

Immigration & Tax Planning for Inbound Executives

Richardson Chamber
International Concierge Team

Roundtable Breakfast
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Speakers:

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Lisa is an immigration attorney in Richardson, Texas working with clients in a variety of immigration matters such as visas for investors, multi-national company transferees, H-1B visas, National Interest Waivers and other types of immigration cases. Lisa is a tri-chair of the Richardson Chamber of Commerce International Concierge Committee.

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The Case of ABC Company

ABC is a French company, with the home office incorporated in France, and having branches in Luxembourg and The Netherlands. Javier is the sole owner and CEO of ABC Company, and he is a citizen of Spain. Javier's company has grown substantially and been very successful, and he wants to expand his company's presence in the United States. Javier is interested in obtaining a US Green Card so that he can live and work in the US in order to oversee the establishment of the new US branch of his company. Javier wants to know how he can obtain immigration status in the US so that he can set up and operate his company.

Visa Categories for Foreign Company Expansion

AKA “The Visa Alphabet Soup”

L-1A Visa – Manager or Executive of Multinational company

E-1/E-2 - Treaty Trader or Treaty Investor (Non-Immigrant)

EB-5 -- Investor Visa (Immigrant/Green Card)

National Interest Waiver -- For Entrepreneur (Immigrant/ GC)

Personal Considerations for the Executive & Family

Impact on Choice of Visa Categories:

- What is the Executive's goal?
 - Long term immigration to the US?
 - US citizenship?
 - Move the family to the US?
 - Have the ability to freely enter/exit the US and supervise the business investment?

Definition of “Resident” in Immigration Law and Tax Law

The term “Resident” has different definitions in the immigration law and the tax law.

Immigration:

A “Legal Permanent Resident” is a foreign national who intends to live in the US. A Legal Permanent Resident may appear to have abandoned his/her resident status by remaining outside the US for too long, not maintaining sufficient ties in the US such as employment and domicile, by claiming to be a non-resident on US tax return.

Tax:

A “resident” for U.S. income tax purposes includes Legal Permanent Residents but also includes non-immigrant non-residents who spend sufficient time in the U.S. to trigger tax residence.

Defining U.S. Tax “Resident”

- Two classifications for tax purposes
 - Non-resident: taxed on U.S. source income only
 - Resident: taxed on worldwide income
- How to become a U.S. tax resident?
 - Substantial Presence Test (three-year, 183-day test)
 - Green card holders (Lawful Permanent Residents)
 - U.S. citizens

Defining U.S. Tax “Resident”

- Some exceptions to substantial presence test
 - Student visas
 - Medical exception
 - Closer connection to a foreign country
- Treaty exception
 - Residents of a tax treaty partner country may be eligible to claim home country residence despite substantial U.S. presence or green card

Case Study Example

- Javier wishes to obtain a green card to make it easier for him to manage ABC Company in the U.S.
- Obtaining a green card will trigger automatic U.S. tax resident status.
- What would this mean for Javier's tax situation?

Resident Taxation and Reporting

- U.S. taxation of worldwide income
 - Foreign tax credit granted for foreign income taxes
- Punitive taxation of certain foreign assets
 - Controlled Foreign Corporations (CFCs)
 - Passive foreign investments (e.g. mutual funds)
 - Foreign retirement funds

Resident Taxation and Reporting

- Invasive foreign asset reporting
 - Foreign bank account report (FBAR) if foreign accounts exceeded \$10,000
 - FATCA reporting (Form 8938) if foreign financial assets exceed thresholds (\$50,000 for single filers)
 - Detailed, complex reporting for CFCs and other foreign entities
- Severe penalties apply to late or missing reports
 - Generally \$10,000 and up, per violation

Case Study Example

- Javier has substantial assets in France, including bank accounts, investments, and ABC Company France stock.
- If Javier becomes a U.S. tax resident, he will be taxed on his worldwide income in the U.S. and will need to report all of these foreign assets on his U.S. tax return and FBAR.
- After learning about the potential tax impact, Javier would rather not pursue green card and decides to pursue a different visa category.
- However, Javier knows there is a good chance his U.S. days may trigger tax residency, and wants to know what to do to minimize the negative impacts.

Pre-immigration Tax Planning

- Without planning, double taxation could apply when taxpayers move to the U.S.
 - Cost basis of assets does not reset upon immigration – built-in gains are taxable in the U.S. when realized.
 - Home country exit tax may apply, but no matching gain on the U.S. side
 - Foreign corporations subject to tax in home country, but income may be taxed again in U.S.
- Pre-immigration planning focuses on reducing these effects
 - Reset cost basis
 - Match home country and U.S. tax timing
 - Restructure foreign operations to reduce complexity and effective worldwide tax rate

Pre-immigration Tax Planning

- Reset cost bases:
 - If home country has tax exemptions for certain asset classes, consider an actual related party sale at a gain prior to U.S. landing
 - e.g. New Zealand exempts land gains
 - Some countries do not have income taxes
- Without changing entity structure, a check-the-box election for foreign entities may result in a cost basis reset for U.S. tax purposes

Pre-immigration Tax Planning

- Timing:
 - If home country and U.S. tax rates differ, considering accelerating income or expenses accordingly
 - Defer income and accelerate expenses if home country taxes are higher
 - Accelerate income and defer expenses if U.S. taxes are higher
- If home country applies an exit tax when terminating residence, consider an actual sale of assets to reset bases and match timing with U.S. tax

Pre-immigration Tax Planning

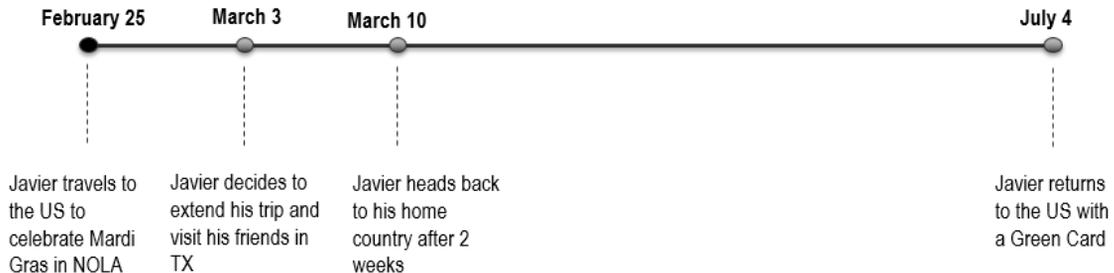
- Restructuring foreign entities:
 - “Check-the-box” election can change U.S. tax treatment of foreign entities from unfavorable CFC treatment to more favorable pass-through taxation.
 - Foreign entity must have U.S. tax relevance before making election – e.g. owns a U.S. income-producing investment or files a U.S. tax return.
 - Generally, home countries disregard the U.S. election. Take care to confirm ramifications with local counsel.
- Make sure that any restructuring plan considers eventual exit from U.S.

Pre-immigration Tax Planning

- After thorough analysis with his US and French tax advisors, Javier decides that making a check-the-box election for ABC Company France will result in the lowest overall tax impact.
- When and if Javier becomes a U.S. tax resident, he will be eligible for more favorable taxation. While a French tax resident, the U.S. election will have minimal impact.
- ABC Company France invests in a few shares of U.S. dividend-paying stocks to create U.S. tax relevance and proceeds with the check-the-box election.

Deadline Day: U.S. Landing Date

- Watch out for pre-immigration U.S. tourist or business visits
- If becoming resident during a year, the earliest date present in U.S. during the year generally becomes the start date



Visa Category and the Impact of Choice of Entity

L Visa – The relationship between the US entity and the foreign entity must be a parent - branch, parent - subsidiary or affiliate.

E-2 Treaty Investor - Must demonstrate that the treaty investor is in possession or control of the funds or assets, that the treaty investor will develop and direct the investment enterprise in the US (ownership of at least 50% of the investment business).

Timeline for Processing of Visa Application

L-1 and E-2 visas are eligible for Premium Processing and review within 15 days with USCIS

An E-2 visa submitted to a US Embassy/Consulate is subject to visa appointment availability

EB-5 Visa – Current USCIS processing times are 32 – 52 months and subject to visa availability – China, India and Vietnam are oversubscribed countries

National Interest Waiver – USCIS processing time 9 – 12 months, subject to visa availability based on country

US Dept of State – FAM – Permitted activities while in B-1 Status:

- Engage in commercial transactions which do not involve gainful employment
- Negotiate contracts
- Consult with business associates
- Litigate
- Participate in scientific, educational, professional, or business conferences
- Undertake independent research

Coordinating Tax Reporting and Immigration

- Renewal of visa status
- Legal Permanent Resident or Non-resident
 - A Legal Permanent Resident who makes a tax treaty non-resident claim may face abandonment of residence and loss of status, or be unable to confer the benefit of residence to a qualifying relative

U.S. Expatriation Tax

- Exit tax may apply when giving up U.S. residency
 - U.S. citizens who renounce citizenship
 - Green card holders (8 out of 15 years rule)
- Tax applies if any of three tests is failed:
 - Tax compliance test (full compliance for prior five years)
 - Asset test (total assets worth more than \$2 million)
 - Tax liability test (average tax liability over \$168,000)
- If tax is expected to apply, discuss with counsel whether liability can be reduced through proper planning

Case Study Conclusion

- Javier decides to pursue an E-2 visa application, funds ABC Company USA, and proceeds to invest in and grow the business.
- By counting his days carefully, Javier can avoid U.S. tax residency.
- By avoiding green card status, Javier avoids automatic U.S. tax residency and also avoids any potential exit tax.
- If Javier's plans change and he must spend more time in the U.S., his pre-immigration tax planning will prevent some of the worst U.S. tax consequences of becoming resident.

Thank you!

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