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IMMIGRATION ATTORNEYS

Immigration to the U.S. Tax Planning and Fast Track Permanent Residency

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INTRODUCTION

Immigration to the U.S. is a challenging task, especially with the restrictions imposed after 9/11. The first section of this article discusses pre-immigration tax planning opportunities, and the second section describes the availability of fast track immigration and Green Card status.

I. PRE-IMMIGRATION TAX PLANNING

Foreigners legally resident in the U.S. ("Resident Aliens") are taxed like U.S. citizens, subject to income tax on worldwide income. Resident Aliens are also subject to U.S. gift, estate, and generation-skipping taxes, but they are denied significant tax exemptions otherwise available to U.S. citizens. Examples include a nominal estate tax exemption for gifts to a surviving non-citizen Spouse and a $100,000 gift tax exemption, rather then the unlimited exemptions afforded to Citizen spouses. Joint tenancy property held by non-citizens receives disadvantageous estate tax treatment, and there are other tax disadvantages.

A foreigner becomes a U.S. tax resident by having a Green Card, or by simply by remaining the U.S. 183 days or more in any single calendar year, or 183 days as determined over a three-year period by the following formula:

The multiplier is:
Current year 1
1st preceding year 1/3
2nd preceding year 1/6

The Tax obligation on worldwide income is often an unpleasant surprise to the uninformed immigrant. However, for those who have the foresight and good advice to plan before immigrating to the U.S., and possibly even for those who did not, current law affords significant planning opportunities.

The U.S. tax code treats a foreign trust established by a Citizen or Resident Alien a "grantor trust," meaning that it is transparent for income tax purposes; all trust activity must be reported annually, on Forms 3520 and 3520A, and all trust income is currently taxed. Failure to timely file the required reports carries serious civil and possibly criminal penalties.

However, a Non-Resident Alien, at least five years prior to immigration, might create a discretionary trust in his or her own country or in a low or no tax jurisdiction, to hold assets for investment and for future distributions to U.S. beneficiaries. The Trust must be drafted to meet both foreign and U.S. criteria. If the five year rule is not met, the new resident will be treated as if the assets were transferred into trust on the date U.S. residency commenced, resulting in grantor trust treatment, and therefore to current tax and reporting requirements.

The immigrant may become a U.S. resident without the knowledge or time to take advantage of the five-year rule. There may nevertheless still be some planning opportunities. As an example, the new Resident Alien may have a wealthy family living outside the U.S., with the desire to establish a foreign Trust for the benefit of the U.S. residents. For example, a foreign Trust established by a foreign Trustor, and which is revocable by that Trustor, could, if it meets other requirements, qualify to make tax-exempt distributions to U.S. beneficiaries. The U.S. beneficiaries must not have any direct ownership or control over the Trustee's discretion to make Trust distributions. However, the receipt by Citizens or Resident Aliens of funds or assets from a foreign trust are reportable, even if not taxable. Any foreign Trust, foreign or domestic, must be considered as part of overall estate planning and should provide for alternatives in the event of the death of the primary U.S. beneficiaries.

The U.S. Resident Alien can receive monetary gifts from foreign sources. While such direct gifts are not subject to U.S. tax, the new rules require that gifts from foreign sources be reported on Form 3520 with annual tax returns. The reporting required for foreign gifts is much less extensive than that required for foreign Trusts, and does not require the taxpayer to reveal the identity of the individual donor of the gift. Partnerships or corporations, or an "intermediary" for such entity, must however be specifically identified. The IRS reserves the right to require the beneficiary to reveal the identity of an individual donor.

The IRS reporting form excludes reporting of annual gifts from foreign individuals under $100,000 from foreign individuals or estates.

Unlike U.S. Citizens, the Resident Alien may be in a position to avoid estate tax on assets located outside the U.S. if he or she (or the estate) can establish that the U.S. is not the country of domicile. The U.S. estate tax is based on the concept of domicile, and not on Citizenship. The long term Resident Alien will have to plan in advance to establish foreign domicile, which the U.S. regulations define generally as the place where the Resident Alien intends to eventually return to as a

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permanent abode. IRS regulations provide some guidance as to requirements to establish a foreign domicile, and each country has its own definitions and requirements, but it must be emphasized that advance planning is critical. The Resident Alien with a foreign domicile will pay U.S. income taxes, but all foreign assets could be excluded from estate taxes on death, particularly important since the Resident Alien will be denied the estate tax exemption available to Citizens if the beneficiary is not a Citizen, including the surviving spouse.

The benefits of foreign trusts for asset protection are beyond the scope of this article, but in the litigious U.S., sheltering assets from potential business and personal creditors is often of primary concern. Neither a foreign Trustee nor a foreign Trust with U.S. beneficiaries is subject to the jurisdiction of U.S. courts. Furthermore, many offshore jurisdictions have laws which effectively preclude a creditor from reaching the assets even if the creditor were willing to undertake the expense and uncertainty of bringing legal action in that country. Several "tax-haven" countries have adopted extremely short time periods ("statutes of limitation"), some as short as one year, after which a creditor can not reach assets transferred to a Trust regardless of "fraud" as defined in various U.S. statutes. It should be noted that most countries will not protect assets derived though criminal conduct, although tax avoidance may not be included in that category. To be effective, the foreign Trust must preclude the U.S. person's control over Trust assets.

This section on tax planning is only an overview and brief summary of a complex area of United States law. U.S. tax law is subject to frequent change and interpretation.

II. U.S. IMMIGRATION GREEN CARDS IN LESS THAN 1½ YEARS THROUGH INVESTMENT

For foreign investors looking for freedom and flexibility to live and work in the United States in a way accommodating to their lifestyles, the little-known EB-5 investor category can provide an excellent opportunity to accomplish this goal through the obtaining of Green Cards. Since this regulation first became law in 1990, EB-5 case adjudications have gone through several modifications, withdrawals and other hiccups before implementation of the latest statute in 2002.

There are essentially two EB-5 programs, i.e. the Regular program and the Regional Center program. In order for an applicant to qualify under the Regular program, the following three basic requirements must be met: investment in a new commercial enterprise; investment of at least $1 million (or $500,000 in certain cases) into the business, and creation of full-time employment for at least 10 full-time U.S. workers.

Additionally, to satisfy CIS' (formerly INS) standards of a bona fide "new commercial enterprise," a business can qualify in one of three ways: investment in a business formed after November 29, 1990; substantial restructure of business formed before November 29, 1990; or substantial expansion of business formed after November 29, 1990.

The investment may consist of the contribution of various forms of capital, including cash, equipment, inventory, property, and other tangible equivalents. An investment amount of $1 million is generally the minimum. However, $500,000 is acceptable if the business is situated in a "targeted" employment area, i.e. one that has experienced unemployment of at least 150 per cent of the national average rate or a rural area, as designated by the U.S. Office of Management and Budget. The final Regular program requirement is that at least 10 full-time jobs are subsequently created for U.S. workers.

The second program within the EB-5 category, i.e. the Regional Center program, is ideal for the retiree or inactive investor due in large part to the "indirect employment" feature of this program. The Regional Center program advantageously removes the 10 employee requirement of the Regular program and substitutes the less-restrictive "indirect employment creation," which allows the investor to qualify for an EB-5 Green Card without hiring 10 people in the company that the investor has invested in. So, in a nutshell, under a Regional Center program, the investor can qualify by presenting evidence that 10 new jobs will be created throughout the Regional Center economy, typically supported by an economist's report.

The EB-5 management requirement is minimal in that the investor can be a limited partner with a policy making role and still qualify. Thus, for those who are not interested in day-to-day management or running an active business, Regional Center programs offer a more acceptable inactive form of investment, than do most Regular program investments.

Another advantage of Regional Center programs that adds to the flexibility of this Green Card category is that the investor is not required to live in the place of investment; rather, he or she can live wherever he/she wishes in the United States. For example, the investor may invest in a Regional Center in the state of Washington, but choose to live in upstate New York.

Under mandate by Congress, Regional Center EB-5 petitions are given priority by CIS which, among other benefits, often results in a quicker path to approval. The official CIS definition of a Regional Center is "any economic unit, public or private, which is involved with the pro-

motion of economic growth, including increased export sales, improved regional productively, job creation, or increased domestic capital investment." Each Regional Center program must be pre-approved by CIS in order to be eligible for EB-5 Green Cards. Currently, there are 4 primary active CIS approved Regional Center programs with long term track records, including:

- A real estate limited partnership program that offers an investment in industrial properties that generally will be renovated into commercial offices and stores in a specified major city.
- A limited partnership program that makes low interest loans to businesses in a specified major city.
- Ownership of machine equipment in a specified location.
- Ownership of dairy farms in the Midwest.

The procedure for obtaining an EB-5 Investor Green Card is relatively straightforward. The investor must produce 5 years of tax returns to substantiate the source of investment funds. The funds can be in the form of a loan or gift, which would allow a parent to gift a son or daughter. Gift taxes, if required in the investor's home country, should be paid. He or she must also present evidence that traces the capital, through bank transfers and other documentation, from the investor directly to the enterprise. This provision of the regulation, which requires clear evidence that the source of funds was procured by legal means, arose from earlier concerns of Congress over money laundering issues.

After the investor completes a thorough business and financial due diligence analysis of the viability of the business, the investment is made and a petition is filed by the foreign investor with the CIS, requiring CIS to certify that the applicant and the investment are eligible for EB-5 status. The approval of the petition takes, on average, a mere 3–6 months.

If the investor is already in the U.S., he or she then applies for a Green Card through CIS. No interview customarily is required, and approval has been taking approximately 10–12 months. If the investor resides abroad, an application for the Green Card is generally made at the U.S. embassy or consulate of the investor's home country; however, in this case, for consular processing purposes, an interview is necessary. Approval of the Green Card in this case takes on average about 8-10 months.

In either of the above two scenarios, in most Regional Center cases, the entire process generally takes less than 1½ years. This is based on current CIS and Consular processing times.

Once CIS approves the investor's Green Card, it is conditional for a period of two years.

Conditional Green Card status confers the same rights as the permanent unconditional Green Card.

Between 21–24 months after the conditional Green Card has been approved, the investor must reconfirm that the investment has been made or is still in place and that the employment requirement has been fulfilled or maintained. An application to remove the conditional Green Card status is then filed with CIS.

Once the condition has been removed, a full Green Card is granted for indefinite permanent resident status and work permission in the United States. From the time the conditional Green Card is approved until approval of the removal of condition usually takes about two and a half years. Thereafter, in approved Regional Center programs, depending on the terms of their agreement, the investment may be sold, and the investor will still maintain the permanent Green Card. U.S. Citizenship is possible two and a half years later, five years after approval of the conditional Green Card, upon satisfaction of residence and other criteria.

In summary, freedom to live anywhere in the United States, a passive form of investment with no required direct management responsibilities, priority standing within the Immigration process, and an accelerated path to Green Card procurement, are important factors which make the little-known EB-5 Green Card category (and the approved Regional Center programs) an ideal investment vehicle for the inactive investor or retiree who wishes to live and work in the United States.

As with other U.S. Immigration visas, applicants also need to take into account U.S. and foreign tax and other business and personal planning considerations.

Nothing in this article should be considered legal advice, and interested persons are advised to consult qualified advisors.

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