Pre-Immigration Tax and U.S. Investment Planning for High Net Worth Individuals

Navigating the EB-5 Investor’s Visa Program, Leveraging Tax Credits and Avoiding Tax Traps

THURSDAY, MARCH 8, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:


Richard S. Lehman, Atty, United States Taxation and Immigration Law, Boca Raton, Fla.

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Pre-Immigration Tax & Investment for High Net Worth Individuals

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Anthony Korda
Biography

- Anthony Korda has been a practicing attorney for thirty years. Named as one of the top 25 EB-5 Attorneys for several years, Anthony focuses his practice on EB-5 matters, representing Developers, Regional Centers and Investors. Since moving his practice from England to the US in 2007 and has focused his practice on Immigration and Securities Law, with particular emphasis on the EB-5. He has represented hundreds of investors as well as businesses throughout the United States who wish to offer a secure EB-5 opportunity to the world market.
- More recently, Anthony has developed a practice representing investors in failed EB-5 projects and works with his clients to try to ensure that they may remain in the US as permanent residents despite failures for which they are usually not responsible.
- Anthony moved himself and his family to the US using the EB-5 program and is therefore able to offer his Clients a unique perspective on the process.
- Anthony is the owner of The Korda Law Firm with offices located in Florida, California and in London.
Non-Immigrant Visas

• L-1 Intra-company transfer (Manager or Executive)
• E-Visa Treaty Trader (E-1) or Investor (E-2)
• H-Visas (Temporary Workers)
Immigrant Visas

• EB-5 Immigrant Investor Visa
• EB-1 Multi-National Manager or Executive
• Others
Tax Treatment of Immigrants and Non-Immigrants

- Although the immigration laws of the United States refer to aliens as immigrants, nonimmigrants, and undocumented (illegal) aliens, the tax laws of the United States refer only to RESIDENT and NONRESIDENT ALIENS.
Residence

• Residence for Immigration Purposes and Residence for Tax Purposes are not the same
• Different Tests
EB-5

• EB-5 Investor Visa Program:
  • Direct Investment
  • Regional Center Pilot Program
• Once approved investor, investor’s spouse and any unmarried children under 21 receive permanent residence (Green Card)
• Initial Residence Period – 2 years
EB-5 Requirements

• Must be otherwise admissible (from any country)
• Lawful source of funds: income, investment profits, gift, bequest, loan (if secured on assets owned by investor (for value))
• Project must meet the requirements of EB-5 Regulations, USCIS Interpretation and 8 CFR § 204.6
Job Creation

• The project must create 10 new full time jobs (35 hours per week at minimum wage or more) within the two year conditional residence period
• Minimum Investment Amount $1 million
• Reduced to $500,000 if located in a Targeted Employment Area or a Rural Area
• Congress have stated an intention to raise the minimum amounts
EB-5 and New Market Tax Credits

• $3.5 Billion allocated annually
• 39% total Tax Credits earned over 7 years
• Investment must be made in Low Income Community (LIC)
• Community Development Entity (CDE) makes the Investment
• NMTC Investors fund the Qualified Investment Equity (QIE)
• QIE must be expended (85%) on Qualified Active Low Income Community Business (QALICB)
New Market Tax Credits

• **Advantages:**

• Can be added to the Capital Stack with Private Equity, Public Financing Sources or EB-5 Capital

• Sale of NMTC results in “free equity” to project
Mew Market Tax Credits

• **Disadvantages:**

• Allocation is hard to find
• 7 Year Holding Period
• Conflicts / Complications with others in the Capital Stack
• High Costs and Complicated Structures involved
Resident or Non-Resident

- Although the immigration laws of the United States refer to aliens as immigrants, nonimmigrants, and undocumented (illegal) aliens, the tax laws of the United States refer only to RESIDENT and NONRESIDENT ALIENS.
Residency Rules

• In general, the controlling principle is that resident aliens are taxed in the same manner as U.S. citizens on their worldwide income, and nonresident aliens are taxed according to special rules contained in certain parts of the Internal Revenue Code (hereinafter referred to as I.R.C. or the Code).

• A major distinguishing feature of this special tax regime concerns the source of income: a nonresident alien (with certain narrowly defined exceptions) is subject to federal income tax only on income which is derived from sources within the United States and/or income that is effectively connected with a U.S. trade or business.
Residency Test

• The residency rules for tax purposes are found in I.R.C. § 7701(b). Although the tax residency rules are based on the immigration laws concerning immigrants and nonimmigrants, the rules define residency for tax purposes in a way that is very different from the immigration laws.
Residency

• If you are an alien (not a U.S. citizen), you are considered a nonresident alien, unless you meet one of two tests for the calendar year (January 1 – December 31):

• You are admitted to the United States as, or change your status to, a Lawful Permanent Resident under the immigration laws (the Green Card Test)

• You pass the Substantial Presence Test (which is a numerical formula which measures days of presence in the United States)
Undocumented Aliens

- Under these rules, even an undocumented (illegal) alien under the immigration laws who passes the Substantial Presence Test will be treated for tax purposes as a resident alien.
Timing

• Planning for High Net Worth and other individuals
• Determine when to obtain visa and tax up residence
• Declare domicile in the next Tax Year
Richard S. Lehman *Esq.*

- Masters in Tax Law from New York University Law School
- U.S. Tax Court and Internal Revenue Service experience in Washington D.C.

Richard Lehman regularly works with law firms, accountants, businesses and individuals struggling to find their way through the complexities of the US tax law. In short, Lehman is a valuable resource to each of these audiences.

With over 40 years as a tax lawyer in Florida, Lehman has built a national reputation for being able to handle the toughest tax cases, structure the most sophisticated income tax and estate tax plans, and defend clients before the IRS.

- Mr. Lehman’s international practice spans the globe. This has resulted in Lehman’s representation of foreign investors giving tax and practical advice in acquiring and selling a wide range of commercial businesses and other U.S. investment assets. This includes not only the acquisition and sale of active businesses in the U.S. but also investments in all fields of real estate including raw land, shopping centers, commercial office buildings, condominiums, residential apartments, residential homes and the like.
Pre-Immigration
Income Tax Planning

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The Residency Starting Date

* THE IMPORTANT DATE *

Pre-Immigration Tax Planning generally cannot be accomplished after the Residency Starting Date.
Definition for Tax Purposes

Non Resident Alien vs Resident Alien

The Resident Alien
- Taxation on Worldwide Income Similar to Taxation on U.S. Citizens
- Tax Planning
TAXATION PATTERN

U.S. Resident Alien ("Tax Resident") - Subject to Taxation

1. Income Taxation - Worldwide Income
2. Estate Taxation - Worldwide Assets
3. Gift Taxation - Worldwide Assets
STATUS FOR TAX PURPOSES

Non-Resident Alien - Not a “Resident Alien”

Resident for Income Tax Purposes

1. Green Card
2. Substantial Presence Test
3. Voluntary Election

Exceptions:
4. The Closer Connection
5. Treaties: Tie Breaker

Foreign Corporations
The Income Tax Residency

Starting Date

1. Substantial Presence Test
2. Permanent Residency Test
3. Tax Election
Residency Starting Date

Substantial Presence Test

Residency starting date for individuals meeting substantial presence test. In the case of an individual who meets the substantial presence test of paragraph (3) with respect to any calendar year, the residency starting date shall be the first day during such calendar year on which the individual is present in the United States.
## Substantial Presence Test

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Residency Starting Date

Green Card

Residency starting date for individuals lawfully admitted for permanent residence. In the case of an individual who is a lawfully permanent resident of the United States at any time during the calendar year, but does not meet the substantial presence test of paragraph (3), the residency starting date shall be the first day in such calendar year on which he was present in the United States while a lawful permanent resident of the United States.
Residency Starting Date

Assumption No. 1:
The alien individual (Non Resident Alien) has no physical presence in the U.S. for the years 2016 and 2017.

ALTERNATIVE Assumption No. 2:
The Non Resident Alien had the following U.S. physical presence in the year 2009.

- January 1, 2018 - February 15, 2018 = 46 days
- August 31, 2018 - December 31, 2018 = 123 days

Total Days in U.S. = 169 days

- Green Card Issued: August 31, 2018
- With Presence in U.S. August 31, 2018
- Tax Status: U.S. Tax Resident starting August 31, 2018
Residency Starting Date

Assumption No. 1:
The alien individual (Non Resident Alien) has no physical presence in the U.S. for the years 2016 and 2017

Assumption No. 2:
The Non Resident Alien had the following U.S. physical presence in the year 2018.

- January 1, 2018 - February 15, 2018 = 46 days
- August 1, 2018 - December 31, 2018 = 153 days
  Total Days in U.S. = 199 days

- Green Card Issued: August 1, 2018
- With Presence in U.S. August 1, 2018
- Tax Status: U.S. Tax Resident starting January 1, 2018
The Closer Connection Exception

Exception where individual is present in the United States during less than one-half of current year and closer connection to foreign country is established.

An individual shall not be treated as meeting the substantial presence test of this paragraph with respect to any current year if . . .

(i) such individual is present in the United States on fewer than 183 days during the current year, and

(ii) it is established that for the current year such individual has a tax home (as defined in section 911(d)(3) without regard to the second sentence thereof) in a foreign country and has a closer connection to such foreign country than to the United States.
Tax Treaty - Tie Breaker Rules

For the purposes of this Convention, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of incorporation, or any other criterion of a similar nature.

- However, this term does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein. In the case of income derived by a partnership, trust, or estate, residence is determined in accordance with the residence of the person liable to tax with respect to such income.
Tax Treaty - Tie Breaker Rules

Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

(a) He shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (center of vital interests);
(b) If the State in which he has his center of vital interests cannot be determined, or if he does not have a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode;
(c) If he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a citizen;
(d) If each State considers him as its citizen or if he is a citizen of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.
EXCEPTIONAL CIRCUMSTANCES
AND SPECIAL BENEFITS

Students

A foreign student who has obtained the proper immigration status will be exempt from being treated as a U.S. resident for U.S. tax purposes even if he or she is here for a substantial time period that would originally result in the student being taxed as a U.S. resident.

This student visa not only permits the student to study in the United States, but to pay taxes only on income from U.S. sources not worldwide income.

The visa also permits the student's direct relatives to accompany the student to the United States and receive the same tax benefits.
Resident Alien

Tax Residency in the United States

1. The Affect of Treaties
2. The Substantial Presence Test
3. The Closer connection Exception
4. Additional Exceptions
Four Tax Planning Principles
The Income Tax Objectives

A. Acceleration of Gains - Non U.S. Property
B. Acceleration of Income from Foreign Sources
C. Deferral of Loss Recognition
D. Deferral of Payment of Deductible Expenses
Four Tax Planning Principles

1. A Nonresident Alien, prior to becoming a U.S. tax resident will want to make sure that he or she does not have to pay a U.S. tax on gains that have accrued as a practical matter before their residency period. The first strategy is to accelerate (realize and recognize) any and all gains earned by the Taxpayer prior to becoming a Resident Alien.

2. The second key strategy is to accelerate income that is expected to be paid after residency. Income payments should be collected prior to residency to avoid being taxed by the U.S.
Four Tax Planning Principles

3. The third strategy is to defer recognizing a loss until after obtaining tax residency as a Resident Alien so that the loss can be used against post residency gains. Assets with a fair market value below cost can be sold after residency. Those losses may be taken against gains in assets earned after U.S. residency. These losses can reduce or wipe out gains from the sale of assets that accrue after U.S. residency.

4. The fourth strategy is to defer paying deductible expenses until after the Residency Starting date. Many types of payments (both business and personal) in the U.S. are deductible from a U.S. Taxpayer’s income to determine the actual taxable amount of income.
Accelerate Gains Prior to Residency Starting Date

Assume a nonresident alien owned $1.0 Million Dollars worth of shares of General Motors that was purchased for $50,000.

If the shares are sold after U.S. tax residency is assumed when the immigrant is a Resident Alien, there will be a tax on $950,000 in gains. A sale of these same shares by a Nonresident Alien before becoming a Resident Alien would result in no taxable gain.
Accelerate Income Prior to Residency Starting Date

For example, assume a non resident alien owns a foreign corporation that conducted a business in his home country that now has $2 Million in receivables that will not be collected until after the owner has become a Resident Alien for U.S. tax purposes.

These receivables might be accelerated, for example, by the liquidation of the taxpayer’s company and the transfer of the receivables to the taxpayer at their present fair market value, prior to the Residency Starting Date.

The taxpayer may also sell his interest in the company or to the company for a Promissory Note. The ongoing foreign company may collect the receivables which are then paid to the seller and Non Resident Alien, in payment of the Promissory Note he received to sell his shares to the company.
Income Assets to Accelerate

• Pension Plans
• Stock Options
• Prepaid Rent
• Repaid Royalties
• Prepaid Dividends
• Prepaid Interest
• Annuity Products
Example of Sale at Loss

- Assume a non resident alien taxpayer from Panama has purchased a Panama apartment at the high end of the market for $4.0 Million, and it is worth $3.0 Million before he immigrates to the United States.
- Assume the Panamanian taxpayer will be immigrating to the U.S. effective January 1, 2018.
- Assume that same taxpayer invests $100,000 in a Florida corporation after obtaining tax residency and sells the Florida corporation after obtaining Resident Alien status for $1 Million in excess of its cost to the Panamanian investor.
Example of Sale at Loss

• In the event the investor were to sell his Panama apartment at a loss prior to becoming a Resident Alien and then sell his profitable Florida corporation at a gain in the following year when he is a Resident Alien, there will be a capital gains tax on the $1.0 Million gain at a cost of $150,000-$200,000.

  – Had the Panama apartment been sold in the year of Residency there would be no tax cost at all since as a Resident Alien, the taxpayer would pay a tax on all of his worldwide net losses and gains, thereby reducing his U.S. gains by his Panama losses.
Defer Recognizing Loss

• In today’s times there are many wealthy immigrants coming to the U.S. who have significant losses in their investment portfolios from the last few years. If it is economic, these portfolios should not be liquidated and losses should not be realized and recognized prior to immigration to the U.S.; as they can be extremely valuable to use against capital gains in the U.S.; and even against ordinary income in the U.S. under certain circumstances.
  – Assume the same taxpayer who bought General Motors stock in the prior example purchased the stock at $1,000 and now it was only worth $500.
  – In the event the investor were to sell his stock at a loss prior to becoming a Resident Alien, the loss is useless against other income. Had the General Motors stock been sold in the year of Residency there would be a tax loss since as a Resident Alien, the taxpayer would pay a tax on all of his worldwide net losses and gains.
Estate Tax
Definition of Residency

A “resident” decedent is a decedent who, at the time of his death, had his domicile in the United States. The term “United States”, as used in the estate tax regulations, includes only the States and the District of Columbia. The term also includes the Territories of Alaska and Hawaii prior to their admission as States. See section 7701(a)(9). A person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of later removing therefore Residence without the requisite intention to remain indefinitely will not suffice to constitute domicile, nor will intention to change domicile effect such a change unless accompanied by actual removal.
Practical Advice

*One client leads to another.*

*If you do the right job as a professional, it works.*

*If you do not, it does not work.*

- Real Estate Attorney
- Tax Attorney
- Accountant
- Real Estate Broker(s)
- Appraisers

Any missing link spells the end if it is early in the relationship. A deal gone bad in Florida for someone who needs to fly in from New York for a day to fix it is alot different than a deal gone bad for a person who comes from Mumbai.
Pre-Immigration Income Tax Planning

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