DEBUNKING THE SNOWBIRD '30-DAY RULE'

Smarter Way to Cross Blog Archives
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A recent blog entry summarized some misconceptions about the immigration rules for snowbirds and other long-term or frequent visitors to the United States, centered around the person's annual day count (days of presence) in the United States. Too many well-intentioned but misinformed "advisors" have turned helpful rules of thumb into rigid arithmetic standards that do not give adequate consideration to the underlying immigration laws. In order to use the numbers properly, the person has to understand the immigration law principles for visitors. The place where this happens is the U.S. port of entry and the fundamental question in the mind of the Customs and Border Protection (CBP) officer is not *what is your number?* The CBP officer wants to know: *are you a visitor?*

In the past year or two, our office has received numerous inquiries about a "30-day rule" that is supposedly used for calculating the number of days of U.S. presence. As explained to me and as found in several articles written by non-immigration lawyers, if a visitor to the United States makes a return trip to Canada of less than 30 days, then the time spent in Canada is added back to the U.S. trip and will be treated as days spent in the United States for purposes of one's day count. We dismissed the report as foolishness when we first heard it, but it has come back to us enough times to justify a comment and explanation.

My reaction to this 30-day rule can be summed up in one word: nonsense. There is no such rule. This bogus rule is often discussed within the larger context of numerical limitations on one's stay as a visitor in the United States. We read that the Canadian visitor is entitled to or "allotted" 182 days as a visitor within any 12-month cycle and that there are dire, automatic immigration law consequences for exceeding that by even one day. The unfortunate consequence of such rules is that important immigration law principles get lost or overlooked when the rules are reduced to fixed arithmetic formulas.

As stated in the previous article, the Canadian snowbird or frequent business traveler needs to move the analysis from a numerical matter to an immigration law matter. The math may be important, but the person has to know *why* a number is important. A number by itself, without any context, is meaningless and has no conclusive value for U.S. immigration law purposes. The focus should be on whether the person is a visitor to the United States.

The number of days in the United States can certainly raise questions about visitor status, but it does not determine it. The 183-day point is critical for visitors for practical reasons, not as an automatic rule. The non-legal concept of "center of gravity" is helpful in understanding the issues. A visitor needs a center of gravity in Canada to support visitor status in the United States. When the person's essential social, family, economic, employment, and financial ties to Canada are examined and weighed in light of the actual number of days spent in the United States, the totality has to point to Canada to support visitor status in the United States. When a person spends more than half of his time in the United States, it becomes harder to explain how his center of gravity is in Canada. But the decision is not automatic. A truck driver or sales person with frequent entries and cumulative time approaching or exceeding 183 days might be able to explain it without much problem. That person only has one home—in Canada—and no fixed place of presence in the United States. But when the person is a snowbird with a second home in the United States, it becomes almost a philosophical question as much as a legal one: how do you prove that the Canadian home is primary? Is it just a matter of one's day count? Days of

presence in the United States might be a logical starting point in the analysis, but it is not determinative.

The snowbird with more than 182 days in the United States has the chance to explain him/herself and prove visitor status, but that might be difficult or unpersuasive. For that reason, my advice is to keep it under 183 days if you can—but as a practical matter, not because it has automatic consequences. Someone with more than 182 days can still be a visitor if circumstances are right and the evidence is there. Conversely, a number under 183 does not provide absolute protection. If the CBP officer thinks you have abandoned or will abandon your residence in Canada, you will be refused entry regardless of any mathematical "rules." A number under or over 183 is merely persuasive, not conclusive, and the further you go in either direction, the more persuasive and conclusive it is likely to be.

The Canadian visitor needs to be guided by immigration law principles, not numbers. The place where this issue plays out is at the port of entry (border crossing or airport) upon entry to the United States by a person who is not a first-time visitor. The question presented is whether the person is a bona fide visitor (i.e., whether the person has a primary residence in Canada and is not attempting to enter the United States to begin or resume illegal residence or employment). When one departs the United States and then reenters, it does not wipe the historical slate clean. The frequency and duration of previous visits are an important part of the analysis of one's eligibility as a visitor. A person who is enjoying a long visit to the United States does not get a free pass by returning to Canada for a very short time and then reentering. The shorter the return visit to Canada, the more likely that the CBP inspector will disregard that legal significance of the departure and view the reentry as a continuation of the purposes and activities associated with the previous long trip. For example, if a person spends four months in the United States and returns to Canada for two days, the short trip to Canada may not be viewed as interrupting the four-month trip. The CBP officer will not blindly and automatically admit the person for another six months under that scenario. Upon reentry, the person will probably not be viewed as a new visitor but as someone who is continuing the previous four-month trip. That could raise doubt as to the visitor status of that person, resulting in more scrutiny about the nature and duration of the proposed new visit and the validity of the person's permanent ties to Canada. It could lead to a limitation on the permitted length of reentry or even a refusal of entry.

The principles associated with a scenario like that may have led to the development of the bogus 30-day rule. A two-day return to Canada after four months in the United States might do little to impress the CBP officer about the person's primary ties to Canada. So, the person might ask, what time frame is long enough to be sufficiently interruptive of the prior visit to the United States? It might take fewer or more than 30 days depending on the circumstances, but 30 days is a good starting point for discussion. It would not surprise me if somewhere, at some time, a CBP officer told someone that 30 days in Canada is required in order to make a credible reentry as a visitor. But that would have just been that officer's assessment of that particular situation, not the application of a formal regulation. And regardless, there is no add-back of days. There is just an unwillingness of a CBP officer to regard a short trip to Canada as having sufficient length or quality to terminate the previous visit and allow the reentry to be treated as a new, separate visit. The reentry will be analyzed and considered in light of the prior recent travel history and any other "center of gravity" evidence the officer may want to consider.

There is a regulation that is often pointed to improperly by commentators to explain the bogus 30-day rule. The regulation contains a 30-day feature but it has no relevance to the Canadian snowbird visitor issue. However, it does illustrate the principle in a sort of backward way. It is a Department of State regulation (8 CFR §41.112(d)), often called the "visa revalidation rule" or "contiguous country rule" that applies to people who are admitted to the United States as a visitor or

other visa category for a fixed duration. Normally, when such individuals depart the United States, they would need a new visa or other entry document in order to reenter. But there is an exception for people who leave the United States for less than 30 days and stay within North America (Mexico, Canada, and certain Caribbean islands) during the period of their original authorized period of stay. They can reenter the United States on the original approval documents without having to start over again. The foreign student, tourist, or temporary worker in the United States can take a short (less than 30 days) side trip to Canada or Mexico, or go on a Caribbean cruise, and return to the United States without interrupting the original period of admission or requiring a new visa for reentry. But there is no "adding of days," and the regulation was not intended to be punitive or invoke any tax consequences. Quite the opposite. It is just a commonsense accommodation to reduce paperwork for short-term travel within North America. It has absolutely nothing to do with Canadian visitors in practice or in purpose.

There is no adding back of days in any formula or in any rule. There is no rule that turns an actual day of physical presence in Canada into an actual day of physical presence in the United States. In any context that asks for an accounting of one's physical presence, a day that is spent solely in Canada is a day in Canada and can never be counted as a day in the United States.