Paull:

I am writing to give you additional information on the expatriation tax rules for individuals. I have organized the information in three sections:

- Follow-up questions to the September 16, 2002 letter from Floyd Williams
- Follow-up questions to the August 14, 2002 letter from Commissioner Rossotti
- Additional information requested during the September 23, 2002 conference call

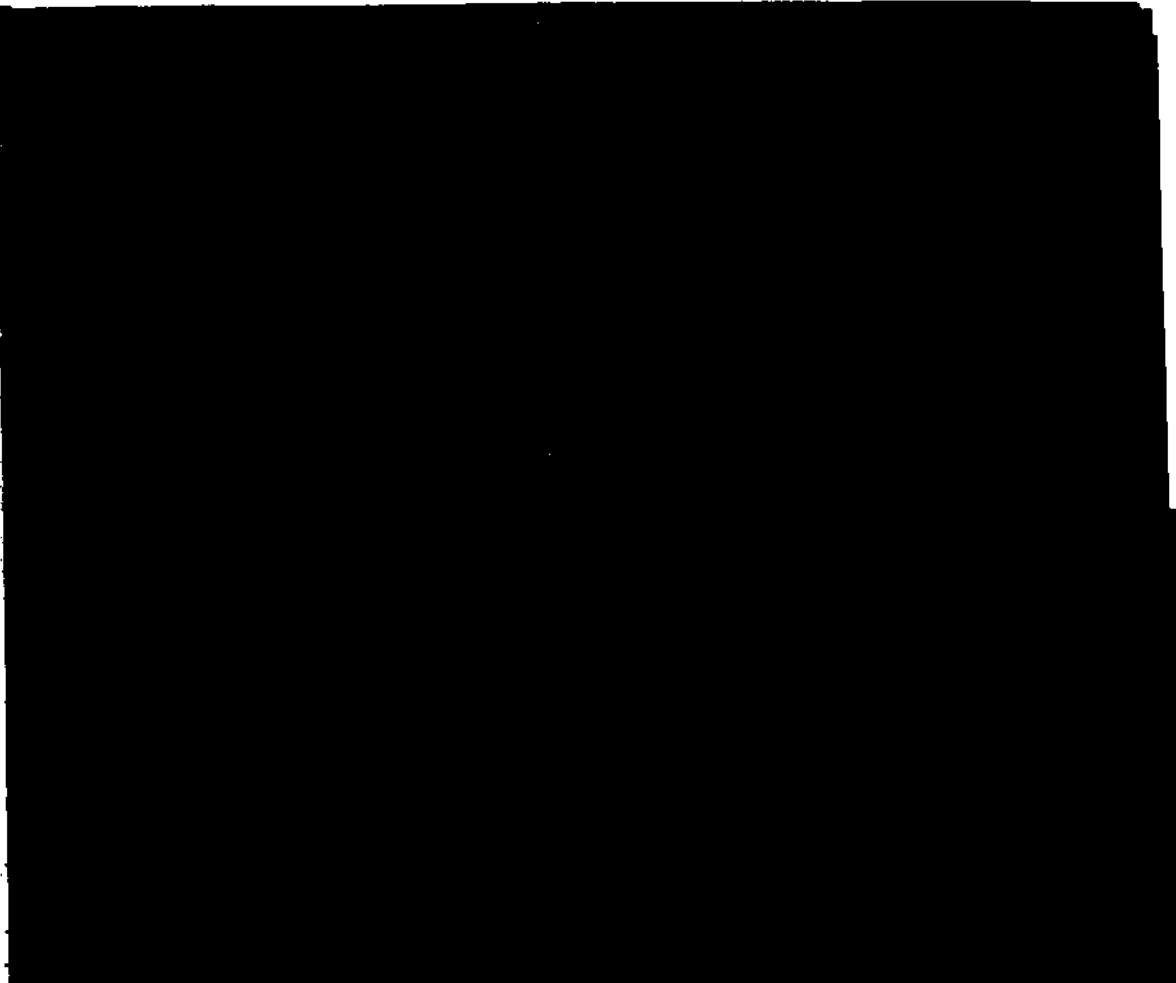
Follow-up questions relating to the September 16, 2002 letter from Floyd Williams

1. As part of the ruling process, does the IRS check or test the estimates provided by the taxpayer? Has the IRS sought additional information regarding the estimates from those who submitted letter-ruling requests?

We assign every ruling request to a docket attorney and a reviewer in Branch 1 of the Office of the Associate Chief Counsel (International). As part of the process, a docket attorney reviews all information an expatriate or representative submits and discusses the information with his or her reviewer. Frequently, we request additional information from the expatriate. However, the office cannot independently verify all estimates and calculations of U.S. and foreign income and estate tax liabilities. The estimates relate to future tax periods for which the individuals have not filed returns and are based on a number of assumptions concerning income, deductions, and the tax laws of both the United States and other countries. The amount and nature of the information the office receives is under the control of the expatriate. Finally, the Chief Counsel's office does not usually have the resources to verify complicated income and estate tax computations under U.S. and foreign laws. However, individuals must submit the estimates under penalties of perjury, and we have found that the calculations are generally reasonable.

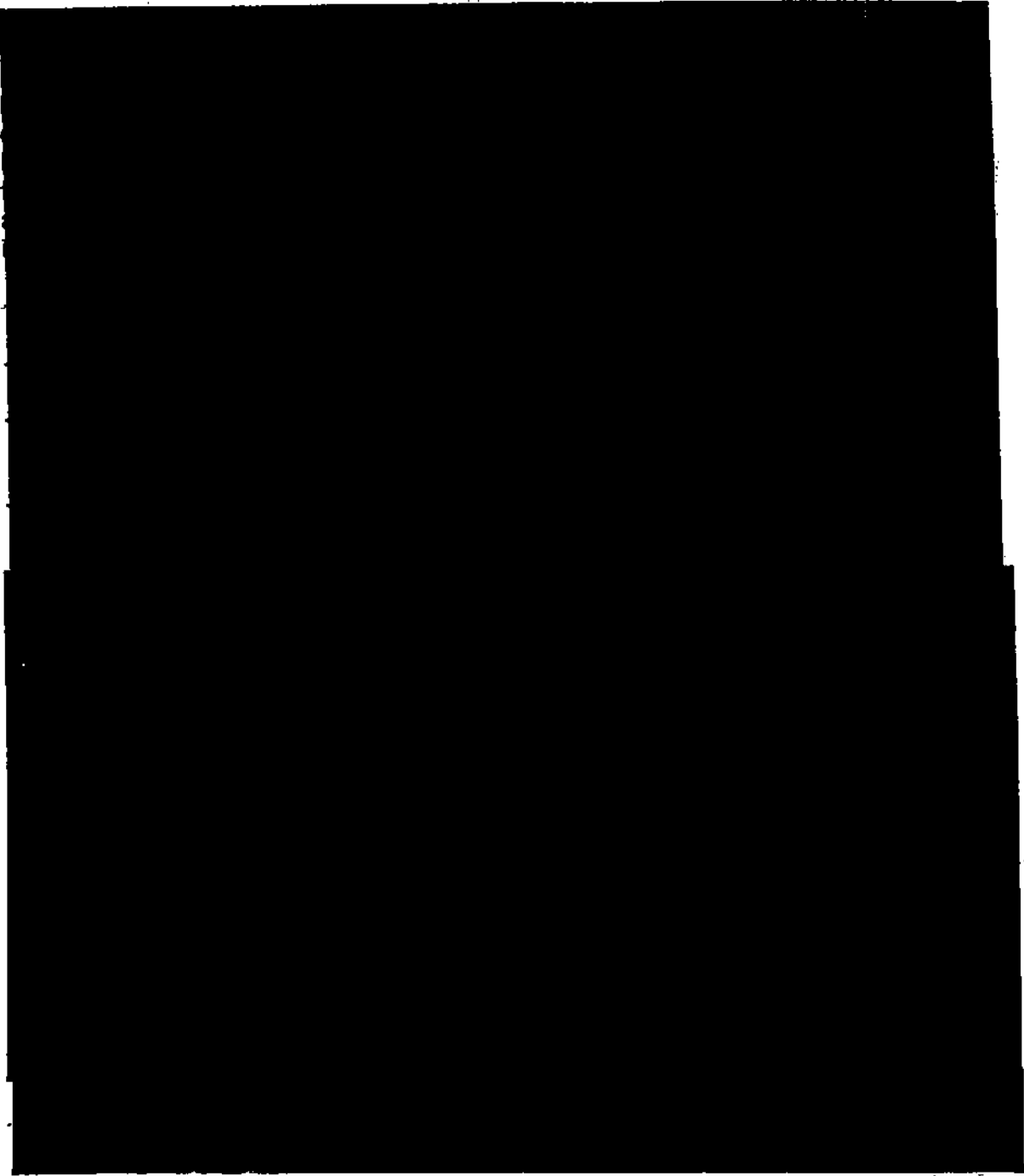
2. Were the summaries of projected tax liabilities provided to us in the September 16, 2002, letter the estimates provided by the taxpayers? If not, please indicate on what basis these projected tax liabilities were calculated.

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6103
(b)(3)



FOR OFFICIAL USE ONLY

IRC
6103
(b)(3)

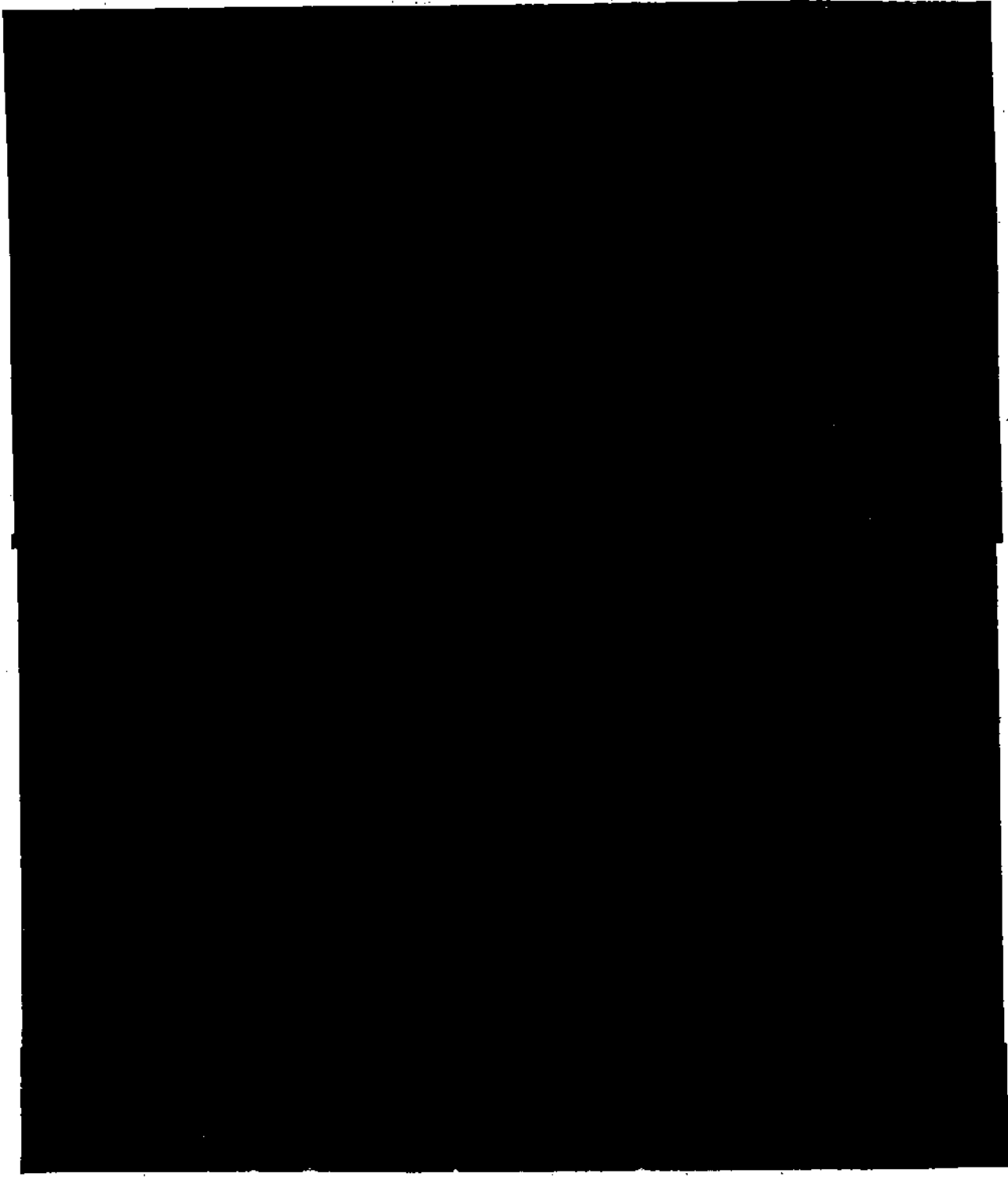


IRC 6103 (b)(3)

¹/ This information corrected of the [REDACTED] stated in our letter of September 16, 2002.

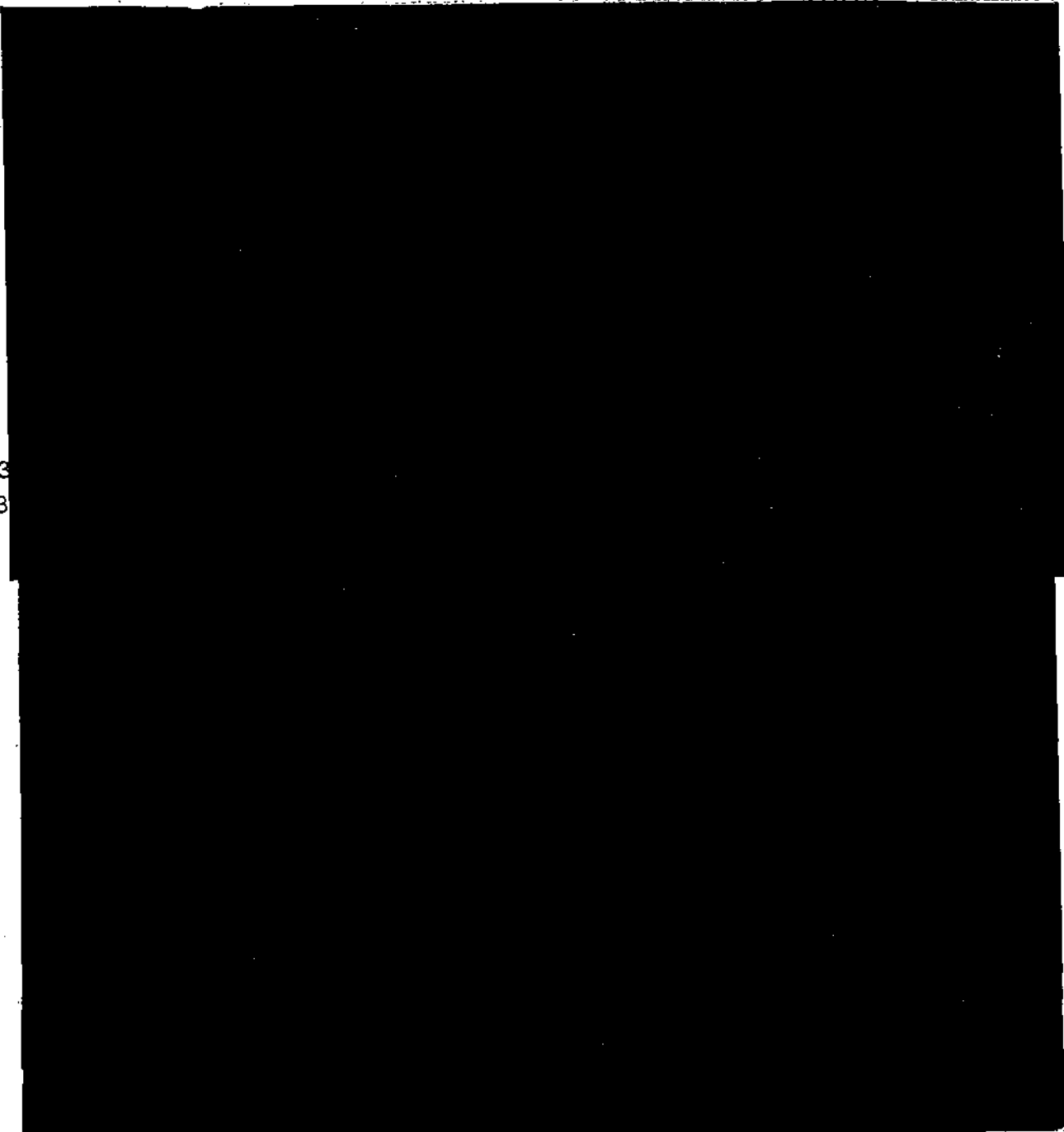
FOR OFFICIAL USE ONLY

IRC
6103
(b)(3)



FOR OFFICIAL USE ONLY

IRC
6103
(b)(3)



FOR OFFICIAL USE ONLY

4. In the letter, Floyd Williams related that these estimates are factors in determining the IRS' decision with respect to the letter-ruling request. Please elaborate on the factors that are used in analyzing a letter-ruling request. Is there a main criterion? What factors are most relevant?

Notices 97-19 and 98-34 contain information explaining the process for requesting a ruling under IRC § 877(c)(1). The latter describes information that an individual must include in a request in response to 23 specific questions. As explained in Commissioner Rosotti's letter dated May 5, 2000, after we make a determination that a submission is complete and submitted in good faith, we examine the request to determine whether we can make a substantive determination in the ruling process as to whether one of the principal purposes of expatriating was to avoid U.S. taxes. Under IRC § 877(f), a taxpayer must prove the absence of a principal purpose of tax avoidance if the IRS establishes that it is reasonable to believe that a taxpayer's expatriation will result in a significant reduction in taxes on his probable income.

We examine all the facts submitted with a request for a ruling before we reach a conclusion on whether an expatriate had a principal purpose of avoiding U.S. tax. No single factor is determinative, although a substantial and verifiable nontax reason for expatriation will carry substantial weight. In certain circumstances, the facts clearly establish the existence of a principal purpose of tax avoidance. For example, the submission might indicate that the taxpayer might significantly reduce taxes (including transfer taxes, which are not specifically referred to in section 877(f) by expatriating, with no objective evidence of significant non-tax avoidance purposes. In some cases, it might be clear that no principal purpose of tax avoidance existed, either because the facts do not indicate a significant reduction in taxes, or because objective evidence is presented of significant non-tax avoidance purposes. In other cases, the facts submitted in the ruling process do not clearly indicate either the absence or existence of a principal purpose of tax avoidance.

FOR OFFICIAL USE ONLY

**Questions relating to information in the letter of August 14, 2002, from
Commissioner Charles O. Rossofi to Lindy Paull**

1. For all the individuals referenced in the letter of August 14, 2002, provide the individual's date of expatriation and age on the date of expatriation.

See Enclosure I.

How many of these individuals are subject to the 1996 expatriation tax rules as compared with the pre-1996 expatriation tax rules?

All of the individuals were subject to the 1996 expatriation rules. In this regard, the 1996 expatriation rules (IRC Sections 877, 2107 and 2501, as amended by the Health Insurance Portability and Accountability Act of 1996) apply to individuals who expatriate after February 5, 1995, and to individuals subject to § 511(b)(1)(A) of the Act. Section 511(b)(1)(A) of the Act provides a special transition provision in the case of a former citizen who performed an expatriating act specified in Paragraphs (1) – (4) of § 349(a) of the Immigration and Nationality Act before February 6, 1995, but who did not, on or before that date, confirm the act by providing the U.S. Department of State a signed statement voluntarily relinquishing his or her U.S. nationality. Such an individual would not come within the general effective date of the amendments to §§ 877 and 6039F because, under the provisions for determining the date of loss of citizenship (which were not modified by the Act), the date of loss of citizenship is retroactive to the date of the expatriating act (i.e., prior to February 6, 1995).

2. For all the individuals referenced in the letter of August 14, 2002, describe in detail how the individual was identified as potentially subject to the expatriation tax rules.

The information requested in Questions 2-5 (Pages 8-9 of this memorandum) is contained in Enclosure II.

During 1996, former International District Office developed a database to capture information from the Department of State on Certificate of Loss of Nationality (CLN) forms. During 1999, we conducted a Compliance Initiative Project (CIP) to determine levels of compliance with the expatriation tax laws. The test sample was pulled from the CLN database. During investigation of internal information on the sample cases, we determined that many of these cases were already in the examination process. Column 3 on Enclosure II identifies the original source for each of the individuals: regular classification by DIF score, referrals, or other compliance projects.

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3. Has each individual filed a return for the year of expatriation and each year subsequent to expatriation?

See Enclosure II, Column 5.

4. Please report the tax remitted by each individual for the year of expatriation and each year subsequent to expatriation.

See Enclosure II, Column 7. All of these individuals have paid their tax balances on filed returns except for:

IRC 6103 (b)(3) [REDACTED]

5. Has the IRS audited any of these returns for compliance with Section 877?

Enclosure II, Column 8 identifies cases selected and not selected for examination. We determine expatriation status during the course of the examination and taxpayer interview. Compliance with § 877 is a component of the "full compliance" check performed in all examinations.

6. For the individuals not covered in the letter of September 16, 2002, please provide summaries similar to those provided in that letter, along with explanations of estimates of projected tax liabilities in the case of those individuals submitting ruling requests.

We have provided summaries for those cases in the possession of Compliance Area 15. We will provide additional summaries as we retrieve cases from record retention.

7. The May 5, 2000, letter stated that the IRS routinely "conducts a check of the average tax for the five-year period prior to expatriation as part" of your review process. Please provide the five-year average income tax liability for the five years preceding expatriation for each individual referenced in your letter of August 14, 2002.

See Enclosure II, Column 4.

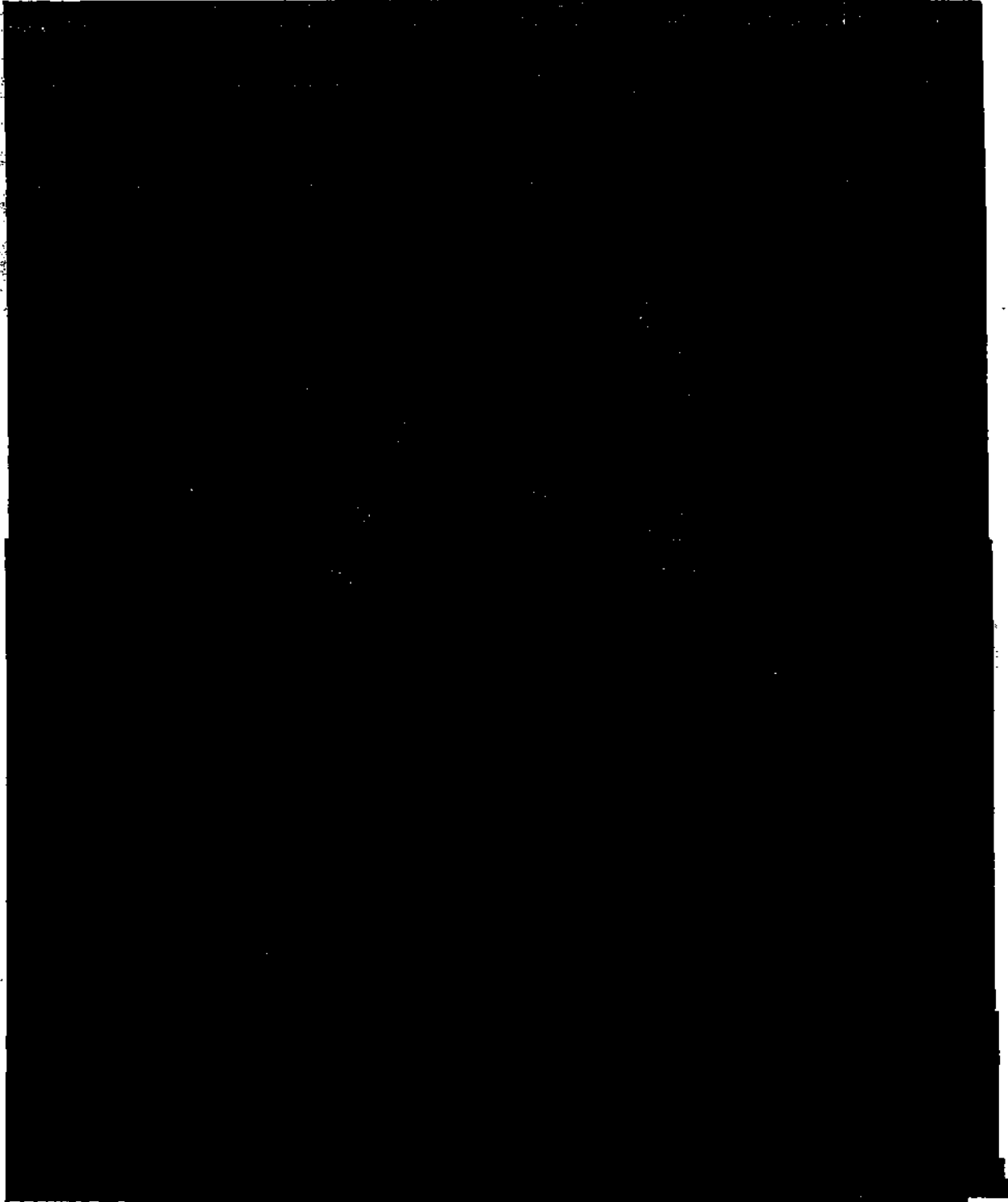
8. The August 14, 2002, letter provided information on all of the individuals identified in the letter of May 5, 2002, to whom the IRS had issued an adverse ruling (or who withdrew their requests for rulings upon being informed that an adverse ruling would be issued) except for [REDACTED]. Please provide information on [REDACTED] comparable to the information provided on the other individuals.

IRC
6103
(b)(3)

The following facts are contained in a ruling request [REDACTED] submitted.

FOR OFFICIAL USE ONLY

IRC
6103
(b)(3)



FOR OFFICIAL USE ONLY

IRC
6103
(b)(3)

**Requests for additional information arising during the conference call of
September 23, 2002**

1. Page 13 of the September 20, 2002, letter indicates that the Philadelphia Service Center has drafted first, second, and third notices, along with a Form 886E, "Explanation of Requested Items," which are to be issued to expatriates regarding their filing requirements, penalty issues, and information that they may have omitted on their Form 8854. We would like to have copies of these proposed notices and the Form 886E.

See Enclosures III (a) – (d). As part of the program move from our field office to the Philadelphia campus, our Compliance operation is developing policies and procedures for working these expatriate cases. These letters represent a first draft of the type of letters we might send taxpayers to gather additional information.

2. Please provide us with a flow chart, or schematic, detailing the flow of information relating to expatriates into the IRS and within the IRS. For example, it is our understanding based on recent correspondence and conversations with IRS personnel that letter ruling requests go to the National Office. Rulings determinations by the National Office are sent to Philadelphia Service Center for entry into the CLN database. Separately, the Department of State collects CLNs and forwards them to the Philadelphia Service Center for entry into the CLN database. The flowchart should show this information flow and other expatriate related information flows within the IRS and to other government agencies.

We are reviewing the flow chart of this process and will forward it to you at a later date.

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3. The IRS indicated that, in the past, some compliance initiatives related to expatriating individuals were initiated as the result of other compliance efforts, such as tax shelter investigations. It was indicated that perhaps 12 investigations were initiated related to expatriating individuals in 1999. Please provide us with detailed information relating to these cases, including a description of each initiative, how individuals were identified as potentially subject to the expatriation tax rules under these initiatives, the nature and status of these cases, and the handling of oversight of these cases.

IRC 6103
(b)(3)

We may select expatriated taxpayers whose accounts fall into high-risk categories for audit through programs other than the expatriate program. Enclosure II shows four examples of expatriated taxpayers we selected for audit through other programs. For example, [REDACTED] is listed as an expatriate but was identified for examination through the Non-Filer Program. In addition, Appeals Division referred his case for exam.

I hope this information answers your questions. If you have any questions, please contact me at (202) 622-3720.

Sincerely,

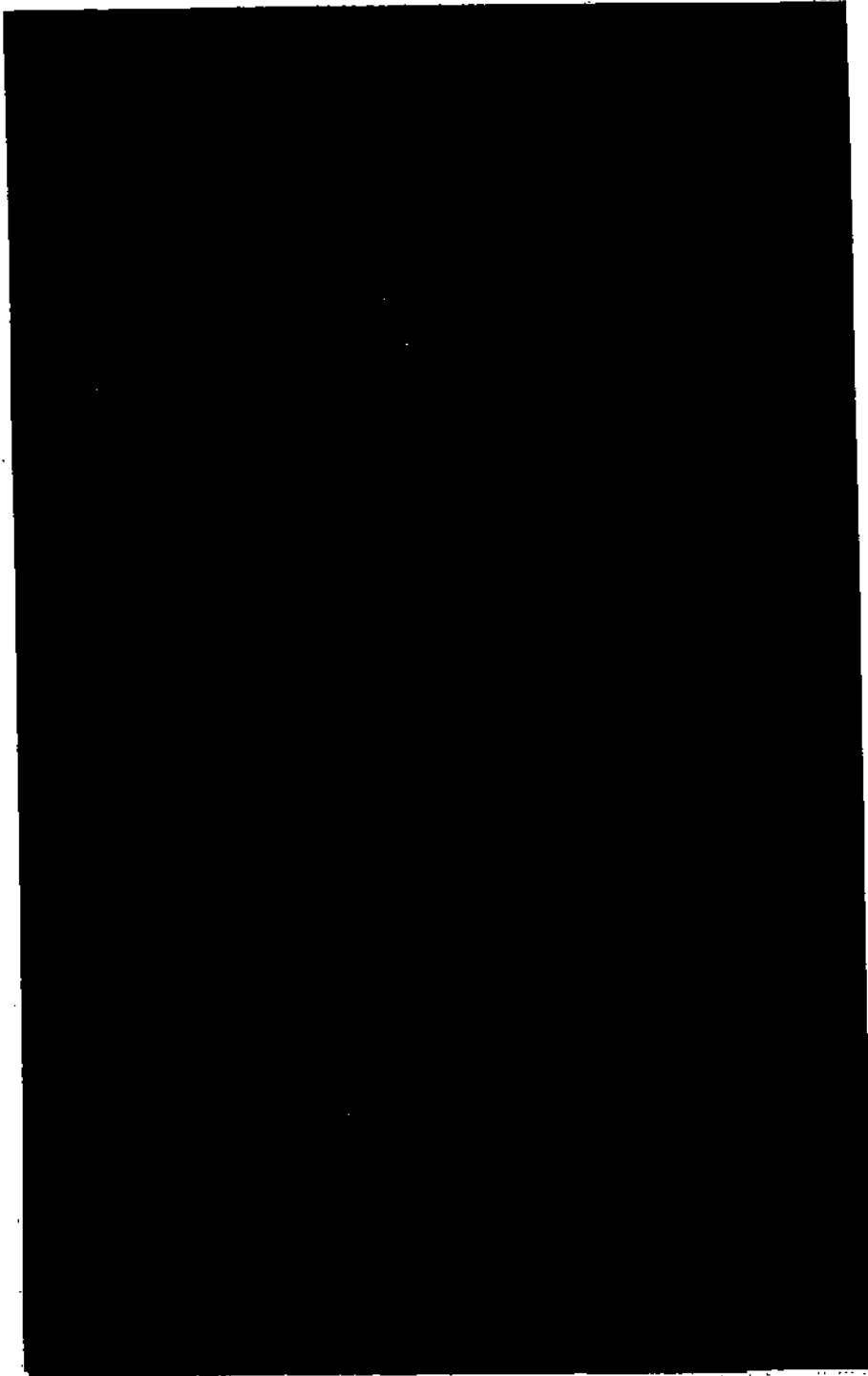


Floyd L. Williams

Enclosures (3)

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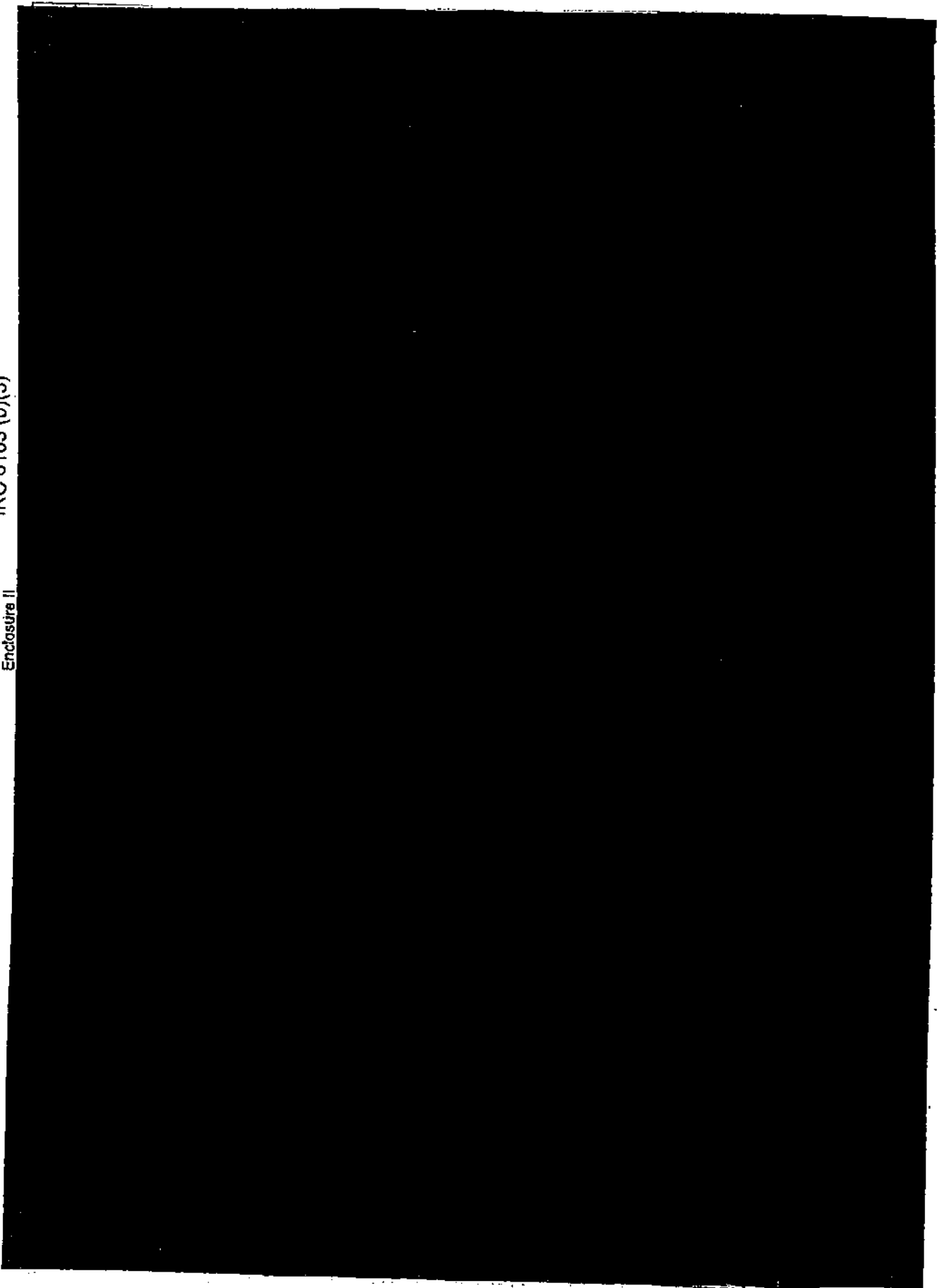
Enclosure I



IRC 6103
(b)(3)

IRC 6103 (b)(3)

Enclosure II



Enclosure II

IRC 6103 (b) (3)





ENCLOSURE III (a)

**DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
Philadelphia, PA 19154**

SMALL BUSINESS/SELF-EMPLOYED DIVISION

Letter Date

**Person to Contact:
The IRS Customer Service Office at**

**Dear First Name Middle Name Last Name
Address
City
Country Postal Code**

Under Internal Revenue Code Section 6039G, individuals who expatriate are required to provide an information statement.

A review of the package provided by the Department of State indicates that you failed to provide some or all of this statement. To assist you in providing this information we have enclosed F8854 and instructions.

Please provide this office with your completed Expatriation Information Statement (F8855) and Private Letter Ruling if it applies by (date.)

If you have any questions, you can call our Customer Service Site in The United States at 215-516-3998.

**Enclosures:
Envelope
F8854
Instructions
Copy of this letter**



ENCLOSURE III (b)

**DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
Philadelphia, PA 19154**

SMALL BUSINESS/SELF-EMPLOYED DIVISION

Letter Date

**Person to Contact
The IRS Customer Service Office at**

**Dear First Name Middle Name Last Name
Address
City
Country Postal Code**

Under Internal Revenue Code Section 6039G, individuals who expatriated are required to provide an information statement (F8854).

A review of the package provided by the Department of State indicates that you failed to provide some or all of this statement.

To assist you in providing this information, we previously sent you F8854 and instructions.

Please provide this office with your completed Expatriation Information Statement (F8854) and the Private Letter Ruling if it applies by (date).

The penalty for failure to provide this information is a minimum of \$1,000.00.

If you have any questions, you can call our Customer Service site in the United States at 215-516-3998.

**Enclosures:
Envelope
F8854
Instructions
Copy of this letter**



ENCLOSURE III (c)

**DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
Philadelphia, PA 19154**

SMALL BUSINESS/SELF-EMPLOYED DIVISION

Date

**Person to Contact
The IRS Customer Service office at**

**Dear First Name Middle Name Last name
Address
City
Country Postal Code**

Under Internal Revenue Code Section 6039G, individuals who expatriate are required to provide an information statement.

A review of our files indicates that you have failed to comply with our previous requests for the missing information.

This notice is to inform you of our intent to assess a Failure to File penalty. The assessed penalty will be the greater of \$1,000.00 or 5% of the total tax required to be paid under Section 877 for that year.

If you can show that your failure to file was due to reasonable cause and not willful neglect, the penalty will not be imposed.

If you do not agree with this notice, call us immediately at 215-516-3998.

**Enclosures
Copy of this letter**

ENCLOSURE III (d)

Form 886-EP

EXPLANATION OF ITEMS

Schedule Number or Exhibit
8854

Name of taxpayer

Tax Identification Number

A review of your F8854 is incomplete. For your convenience, we are returning your F8855 to you with specific areas highlighted which need to be completed.

Please provide this information to us by (date).

If you have any questions, call our Customer Service site in the United States at 215-516-3998.