Tax-Savvy Planning for Foreign Business Owners Seeking Temporary U.S. Residence: Alternatives to the EB-5 Visa

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The EB-5 Visa is not a panacea for non-resident alien high-net-worth investors contemplating a move to the United States and legal permanent residency. The investment threshold is high and other non-immigrant visa options may provide a better tax result from a U.S. perspective—particularly when the political and economic impetus prompting the move is short-term in nature.

Introduction

The EB-5 Visa program has been widely promoted as a legal basis for foreign business owners to gain conditional residency followed by permanent residency in the United States. The program is a great solution to the proposition "I want to live in America."

The decision to become a permanent resident or U.S. citizen has some significant, potentially costly, trade-offs from a tax perspective. These trade-offs should make a wealthy foreigner think twice about becoming a U.S. permanent resident or citizen particularly if there are other ways to spend a substantial amount of time in the U.S. without being locked into permanent residency or U.S. citizenship from a tax perspective.

It is the author's view that the tax consequences of U.S. residency are not adequately discussed when business immigration options are being considered. Some of the subtleties of being an American taxpayer are often overlooked, including the tax consequences of forfeiting U.S. residency or citizenship in the future after obtaining U.S. residency. The civil and criminal penalties of foreign bank account reporting and compliance frequently come as a complete shock to many foreigners.

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One of the reasons that this happens is that the profession of law has become so highly specialized. Unless one practices in a large law firm, an estate planner or tax practitioner lives and practices in a different world than an immigration attorney, and vice versa. Tax attorneys who deal with inbound transactions generally have a reasonable understanding of the tax implications, but are generally not familiar with family and business immigration considerations. This disconnect in the planning process has a great potential to ignite after the foreign investor becomes a U.S. resident.

It is very common for wealthy families to have stockpiles of cash in all of the best known tax havens. What often is not appreciated, however, are the U.S. compliance requirements for maintaining that pile of cash offshore in the event the foreign investor is also a U.S. citizen or resident. The author's general sense, confirmed unscientifically through discussions with tax practitioners on the "front lines" in Miami, is that tax compliance with the requirements of the Report of Foreign Bank and Financial Accounts (FBAR) is very lax.

Many foreigners will need to be in the U.S. for only a short period of time—say, until the political and economic situation in their home country improves. Alternatively, a foreigner investor's children may have been educated in the United States and then remained in the country, appreciating the combination of political and economic freedom available here. In a number of cases, the children have married Americans whom they met in college or graduate school. As a result, the senior generation, i.e., the foreign investor, might only need a convenient method to visit and remain for longer periods of time than the typical tourist visa allows, particularly considering the combination of personal and political factors in the decision matrix.

One other important consideration in a decision to become a U.S. permanent resident is the fact that the foreign investor is an entrepreneur who is accustomed to management and control over his own investments. The EB-5 investment may limit the foreign business owner's management and control over the investment. As a practical matter, a number of commentators have suggested that many EB-5 investments have been mediocre investments at best.[1] The typical business owner, foreign or domestic, would rather follow the business maxim that if a business owner is going to lose money on a business investment, he would prefer to lose the money himself!

It is also not uncommon for many foreign business owners to become aware of the adverse tax consequences of U.S. residency only after becoming a

[1] See, e.g., Andy J. Semotick, "EB-5 Fraud Highlights Risks of Investor, Program" (Forbes Online, Jan. 5, 2015), available at http://www.forbes.com/sites/andyjsemotiuk/2015/01/05/the-eb-5-investor-program-risks-and-rewards/;see also U.S. Securities and Exchange Commission (SEC), "Investor Alert: Investment Scams Exploit Immigrant Investor Program" (Investor Alerts and Bulls., Oct. 9, 2013), available at http://www.sec.gov/investor/alerts/ia_immigrant.htm.

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U.S. resident. The purpose of this article is to articulate an important planning point: The decision to pursue the EB-5 visa may be premature in many cases. It is an excellent solution for some, but not necessarily for everyone. This article looks at what may be preferable alternatives to the EB-5 visa, such as the E-2 investor visa and the L-1A visa, and also discusses a method for investors whose home country does not have a treaty with the U.S. for the E-2 visa to consider.

EB-5 Visa Overview

Congress established the EB-5 program in 1990 as a way to stimulate the U.S. economy through job creation and capital investment by foreign investors. The program is administered through United States Citizenship and Immigration Services (USCIS).[2](In 2014, Chinese applicants accounted for more than 85 percent of the EB-5 applications, with 9,128 applicants.[3])

Investment Requirements. EB-5 visas are for foreign investors who make a direct minimum investment of $1 million in an ongoing business, or who start a new business in the U.S., that preserves or creates 10 or more jobs for U.S. workers.[4] The direct investment requirement is reduced to $500,000 if the investment is made in a targeted employment area.[5] Investment is made through a private or public economic entity, known as an EB-5 Regional Center, devoted to increased domestic capital promotion, job creation, and improved regional productivity.

Upon making an EB-5 investment and upon approval of the application, a foreign investor (and immediate family including children under age 21) will be granted conditional permanent residence.[6] A foreign investor-applicant who can show that the investment satisfies the EB-5 job creation requirements after two years will be granted permanent residence.

Foreign investors are entitled to permanent residency under the EB-5 program only if they put the minimum-required investment ($1 million under the Investor Program or $500,000 under the Pilot Program) "at risk." Capital is "at risk" only where there is a chance for a loss or a gain.[7]

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[2] Immigration Act of 1990, PL 101-649, § 121, 104 Stat.4978.

[3] Miriam Jordan, "Investor Visa Soaked Up by Chinese" (Wall St. J., Aug. 27,2014), available at_ http://www.wsj.com/articles/investor-visas-soaked-up-by-chinese-1409095982. The cap for EB-5 visas is set at 10,000 per year. No country may have more than 7 percent of the EB-5 visas. However, unallocated visas allow a country, such as China, to exceed the 7 percent annual cap.

[4] Immigration and Nationality Act (INA) § 203(b)(5)(c); 8 CFR § 204.6(c).

[5] INA §§ 203(b)(5)(B)(ii); 216A.

[6] INA §§ 203(b)(5); 216A.

[7] 8 CFR § 204.6(i)(2).

Investment Structure. Generally, EB-5 investments are structured as debt or equity investments:

- *Under the debt model*, two enterprises are created: a "new commercial enterprise" (NCE) and a "job creating enterprise" (JCE). Foreign investors make a capital investment in the NCE.[8] The NCE, in turn, loans the JCE capital raised from the foreign investors, which the JCE uses to create the requisite jobs. The JCE repays the NCE, typically at 5 percent to 8 percent interest. Once the JCE has repaid the loan, the NCE can be liquidated.
- *Under the equity model*, the foreign investor is given either true or preferred equity in the JCE in exchange for his or her capital investment. The JCE can issue the equity either directly to the foreign investor or to an NCE. Most investors and developers prefer the preferred equity model since investors are generally not interested in maximizing their rate of return (they are more concerned with obtaining a green card) and developers would prefer to share their upside with investors.

Taxation of Residents and Non-Residents

This portion of the article provides an overview of the differences in tax treatment of citizens and residents versus non-residents for both federal income and estate and gift tax purposes.

Federal Income Taxation. The U.S. is one of the few countries that require residents and citizens to pay tax on their worldwide income. U.S. nationality exposes an individual to worldwide income taxation by the United States, regardless of other nationality.[9] Dual nationals with U.S. citizenship are subject to U.S. income tax even if unaware of their U.S. citizenship. A dual national who lives outside the United States from birth, and indefinitely thereafter, without taking any action to lose U.S. nationality remains subject to taxation as a U.S. citizen.

Permanent Residents. The United States taxes the income of permanent residents as defined in Code Section 7701(b) from all sources, domestic or foreign.[10] A resident alien is taxed on his worldwide income regardless of the source. Therefore, a green card holder is subject to worldwide taxation whether he or she lives in the U.S. or abroad. Worldwide taxation also applies

[8] 22 I&N Dec. 201 (AC 1998).

[9] IRC §§ 1, 61.

[10] IRC § 7701(b).

to “substantial presence” residents if they fail the mechanical test of substantial presence even where there is an intent to be domiciled abroad.

The federal income tax and federal transfer tax residency classifications are significantly different. The transfer tax sense of the term “resident” centers upon the subjective concept of “domicile” within the United States, whereas the income tax sense of the term “resident alien” centers upon a very objective set of standards.[11]

Under the green card test, the person holding the green card is considered a U.S. resident for income tax purposes. The green card holder continues to be treated as a U.S. taxpayer unless the taxpayer proactively makes an effort to relinquish or revoke green card status.[12]

The substantial presence test of Section 7701(b)(3) looks at the number of days over a three-year period that the individual is physically present in the U.S. An individual is substantially present if he or she is present for at least 31 days during the current year and a total of at least 183 days for the three-year period ending on the last day of the current year (December 31).[13]

The calculation uses a formula that weights the current-year days more heavily than days in prior years. The substantial presence test does not apply at all if the taxpayer is not in the U.S. at least 31 days in the current tax year.[14] Furthermore, such a taxpayer does not have to prove a “closer connection” to the foreign jurisdiction than the U.S.

As an example of how the weighted formula works, assume Chico Da Silva, a Brazilian, spends 120 days in the U.S. in each of 2015, 2014, and 2013. The weighting formula is:

Year	**Formula**
2015	120 days present × 1 = 120 days
2014	120 days × 1/3 = 40 days
2013	120 days × 1/6 = 20 days

Weighted Total = 180 days

Because the weighted total is under 183 days, Da Silva does not satisfy the substantial presence test.

The closer connection test, an important exception to the substantial presence test ,provides that if the non-resident alien is able to demonstrate

[11] See Elkins v. Moreno, 435 U.S. 647 (1978) (individuals in the United States on a G-4 visa could be regarded as U.S. domiciliaries). The Service has taken the opportunity to follow the holding in *Elkins*. See Rev. Rul. 80-363, 1980-2 CB 249.

[12] IRC § 7701(b)(1)(A)(i).

[13] IRC § 7701(b)(1)(A)(ii).

[14] IRC § 7701(b)(3)(A)(i) and (ii.)

to the IRS on Form 8840 that the taxpayer (1) has a tax home in a foreign jurisdiction, and (2) has a closer connection to the foreign jurisdiction than to the United States, then—regardless of the substantial presence test—the individual will not be treated as a U.S. taxpayer.[15]

The "tax home" is the taxpayer's home for determining deductible travel expenses while away from home in pursuit of a trade or business. The closer connection test is more subjective, and is based on intent. The analysis focuses on the amount of time spent in the U.S. versus in the tax home—in our example, Brazil—the value and locations of homes, and whether the homes are owned or rented. In addition, the analysis considers the following factors[16]:

- Time spent in the U.S. due to health problems or political problems in Brazil;
- The location where the taxpayer's family and friends are situated;
- Location of valuable personal property;
- Visa status;
- Jurisdiction where the individual is registered to vote;
- Jurisdiction of driver's license;
- Location of business interests; and
- Location of religious and social affiliations.

The First Year Election allows a taxpayer to make an affirmative election to be treated as a U.S. taxpayer providing (1) the taxpayer is present in the U.S. at least 31 consecutive days in the current tax year and 75 percent or more of the days in the testing period (starting on the first day of the consecutive 31-day period and ending on December 31 in the year of election); and (2) the taxpayer meets the substantial presence test in the next tax year.[17]

Nonresident Aliens. The United States taxes the incomes of nonresident aliens of the United States, as defined in Section 7701(b), only in respect of U.S.-source income. Their taxable U.S.-source income is divided into one of two categories: (1) U.S.-source income that is not "effectively connected" with the conduct of a trade or business within the United States (and is taxable at the rate of 30 percent under Section 871(a), without the allowance of deductions, and with the tax rate often reduced by treaty); and (2) income that is "effectively connected" with a U.S. trade or business (and is taxable at graduated rates, on a net basis, under Section 871(b)).[18]

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[15] IRC § 7701(b)(3)(B).

[16] Treas. Reg. § 1. 7702(b)-2(d)(1).

[17] IRC § 7701(B)(4).

[18] IRC § 871(b).

Federal Gift and Estate Taxation. Code Sections 2033-2044 indicate the property interests that are includible in the gross estate of a decedent. All such property interests, wherever situated, must be included in a U.S. citizen's gross estate, even if he or she lived and died abroad. For purposes of the federal estate tax, the regulations define a U.S. "resident decedent" as a decedent who, at the time of his or her death, had his or her domicile in the United States.[19]

The regulations define "domicile" for federal estate and gift taxation under essentially common law principles and, thereunder, domicile is acquired by living in a place, for even a brief period of time, with no definite present intention of living elsewhere.[20] In contrast, the term "citizen" is not defined in the gift or estate tax statutes or regulations. Transfers from estates of dual citizens—that is, people who have citizenship both of the United States and another country (or countries)—are taxed the same as those from estates of U.S. citizens, and any other citizenship is generally ignored for U.S. tax purposes.

The federal gift tax is imposed on gratuitous transfers of property made by any individual who is a citizen (wherever resident) or resident of the United States, that is, to the extent that the value of the property transferred exceeds the amount of the exclusions and deductions allowable.[21]

If on the date of death one is a nonresident non-citizen and, thus, not a domiciliary of the United States under this standard, transfers from his or her estate are not subject to the full reach of the federal estate tax. The federal estate tax applies only to the gross U.S. estate of a nonresident non-citizen—that is, on only property, tangible or intangible, situated in the United States.[22]

It applies also to U.S.-situs properties in which a nonresident non-citizen had an interest at death, was deemed to have an interest by being subject to a certain type of transfer, or had certain rights or powers over the property (within the meaning of Sections 2033–2046. Thus, property situated outside the United States is not included in the gross U.S. estate (and need not be disclosed on a decedent's U.S. estate tax return unless certain circumstances, such as the claiming of certain deductions, require disclosure).

Effect of Relinquishing Permanent Residency or U.S. Citizenship. The other end of the blade, i.e. Some foreign investors change their minds after obtaining visa benefits under EB-5, an seek to relinquish U.S.

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[19] Treas. Reg. § 20.01(b)(1).

[20] Id. IRC § 7701(b)(1) states that the definitions of "resident alien" and "nonresident alien" contained in IRC §7701(b) do not apply for purposes of gift or estate taxes.

[21] IRC § 2501(a)(1); Treas. Reg. § 25.2501-1.

[22] Treas. Reg. § 20.0-1(b)(1). IRC § 7701(b)(1) states that the definitions of "resident alien" and "nonresident alien" contained in IRC § 7701(b) do not apply for purposes of gift or estate taxes.

residency or citizenship. This does not necessarily mean they will escape U.S. taxes. The expatriation rules apply to U.S. citizens or long-term residents who have had a green card in eight of the last 15 years preceding the application for expatriation. The expatriation rules apply to taxpayers who meet one of two tests:

- The net worth test of Section 877A(g)(1) of $2 million or more;[23] or
- The tax liability test, under which the expatriation rules apply if the taxpayer's average annual net income tax exceeds a dollar figure indexed for inflation ($160,000 in 2015).

Caution: Regardless of the application of the preceding two rules, under a third test, the certification test, the expatriation rules apply if the taxpayer fails to certify that he is compliant with all of his federal tax obligations on Form 8854.[24] A non-compliant foreign investor who becomes a U.S. resident or citizen and is hiding a mountain of cash in, say, the Cayman Islands may have a difficult time certifying compliance.

The expatriation rules are not applicable to a taxpayer who became a dual citizen at birth, however,[25] if that taxpayer has remained a dual citizen of both countries. A second exemption from the expatriation rules applies to taxpayers who expatriate before age 18-1/2 and who did not qualify as a U.S. resident under the substantial presence test for more than 10 years prior to the year of expatriation.

Section 877A subjects a covered expatriate to an exit tax on the net unrealized gain with respect to all worldwide property when the taxpayer terminates U.S. citizenship or permanent U.S. residency. The property is deemed sold on the day before expatriation occurs, and the tax applies to the amount of gain that exceeds an exemption threshold ($690,000 in 2015).[26] In the case of a grantor trust, trust assets are subject to the mark-to-market rules. Beneficial interests in a non-grantor trust are exempt from taxation.

The exit tax base is predicated on the fair market value of all property. The taxpayer is able to adjust his tax basis on each item subject to the deemed sale to its fair market value on the expatriation date. A covered expatriate may defer the payment of the exit tax in exchange for providing security to the IRS that satisfies Section 877A(b)(4). The taxpayer irrevocably waives any treaty benefits that might otherwise preclude a tax assessment. Interest accrues at the normal underpayment rate of Section 6621.

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[23] IRC § 877A(g)(1).

[24] Internal Revenue Service, Instructions to Form 8854, at 2.

[25] IRC § 877A(g)(1)(B)(i).

[26] IRC § 877A(a)(3).

Tax Compliance. One of the objectives of foreign tax structuring is to avoid having the foreign individual fall within the jurisdiction of the IRS. U.S. individual residency for tax purposes is a major trade-off. Many foreigners come from foreign jurisdictions where the fiscal authorities lack the enforcement capability of the IRS. As a result, they may not appreciate the enforcement capability of the U.S. federal government for tax compliance purposes. The "quid pro quo" that may exist between wealthy foreigners and their governments for tax purposes does not exist in the U.S.

A key component of the tax compliance issue is the requirement for foreign bank account reporting (FBAR) and foreign investment account reporting for permanent residents and U.S. citizens.[27] (Tax attorneys in Miami have been heard to say that the national debt could easily be satisfied if every Latin American in Key Biscayne were fully FBAR compliant.) Consider that many foreign investors come from a background where not only do they not trust their government in their home jurisdiction; they also may not fully trust every member in their extended family. Financial disclosure, therefore, is limited to a very small group of personal advisors. Such foreigners are almost certainly not fully tax compliant in their home jurisdictions.

The problem with U.S. residency or citizenship for such people is the need to disclose any stockpile of cash in Switzerland, Panama, or the Cayman Islands. The list of countries that currently have tax information treaties with the U.S. and have signed on to FATCA includes most of the tax haven jurisdictions.[28] There is nowhere left to hide.

Wealthy foreign investors need to come to terms with the idea of annual filing of the FBAR, Schedule B of Form 1040, and Form 8938. A willful intent to disregard these requirements leads to the unpleasantness of facing the criminal enforcement side of the IRS. Maybe it is better for some foreigners to stay home and just visit the U.S. whenever and for however long as long as they want without residency.

Business Immigration Alternatives to the EB-5 Visa Program

The premise underlying this article is that a majority of foreign investors who long to live in the United States primarily are looking at U.S. residency on a temporary basis. The price of U.S. residency and citizenship is very high from a tax perspective: worldwide taxation for federal income and estate tax purposes.

Temporary U.S. residency or non-U.S. residency has advantages in that the temporary resident can relinquish U.S. residency without triggering the

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[27] 31 U.S.C. §§ 5311-5330; Financial Crimes Enforcement Network (FINCEN) Report 114.

[28] IRC §§ 1471-1474. A list of countries that have signed an intergovernmental agreement with the United States for FATCA may be found at http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx.

adverse tax consequences of expatriation. The non-resident will be taxed only on U.S. investment income or income that is effectively connected to a U.S. trade or business. Furthermore, the non-resident only faces federal estate taxation on his U.S. estate, leaving his non-resident estate safe from IRS clutches. The U.S. tax rules applying to expatriation would not apply to the temporary resident when he returns to his home country.

Temporary residency or non-residency provides the greatest flexibility for the foreign investor whose situation requires flexibility as he copes with the political and economic uncertainty in his home country and its impact on his personal situation. In many cases, the foreign investor needs a safe harbor to park himself as the uncertainties resolve themselves in the home country. These circumstances do not require the foreign investor to secure U.S. residency.

The summary of various business immigrant options set out below provides several options for the foreign investor or entrepreneur to live in the United States for several years, or indefinitely, while retaining the ability to travel inside and outside the United States while returning to the home country.

E-2 Visa. The E-2 visa is an excellent option for the foreign investor or entrepreneur. This type of visa allows the foreign investor to retain non-residency status for both income and estate tax purposes.

Eligibility. The E-2 is for treaty investors. That is, the E-2 visa requires a treaty of friendship, commerce, and navigation between the United States and the foreign national's country. The list is quite extensive, but some countries are noticeably missing, e.g., Brazil, mainland China, most Middle Eastern countries, and Hong Kong.[29] The treaty investor must hold the nationality of the treaty country in order to obtain an E-2 visa. If the treaty investor is a business, ownership must be traced to the individuals who are ultimately the owners. At least 50 percent of the business must be owned by nationals of the treaty country.[30] If the owners have dual nationality, the individuals must select the nationality of the country with E treaty status.

The E-2 applicant seeks temporary entry to the United States with "an expression of an unequivocal intent to return abroad when the E status ends."[31] However, unlike other visas, the E-2 applicant does not need to meet the requirement of maintaining a foreign residence abroad during the pendency of the E-2 visa. Furthermore, the E-2 investor can travel outside the U.S. liberally. However, the E-2 visa holder must indicate an intent to depart the U.S. upon termination of status or cessation of business activities.

[29] 9 Foreign Affairs Manual (FAM) 41.51, Exh. 1, available at http://www.state.gov/m/a/dir/regs/fam/09fam/index.htm.

[30] 22 CFR § 41.51(b)(6); 9 FAM 41.51, at n.3.1.

[31] 8 CFR § 214.2(e)(1)(ii), (2)(iii), (5); 9 FAM 41.51 N.1.1, N.1.2.

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Conditions and Limitations. The E-2 investor is admitted to the United States "solely to develop and direct the operations of an enterprise in which he has invested or of an enterprise in which he is actively in the process of investing a substantial amount of capital."[32] The regulations require that the investor possess and control the funds and that the investment must be "at risk." The investment must be irrevocable.

Unlike the EB-5 program with its minimum investment level, the Department of State guidance does not have a set dollar figure that constitutes a minimum investment to be considered substantial for E-2 visa purposes. Instead, the inquiry focuses on the total amount actually invested relative to the value of the business. A smaller business that is part of a joint venture may also qualify. The E-2 investor needs to perform executive or supervisory duties.[33] An E-2 entity may be established in order to perform on a contract for services or goods with a U.S. business.

Upon approval, the foreign national receives Form I94 for up to two years after the date of admission. Based upon treaty provisions and reciprocity agreements under the E-2 treaty, the visa may be valid for a longer or shorter period of time than two years. For reasons discussed below, the E-2 investor visa with Panama has a five-year period under the treaty.

Spouses of E-2 investors may accompany the E-2 investor, and spouses are eligible or to apply for employment authorization documents and a social security number. Renewal of the E-2 visa may be accomplished on a streamlined basis. Depending upon the consulate, the E-2 investor will submit Form DS-156E with financial statements and tax returns annually or periodically. The regulations for E-2 do not limit the number of extensions that the E-2 investor may receive.

Summary of Benefits to the Foreign Investor. In summary, the E-2 investor visa provides the foreign entrepreneur with the ability to travel in and out of the United States without limitation as long as the E-2 visa remains valid. The program does not suffer from the steep minimum investment requirements of the EB-5 visa and is easily renewed. The number of E-2 visas does not have an annual cap.

Family members have the ability to accompany the E-2 investor, including the ability to work while in the United States. Most important, the E-2 investor does not get locked into U.S. residency for tax purposes, but retains the ability to adjust status for permanent residency if it is desired in the future. The E-2 visa does not suffer from the annual cap on EB-5 visa and is adjudicated much more quickly than the E-2 visa.

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[32] 9 FAM 3.51. N.12 ;C.F.R. §214.2(e)(14); 9 FAM 41.51 N.10; 22 C.F.R. §41.51(b)(9).

[33] Id.

The Panamanian Second Passport Program for Foreign Investors With a Treaty for E-2. Panama has become a popular destination for many Americans and Canadians for retirement purposes. As "the Switzerland of Latin America," it is also a popular destination for many South Americans, particularly Venezuelans and Colombians. Historically, Panama has been and remains politically and economically stable. The currency is tied to the U.S. dollar. For purposes of this article, the attractiveness of Panama is the relative ease and low cost to obtain a second passport in Panama. Additionally, Panama has a valid treaty for the E-2 investor treaty which is very attractive.

Panama has adopted a series of incentives to attract foreign capital, including the opportunity to obtain a second passport. The Panamanian second passport provides for visa-free travel to 100 countries including 27 European countries. The requirements for getting the second passport are straightforward: The person applying for it must make an investment of $350,000 in a personal bank account in a Panamanian bank, for a minimum period of five years[34] (the current yield on such investments currently is approximately 3 percent). The second passport is issued within the course of a month; there is no need for the applicant to reside or spend time in Panama. The applicant's family members also receive the benefit of the second passport. Most EB-5 investment programs have been speculative and illiquid, but the Panamanian second passport is available on a liquid basis with the required investment principal guaranteed by the National Bank of Panama, which currently has a Standard and Poor's rating of AA. The foreign investor who does not have the benefit of an E-2 treaty with the United States can utilize the Panamanian second passport program to access the benefits of Panama's favorable E-2 treaty with the United States. This treaty provides for a five-year term, which may be easily renewed.

Panamanian residency and a Panamanian second passport provide the pathway for easy access to obtain the E-2 investor visa to own and operate a business in the U.S., while traveling inside and outside the United States at will.

L-1A Visa. The L-1-A visa can be useful in situations where the investor is a resident of a country that does not have treaties for E-1 and E-2. Additionally, the L-1-A visa can be attractive for a foreign investor that does not have the available capital.

Eligibility Requirements. Applicants for the L-1A visa must meet several requirements.

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[34] See Immigration Website of Panamanian Government, www.migracion.gob.pa; Residente Permanente, Solvencia economica por Apertura de Deposito a Plazo Fijo, available at http://www.migracion.gob.pa/images/Noticias/Archivos%20PDF/Archivos%20en%20pdf/Transparencia/Requisitos/Residente%20Permanente%20por%20razones%20econimicas/SOLVENCIA%20ECONÓMICA%20POR%20APERTURA%20DE%20DEPÓSITO%20A%20PLAZO%20FIJO.pdf.

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Qualifying Relationship With Foreign Entity. The would-be employer—i.e., the petitioning U.S. entity—must have a qualifying relationship with an entity abroad. The new U.S. office must have a corporate relationship with the foreign entity abroad where the individual seeking L-1A status has been employed as a manager, executive, or worker with specialized knowledge. This means that the new U.S. office must be a parent, affiliate, subsidiary, or branch of the foreign entity, and that the U.S. office and the foreign entity must continue to share common ownership and control.[35]

The foreign investor must seek to enter the U.S. temporarily to continue to work in a managerial capacity for the same employer, affiliate, or subsidiary. Full-time U.S. employment is not required, but an employee must dedicate a significant portion of time on a regular and systematic basis. The manager or executive of the new U.S. operation may be the majority or substantial shareholder or even a sole proprietor.[36] Where the beneficiary is the owner or major stockholder, he must submit evidence that his services will be temporary, and that he will be transferred abroad upon completion of the temporary U.S. assignment.[37] The manager or executive may be non-salaried, and employment is not dependent upon the amount or existence of a salary.[38]

The U.S. subsidiary of the foreign company can demonstrate its corporate relationship to the foreign company through any of the following[39]:

- Articles of incorporation showing common ownership of the U.S. and foreign entities;
- Business licenses or other documents showing common ownership of the U.S. entity;
- Annual reports describing the corporate structure;

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[35] 8 CFR § 214.2(*l*)(1)(ii).

[36] In re Aphrodite Invs Ltd., 17 I&N Dec. 530 (Comm. 1980). See also In re Allan Gee, Inc., 17 I&N Dec. 296 (RC 1979);Matter of Tessel, Inc., 17 I&N Dec. 631 (AAC 1981) (alien owned 93 percent of foreign corp., 60 percent of U.S. corp.). See also http://www.uscis.gov/sites/default/files/err/B4%20-%20Multinational%20Managers%20and%20Executives/Decisions_Issued_in_2013/JUN132013_06B4203.pdf (in rejecting Nebraska Service Center's denial where L was majority shareholder in both the parent and the subsidiary, the Adminstrative Appeals Office of USCIS found that the "beneficiary's employer-employee relationship with the foreign and U.S. entities is not an essential issue for consideration") (June 13, 2013).

[37] 8 CFR § 214.2(*l*)(3)(vii).

[38] Johnson-Laird, Inc. v. INS, 537 F.Supp. 52 (D. Or. 1981); In re Tessel, Inc., 17 I&N Dec. 631 (AAC 1981) (nonsalaried chairman can qualify as L-1); In re Pozzoli, 14 I&N Dec. 569 (RC 1974) (control over employee's activity rather than salary is essential element). Payment by foreign or U.S. company is not material. In re Pozzoli, supra; 9 FAM 41.54, at n.8.1.

[39] U.S. Citizenship and Immigration Services (USCIS), "Understanding L-1 Requirements – Requirement #1," available at http://www.uscis.gov/eir/visa-guide/l-1-intracompany-transferee/understanding-l-1-requirements.

- Contracts or other documents detailing the affiliate relationship;
- Corporate filings in the United States or abroad describing the corporate relationship; or
- Any other evidence demonstrating ownership and control over the U.S. and foreign entities (i.e., stock purchase agreements, voting rights agreements, capitalization table, term sheet).

The foreign executive must demonstrate employment with the foreign company for one out of the last three years, which may be done through payroll records and pay stubs as well as work product and tax returns. The executive can demonstrate employment in a managerial or executive capacity through an organizational chart or job description.

Physical Space. The second requirement for the L-1A visa is the acquisition of sufficient physical space for the new office, which may be purchased or leased. The amount of space would be dependent upon the type of business. The evidence necessary to satisfy this requirement might include a signed lease or mortgage as well as a business plan and marketing materials connecting the business with the physical space required.

Evidence of "Ramp Up" and Ability to Continue the Business. The third requirement for the L-1A visa is demonstration of the "ramp up" of the new office in the United States. Evidence, to demonstrate the "ramp up" of a new U.S. location over the initial year depends upon the nature of the business but the U.S. subsidiary and its foreign owner might present the following: proof of the hiring of additional employees, fulfillment of contract orders, having a revenue stream, or holding inventory, if applicable.

The fourth L-1A visa requirement is demonstration of evidence that, after the first year of business, the new office can support the manager or executive position in order to support an extension of the L-1A visa. The evidence might include payroll records for employees hired, purchase orders, and contracts evidencing commercial activity. Bank reports and financial statements used to demonstrate the initial "ramp up" may also help to support the case for the expansion.

Negotiationg the Process. USCIS has a reputation for being extremely difficult in the approval for extensions beyond the first year. The foreign business owner must anticipate this fight and spend thoughtful time in the development of the business plan at the time the initial application for the L-1A visa is submitted. The difficulty is not in the initial approval but rather the extension for an additional two-year increment after the initial year of the L-1 visa grant. Exhibit 1 illustrates a typical scenario.

Exhibit 1: The Road to Obtaining an L-1A Visa and Extension

Investor's Goal

Joao Velasco, a resident of Sao Paolo, is married and has four children. He operates a tile manufacturer in Sao Paolo and would like to create a new U.S. subsidiary, which he would manage on-site. He would like to set up the company in Florida and live in South Florida, along with his wife and family, due to the similarity in weather and the growing Brazilian community in that area.

Achieving the Goal

Joao creates a new Florida corporation as a subsidiary of his Brazilian corporation. He meticulously follows the requirements of L-1A visa process in the preparation of his Form I-129 and I-765 requests. He applies for an L-2 visa for his wife and children. His children will attend private school in Dade County. The Florida corporation forms two new LLCs. One LLC will serve as a new business venture to import and distribute Brazilian tile nationally. Joao will operate his office out of warehouse space in the Doral, FL, area on a lease. He hires three people immediately to help with the new tile business in the United States. The second LLC will purchase an existing Dunkin' Donuts operation in Western Massachusetts with a license to add new restaurants in the area. The existing operation has 15 employees and net profits of $500,000.

Joao will travel back and forth to Brazil while his family remains in the United States. He retains the flexibility to adjust his status for immigration purposes over the next years based upon political and economic factors in Brazil, the success of the new operations, and his family's adjustment to life in south Florida.

The visa request is made on an expedited process, which takes one month from the time of submission to completion, compared to 13 or 14 months for an unexpedited request. The approximate filing fees, including the expedited request, are $2,500. Attorney's fees are in the $5,000 range.

F-1 Student Visa. The F-1 student visa is typically viewed from the perspective of the foreign student coming to the United States for college or boarding school, but the F-1 visa does not have any age restrictions. Further, parents can obtain F-2 visas to accompany their student children. The parents can then lease or purchase a home to live in while Junior and his sister complete elementary and secondary school, college, and even graduate studies. The parent as the F-2 visa holder should have no trouble traveling outside the country without the F-1 student (child) providing the Form I-20 Certificate of Eligibility for Non-Immigrant Students.

The administrative requirements and costs of the F-1 visa for a student and F-2 visa for dependents) are inexpensive and straightforward when compared to many other visa options. The uniqueness of the planning application is that the parents are the dependents or F-2 visa holders and the young children are the F-1 students. Furthermore, the F-1 visa may be easily renewed in order to complete the educational process.

One requirement is that F-1 applicants must have a foreign residence to return to upon the completion of their studies. The F-1 visa applies only to

the academic institution where a student completes his or her studies.[40] As a practical matter, the certification process for the Student and Exchange Visitor Program (SEVP) through the Department of Homeland Security is quick and inexpensive. The SEVP fee is $200 and is quickly processed. The SEVP does not apply to the F-2 dependents.

The foreign student must be able to demonstrate financial support and ties to the home country, such as family and personal assets. For public school attendance, the F-1 visa is limited to a 12-month period, and the foreign student must reimburse the county or state government. As a result, the preferred immigration strategy is attendance at a private school. The private school does not have a reimbursement requirement, but rather the payment of private school tution. Exhibit 2 illustrates how the F-1 andF-2 visa programs might be utilized by a foreign business owner.

Exhibit 2: Using the F-1 and F-2 Visa Programs

Foreign Family's Situation

The visa applicant, Joao Velasco, is an entrepreneur who is married and has two young children (ages 5 and 6) in Brazil. He has a solid and profitable business in Sao Paulo, but is concerned about Brazil's short-term political and economic prospects, and equally concerned about the family's safety.

Joao owns a nice home in Sao Paulo and plans to continue to operate the business there. He also owns investment real estate, both in south Florida and in Sao Paolo, and he has offshore investments in the Cayman Islands. He likes the anonymity of living in South Florida. The growing Brazilian community is a positive factor, along with the large Latin American population and many daily flights to Brazil. Equally important is the idea that his children can receive an American education, learn English, and possibly become as fluent in Spanish as they are in Portuguese. Finally, Florida's tropical weather is a popular selling point with Joao's wife.

How Goal Is Reached

Joao proposes to move his family to Boca Raton, Florida, an affluent community in southern Palm Beach County. The town has a sizable Brazilian population and is next to the largest Brazilian community in the United States—Pompano Beach-Deerfield Beach. Boca Raton offers a number of excellent religious and non-religious private school options from kindergarten through twelfth grade. The area surrounding nearby Fort Lauderdale also offers a wide selection of non-religious and religious K-12 private schools.

Joao retains his business in Sao Paulo while living with his family in Boca Raton. The children attend a Christian school in Boca Raton. The family's income is totally dependent on U.S. real estate investments and dividend payments from the family business in Brazil. The tax benefit in this situation is that the client should not be treated as a resident for tax purposes taxable on worldwide income.

[40] INA § 101(a)(15)(F), 8 USC § 1101(a)(15)(F); 8 CFR § 214.2(f), 9 FAM 41.61.

Conclusion

Among the world's "rich and famous," the Internal Revenue Service has achieved a certain notoriety, and most of them will move to the end of the earth to avoid coming within IRS jurisdiction for tax purposes. Equally notorious is U.S. tax treatment of worldwide income for income tax and federal estate tax purposes . So, although a green card to come to the United States when "Rome is burning" is very appealing, the tax hangover from such immigration may be more than the foreign investor bargained for. But a wealthy foreign business owner has options beyond the EB-5 visa that can be used to access the United States on an ongoing basis, options that don't involve becoming a resident for tax purposes. This article summarized critical tax implications that should be understood by tax professionals and immigration attorneys alike.

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