STEP JOURNAL
WEALTH STRUCTURING ANALYSIS FOR TRUST AND ESTATE PRACTITIONERS

Born in the USA

Author : Mark Ivener
Date : April 2010

ABOUT THE AUTHOR: Mark Ivener TEP is a founding Partner of Ivener & Fullmer LLP

There are many immigration issues that intertwine with trust and estate planning because of global tax concerns. Three important ones to consider are: (1) EB-5 Investor Green Cards, (2) Green Cards and the Exit Tax and (3) Unplanned US Citizenship. Thus, the discussion will cover foreign nationals who want a Green Card, those who want to give up a Green Card, and those who do not even know they are American citizens.

For foreign nationals who want a Green Card, the EB-5 Investor program is an attractive immigration option for retirees, entrepreneurs, investors and professionals who are able to make a substantial investment in the US. The *Immigration* □□□of 1990 established the EB-5 program to create US jobs by attracting foreign capital to the United States. Every year 10,000 EB-5 Green Cards are available with no current quota waiting list. An EB-5 investor can get a conditional Green Card in 10 to 18 months, as fast as one who marries a US citizen. Other relative petition Green Cards take 5-15 years; employment-based Green Cards take 3-20 years.

There are two types of EB-5 programs: the 'Regular' and the 'Regional Center.' An applicant qualifies for the Regular EB-5 program by his or her own investment generally in a new commercial enterprise that creates employment for at least 10 full time US workers directly for the business. 'Direct jobs' are defined as legal W-2 employees of the company, which are receiving the investment funds. An investment amount of USD1 million is usually the minimum, except if in a high unemployment or rural area, where only USD500,000 is required. The investment may consist of various forms of capital, such as cash (including a gift or loan), equipment, inventory, property and other tangible equivalents.

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A Regional Center is a private enterprise or corporation or a regional governmental agency with a targeted investment programme within a specific, designated geographic area. Immigration (USCIS) has currently designated over 80 Regional Centers located throughout the US for selection. Regional Center diverse opportunities range from investing in real estate projects to dairy farms. An applicant qualifies for the Regional Center EB-5 program by generally investing USD500,000 in a project located where the unemployment rate is at least 1.5 times higher than the national average, or in a rural area. The 10 jobs

created from the investment can be indirect. ‘Indirect employment’ is demonstrated by various economic methodologies, which measure employment creation using multiplier tables that show substantially increased employment numbers in comparison to direct employment. Thus, many more Green Card applicants can invest in a Regional Center project than in a similar Regular EB-5 investment.

Every year, at least 3,000 out of the above mentioned 10,000 EB-5 Green Cards are set aside for immigrants who make an investment in a Regional Center project. According to Immigration statistics for 2009, more than 91 per cent of Regional Center cases were approved versus 9 per cent for Regular EB-5 cases. The benefits of the more popular Regional Center investments include: less up-front capital (generally USD500,000 versus USD1 million); no day-to-day management requirement; jobs created from the investment can be indirect; the investor can live and work anywhere in the US and the investor can be retired. The EB-5 investor must prove the source of funds for the investment. After Immigration processing, a two year conditional Green Card is approved. By the end of this two year period, the full investment must still be in place and 10 jobs created. Then, an application is filed with USCIS to remove the two year condition and grant permanent Green Card status.

Next, for those who want to give up a Green Card, the Exit Tax presents numerous Immigration obstacles. While the Exit Tax is financially burdensome to say the least, there are three ways to successfully avoid its encumbrances. First, an individual can choose to maintain permanent resident status by residing in the US or residing abroad. Second, an individual can voluntarily surrender his or her Green Card before becoming a Long-term Resident (one who has had a Green Card in any eight out of 15 years). The third option to avoid the Exit Tax before becoming a Long-Term Resident is to change Green Card status to a non-immigrant status.

Transition from Green Card status to a non-immigrant status can be difficult. Changing status within the US from a Green Card to a nonimmigrant status is not permitted. No nonimmigrant visa is needed for short term visits by Canadians or nationals from one of the 35 visa waiver countries, which includes all the countries of Europe, Japan and South Korea. Nationals from all other countries, such as India or China for example, who wish to visit the US for business or pleasure, must obtain a B-1 or B-2 visa from a US Consulate or Embassy. Another usual way to come back to the US is on an E-2 investor visa for an applicant who wants to intermittently work in his or her own business in the US. The E-2 visa requires approval at a US Consulate or Embassy.

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For certain applicants, background checks can delay visa issuance, sometimes for weeks or months. Some non-immigrants are subject to the National Security Entry-Exit Registration System (NSEERS). Some Permanent Residents are not eligible for a non-immigrant visa due to an arrest for a crime or DUI (even if not convicted) or unlawful presence prior to obtaining Green Card status.

Finally, US citizenship law is highly complex and involves a vast web of contingencies that demand meticulous untangling. Many individuals do not even know that they are American citizens. Therefore, to ensure the appropriate standard of care, it is imperative that an analysis of a family's citizenship and residence is carried out to determine if an individual is in fact a US citizen. There are four ways by which an individual can be a US citizen: birth in the US, birth abroad to a US citizen parent, derivative naturalisation and retroactive presumption against loss of US citizenship.

Any child who is born in the US is a US citizen unless the parents have diplomatic immunity. The citizenship and immigration status of the parents is not at issue, and there is no residence requirement for the parents or child before or after birth. However, in the following cases, factors such as date and place of birth of the child, and whether one or both parents are US citizens, are facts that must be considered. An individual is a US citizen based on birth abroad to two US citizen parents, so long as one of them resided in the US prior to the child's birth. Under current law, a child is also a US citizen if he or she was born to only one US citizen parent who was physically present in the US for a total of five years prior to the birth of the child, and if the child is over 14 years of age, for two of the five years. The law changed numerous times before the current law. Therefore it is important to check what regulation was in effect at the time of the child's birth. For older applicants, the law that was in effect at the time of birth applies.

Under current law, derivative naturalisation applies to the automatic US citizenship of a child born abroad who meets the following criteria: he or she is under 18 years of age; is or becomes a permanent resident; is residing in the US in the legal and physical custody of the US citizen parent; and at least one parent is or becomes a US citizen.

Yet another twist applies to US citizens who, prior to 1990, moved abroad and obtained another citizenship and now question whether or not they are still US citizens. The fact is that unless an individual takes action to confirm that he or she intended to lose US citizenship, it remains in tact. Moreover, US citizenship may also apply to their children and grandchildren through the abovementioned birth abroad to a parent who is not aware of his or her US citizenship. In 1990, the US State Department adopted a presumption of intent to retain US citizenship. Since then, there has been retroactive presumption against loss of US citizenship.

Because of the above stated intricacies in Immigration law, it is beneficial to trust and estate practitioners to be informed about the current requirements and changes in immigration, citizenship and naturalisation law to be able to inform their clients of these issues.