E. Immigration Rules

1. Substantive determinations of inadmissibility

The immigration rules require the Attorney General to determine whether an individual renounced his or her citizenship for the purpose of avoiding U.S. taxation. The statute does not give any standards to judge the citizen's intent in relinquishing his or her citizenship. As a result, the Attorney General has discretion in determining whether an individual's purpose in renouncing U.S. citizenship was to avoid taxation. The Attorney General, however, is not charged with the administration of the tax laws. That responsibility lies with the Department of Treasury. The Department of Treasury, however, is not charged with enforcing or assisting in the enforcement of the immigration provision. Thus, the statute requires an INS immigration officer at the border or Department of State consular officer abroad to make a tax determination in order to enforce the immigration laws. In theory, to enforce the statute, the INS immigration officer or consular officer (as representatives of the Attorney General) would have to consider the tax treatment of the individual as a U.S. citizen, and then compare it to the tax treatment of the individual in his or her new country and consider whether the individual had other reasons for relinquishing citizenship.

Because the exclusion is based on the subjective intent or motivation of the former citizen, it is inherently difficult to administer. This difficulty is exacerbated by the inability of the INS and the Department of State to obtain information from the IRS to make the required determination. Even if the IRS had concluded that an citizenship relinquishment was motivated by tax avoidance, that information could not be shared with the INS or Department of State in its determination of whether a citizenship relinquishment was for the purpose of tax avoidance. The lack of explicit disclosure authority to administer the immigration provision renders the bar ineffective. Given the lack of training in tax matters and the lack of access to tax records, it is not efficient for the INS or Department of State to make the required determination.[463]

In addition to the difficulty of administration, a disparity exists between the coverage of section 877 and the immigration provision. Under section 877, tax avoidance must be one of the principal purposes for citizenship relinquishment, thus allowing for other principal purposes. Under the immigration provision, tax avoidance must be the purpose for citizenship relinquishment. Consequently, the test is more inclusive under section 877 than under the immigration provision. Coverage also differs as to former green card holders. Under section 877, former long-term residents with a tax avoidance purpose, as well as former citizens, are subject to the 10-year tax. The immigration provision does not apply to these former long-term residents.

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[463] As discussed in Part V, above, the Homeland Security Act transfers the functions of the INS and the immigration functions of both the Attorney General and the Department of State to the Department of Homeland Security.

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2. Waivers

Present law provides for discretionary waiver of inadmissibility to the United States. This waiver neutralizes the effect of being deemed inadmissible under the immigration provision. For those individuals seeking to establish permanent residence in the United States, the immigration provision is a bar to entry. For those individuals seeking to visit the United States temporarily, however, this ground of inadmissibility can be waived.[464] Waiver is discretionary and applications are evaluated on a case-by-case basis. Factors considered in determining whether to approve a waiver include:

(1) The effect on U.S. public interests;

(2) The seriousness of actions or conditions causing inadmissibility; and

(3) The reasons for wishing to enter the United States. There is no need to show a compelling reason for the visit.[465]

Thus, under present law, an individual who renounces citizenship for tax reasons could be admitted to the United States to visit family or for vacation. Since the former citizen left the United States to avoid taxation, there is little likelihood that such individual would wish to re-establish permanent residency as an immigrant (i.e., and be subject to tax once again). More likely than not, such individuals would be making short, perhaps frequent, trips to the United States for business or pleasure. Given the discretionary nature of the waiver, such visits are not impeded by such individual being deemed inadmissible. Thus, the goal of the immigration provision -- to deny reentry into the United States for individuals who renounce citizenship for tax reasons -- is not achieved because such individual can continue to reenter the United States, even routinely, without establishing permanent residency.

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[464] 8 U.S.C. sec. 1182(d)(3).

[465] Department of State, 9 Foreign Affairs Manual, sec. 40.301 n.3.