

# Marrying U.S. Tax and Immigration Planning

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# Who is a U.S. *Income Tax Resident*?

- If a Green card holder, you are automatically a U.S. income tax resident, regardless of your presence or days spent in the U.S.
- If in U.S. 183 actual days or more in a particular year on **a *work or investor*** visa, whether the days are consecutive or not, you are a U.S. *income tax resident*.\*
- If in U.S. under 183 actual days, but over 183 days under the ***substantial presence test***, you are U.S. income tax resident.\*

\*UNLESS AN EXCEPTION APPLIES.

# U.S. *Income* Tax Resident: What it Means

- Taxation on **worldwide** income (percentage depends on income level, highest rate generally is **40.8%** on ordinary income, **23.8%** on capital gains)
  - Income earned in U.S.
  - Income earned overseas (advised to “step up” the basis of foreign assets, if possible)
  - Active and passive investments
- Annual disclosure of **worldwide** assets
  - Foreign corporations (Form 5471)(if applicable)
  - Foreign assets (Form 8938)
  - Foreign bank accounts (FBARs)
- Foreign tax treaties (if they exist) and foreign tax credits could be applied

# Who is a U.S. *Estate* Tax Resident?

- The determination is based not on days, but on “domicile”: where is your permanent home, and is it your intention to remain in the U.S.?
- Applying for a green card while in the U.S. is strong evidence of intent to remain in the U.S. and therefore you could be considered a U.S. estate tax resident from that date. Facts and circumstances, such as your family living in the U.S. and owning real property in the U.S., is also considered.
- Pre-Immigration Tax Planning: prior to establishing *domicile* in the U.S., there are opportunities to make gifts/transfers to cause assets to be considered “out of your taxable estate.”

# U.S. *Estate* Tax Rules: What Are They?

- Currently, the combined lifetime estate and gift exclusion amount is \$12.92 million (for each spouse), adjusted annually for inflation, for U.S. estate tax residents. This can be combined if both are citizens and assets are structured properly. In 2026, however, such exclusion amount is scheduled to be cut in half by Congress.
- \$17,000 in gifts (annual exclusion) can be gifted per year, per recipient, to as many recipients as desired, without going against lifetime exclusion.
- Upon death, any value remaining once exclusion amount has been exhausted, on not just U.S. source assets (non-residents) but your **worldwide** assets at their fair market value on your date of death, are taxed at 40%.

# Non-Immigrant Visas

- B1/B2 TOURIST VISAS
  - Renew every six months
- F VISAS – STUDENTS
  - 5 years of tax exempt status, as long as studying
  - Need to have intent not to abandon foreign residency
- INVESTOR AND WORK VISAS
  - E2 (Treaty based Investor Visa)
  - O (extraordinary ability)
  - L (intra-company transfer)

# E-2 Visa

- The U.S. has treaties with several European countries for this purpose (France, Spain, Germany, Italy, Netherlands, and more) which makes it attractive for European clients to come to the U.S. on a non-permanent basis.
- Four factors
  - Active investment: in a business enterprise, operational with activity
  - Substantial investment: no set dollar amount, but at least \$150,000
  - Creation of jobs: for U.S. workers, not just family
  - Essential role: principal investor remains involved in business
- Can be applied for at U.S. consulate and renewed over time
- Can be used as a stepping stone to a green card, but is not directly convertible into a green card.

# Immigrant Visas

The following visas are employment based green cards. There are also family based immigration visas, which are out of scope of this presentation.

- EB1: 3 Types
  - 1); Similar to O1; (2) Outstanding Professors and Researchers; and (3) Certain multinational executives and managers
- EB2: professional with advanced degree or exceptional ability
- EB3: skill based worker, professional, or other (unskilled worker)
- EB5: investment based (at least \$1,050,000)

# Simple Advising

- Non-U.S. married couple wants to come to the U.S. as a matter of preference. The year is 2023 and they want to come now. They have approximately \$50M of worldwide assets.
- *Advice:*
  - Analyze days spent in U.S. this year if here remainder of the year. If under 183, they can come on a tourist visa for the rest of 2023. If over 183, stay out enough days. Restructure assets in 2023.
  - Or, wait to restructure until 2024. Assist clients with enrolling at university in English classes with a F visa. But, now they cannot work.
  - As long as the restructuring occurs first, then assist with obtaining green card / immigrant visa.
  - Lower estate tax exemption prior to green card. Careful of days spent.

# Foreign Tax Residence Impact

- Client here on an F visa, but wants to exit tax residence in home country for tax reasons. How do we advise?
- Technically, this is abandoning residence and violates F visa, but no subsequent filings once granted are required, so it's a client risk question
- Impact on tax status:
  - Makes it harder to claim not an estate tax resident for future transfers
  - Harder to claim closer connection (if on E2 in the future) for income tax purposes
- Impact on immigration status:
  - Potentially at risk at border crossings
  - Limited on EB5 as it requires documentation of past tax returns in home country
  - Children limited for their F visas

# Expatriation

- Immigration
  - Oath of renunciation before a U.S. consular officer
  - Need a visa to re-enter like any non-U.S. person
  - Does not trickle down to dependent children
- Tax
  - \$2 million of assets or more, you could be a “covered expatriate”
  - If green card holder, your gain is measured from your date of initial residency and “deemed sold” at fair market value. Such gain is taxed with an exemption adjusted for inflation (was \$767,000 in 2020).
  - 8 calendar years as a green card holder, followed by renouncing the green card, causes you to be a covered expatriate

# Medical Exemption Example

- Here on a B1/B2 tourist visa, unexpected injury causing you to not be able to leave the U.S. Usually physical but could be mental as well.
- Form 8843 exempts days here in which could not leave the U.S., signed by client and doctor certifying the same. Could theoretically be indefinite from a tax perspective as long as you file the form annually.
- Immigration perspective, every 6 months we need to continue to extend the stay. May eventually be denied by USCIS.
- What about getting the spouse an F visa?
- What happens if you are out of status for Immigration purposes but cannot leave (for medical reasons)?

# Like in any marriage...

- Communication is key!
- Both sides need to be willing to be flexible.
- Teamwork makes the dream work.

# Questions for us?

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