The Tax-Efficient Way to Move to the USA

Melvin A. Warshaw, Esq.
David Lesperance, J.D.

TABLE OF CONTENTS

- **About the Authors** **3**
- **About the Report** **4**
- **Part 1: Ways to Immigrate to the United States** **5**
  - US Citizens 5
  - Legal Permanent Residents or Green Card Holders 6
  - Non-Immigrant Visa or Temporary Residents 7
  - Pathways to a Green Card 12
  - Transition to Citizenship 14
  - Developing a US Immigration Strategy 15
- **Part 2: Tax Strategies for Immigration to the US** **18**
  - The US Tax System is Complex: Here Are the Basics 18
  - Securing Non-Immigrant Status Without Becoming a US Taxpayer 23
  - Pre-Domicile Transfer Tax Planning 41
- **Final Considerations for Those "Coming to America"** **53**

ABOUT THE AUTHORS

Melvin A. Warshaw, Esq.

Mel has more than 40 years of experience as a US estate planning and tax lawyer.

He represents both US and non-US high net worth individuals, families, and companies on a wide range of personal and business tax matters, especially in connection with cross-border income and estate tax planning and compliance in the US.

Mel is an ACTEC Fellow, a member of the International Academy of Estate and Trust Law, a STEP member and a member of the editorial board of Trusts & Estates magazine.

Before undertaking his current solo practice, Mel was a private client partner in the Boston office of McDermott, Will & Emery, and also worked as a senior wealth advisor at JP Morgan Private Bank, and he began his legal career in the General Counsel's office of the IRS National Office in Washington, DC. He holds an L.L.M. (Tax) from Georgetown University.

See website

David Lesperance, JD

David is one of the world's leading advisors on international tax and immigration, an area in which he has worked for more than 30 years.

A published author in the field, David's personal interest in these areas grew from his experience working as a Canadian immigration and customs officer while studying law.

Since being called to the bar in Ontario in 1990, he has established his expertise with major law firms, his own law firm and as a private consultant.

Routinely cited in the world's most respected publications, David has successfully advised hundreds of high and ultra high net worth individuals and their families, many of whom continue to seek his counsel today.

David is supported by a team of professionals, some of whom have worked with him since the early 1990s.

See website

ABOUT THE REPORT

For the last three hundred years, the United States has been a magnet for immigration.

This is because of the widely held belief that the US is the "land of opportunity".

Supporting this belief is the US’s position as the world's largest economy and its status as the home of many of the world's top educational institutions and technology and finance ecosystems.

Unfortunately, the US immigration and tax systems are also extraordinarily complex and daunting.

In this guide, tax and immigration experts Melvin Warshaw and David Lesperance bring to bear their over 3/4s of a century of combined experience to explaining the integration of these two complex areas of US law.

Whether simply moving temporarily to open up an American branch office or a complete permanent relocation of an entire family, US immigrants and their advisors will find their advice invaluable.

PART 1: WAYS TO IMMIGRATE TO THE UNITED STATES

The United States classifies legal immigration/citizenship status into three categories:

- US Citizens;
- Legal Permanent Residents (LPRs): “Green Card” holders; and
- Nonimmigrant visa: Foreign nationals desiring temporary entry for varied reasons, like tourism, medical procedures, business activities, temporary employment, academic pursuits, etc.

We will now discuss the methods to achieve these statuses, including their advantages and potential challenges.

US Citizens

A person could be a US citizen if he or she satisfies the following criteria:

- One or both of his/her parents are US citizens (by descent);
- Born in the United States and not the child of a diplomat or foreign military personnel; or
- Successfully naturalized after at least 5 (or 3 for spouses of US citizens) years as a Green Card holder.

The benefits of US citizenship include not having to worry about renewing a Permanent Resident Card (i.e., the travel document confirming Green Card status) every ten years, voting, carrying a US passport, and being able to petition certain relatives for Green Card status.

The major drawback is that as a result of US citizenship-based taxation, US citizens (even if they are not living in the United States) are subject to

US taxation on a worldwide basis and have extensive financial reporting requirements.

Legal Permanent Residents or Green Card Holders

A person can obtain Legal Permanent Residence status ("Green Card") through sponsorship by an employer or eligible family member, by investment, or through a successful refugee/asylum claim.

The benefits of a US Green Card are that it allows for mostly unrestricted work/lifestyle rights, a choice to transition to US citizenship after five years, and the ability to petition a spouse and unmarried children for a Green Card.

As with US citizenship, a US Green Card holder is subject to US income taxation on a worldwide basis and has extensive US international financial information reporting requirements. If a Green Card holder is found to be a Long-Term Green Card holder (8 out of 15 years), they may also be subject to the Expatriation Tax Regime if they also trigger a specific net worth, federal tax liability average, or fail to certify compliance with US tax.

Moreover, holding a Green Card while physically present in the US creates a "presumption" that such an individual is a US domiciliary subject to US gift, estate, and GST tax on worldwide assets subject to the same lifetime gift/estate tax exemption as any US citizen.

One important point is that while Green Card status can be relinquished

or administratively taken away for “abandonment,” it is not lost simply because a Permanent Resident Card has expired.

We are often asked by Green Card holders whether they have lost their Green Card status when their Permanent Resident Card expires. We then ask them if they believe a US citizen loses US citizenship merely because his or her passport has expired. As the same concept applies to US Green Card holders, the answer is “No”.

Non-Immigrant Visa or Temporary Residents

Foreign nationals can enter the United States on a temporary basis, such as for tourism, medical treatment, business, temporary work, study, or similar impermanent reasons.

It is worth noting that the acquisition of a Non-Immigrant Visa does not automatically make the holder a US taxpayer.

Rather, one needs to look at the specific category of visa, the amount of time spent in the United States, whether there are closer connections to another jurisdiction, and whether there is a bilateral agreement such as any US Tax Treaties with various countries.

While there are non-immigrant visas such as F-1 Student and B-2 Tourist visas, the most important Non-immigrant employment visas are:

- B-1 (Business visitor);
- H-1B (Speciality occupation);

- TN visa (e.g., US MCA professional or intra-corporate transfer worker from a NAFTA country, Canada or Mexico);
- L-1 visa (Intra-company transfer);
- E-1/E-2 visa (Treaty traders/treaty investors); or
- O-1 (extraordinary ability).

B-1 (Business Visitor)

B-1 visitors cannot engage in productive employment nor receive remuneration in the United States but may meet with colleagues, attend conferences, and engage in similar activities.

B-1s can be admitted for the period of time necessary to complete their work but for no more than six months.

Canadians and Bermudians do not need to apply for B1 visas at a US embassy or consulate prior to seeking entry.

Persons from certain other countries may be exempt from this visa requirement and enter under the Visa Waiver Program (Most of Europe, Australia, Japan, Chile and others) but do need to register with the Electronic System for Travel Authorisation ("ESTA").

Note that certain countries have applied for but are not currently part of the US Visa Waiver Program.

The inclusion or exclusion of a country in this program depends on various factors and agreements.

H-1B (Specialty Occupation)

To qualify for an H1-B visa, the US job position must require theoretical and practical application of a body of highly specialized knowledge.

The H1-B is the most commonly sought visa for professional workers, with an annual cap of 65,000 visas and an additional 20,000 for applicants with advanced degrees.

H-1B visas can be for up to three years, with the possibility of extensions for up to six years.

Spouses and unmarried children under age 21 of H1-B visa holders are allowed to live in the United States but are not allowed to be employed.

TN Visa (e.g., USMCA Professional or Intra-Corporate Transfer Worker)

Pursuant to the US-Mexico-Canada Trade Agreement (NAFTA), citizens of Canada and Mexico workers in certain professions are eligible for TN visas. The Canadian or Mexican citizen must meet the degree, experience, or licensing required for specific professions or possess senior management or specialized knowledge of a foreign affiliate.

The TN visa numbers have no annual cap, are granted in three-year increments, and can be renewed indefinitely.

Spouses and unmarried children under age 21 are allowed to live in the United States but are not allowed to be employed.

L-1 Visa (Intra-Company Transfer)

L-1 visas are available to individuals who have already been employed outside the United States for at least one year by an affiliate, subsidiary, parent, or branch of a US company.

The work abroad and in the United States must be managerial, executive, or require specialized knowledge. Unlike the H1-B, L-1 visas do not have an annual quota limit and are generally approved for up to three years with an extension to a maximum of seven years.

In addition, unlike E1/E2 visas, there is no minimum required investment or full-time active management in the US. Further, spouses and unmarried children under age 21 are allowed both the right to live and work as derivative L-2 visa holders.

E-1/E-2 Visa (Treaty Traders/Treaty Investors)

The E-1 Treaty Trader visa allows foreign nationals of certain countries to engage in international trade in the United States. The E-2 Treaty Investor visa permits foreign nationals of specific countries to enter the United States for purposes of investing a “substantial amount” into an enterprise.

While there is no stated investment amount, it is generally recognized to be US$120,000 or more. The specific list of eligible countries can change over time and should be consulted directly.

The Treaty Trader/Investor must own at least 50% of the US entity involved. Essential employees of traders and investors may also obtain visas. Spouses are eligible to work in the United States, but unmarried children under the age of 21 are not eligible to work.

Since December 2022, persons who obtained Citizenship through Investment in Treaty countries (i.e., Grenada, Turkey, and Montenegro) must be domiciled in that country for at least three years to be eligible for E1 or E2 Visas.

O-1 (Extraordinary Ability)

An O-1 visa is available to persons with extraordinary ability in science, art, education, business, or athletics as demonstrated by national or international acclaim. It is initially granted for up to three years and may be extended indefinitely in one-year increments. Spouses and unmarried children under age 21 are allowed entry but can’t work.

A foreign national would apply for a specific form of the O visa, such as the following:

- O-1A: science, education, business, athletics;
- O-1B: artists and workers in the motion picture or TV industries;
- O-2: workers who assist an O-1 visa holder; and
- O-3: spouses and children of an O-1 visa holder.

Pathways to a Green Card

The following are the various paths to the acquisition of a Green Card:

Employment

A job candidate or employee who may already have a nonimmigrant visa status can be sponsored for a Green Card by an employer with an immigrant visa.

Certain applicants, such as workers with extraordinary ability, investors, and certain special immigrants, can petition on their own behalf.

Family Sponsorship

A person may be eligible to apply for a Green Card if they are a spouse, unmarried child under the age of 21, parent, or sibling of a US citizen who is at least 21 years old.

EB-5 (Investor Visa)

An EB-5 Visa is a path to a Green Card for an applicant, spouse, or unmarried child under age 21, where they have invested (or are in the process of investing) at least $1,050,000 ($800,000 if the investment is made in a qualifying infrastructure project or targeted employment area) in a new commercial enterprise that will create at least ten qualifying jobs.

Applicants can invest directly or through a "larger investor pool via regional centers (RC)." RCs are federally approved third-party intermediaries that "connect foreign investors with developers in need of funding and take a commission." RCs are usually private, for-profit businesses that are approved by the US Citizenship and Immigration Services (USCIS).

An EB-5 visa involves two steps: (1) an I-526, *Immigrant Petition by Standalone Investor*, must be filed while the applicant is outside the United States (note that the processing time ranges between 29.5 and 61 months, as of May 2023); and (2) an I-485, *Application to Register Permanent Residence or Adjust Status*, must be filed while the applicant is in United States to apply to change their status to a green card (note that the processing time ranges between seven to 29 months).

Wait times are dependent upon the quota for the country of birth of the applicant.

Applicants can invest directly or through a "larger investor pool via regional centers (RC)."

RCs are federally approved third-party intermediaries that "connect foreign investors with developers in need of funding and take a commission."

RCs are usually private, for-profit businesses that are approved by the US Citizenship and Immigration Services (USCIS).

An EB-5 visa involves two steps: (1) an I-526, *Immigrant Petition by Standalone Investor*, must be filed while the applicant is outside the United States (note that the processing time ranges between 29.5 and 61 months, as of May 2023); and (2) an I-485, *Application to Register Permanent Residence or Adjust Status*, must be filed while the applicant is in United States to apply to change their status to a green card (note that the processing time ranges between seven to 29 months).

Wait times are dependent upon the quota for the country of birth of the applicant.

Transition to Citizenship

At some point, Green Card holders may wish to become US citizens through naturalization.

The requirements include:

- Being at least 18 years old;
- Demonstrating continuous residency in the United States for at least five years (3 years if spouse of a US citizen) immediately before applying;
- Being physically present in the United States for at least 30 months out of the last five (or 3) years immediately before applying;
- Living for at least three months in the state or USCIS district where the application is made;
- Being a person of good moral character;
- Demonstrating an attachment to the principles and ideals of the US constitution;
- Being able to read, write, and speak basic English;
- Having a basic understanding of U.S. history and government; and
- Taking an oath of allegiance to the United States.

Developing a US Immigration Strategy

There are several considerations in developing a tax-efficient immigration strategy that meets the needs of all family members and can be "sold at the breakfast table."

These considerations include the following:

- Various family members may have different needs and goals. For example, young parents will want to relocate to the US, where their children are attending primary or secondary school. Older children may be living on their own in the US for post-secondary education

or working in their careers. In such cases, the parents may only want occasional access to the United States to visit children and grandchildren or to do occasional business.

- US tax ramifications vary depending on the immigration status of the individual and the amount of time that individual spends in the United States. For younger families, it is frequently the case that one parent becomes a US taxpayer through either a Green Card or triggering the Substantial Presence day count test. At the same time, the other parent does not become a US taxpayer and continues to shelter the family wealth and their ongoing foreign income from US taxation.

- The timing of each family's goals must be considered. For example, some family members may need to start school at particular times of the year, while adult businesspeople may need time to transition their business operations.

- The familiarity with immigration status will either require periodic renewal or be permanent and will entail the possibility of the future acquisition of US citizenship.

The final immigration strategy is often a blend of various non-immigrant categories and Green Card status for some or all of the family members.

Some family members may elect to apply for US citizenship status after five years as a green card holder, while others may elect not to do so for

tax purposes.

In fact, they may even elect to engage in a sophisticated tax plan to avoid triggering an expatriation tax regime that applies to renouncing US citizens and long-term green card holders who relinquish that status.

In the second part of this report, we will discuss tax considerations in leaving one's home country and in coming to the United States. As you will see, the tax and immigration strategies must work together.

PART 2: TAX STRATEGIES FOR IMMIGRATION TO THE US

As we discussed in Part 1 of this report, various immigration options are available when considering a move to the US.

Quite often, we will receive a request to "get us all a Green Card". However, after further discussion, we discover that only certain family members want to live, work, or study in the US full-time.

Others (often the wealth creator) just want access to the US for business and personal reasons but do not want to immediately or ever expose their existing wealth to US taxation.

The US Tax System is Complex: Here Are the Basics

U.S. citizens, green card holders (i.e., permanent legal residents), and substantial-presence residents of the U.S. are subject to income taxes on worldwide income and, typically, transfer taxes on their worldwide assets.

The 2017 tax act in the U.S. will generally cause the net income of many foreign entities to be taxed to certain U.S. shareholders currently, even if the earnings are not distributed. U.S. citizens and green card holders remain subject to U.S. income tax wherever they reside in the world and may incur an exit tax if they seek to give up their U.S. status.

Non-residents of the U.S., on the other hand, are generally only subject to U.S. tax on income that is effectively connected with a U.S. trade or business (including gains on the sale of real property) and dividend payments received from U.S. corporations (through withholding tax).

Non-U.S. citizens and non-U.S. residents (known as “NCNDs””) are generally subject to U.S. estate tax only on certain U.S. assets, typically real estate and tangible property located in the U.S.

Importantly, there is no U.S. gift tax on the transfer of intangibles such as shares of a U.S. corporation but such shares are subject to U.S. estate tax if held by a non-domiciliary in his or her personal name.

Residence

An individual who is not a U.S citizen is treated as a U.S. tax resident (known as a Resident Alien) during a particular tax year, and, therefore, is subject to U.S. federal income tax on a worldwide basis, unless an applicable tax treaty provides otherwise, if such individual is a lawful permanent resident (green card holder), satisfies the substantial presence test, or makes an election to be treated as a U.S. tax resident.

In addition, an individual who meets the substantial presence test will not be considered a U.S. tax resident for that year if such individual is present in the U.S. for fewer than 183 days during such year and establishes that for such year he or she has a tax home (i.e., a place of employment, otherwise a habitual residence) in a foreign country and has a closer connection to such foreign country.

In most U.S. tax treaties, where a Resident Alien is also a resident of a foreign country under the internal laws of that country, ther individual may be able to claim “treaty tie-breaker” alien status in the U.S. by attaching Form 8833 to Form 1040NR (even if the taxpayer had no U.S.

income and no U.S. tax is due. Claiming "treaty tie-breaker" alien status in the U.S. limits the scope of the individual's U.S. income for the year to U.S. source and effectively connected income from the U.S. In general, the individual is relieved from paying U.S. tax on non-U.S. source income and gain.

However, for all other U.S. tax purposes except for calculating taxable income the individual is considered a U.S. resident and must comply with various U.S. tax filing obligations.

It is important to understand how residency status impacts an individual's U.S. estate and gift tax position. Unlike the income tax residency rules, which are relatively objective, exposure to U.S. gift and estate taxes for Resident Aliens is determined based on domicile, and typically influenced by an individual's subjective intent.

An individual could be exposed to U.S. gift and estate tax on worldwide assets if such individual moves to the U.S. and his or her actions imply an intention to remain in the U.S. indefinitely. In addition, applying for U.S. citizenship or a green card could expose the individual's worldwide assets to U.S. estate and gift taxes.

Resolving the U.S. residency issue will have immigration as well as U.S. and possible state income and/or estate tax implications as well as regulatory and FBAR reporting and home country residency implications.

Conversely, it is possible that a green card holder who permanently

leaves the U.S. and establishes domicile in another country might be considered a NCND of the U.S, however, there is no notice requirement that a NCND must provide to the U.S. government notifying the U.S. of a change of domicile away from the U.S.

U.S. citizens and U.S. domiciliaries are entitled to lifetime gift and estate tax exemption amounts of $13.61M in 2024. However, these relatively high exemption amounts are temporary and absent intervening Congressional action before 2026, the exemption amounts will sunset and revert to pre-2018 levels of approximately $7.5M beginning in 2026.

For non-U.S. domiciliaries, the U.S. estate tax is imposed on certain U.S. situs assets in excess of $60,000 (subject to possible relief under a U.S. estate tax treaty with some countries that impose an inheritance tax, as well as with Canada).

U.S. citizens may pass their entire estate free of U.S. estate tax to a U.S. citizen spouse on death.

However, if a U.S. citizen or U.S. domiciliary is married to a non-U.S. citizen then he or she may transfer $175,000 annually (in 2023) to such spouse during life.

At death, after applying their remaining lifetime gift/estate tax exemption amount, such excess must be transferred to a Qualified Domestic Trust (QDOT) which merely defers U.S. estate tax on this excess amount until the death of the non-U.S. domiciled spouse.

State and Local Tax

In addition to the U.S. federal tax issues outlined in this paper, individuals considering coming to the U.S. should be aware of the different tests for residency adopted by each state. Most use a combination of physical presence in the state (e.g., over 183 days) and domicile. There are also very significant differences among the states in imposing a state income tax and a state estate tax. Anyone considering a move to the U.S. should seek further specific guidance in this area.

California and New York impose the highest state income taxes on its residents but only New York has a state estate tax. Texas and Florida do not impose a state income tax and neither state imposes a state estate tax.

Next is to develop a tax savvy immigration strategy which meets all the family goals with regards to proposed activity; amount of time to be spent in the US; and timing to commence US activities.

Securing Non-Immigrant Status But Avoiding Becoming A Us Taxpayer

There are a few techniques to potentially minimize the extensive scope of the U.S. income tax system for businesspeople who often travel to the United States but aim to avoid the global application of the U.S. income tax system.

Generally, if a non-U.S. citizen stays in the U.S. for over 121 days annually, that individual may meet the “substantial presence” criteria and thus be classified as a resident alien, becoming liable for U.S. tax on their global income. Several exceptions to this “substantial presence” rule exist.

Closer Connection Test

One significant exception to the “substantial presence” test, which is crucial for non-U.S. individuals who find themselves spending extended periods in the United States, is the “closer connection exception.”

This exception comes into play when an individual is in the United States for under 183 days in the current year, but the weighted average formula typically used for the “substantial presence” test meets or surpasses 183 days (due to the individual’s time spent in the United States over the past two years).

For this exception to be valid, the individual must demonstrate for the current year that they have a (i) “tax home” in a country outside the U.S.,

and (ii) stronger ties or “closer connections” to that foreign country than to the United States. Treasury Regulations §301.7701(b)-2(c)(1) clarifies that an individual’s tax home refers to their regular or main place of business.

If there’s no regular or primary business location due to the nature of the individual’s business, or if they aren’t involved in any trade or business, then their tax home is where they regularly reside in a genuine and significant manner. Treasury Regulations §301.7701(b)-2(d)(1)(i) – 301.7701(b)-2(d)(1)(x) enumerate ten non-exclusive factors to be considered when determining if a closer connection is present.

As mentioned earlier, the closer connection exception doesn’t apply if the individual stays in the United States for 183 days or more during the current year. Practically, this exception might be relevant to someone without a business or workplace in the U.S. who spends between 122 and 182 days in the U.S. annually.

Furthermore, this exception is void if the individual holds lawful permanent residency in the United States (e.g., has a green card) or if they’ve initiated or “taken other affirmative steps” in the current year to alter their status to a lawful permanent resident or have a pending application for status adjustment.

To claim this exception, one must complete and submit IRS Form 8840, Closer Connection Exception Statement for Aliens, by the stipulated deadline.

Treaty Tie-Breaker Election

If an individual qualifies for the “substantial presence” test (and thus is a U.S. income tax resident according to the Code), but also maintains tax residency in another country that has an income tax treaty with the U.S. (termed a “treaty party country” here), they might be eligible to sidestep taxation as a U.S. income tax resident due to the treaty’s provisions.

This provision, often dubbed the “tie-breaker” rule, allows an individual considered a tax resident of both the U.S. and a treaty country be taxed as a resident of just one of the two countries.

This decision is based on criteria found in each tax treaty which lays out a hierarchy of factors to consider in which country the individual is primarily a tax resident.

To obtain this tie-breaker benefit and be taxed in the treaty party country instead of the U.S., the individual must meet particular conditions detailed in the relevant treaty.

Usually, this means having stronger connections to the treaty party country than to the U.S.

Should someone claim this tie-breaker relief, they would compute their U.S. income tax as if they were a nonresident alien, possibly letting them pay U.S. federal income tax on only on their U.S. source employment, dividend or business income while their non-U.S. source investment and business income would not be subject to U.S. tax..

However, contrasting the closer connection exception, a person claiming treaty tie-breaker relief must fill out IRS Form 1040NR, U.S. Nonresident Alien Income Tax Return. They're also bound by many reporting stipulations applicable to U.S. income tax residents (for instance, reporting certain foreign entity ownerships, financial interests, or control over foreign accounts, and gifts from nonresident aliens, among others).

Additionally, they need to attach IRS Form 8833, Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b), to their Form 1040NR, where they assert the tie-breaker position by citing the language in the applicable treaty that pertains to them.

As highlighted later, claiming a Form 8833 treaty tie-breaker status in the eighth year or beyond as a green card holder is seen as an expatriation act for U.S. tax purposes and might activate U.S. exit tax and future U.S. inheritance tax obligations for U.S. heirs in specific scenarios.

Delay Decision to Obtain Green Card

Generally, it's often advised for individuals relocating to the U.S. to postpone acquiring a green card (permanent legal resident) status as long as feasible. The primary rationale behind this typical advice is to prevent potential exposure to the U.S. exit tax and having their U.S. descendants liable to U.S. inheritance tax if they decide to depart from the U.S. down the line. Those in the U.S. on multi-year L-1 intracompany work visas who meet the "physical presence" test can never be exposed to the U.S. exit or inheritance taxes.

If a green card holder remains a permanent legal resident for eight straight years, they'd likely be labeled a "long-term" green card holder if they then relinquish U.S. permanent legal residency any time in or after the eighth year.

Such "long-term" green card holders. can be tagged as "covered expatriates" if they fulfill any one of three alternate tests. One is a net worth test amounting to $2 million or more the day before surrendering the U.S. green card.

Another is not being able to prove complete U.S. tax compliance five years before the expatriation year. The third test examines whether the individual paid more than an average of $190,000 in federal income tax liability (in 2023, adjusted for inflation) over a rolling five year period

Thus, U.S. exit tax might be levied if a "long-term" green card holder's net worth is $2 million or higher when relinquishing their green card, and their global capital asset appreciation exceeds $821,000 (as of 2023).

Letting a green card expire doesn't affect U.S. permanent legal residency. A holder typically has to give up their permanent legal status, often by completing a Form I-407, Record of Abandonment of Lawful Permanent Resident Status, with the U.S. Citizenship and Immigration Service.

Yet, there's another way a green card holder might unintentionally invoke the U.S. exit tax, even if they retain their green card that year. IRC Section 877(A)(g)(5) referencing IRC Section 877(e)(2) states that a "long-term resident" is any non-U.S. citizen who's a lawful U.S.

permanent resident in at least 8 out of 15 taxable years concluding with the year in which a certain event occurs.

An individual won't be seen as a lawful permanent resident for any taxable years if they're viewed as a resident of a foreign nation for those years under a U.S.-foreign country tax treaty and doesn't renounce the treaty benefits available to foreign country residents.

Therefore, there are two primary ways to avoid counting years within the fifteen-year duration towards the eight-year criterion. The most frequent is when an individual doesn't have a green card for the whole year (by voluntarily submitting a Form I-407 with the U.S. CIS that year).

It's vital to understand the unique regulations surrounding treaty claims (i.e., filing of Form 8833 with Form 1040NR) that might inadvertently activate the U.S. exit tax for green card possessors.

If a holder decides to make a treaty claim to be taxed as another country's resident under tie-breaker rules after June 2008, and it's prior to achieving the "long-term resident" status, that year's treaty claim (done during the first seven green card years) prevents that year from counting towards the eight-year "long-term resident" criterion.

Conversely, if they make such a claim after the eight-year threshold has been met, merely filing of such Form 8833 itself in or after June 2008 is an act of expatriation for tax purposes, even though the individual retains their permanent legal residence status for U.S. immigration purposes.

Only “long-term” holders meeting the eight-year criterion might face the U.S. exit tax if they’re deemed a “covered expatriate” through one of three alternate assessments (average federal net tax liability surpassing a certain amount ($201,000 for 2024, adjusted for inflation), personal net worth of $2M or more, or failing to validate full U.S. tax compliance on a punctually submitted Form 8854 Expatriation Statement for the 5 years before the expatriation date).

Pre-Residency Income Tax Planning for those who will be US Taxpayers

If an individual is moving from a jurisdiction with a lower tax rate than the U.S., consider accelerating the recognition of income, such as dividends paid by closely-held foreign companies or deferred compensation for services performed outside the U.S., before becoming a U.S. income tax resident.

The goal is to minimize being taxed at higher U.S. tax rates. Conversely, if the individual is moving from a jurisdiction with a higher tax rate, consider deferring recognition of the income until after the individual has moved to the U.S. Also consider the impact of any state income taxes based on the state where the individual will reside.

While timing of income recognition may be limited to those few individuals who have such control, the timing of when to realise capital gains or losses can usually be more readily determined. It is important to note that absent a tax treaty provision, capital gains realized once the individual has become a U.S. income tax resident carry the original cost

basis.

The same applies to founders of startups that have low tax basis in their foreign company stock and subsequently sell at a huge gain while a U.S. income tax resident. As discussed below, an inbound individual may benefit from a check-the-box election to increase his or her basis in a highly appreciated asset before moving to the U.S.

The sale of an alien individual's personal residence in a foreign country is an important pre-immigration issue. There is potential U.S. income tax liability if the home is sold after the alien becomes a Resident Alien, although there may be partial exclusion relief available under the general U.S. tax rules applicable to taxpayer who sell a principal residence. There could also be foreign exchange gain on the sale of the home or in respect to the mortgage if sold after becoming a Resident Alien.

When leaving the U.S. a Resident Alien still faces U.S. income tax on the gain on sale of a principal residence in the U.S. if the individual is a NRA on the closing date. The U.S. buyer is obligated to withhold 10% of the amount realized if the sale price does not exceed $300,000. For sales in excess of $300,000, the U.S. buyer is obligated to withhold 15% of the amount realized.

A Resident Alien would be subject to U.S. tax liability in renting out a home in the home or origin country. Gains from trading or selling U.S. or non-U.S. securities owned by a Resident Alien is subject to U.S. tax. Historical cost basis rules apply, with the basis converted into U.S.

Dollars at the exchange rate on the purchase date.

Another area of inquiry prior to becoming a Resident Alien is the extent to which the individual will earn deferred compensation such as a bonus or equity compensation.

This type of income is generally allocated on a time basis for U.S. income tax purposes. The foreign source portion is not taxable by the U.S. The U.S. source portion is taxable by the U.S. Importantly, the U.S. source portion is taxable by the U.S. even if the individual is no longer a Resident Alien and has become a NRA. The portion that is U.S. source is subject to U.S. withholding.

In general non-qualified stock options (NQOs) and "restricted" stock grants are generally determined from the grant date to the vesting date, however, a tax treaty might change this result. The U.S. employer is required to withhold pm the ECI (effectively connected income).

Prior to arriving in the U.S., the inbound individual might consider making a Code Section 83(b) election to avoid future sourcing to the U.S. on grants of "restricted" property (i.e., property subject to a substantial risk of forfeiture). However, there is no subsequent basis step-up to the fair market value of the "restricted" property at the date of grant.

An often overlooked area of pre-immigration planning is the possible opportunity to make an election for whose who wish to claim U.S. income tax residency and may not be able to satisfy any of the tests for U.S. income tax residency discussed above. Under the first-year election,

if an individual was not a Resident Alien, they are allowed to file a joint income tax return for the entire year. Under the first-year election, if an individual was not a Resident Alien in the preceding year, and is a Resident Alien in the year following the year of election and who is present in the U.S. for at least 31 days in the current year and 75% of the days in the testing period, such individual can make a special first-year election to be taxed as a U.S. resident.

A Resident Alien may adopt a fiscal year. Among the requirements for a Resident Alien to adopt a fiscal year is that their U.S. tax year has not been previously established, the U.S. fiscal year must be the fiscal year used in the home country and the U.S. fiscal year must be a calendar month end.

Accordingly, selecting a fiscal year-end coinciding with the home country taxable year may make sense and should be included in the pre-residence planning or at least shortly after arrival in the U.S.

Review Foreign Holdings and Foreign Trusts

The U.S. has adopted three specific anti-deferral tax regimes applicable to American taxpayers who own foreign corporations or investments made through foreign corporations or foreign trusts. All are designed to impose punitive taxes on Americans who hold ownership interests in foreign corporations or foreign trusts.

The U.S. tax rules that address foreign investments are complex and designed to limit the ability of U.S. income tax residents to defer income

taxes. This is typically achieved principally by maintaining fully transparency through onerous U.S. international information reporting.

It is not uncommon for wealthy individuals residing outside the U.S. to hold their investments through an offshore holding company possibly organized in a low-tax jurisdiction.

If an individual holds such an ownership interest in a foreign (non-U.S.) company and becomes a U.S. income tax resident unless they pro-actively undertake pre-immigration tax planning they will have serious adverse U.S. tax consequences.

In general, if U.S. persons control (own more than 50% by vote or value) of a foreign corporation, its 10% or more U.S. shareholders will be potentially subject to current U.S. income tax on their pro rata share of the company's investment income (Subpart F) and most of the company's active business income (GILTI) under the U.S. CFC rules, regardless whether after-tax profits are repatriated as a dividend to the U.S. shareholders.

If U.S. shareholders owns 50% but not more than that percentage of the CFC such U.S. shareholders may have Form 5471 reporting obligations to the extent they acquire or dispose of 10% or more of the CFC stock in a given tax years. U.S. officers and directors of the CFC may also have Form 5471 reporting obligations.

In general there are at least a couple of elections that 10% or more U.S. shareholders of CFCs can adopt. A IRC 962 election is permitted on a

shareholder by shareholder basis to eliminate most of the current year income of the CFC by treating the individual as a U.S. corporate shareholder of the CFC in computing its annual CFC income.

In general, this election is suitable where the CFC is operating in a relatively lower tax jurisdiction. Alternatively, all U.S. shareholders can make a corporate level election to apply the High Tax Exemption to the CFC's annual CFC income. In general this election is suitable where the CFC is operating in a relatively high tax jurisdiction.

A second anti-deferral regime applicable to all American taxpayers is the Passive Investment Income Company (PFIC) tax rules.

Many new Resident Aliens own PFICs. In the Resident Alien's home country, it may be customary for individual residents to invest in collective private investment companies much like U.S. mutual funds. Often a so-called Qualified Electing Fund (QEF) election is impossible because the offshore mutual fund or private equity fund is not marketing to American investors.

Therefore, the fund managers and directors are often unwilling to spend the money necessary to have a U.S. accounting firm prepare the required annual PFIC shareholder statement that U.S. shareholders must disclose to the IRS with their Forms 8621 when making a QEF election.

As a result, the U.S. shareholder of the PFIC will by default be required to report the investment as a IRC Section 1291 fund with punitive tax including a deferred interest charge and ordinary income on disposition

of the PFIC shares. To avoid the PFIC rules and Form 8621 on each separate underlying investment fund treated as a PFIC, often the best advice is that before moving to the U.S. the future Resident Alien should dispose of all PFIC investments.

The PFIC rules also affect family-controlled investment companies and potentially start-ups regardless of the percentage ownership owned by American investors.

Under the "once a PFIC, always a PFIC" rule, if a U.S. investor makes an initial cash investment in a foreign start-up private company without any operating assets that has yet to begin operating an active business, such an investment may qualify as an investment in a PFIC and such label will remain forever with such investment.

This means that after foreign business turns a profit and is eventually sold, all gain to the U.S. shareholder will be treated as ordinary income under the PFIC rules. In general this "once a PFIC always a PFIC" rule incentivizes U.S. investors to either buy single stock positions on a foreign stock exchange or to invest only in U.S. start-up companies.

Finally, U.S. citizen or resident beneficiaries of foreign non-grantor trusts (FNGTs) who receive so-called "accumulation distributions" (i.e., prior years' income and gain, or UNI, undistributed net income) in excess of current year DNI (distributable net income) are subject to the throwback tax.

Under the throwback tax rules, "accumulation distributions" of UNI that

is distributed to the U.S. beneficiaries of the FNGT are taxed at the highest U.S. individual tax rates, subject to a deferred interest charge and all prior year capital gain is converted to ordinary income). There are a variety of work-around strategies to try to eliminate or mitigate the throwback tax rules applicable to FNGT distributions to U.S. person beneficiaries.

Check-the-Box (CTB) Planning

CTB planning is the cornerstone of successful pre-immigration planning for many inbound business owners and investors. Making a CTB election is often possible and desirable for any privately-held foreign company owned by the individual about to become a Resident Alien.

There are a variety of potential U.S. tax benefits in recommending that an individual about to become a Resident Alien make a CTB election in respect to his various foreign companies before his U.S. residency start date:

- A CTB election eliminate all CFC and PFIC tax issues as well as Form 5471 and Form 8621 annual reporting;
- A CTB election essentially clears out the pre-election and pre-U.S. residency "earnings and profits" of the foreign company and steps-up the basis of the company's assets to fair market value shortly before the individual's U.S. residency start date;
- A CTB election only affects the U.S. tax consequences of the foreign company and has no effect in the home country or country of operation of the foreign company;

- A CTB election results in a flow-through of any foreign tax credits paid in the home country of organization or in any other country where the foreign company conducts business, and which the Resident Alien can utilize in filing his U.S. tax return to reduce his U.S. taxable income, thereby creating maximum tax cross-border tax efficiency.
- U.S. tax reporting is still required with a Form 8865 (partnership tax return) required for any foreign entity with at least two owners and with a Form 8858 (disregarded entity) and Form 1120 required for any foreign entity which is a single owner entity.

Careful consideration should be given as to whether it makes sense to liquidate the foreign company before becoming a U.S income tax resident, however, it is often not practical to do so and there may be a significant tax cost in the country from which the individual is moving or where the business is located.

Subject to certain eligibility criteria, it may be possible to cause a ”deemed liquidation” of the foreign company solely for U.S. tax purposes (and not for any other law purposes), before the individual moves to the U.S.

The inbound individual would elect to treat the foreign company as a pass-through entity (i.e., either a”disregarded” entity or a ”partnership” for U.S. tax purposes). This has the same U.S. tax effect as if the company sold it assets thereby potentially obtaining a step-up in the tax cost basis before becoming a U.S. income tax resident while still maintaining the entity’s legal form.

There are at least two other favorable consideration when an inbound individual to the U.S. can cause a check-the-box election on a foreign company in which he or she is a shareholder.

First, the complex anti-deferral U.S. tax systems and reporting requirements under the U.S. controlled foreign corporation and passive foreign investment company rules are avoided and there is reduced U.S. tax reporting.

Moreover, as a pass-through entity for U.S. tax purposes, the owner should be entitled to claim a foreign tax credit on his or her U.S. income tax return for the allocable share of foreign country corporate tax paid by the foreign company, creating more tax efficiency.

Foreign Trusts

The U.S. advisor must determine if the impending Resident Alien is the settlor, trustee or beneficiary of any foreign trust to determine if such foreign trust is ore will become a U.S. “foreign grantor trust” when the individual becomes a Resident Alien of the U.S.

First, if either any substantial trust decisions are made by non-U.S. person (the control test) or a U.S. court lacks primary supervisory authority over the trust (the court test), it will be classified as a “foreign” not “U.S. domestic” trust for tax purposes.

Second, the U.S. tax code provides only two relatively narrow definitions of when a trust is a “foreign grantor trust”? These two narrow definitions

apply only to revocable trusts (foreign settlor unilaterally can revoke the trust and revest the trust assets in himself) and trusts of which the settlor and his spouse are the only beneficiaries during the life of the settlor. All other foreign trusts are classified as foreign non-grantor trusts (FNGTs).

If a foreign settlor of a foreign trust becomes a Resident Alien within 5 years of funding such trust it will be classified as a “U.S. grantor trust” for so long as the settlor is a Resident Alien or U.S. citizen.

Most importantly, the settlor will be taxed by the U.S. on the worldwide income of the foreign trust even though the settlor is not a trustee or beneficiary and has no access to the trust property.

However, a “U.S. grantor trust” must end no later than the death of the settlor or possibly earlier when the settlor leaves the U.S. As of the day before date the foreign trust ceases to be a “U.S. grantor trust” and converts back to a FNGT the settlor must pay an “exit tax on the trust’s appreciated assets when converting from “U.S. grantor trust” status to “FNGT” status.

This comes as a shock to many departing individuals and most U.S. return preparers who are unaware of this exit tax on trusts when they change classification.

The U.S. currently adopts the following tax scheme for trusts. A trust is either “domestic” or “foreign” based on the court and control tests referenced above. Importantly, the trust is a foreign trust if either of the two alternative tests are satisfied.

If the trust is a "grantor trust" (either foreign or U.S.) the trust is transparent for U.S. tax purposes and the settlor is treated as the owner of the trust income and gain.

However, a "foreign grantor trust" (i.e., revocable by a foreign settlor or for the benefit of only the foreign settlor and spouse during the settlor's life) is only subject to U.S. income tax on its U.S. source income (generally U.S. dividends and U.S. ECI perhaps from a U.S. partnership or other business entity).

A "U.S. grantor trust" on the other hand results in the settlor being subject currently to the worldwide income and gains of the trust so long as the settlor is a U.S. person.

Alternatively, a trust may be an "ordinary" trust in event the trust and the beneficiaries are that taxpayers for U.S. income tax purposes. For U.S. income tax purposes the trust is taxed like an individual but at much higher tax rates designed to discourage the use of trusts rather than individual taxpayers.

A foreign trust that is an ordinary trust is taxed like a NRA. It is taxable on its U.S. source income (excluding capital gains, except for gain on sale of U.S. real estate under FIRPTA) at a flat rate of 30% (unless a lower treaty rate applies). Income that is effectively connected with a U.S. trade or business (ECI) is taxed at graduated individual tax rates up to 37%.

If the ordinary trust is a foreign trust then as noted any distributions of "accumulation distributions" (UNI) to U.S. beneficiaries is subject to the

throwback tax rules and their punitive tax implications.

Pre-Domicile Transfer Tax Planning

If an individual intends to be in the U.S. indefinitely and might face U.S. estate and gift taxes, such individual might consider making an irrevocable gift to either a non-U.S. relative (not be moving to the U.S.) or a discretionary ”drop-off” trust.

To the extent intangible assets located anywhere or real estate or tangible property located outside the U.S., there should be no U.S. gift tax and no U.S. gift tax reporting obligation.

Those assets should be removed from the individual’s U.S. taxable estate.

This strategy is especially appealing to wealthy individuals whose estate will be in excess of the current $12.92M (2023) lifetime gift/estate tax exclusion amount.

A gift to a so-called ”drop-off” trust (i.e., a fully discretionary U.S. domestic trust) before moving to the U.S. will generally not use up any portion of the individual’s $12.92M (2023) exclusion amount.

In most situations, however, the income earned by the ”drop-off” trust will likely remain taxable to the individual trust creator, unless he or she established and funded the trust more than five years prior to moving to the U.S.

To be most effective, an inbound individual should only fund the ”drop-off” trust with no more than roughly 80% of his overall net worth, and while residing in the U.S. the trust creator should limit distributions of trust income and principal to himself while encouraging distributions to other beneficiaries.

The trust creator does not want the IRS to perceive that the trust creator has an indirect ownership in the trust access as demonstrated by multiple distributions to support his lifestyle while living in the U.S.

An independent trustee is highly recommended and the trust creator should retain no powers over the ”drop-off” trust that would cause inclusion of the trust property in his taxable estate if he died while living in the U.S.

The trust creator could retain the power to remove a trustee and appoint a new independent trustee to fill any vacancy, without any adverse U.S. estate tax implications.)

If an individual plans to be in the U.S. indefinitely and possibly might obtain U.S. citizenship but his or her spouse is not a U.S. citizen, such individual might consider that only the lifetime gift/estate tax exclusion amount can pass to the non-U.S. citizen spouse tax free on death of such U.S. domiciliary or citizen.

Such individual may wish to consider the use of a Qualified Domestic Trust (QDOT) which allows a martial deduction on death of the U.S. citizen or domiciliary spouse on the assets in excess of the lifetime

gift/estate tax exclusion amount but there are some drawbacks to such trust. Such individual might consider the benefits of alternatively funding a life insurance trust for the benefit of such surviving non-U.S. citizen spouse which should avoid all of the QDOT constraints and requirements.

Possible Cross-Border Business Issues For Business People

Well before entrepreneurs begin to consider their departure from their home country, they should consider all of the important early-stage tax and non-tax considerations of their cross-border business. Among the considerations is what is the most appropriate legal entity to use when expanding to the United States.

For example, should the organizational form of the U.S. operation include a subsidiary, branch or limited liability company (LLC) /partnership?

Another consideration is whether other employees or personnel should relocate to the United States? An additional consideration to be made by the foreign business is whether to capitalize the U.S. venture with debt, equity or a combination of the two?

The foreign direct investor into a U.S. business also has a variety of ways by which it can repatriate the profits of its U.S. operations.

These include the payment of interest or dividends to the foreign owner. The utilization of royalties, if applicable is often a tax-efficient means to

extract profit the U.S. enterprise. Often the business activity being contemplated for the U.S. involves the sale of inventory products by a foreign company to customers located in the U.S., or so-called inbound sales.

The essence of this planning is to divide the total profit to be earned in respect to the importing and sale of inventory between the foreign manufacturer and its related U.S. affiliate.

The goal is to minimize the role that the U.S. affiliate plays in the transaction in order to support less income being allocated to it.

Moreover, the transfer pricing considerations in the U.S. and, if applicable, in the foreign country must also be considered.

Changing the initial business structure becomes more difficult and more expensive after a start-up company becomes more advanced in its business cycle.

For example, changing the ownership of intellectual property from a company in the tech entrepreneur's current home country of residence to a U.S. subsidiary might be very costly and could draw the attention of the home country's tax authority due to its transfer pricing rules.

Moreover, if access to U.S. capital markets is contemplated, most U.S. investors would prefer to invest in a U.S. entity when making their initial investment in the business.

Entrepreneurs might desire their original parent company in their home country to own the U.S. subsidiary. This arrangement could have potential benefits in terms of estate tax considerations in the U.S.

But until the entrepreneur relocates to the U.S., the original parent company would serve as a foreign holding company. The entrepreneur's estate tax considerations in their home country should be taken into account when determining the initial structure of the business.

If the tech entrepreneur's current home country of residence has an inheritance tax, as do many EU nations, local counsel must advise on the implications in such home country.

If the goal is to access the capital and distribution markets of the U.S. and to appeal to U.S. investors, a U.S.-based parent company might be appealing. However, there might be complications if the intellectual property was developed in the entrepreneur's home country.

The home country's tax authority could challenge the economic ownership of the intellectual property under the transfer pricing rules, if any, applicable in the home country, especially if no significant business activities are taking place in the U.S.

The essence is that transferring intellectual property across borders is not straightforward, especially without triggering gain recognition in the seller's home jurisdiction. U.S. investors typically prefer that intellectual property is owned within the U.S., leveraging certain favorable tax incentives. However, these U.S. investors might be wary of an ownership

structure that subjects them to U.S. income tax on income generated from non-U.S. sourced intellectual property.

Entrepreneurs from other countries might structure their ownership to have a U.S. parent company with a subsidiary in their home country acting as a contractor for R&D. However, there are inherent challenges in locating intellectual property in the U.S., including potential costs and operational considerations.

If foreign entrepreneurs are testing the U.S. market, they might consider hiring an independent contractor for distribution or other services in the U.S. The key tax issue is to avoid having the U.S. contractor be viewed as a dependent agent, which might create a permanent establishment (PE) in the U.S., subjecting part of the business income to U.S. tax.

Forming a U.S. LLC to operate the business in the U.S. has implications for permanent establishment tax treatment. Transactions between the parent company and its U.S. subsidiary are subject to transfer pricing rules, potentially leading to different tax outcomes in each jurisdiction.

Ownership of a company from outside the U.S. by U.S. entities also presents challenges. There are specific U.S. tax considerations and regimes to consider, such as passive foreign investment company (PFIC) rules and controlled foreign corporation (CFC) rules. These can have significant generally adverse tax implications for U.S. investors.

One significant incentive for structuring a parent company in the U.S. is the QSB tax provision. This benefit is a major draw for U.S. investors. Because of the potential advantages of the QSB and the complexities of PFIC and CFC rules, U.S. investors typically prefer to invest in U.S. corporations over foreign ones.

For serial U.S. investors, a threshold criteria is often whether a U.S. investor would be entitled to the lucrative QSB gain exclusion amount (currently $10M) on eventual sale of the QSB shares following a 5-year holding period?

Finally, entrepreneurs should always be aware of any available benefits and incentives in their home country before making a decision about relocating or expanding their business to the U.S.

The Evolving Exit Tax in Some Countries

Many countries, especially those still developing and refining their tax laws, have exit tax rules.

For example, the U.S. has an onerous and robust exit tax regime applicable to certain U.S. citizens and long-term permanent residents who satisfy any one of three alternative tests.

In general, the U.S. requires payment of a „mark-to-market" exit tax on worldwide appreciated assets or arranging for a U.S. person to periodically withhold U.S. exit tax on certain types of retirement assets as they are distributed to former U.S. persons.

In other countries, the default position is that a departing resident is deemed to have elected to defer payment of the exit tax until the underlying asset is sold.

For these other countries, such an approach often leads to numerous collection and enforcement challenges for the country's tax authorities once the taxpayer is no longer a resident. Some of the tax treaties these countries enter into may lack robust provisions for cooperation and sharing of information with the tax authority in the new country of residency.

For example, if an individual leaves their home country for a residence in a nation without capital gains tax, challenges can arise. Tax authorities in the departing country might actively seek information from the new country's tax administrations regarding affluent former residents and their assets, both held individually or through foreign entities.

The information shared could be much more detailed than what is typically exchanged between the two countries. In some nations, residents have the right to review requests made by their former country's tax authority before their personal information is shared.

Many tax authorities are proactive in collecting tax information on high net worth individuals and auditing their high-value assets located globally, including those held through foreign trusts and corporations.

However, obtaining such information can be a slow and inefficient process for the country's tax authority, especially if their former

residents now live in countries known for banking privacy.

Due to the inefficiencies and challenges of current exit tax systems, some countries have initiated tax reform efforts to revise their policies. A common feature in many exit tax regimes is the imposition of a tax on a person (individual or company) who ceases to be a resident.

To determine the amount, the person is often deemed to have sold their assets at the fair market value on the date they cease to be a resident. However, while the tax is determined at departure, typically the payment is deferred until the actual sale of the underlying assets.

Such deferred systems might use a method that calculates the portion of the gain on the sale allocable to the original country, often based on how long the asset was held while the individual was a resident.

To ensure tax collection, some tax reform committees have recommended extensive changes. These might include allowing departing residents to choose between immediate tax payment or deferring it, with both options having more stringent reporting obligations.

When the value of assets subject to exit tax doesn't exceed a certain threshold, both immediate and deferred tax routes might be available. But for more valuable assets, new and detailed exit tax regimes could be proposed, only allowing deferral on non-tradable assets. For instance, for foreign real estate above a certain value, deferral might require a pledge of assets.

For other assets, annual reporting could be mandated, with certain types of income excluded from the exit tax. Corporate exit tax rules might also be reformed, with a focus on immediate tax on accrued profits up to the date of residency change.

In essence, as global mobility increases and assets are held in various jurisdictions, countries are grappling with refining and tightening their exit tax rules to ensure that their tax base remains protected.

Planning for Family Who Will Remain a NRA But Whose Children Have Become U.S. Persons

Suppose the wealthy family matriarch or patriarch and NRA of the U.S. has no plans to move to the U.S. and become an income tax resident.

Also assume that the foreign family patriarch has substantial wealth tied up in many foreign corporations, including operating companies, and he intends to leave his fortune to his son and grandchildren, all of whom are U.S. citizens.

Instead of making outright gifts to the son and grandson, which would bring the assets into the U.S. income tax net and make them subject to inclusion in their U.S. taxable estates upon their deaths, the wealthy family patriarch should consider transferring the shares in the foreign corporations to a revocable family trust. The trust would be classified as a foreign grantor trust for U.S. tax purposes during the life of the family patriarch as he would have complete control over the trust assets during his life.

During the life of the foreign patriarch, he would be considered as the owner of the trust assets for U.S. tax purposes. So long as the trust had no U.S. source income from U.S. investments or a U.S. business during the patriarch's life, there would be no U.S. tax due since the trust would be treated as a NRA.

Trust distributions to the son and grandchildren during the patriarch's life would be treated as gifts not subject to U.S. transfer tax as long as made from a non-U.S. account. Those gifts would need to be reported on a Form 3520 by the son and the grandchildren.

After the patriarch's death, the trust could continue for the life of the son and grandson, and would likely convert to become a U.S. domestic accumulation trust. This should avoid any throwback tax issues in respect to distributions to the U.S. beneficiaries.

Indeed, many wealthy foreign parents establish so-called "*hybrid*" trusts to benefit themselves during their life and thereafter their U.S. children and grandchildren.

A "*hybrid*" trust is typically governed by a trust-friendly state from inception but since the foreign parent has the power to revoke the trust during his life (i.e. foreign parent retained a substantial trust power) the trust will be classified as a "foreign grantor trust" during the parent's life.

At the death of the foreign parent, the trust terms would require that all substantial trust decisions be made by U.S. person. This is a so-called "automatic" migration or domestication of the trust after the parent's

death. Except for a possible change of trustee, the trust will become a U.S. domestic ordinary non-grantor trust after the foreign parent's death. In general, U.S. domestic trusts are preferable for U.S. beneficiaries because of the ability to accumulate income and gain without throwback tax.

To the extent income is accumulated by the trustee, the trust would pay the U.S. income tax based on the U.S. "distributable net income" (DNI) rules. To the extent income is distributed by the trustee to the trust beneficiaries each of the beneficiaries would have to include in income a portion of such DNI.

Final Considerations for Those “Coming to America”

After reading this report, it is apparent that for HNW businesspeople, “Coming to America” requires a expertly devised and executed integrated immigration and tax strategy that meets the needs and timing of each family member.

If done properly, this approach will result in a successful relocation which minimises the tax burden both in the US and the country. If done improperly, the cost of unnecessary easily avoidable tax will make the cost of developing a proper plan look like a mere rounding error.

In closing, the US is very attractive to many international families for many reasons. However, it is critical to understand the complexity of the US immigration and tax regimes and to navigate them expertly.

As with many things in life, “Failure to plan is planning to fail”.