# U.S. Immigration, International Tax and Estate Planning Key Issues, Opportunities and Pitfalls

**Presentation**

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2. Relevance to CPAs and Tax Professionals.

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## II. KEY TERMS.

1. Relevant U.S. Government Agencies.

   U.S. Citizenship and Immigration Services – now part of Department of Homeland Security, formerly Immigration and Naturalization Service

   U.S. Department of State

2. What is a Visa?

   A permit to apply for admission to the U.S.

3. Nonimmigrant (temporary) versus Lawful Permanent Resident ("LPR" aka "green card")

4. Alien – Non-Resident, Non-Citizen ("NRNC") or Resident Non-Citizen ("RNC") versus U.S. Citizen ("USC").

   For <u>US estate tax purposes</u>, a NRNC does not have a domicile in the US. This is discussed in more detail below in section V.4 of this outline.

   For <u>US income tax purposes</u>, under Code section 7701, a NRNC is a person who is not a US citizen and not a US resident as a Lawful Permanent Resident (i.e., has a green card), under the "substantial presence" test or by election. For these purposes the US does not include its territories or possessions.

   <u>Substantial Presence</u>. Subject to certain exceptions noted below, an individual meets the substantial presence test for the current year if:

   (a) he or she was physically present in the US on at least 31 days during the current year, and

   (b) the sum of
   (A) the number of days he or she was physically present in the US during the current year,
   (B) one-third of the number of days he or she was physically present in the U.S. during the first preceding calendar year, and
   (C) one sixth of the number of days he was physically present in the U.S. during the second preceding year
   equals or exceeds **183** days.

   So each day the person is physically present in the US during the current year is a full day; each day in the first preceding year is 1/3 of a day; and each day in the second preceding year 1/6 of a day.

**BUT**, consider these exceptions. 1. A person won't be treated as meeting the test above if he or she is present in the US **fewer than 183 days in the current year**, **<u>and</u>** satisfies the other requirements of the "**foreign tax home/closer connection**" exception. 2. A person won't be treated as being present in the US for these purposes on any day if he or she: (1) **cannot leave the US** on that day because of a medical condition that arose while in the U.S or (2) is an **exempt individual** on that day (i.e., a foreign government-related individual, teacher or trainee, student or professional athlete temporarily in the US to compete in a charitable sports event. A person who is not otherwise a US resident will not be treated as being present in the US under this test on any day he or she **regularly commutes** between the U.S. and Canada or Mexico, or is in the US temporarily while in transit between 2 foreign places.

The **foreign tax home / closer connection** exception requires that the person show for the current year that he or she maintains a tax home in a foreign country **and** has a closer connection to a single foreign country than to the U.S. A person who is applying for US residency cannot satisfy this test even if he or she meets these criteria.

<u>Election</u>. Under Code section 7701(b)(4), a person who (I) is not otherwise a resident in a tax year (the "election year"), (II) does not meet the substantial presence test described above for the election year or the immediately preceding year, (III) is a US resident for the year following the election year, (IV) was present in the US for at least 31 days in the election year, and (V) was present in the US for at least 75% of the days in the election year starting with the first day of the 31 day presence period and ending on the last day of the election, may still elect to the treated as a US resident for the period during the year beginning with the first day of his or her residency period. There are of course limits and further refinements of eligibility for this election contained in the law.

An election is also available under Code section 6013 for a NRNC spouse of a USC or RNC to be treated as a US resident for income tax and wage withholding purposes.

5. Preference System.- See U.S. Department of State Visa Bulletin for August 2008 attached.

6. Priority Date. – This determines the order of availability of visas.

7. Domestic Trust.

   A trust is a domestic trust only if (A) a US court has primary supervision over the administration of the trust, and (B) one or more US persons control all substantial decisions with regard to the trust. Code section 7701(a)(30(E). Regulations indicate that substantial decisions include whether, when, to whom and how much to make in the way of distributions, selection of beneficiary or successor trustee, and allocation of receipts between income and principal.

8. Foreign Trust - not a domestic trust.

   Consider that a domestic trust can inadvertently become a foreign trust merely through the change of a trustee. Regulations under 7701 provide a 12 month cure period if foreign trust status was accidentally incurred.

**III. <u>PLANNING BEFORE YOU COME</u>.** An important consideration for any foreign person contemplating establishing U.S. residency is that after establishing U.S. residence for U.S. income and transfer tax purposes, the U.S. resident will be subject to the global application of the U.S. income tax and taxation of his or her worldwide estate for US estate tax purposes. Before coming to the US, such a client should consider accelerating taxable income, postponing possible income tax deductions and engaging in other asset and trust transactions to limit or eliminate future U.S. income and transfer tax risks.

1. Owning US Real Property. Although the Foreign Investment in Real Property Act ("FIRPTA") is not a transfer tax provision, it does impact the NRNC considering US investments. It impacts a non-US person who owns US real property in several ways.

   A. Withholding on Sale. When the NRNC sells the property, any gain realized will be subject to tax, and the buyer must generally withhold 10% of the purchase price and remit it to the US government. If the property is owned by a domestic partnership or trust, the withholding requirement jumps to 15% or 35%, depending on the nature of the gain. This withholding can be reduced if the IRS issues a "withholding certificate."

   B. Certification of Non-Foreign Status on Acquisition. When the NRNC purchases US real property it is a good idea to have the seller certify to his or her US status so that it is clear the NRNC has no withholding requirement on his or her acquisition. That question can complicate the later sale by the NRNC.

   C. Rental Property Owned by the NRNC. Code section 871 requires a general 30% withholding on rental income from US real property owned by the NRNC unless a treaty provision changes that or the NRNC elects (under 871(d)) to have the rental activity treated as a US trade or business subject to the US tax generally. **Note** that rental income (or even a gift) can be imputed to a personally occupied residence if the residence is owned by a foreign trust or corporation.

   D. Consider Corporate Ownership. All of the strategies described below can be helpful to avoid these issues in one degree or another, at the cost of added complexity. If the real property is not significant enough to warrant the effort, it may not be worth it.

      Domestic. If the real property is owned by a US domestic corporation, some of these issues are mitigated or relieved entirely. A properly structured US corporation of course can offer the NRNC liability protection for claims related to the real property, and relieve him or her of the obligation to file US tax returns if that property is the only item generating that obligation. FIRPTA withholding obligations should not apply to the US corporation even if the corporation sells the property and distributes the proceeds of sale to the NRNC shareholder. Additionally, as described below, a gift of US real property can give rise to US gift tax, but a gift of shares in a US corporation should not.

      Corporate ownership is not without its issues, however. The corporation will have its own tax to pay, and must withhold 30% on dividends paid to the NRNC shareholder unless treaty provisions limit that amount (Code sections 871(a) or 881(a)). This dividend treatment could even apply if the property is refinanced and the proceeds distributed to the NRNC (to the extent of the corporation's retained earnings and profits). The corporation must disclose the identity of the shareholder on its tax return if he or she owns 50% or more of the stock, and on a sale of shares in such a corporation FIRPTA withholding will apply if 50% or more of the corporation's asset value consists of US real property.

      Shares in a domestic corporation would be included in the US taxable estate of the NRNC, as would the real property itself.

      Foreign. A foreign corporation would offer the same liability and lack of tax return benefits of the US corporation, with the added benefit of no FIRPTA compliance when the shareholder sells stock and no withholding on dividends paid. Shares in a foreign corporation should not be subject to US gift tax if given away during life, and if the corporation has been maintained properly and has a sufficient non-tax business purpose, the shares should not be included in the US taxable estate of the NRNC.

      A foreign corporation would be subject to FIRPTA withholding requirements if the real property is sold, and may be subject to a 30% "branch profits tax" on income that is not reinvested in its operations.

Combination. If the NRNC creates a foreign corporation, that in turn is the holder of 100% of the shares of a domestic US corporation, that in turn holds the real estate itself, most of the problems described above can be relieved. The real estate is held in a US entity, so FIRPTA should not apply. The corporation has no activity in the US so the branch profits tax should not apply. If the foreign corporation ever sells the shares of the domestic corporation, FIRPTA may apply in that instance.

Foreign Trust. The NRNC could transfer cash to a foreign trust with an independent trustee who has discretion over distributions to the beneficiaries (the class of whom can include the NRNC). If that trust then creates a US domestic LLC with cash, and the LLC then purchases the US real estate, this can also finesse most of the issues described above.

2. Foreign Trusts. A properly structured foreign trust may be the best pre-immigration planning vehicle though which the NRNC can legally control his or her exposure to US taxation. As described above, such a trust (generally in a proper low-tax jurisdiction) would have an independent trustee who has discretion over distributions to the beneficiaries (the class of whom can include the NRNC). The more control the NRNC has over any aspect of the trust after it has been established, the more likely the limited exposure to US taxes would not be realized. Issues that can expose the trust to US taxes, by rendering it a grantor trust, include the following.

- a reversionary interest;
- a power to control beneficial enjoyment of the trust property;
- a prohibited administrative power;
- a power to revoke the trust; or
- a **right** to possible distribution of income for the grantor or the grantor's spouse.

A. Income Tax Rules Specific for Foreign Trusts With US Connections.

Under Code section 679, a US grantor to a foreign trust that has US beneficiaries is treated as the owner of the income of that foreign trust even though all the other grantor trust rules have been satisfied.

Under Code section 684, a donative transfer of appreciated property by a US person to a non-grantor foreign trust can cause the US transferor to recognize gain on the transfer as if the property had been sold. Section 684 will generally apply where provisions of Code section 679 cease to apply, or if a domestic trust become a foreign trust.

Direct or indirect transfers of property to a foreign trust by a USC or RNC must be reported on Form 3520, filed with the donor’s federal income tax return. US beneficiaries receiving distributions from a foreign trust report those distributions on Form 3520 filed with their federal income tax returns.

The trustee of any foreign grantor trust, whether under 679 or other grantor trust rules, must file a Form 3520-A annual information return.

B. If a foreign trust beneficiary becomes U.S. resident. Under Code section 679, a US grantor to a foreign trust that has US beneficiaries is treated as the owner of the income of that foreign trust even though all the other grantor trust rules have been satisfied. If the US grantor creates a trust for foreign beneficiaries, this rule is not applicable. The rule becomes applicable, however, when a foreign beneficiary of this type of trust becomes a U.S. beneficiary.

To address this issue a trust agreement may provide that only foreign-based beneficiaries are eligible to receive benefits under the trust. For example, the trust could state that an otherwise eligible beneficiary who becomes a US person becomes an ineligible beneficiary. **NOTE**, an NRNC who is considering US residence and who is a beneficiary of such a trust should be advised that eligibility for trust benefits might vanish under these circumstances.

C. If a foreign trust grantor becomes U.S. resident. Foreign grantor trust rules under Code section 679 can apply only to a US grantor since there is no jurisdiction over a foreign grantor absent other circumstances. However, section 679(a)(4) provides that the rules of 679 providing grantor trust treatment are to apply to certain foreign persons who transfer property to a foreign trust and then become US persons. An NRNC who transfers property, directly or indirectly, to a foreign trust and becomes a US resident within five years after the transfer is generally treated as making a transfer to the foreign trust on the individual's U.S. residency starting date.

The amount of this "deemed transfer" is the portion of the trust attributable to the property previously transferred, including undistributed net income. Code section 679(a)(4)(B). This means the deemed grantor is generally treated as the owner of that portion of the trust in any taxable year that the trust has US beneficiaries. Therefore, before moving to the US an NCNR will need to consider if such a trust can be terminated or US beneficiaries eliminated.

**NOTE** that Code section 679 can apply to indirect transfers as well as direct transfers to covered trusts. Transfers through related intermediaries and payment of trust obligations by the deemed grantor are both covered. Treas. Reg. 1.679-3.

D. If a trust changes from grantor trust to non–grantor trust status after residency status is established. If the tax status of a foreign trust changes from being a grantor trust to a non–grantor trust, that change is treated as a deemed transfer of appreciated assets to a foreign trust. Code section 684(c). This section requires gain recognition of the appreciation of property transferred into an irrevocable trust. This means that any of the changes noted above designed to avoid or limit grantor trust treatment can also cause this provision to be applicable and generate significant tax. Further, since the trust will not longer be a grantor trust, the grantor may not have easy access to distribution from the trust to satisfy this liability. Thus transformation of a foreign trust from being a grantor trust to non–grantor trust should be undertaken before the NRNC comes to the US.

3. Controlled Foreign Corporation ("CFC"). Code Section 951(a) provides that if a foreign corporation is a CFC for an uninterrupted period of thirty days or more during a taxable year, every person who is a "US shareholder" who owns (directly and indirectly under Code section 958(a)) at least 10 percent of the stock in the foreign corporation on the last day of the taxable year in which it is a CFC must include in gross income his or her pro rata share of the CFC's "subpart F" income (generally, foreign income that has not been otherwise currently taxed in the US). A corporation is a CFC generally if at any time during the year US persons owned more than 50% of the combined voting power of all classes of the corporation's stock, or 50% of the total value of the corporation's stock. Code section 957. Attribution of ownership is broad and determined under provisions of Code section 318. Code section 958. In the case foreign trusts and estates, this can lead to deemed ownership by the grantor or beneficiary of CFC shares owned by the trust itself, and increased compliance and tax obligations for such a person.

A. Attributed ownership though a foreign estate. If gifts of shares are made, or shares pass with the estate residue, application of the general rule under Code section 958 and its regulations that the beneficiary who receives the shares is deemed to be the owner during estate administration is pretty simple. If formula or fractional share gifts are involved, in which the amount passing to any one person is not determinable because other gifts, debts, expenses or taxes may be paid form the gifted property, things become less straightforward. Still, the general rule applies to that situation as well.

B. <u>Attributed ownership through a foreign trust</u>. Trust beneficiaries are also deemed to own shares held in a trust of which that person is a beneficiary. The example of attribution through a foreign trust set out in the regulations under Code section 958is not a model of clarity – the attribution to the beneficiaries determined by the example could result from their right to trust income, their right to trust corpus on termination, or both. FSA 199952014 (September 23, 1999) clarifies the issue somewhat in that it states that if all income of the trust must be distributed currently, the income beneficiaries are the deemed owners of the trust and nothing is attributed to the remainder beneficiaries.

<u>NOTE</u> that these attribution rules may not apply unless there is at least one real live US shareholder who can vote shares of the corporation or otherwise influence the control of the corporation. Attribution though a foreign trust is not clearly a means to attribute control for purposes of determining CFC status to begin with, since control of the shares would normally reside with a non-US trustee.

C. <u>Income taxed to beneficiary</u>. Where income is actually distributed or distributable to an identified beneficiary, the rules described above generally require that the CFC Subpart F income be taxed to the US shareholder trust beneficiaries. However, most irrevocable foreign trusts are entirely discretionary, leaving it to the non-US trustee to determine who, if anyone, gets distributions from the trust. To this author's knowledge, there is no published guidance from the IRS as to how to apply these rules in the context of a discretionary trust. The best course is to be aware of the issue and avoid it if possible.

## IV. NONIMMIGRANT (TEMPORARY) VISAS. - Types, requirements and permitted activities

1. Types including:

   A. B-1 Visitor for Business/ B-2 Visitor for Pleasure.

   B. H-1B Specialty Occupation.

   C. L-1 Intracompany Transferee.

   D. E-1/E-2 Treaty Trader.

   E. TN – Treaty NAFTA.

2. B-1/ B-2 Visa.

   A. B-1.

      i. Eligibility Criteria include: have a non-U.S. residence which the individual does not intend to abandon; intend to enter for a period of specifically limited duration; INTEND to depart U.S. at expiration of stay; have adequate financial arrangements for U.S. visit and departure; and seek admission for the sole purpose of legitimate activities relating to business.

      ii. Permitted activities include: engage in commercial transactions which do *not* involve gainful employment in U.S.; negotiate contracts; consult with business associates; participate in scientific, educational, professional, business conventions, conferences or seminars; undertake independent research; and certain other activities. B-1 visa holder ***cannot*** engage in productive employment in U.S.

iii. Application process – Appointment versus Visa Waiver Program.

iv. Required security clearances can cause delays.

B. Duration of Stay.

C. Employment Prohibited.

D. **PRACTICE POINTER** – What is Employment? “work for hire”?

3. E-1/ E-2 Treaty Trader/ Treaty Investor Visa.

A. Requirement for E-1 Treaty Trader include the non U.S. individual (Employee) and U.S. business entity (Company) possess non U.S. nationality [for the Company this means that at least 50% of the shares are owned by non U.S. citizens directly or indirectly who do <u>not</u> have U.S. lawful permanent resident (*i.e.* “green card”) status]; current existence of “substantial trade”; over 50% of Company’s trade is between U.S. and non U.S.; and Employee’s work is “executive, supervisory, or essential skill." Note the definition of trade includes goods and certain services.

B. Requirements for E-2 Treaty Investor include: Employee and Company possess non U.S. nationality; investment must be substantial; funds or capital must be at risk; U.S. business is “commercial enterprise.” Employee’s work is “executive, supervisory, or essential skill.”; and “marginality” (the visa cannot be solely for the purpose of applicant to make a living in the U.S.).

C. Procedures and timing: In most cases an application is submitted directly to appropriate U.S. Consulate or Embassy outside the U.S. Adjudication time varies depending on the country and consulate. Employee, spouse, children must schedule and attend a personal interview at the consulate. Visa duration varies depending on the country of citizenship - up to 5 years. Employee, spouse and children may be admitted initially for up to 2 years; extensions may be available. There is no maximum time a person may hold E visa status.

4. L-1 Intracompany Transferee

A. Basic Requirements include: (1) Qualifying relationship between non - U.S. entity and Company; (2) Employee's prior employment with non - U.S. entity (1 year out of last 3) must be managerial, executive, specialized knowledge; and (3) U.S. position must be managerial, executive or specialized knowledge.

B. Procedures and Timing - Company submits forms and supporting documents with filing fees (initial fees up to $1820) to USCIS Service Center. Processing times vary and can be up to 5 months or longer. There is an option for “premium processing” where USCIS provides a decision -approve, deny, or request for additional evidence- within 15 days of filing for an extra $1000 fee. Generally after petition approval, Employee, spouse and children must schedule and attend interview at U.S. consulate or embassy. L-1As for managers and executives may be issued for a maximum of 7 years. L-1Bs for specialized knowledge visa may be issued for maximum of 5 years. Initially L-1 visa may be issued for up to 3 years for an established office, 1 year in new office. Extensions may be obtained for up to 2 years.

C. There are additional requirements for new office L-1. Often times, L-1 visa may be the most effective option for a start up U.S. operation. Spouses of E and L visa holders may qualify to work in U.S. provided they apply for and receive employment authorization from USCIS.

5. H-1B Specialty Occupation Visa.

A. Basic Requirements include (1) "specialty occupation" position; (2) employee has the qualifications for the "Specialty Occupation;" and (3) company must pay prevailing wage or actual wage, whichever is higher, and postings. Specialty occupations require theoretical and practical application of a body of highly specialized knowledge along with at least a bachelor's degree or its equivalent. Examples include architecture, engineering, and business specialties, etc.

B. In FY 2009 ending September 30, 2008 the cap on available H-1B visas is 65,000 (plus 20,000 for individuals with U.S. master’s degrees. *The cap limit for FY 2009 was reached on April 2, 2008. This means new H-1B visas for first-time employment will be unavailable until October 1, 2009 unless the 65,000 visa limit is raised by Congress.* Petitions for current H-1B workers do not count toward the Congressionally mandated cap. Need to apply on April 1, 2009. It is quite probable the cap will be reached on April 1, 2009 again. In order to maximize the probabilities H-1B numbers are available it is advisable to apply on April 1, 2009.

C. Procedures and Timing - Company must file a labor condition application with the U.S. Department of Labor. The application includes declarations concerning payment of prevailing wages and working conditions. Company submits forms and documents together with various fees – up to $3320 per petition to USCIS Service Center. Processing times vary and can be up to 5 months or longer. There is an option for “premium processing” for an extra $1000 fee [total fee -$3,320]. Visa issuance issues are similar to L-1 visas. H-1B visas may be issued initially for 3 years and for a maximum of 6 years, and additional years under certain circumstances.

D. Comments - Spouses of H-1Bs, who hold H-4 status are not eligible to work in U.S. See http://uscis.gov/graphics/services/tempbenefits/ecrd.htm#anchorH1B

6. TN [Treaty NAFTA] Visa.

A. Basic Requirements.

i. Canadian or Mexican citizen.

ii. Alien engaged in activities at a professional level. Activities at a Professional Level under NAFTA is defined as requiring "at least a baccalaureate degree or appropriate credentials demonstrating status as a professional." See list at http://www.amcits.com/nafta_professions.asp

iii. Must prove intent not to immigrate to U.S.

B. Procedures and Duration of Stay – Canadians can apply at “Port of Entry.” Mexicans must apply initially at U.S. Consulate. No statutory limitation on stay. Admitted to U.S. for up to one year.

7. Treated as NRNC for US Federal Estate and Gift Tax purposes.

A. Gift Taxes and the NRNC. The only assets the clearly generate gift taxes when given by the NRNC is US real property and tangible personal property located in the US. Code section 2501(b)(2). The NRNC may take advantage of the generally available annual exclusions, and excluded gifts for education and health-related expenses. Finally, the unified credit of $13,000 (a $60,000 exemption) is available for lifetime gifts as well as transfers at death.

**NOTE** that cash has not been clearly defined as an intangible asset, so it may be that gifts of cash located in the US would be considered a gift subject to tax. Consider making such a gift with cash that is not in the US or by transferring ownership of an entire account.

B. NRNC Estate Tax Generally. The US estate tax is generally an obligation of the estate of the decedent – it is not a tax imposed on the decedent's beneficiaries. The tax is reported on a Form 706NA and is generally due on the date that is nine months after the death of the decedent (any tax due must be paid by that date, but the return can be extended for up to six more months). If the decedent has property subject to US estate tax, the return filed must generally list the decedent's worldwide estate assets and liabilities, not just the US assets and liabilities.

Under the current general US tax rules, the estate of a non-resident non-citizen is eligible for a tax credit of $13,000, which translates to exempt the first $60,000 of assets from being subjected to tax. Some countries may have estate tax treaties with the US - the US and Mexico, for example, have no estate tax treaty (likely since Mexico has no estate tax) that would vary this general rule.

It may be beneficial for an NRNC who has significant U.S.-situs property (and who does not have significant non-U.S. situs property) to take steps to become an RNC. Although by doing so he or she subjects the worldwide estate to U.S. estate tax, he or she will be entitled to a full US resident unified credit, rather than the $13,000 credit available to the NRNC. Obviously, the desirability of establishing U.S. domicile must be determined on a case-by-case basis.

Certain steps can be taken to increase the likelihood that a person will be treated as a U.S. domiciliary. For example, foreign bank accounts can be closed and the proceeds placed in a U.S. bank. If the person maintains homes both in the United States and home country, tangible property and other special personal items should be kept in the U.S. home. Revised U.S. wills, powers of attorney, advance medical directives, and other estate planning documents, each declaring that the individual is a U.S. domiciliary, should also be prepared and executed. In addition, the execution of an affidavit of U.S. residency, although arguably self-serving, could help demonstrate the intent of the individual to be treated as a U.S. domiciliary.

C. Certain US Assets are Taxed. The estate of a non-resident non-US citizen ("NRNC") will generally be taxable for US estate tax purposes only on certain assets that are considered to be located in the US. Note that this would not include property located in US possessions. § 7701(a)(9) of the Internal Revenue Code of 1986 (the "Code").

As stated above, the estate of the NRNC will be taxable for US estate tax purposes on certain assets owned by the decedent at death that are considered to be located in the US. US property will also include any property transferred by the decedent before death over which the decedent has retained a power that would include the property in his or her estate under certain provisions of the Code. That transferred property will be considered US property if it was US property when transferred or at the time of the decedent's death. § 2104(b). For example, in one case a decedent transferred US assets to a trust in 1923 over which she retained a taxable power of appointment. At the time of the decedent's death in 1991, no trust assets were US assets. The trust assets were still included in her estate since they were US assets when the trust was created. TAM 9507044.

Property held beneficially for the decedent may also be considered as held by him or her directly if the interest is deemed as representing the decedent. Cases have held that shares of a domestic corporation held in street name or registered to a Swiss Bank were considered US property of the decedent, unless it could be shown that the shares were actually borrowed by the bank or broker and that the decedent held only a claim against the borrower. Assets held in a partnership that will not be dissolved by the death of the partner should be considered an intangible asset sited where the business of the partnership is carried on. Rev. Rul. 55-701, 1955-2 C.B. 836. However, if under applicable state law the partnership will be dissolved by the partner's death and the assets of the partnership are distributable in kind to the partners, the decedent may be taxable on his or her fractional interest in the underlying partnership assets. *Sanchez v. Bowers*, 70 F.2d 715 (1934).

D. Types of Assets Subject to Tax. Following is a consideration of specific types of property that may or may not be subject to US estate tax.

Real property located in the US. Real property located in the US would generally be included for estate tax purposes. What is or is not real property will be determined by applicable US law. *See de Perigny Estate v. CIR*, 9 T.C. 782 (1947). Generally, mortgages (not associated with ownership of the property secured), liens and leaseholds are not considered real property. Note that a mortgage secured by includable real property may be eligible for an estate tax deduction for the outstanding balance of that mortgage, in the full amount of the mortgage if it is a nonrecourse note, or only in the ratio the decedent's US estate bears to his or her worldwide estate in the case of a recourse mortgage (and only after disclosing the decedent's entire worldwide estate to substantiate that ratio). § 2106(a)(1); Treas. Reg. § 20.2053-7. Real property held in a US partnership may also be includable under certain circumstances, as described above.

Tangible personal property located in the US would generally be included for US estate tax purposes. Property that happens to be in the US merely while traveling or en route to somewhere outside the US should not be taxable, however. Artwork in the US merely because it is on loan for exhibition should also not be taxable.

Stock in any US domestic corporation. Shares of stock of a US domestic corporation are includable under § 2104(a). Mutual funds are included in this category. TAM 9748004. US stock held through a foreign corporation may be excluded, but can be included if the decedent transferred the stock to the foreign corporation but retained an interest in the property transferred, or if the decedent has claimed to be the owner of the US domestic shares in other situations.

US Partnership. A partnership interest is considered to be situated where the business of the partnership is conducted. Whether or not a particular partnership interest would be taxable can depend on the business undertaken and the nature of the partnership under the applicable US state law, as described above.

US Debt Obligations. Debt obligations of a US person, or of the US, a subdivision of the US or any agency or instrumentality of such an entity, are generally considered US assets for purposes of estate taxation of the NRNC if the income from the obligation does not qualify as "portfolio interest." Non-qualifying income generally would be income from the obligation determined with reference to the receipts, sales, cash flow, income, dividends, partnership or similar distributions or other changes in value of the property of the debtor or any related person. §§ 2105(b)(3), 871(h)(4).

Debt obligations, the interest on which would be exempt from the 30% withholding tax imposed under the Internal Revenue Code, are generally treated as having a foreign situs for estate tax purposes. Additionally, bonds, debentures, notes or other forms of debt issued by a US person, the US or any political subdivision of the US, that generate portfolio interest should generally **not** be considered US assets. This exemption applies only if the issuer of the instrument is not an entity in which the decedent and persons related to the decedent own 10% of the voting power or profits interest, and if the instrument is in certain registered or bearer form. §§ 2105(b)(3) and 871(h). Certain other debt obligations may be excluded from being considered US property if the income of the issuer is less than 20% from US sources or other qualifications are satisfied. § 2104(c).

Interest in Trusts. If the decedent is a beneficiary of a trust that holds (or held upon formation) US assets, the interest in the trust is considered for US estate tax purposes even if the trust is a foreign trust. Thus if the decedent held a taxable power of appointment over the trust, the assets subject to that power would generally be included in the taxable estate.

Bank Deposits. Bank deposits in a US bank, including certificates of deposit issued by a US bank, are generally treated as property **not** situated within the United States so long as they are not effectively connected with a US trade or business. §§ 2105(b), 871(i)(3). For this purpose, deposits with a US bank (or similar institution) can include deposits in the US with a US bank; accounts with a US savings and loan association or similar institution; and deposits with a foreign branch of a US commercial bank (this last type of deposit may even be effectively connected with a US trade or business (§ 2105(b)(2)). Cash held in a brokerage account is not eligible for this exemption, since a brokerage is not a bank (Rev. Rul. 65-245, 1965-2 C.B. 379), nor is cash in a safe deposit box of a bank within this exemption (Rev. Rul. 55-143, 1955-1 C.B. 465). Cash in qualifying bank deposits that are held in a trust created by the decedent in which the decedent held a reversionary interest at death will qualify for this exemption. Rev. Rul. 82-193, 1982-2 C.B. 219.

Deposits with a US branch of a foreign bank can be deemed to have US situs, and, as stated above, any US bank deposit effectively connected with a US trade or business will also generally be treated as having a US situs for estate tax purposes.

Life Insurance. Proceeds of life insurance on the life of the decedent are generally **not** considered US assets, whether issued by a domestic or foreign corporation. § 2105(b)(1); Treas. Reg. § 20.2105-1(g). However, the decedent's ownership interest in a policy of insurance on the life of another person may not generally be excluded.

Tax regulations fail to cover specifically some items of property. Thus, the situs of good will, patents, trademarks, copyright, and similar intangible property remains to be clarified for estates of NRNCs not governed by a treaty.

E. Debts and Expenses of the NRNC Estate. An estate of an NRNC is allowed to deduct expenses and losses attributable to US property (Code section 2106(a)(1)), gifts to US charities (2106(a)(2) and a marital deduction with the same limits on the spouse if he or she is not a citizen (2106(a)(3).

Code section 2106 limits the amount of deduction for debts and expenses an estate of an NRNC may claim, unless all information regarding the decedent's worldwide assets and obligations is disclosed on the 706NA filed for the estate. Any information so disclosed will be given to the tax authorities of the NRNC's home country, if a transfer tax or exchange of information treaty applies.

For example, the full value of property that is subject to a **recourse mortgage** or pledge is includible in the gross estate of an NRNC; the amount of the debt is deductible only to the extent of the ratio of U.S.-situs property to worldwide assets. Only the net equity in property subject to a **nonrecourse mortgage** is includible in the gross estate of a NRNC. 702

*Comment*: An NRNC who owns U.S. realty directly rather than through a foreign partnership or holding company can seemingly reduce his or her potential U.S. estate tax by mortgaging the property to the greatest extent possible, if he or she can persuade the lender to take a nonrecourse note. On the other hand, some practitioners have urged that the estate of a NRNC may be able to deduct even recourse mortgage indebtedness without apportionment and without divulging worldwide assets, by having the investment held by a partnership that takes out a recourse mortgage loan.

**V. IMMIGRANT VISAS / PERMANENT RESIDENCE** aka "green cards" Overview - Process, Timing and Retention and Abandonment.

1. Family Based Immigration.

   A. Categories. – See attached Visa Bulletin from the U.S. Department of State.

   B. Application Procedures.

   C. Timing and Travel.

2. Employment Based Immigration.

   A. EB1 includes Extraordinary Ability and Advanced Researchers and Professors.

   B. EB2 Advanced Degree Professionals – Program Electronic Review Management ("PERM") process is a labor certification application process that the U.S. Department of Labor began in March 2005.

   C. EB3 Skilled Workers.

   D. Application Procedures.

   E. Timing and Travel.

3. Diversity Visa Lottery.

4. RNC is generally taxed for estate tax purpose as a USC, except for marital deduction issues.

   A. <u>Who is a Resident for Estate Tax Purposes</u>? The concept of resident for U.S. estate tax purposes is not the same as the definition of "resident" for U.S. income tax purposes. For U.S. estate tax purposes, a resident decedent is a decedent who, at the time of his death, had his domicile in the United States. A person acquires a domicile by living at a location, for even a brief period, with no definite present intention of leaving. Residence without the requisite intention to remain indefinitely does not suffice to constitute domicile. An intention to change domicile is not effective unless accompanied by an actual removal from the jurisdiction. The Service will examine the duration of the individual's stay in the United States, the location of family and friends and important personal belongings, the center of the person's financial and business interests, and the size and location of the person's home.

B. Consider Available Treaties and Credits. Actual taxation of any particular RNC will depend on estate tax treaty provisions that may be applicable. Similarly, section 2014 of the Code allows a credit against US estate for any estate tax or similar assessment imposed at death for property located in a subject to tax in a foreign jurisdiction, and should be utilized if available for the decedent in question. The 2014 credit has two general limitations that may reduce the amount of foreign death taxes ultimately able to be claimed for a credit. Under the first limitation, the credit for foreign death tax cannot be greater than the amount of the foreign tax actually paid multiplied by the following fraction: the value of property situated in the foreign country, subject to that country's tax, and included in the RNC's gross estate, over the value of all property subject to foreign death tax. The second limit applies a similar computation to the US estate and estate tax due, which may reach a different answer since valuation requirements among countries may differ.

C. Taxation of the US Citizen and Resident. Every US citizen and LPR is subject to estate taxation on his or her worldwide estate. The return is filed on a Form 706 and is due on the date that is nine months after the decedent's date of death (any tax due must be paid by that date, but the return can be extended for up to six more months). Under current law, each US citizen or resident decedent is entitled to a tax credit of $780,000, which exempts the first $2,000,000 from exposure to tax. Currently a flat tax of 45% is applied to the balance of the net estate.

If US law is not changed, this exemption level and tax rate will apply for 2008. In 2009 the tax rate stays the same but the exemption jumps to $3,500,000. In 2010 the tax disappears completely for one year only. Then in 2011 the estate tax returns with an exemption of $1,000,000 and a maximum rate of 55%. We will have to watch the US Congress to see what they do, but it is anticipated that they will act to leave the exemption at $3,500,000 while they determine how to deal with this tax in the future.

D. Bypass Planning is Effective. As mentioned above, unlike the NRNC, the RNC can generally take advantage of the unified credit exemption allowed to the USC. Therefore, Bypass Trust planning is generally available to the estate of the RNC, which can exempt up to $7MM from exposure to tax (in 2009) is the spouses' estate's are somewhat equal.

E. Consider Where Assets Should be Owned. Even though a QDOT will be available for the estate of the US resident decedent to claim a marital deduction for a non-citizen spouse, consider that the trust will have to have a US trustee and that bond may be due. If there are assets that the spouse will want to control himself or herself without the trustee, consider ways to get those into the spouse's name during life so there is no issue with having to claim the martial deduction at death.

F. Marital Deduction is Limited. Spouses who are both US citizens can take advantage of the unlimited marital deduction for both gift and estate tax purposes. Where one or both spouses are RNC's or NRNC's, however, the question becomes much more complicated.

Lifetime Gifts to a NCNR or RNC spouse are limited under Code section 2523(i). There is no unlimited martial deduction, Rather, there is an expanded annual exclusion, currently $128,000. Therefore, if spouses have significantly different values in their estates, while it may be a good idea to try to equalize them in order to accomplish the Bypass Planning described above, that may not be so simple as gifts are limited to the annual exclusion in any year without gift taxes being due. The more property you can allocate to the estate of the NRNC or NRC spouse, the less property will be required to be subjected to the estate tax marital deduction rules described below for gifts to a non-citizen spouse.

Transfers at Death to an NRNC or RNC Spouse. Generally the marital deduction will only be available for transfers to a non-citizen spouse if the transfer is to a qualified domestic trust. However, if the spouse transfer property received from the decedent to such a trust before the 706 due date, or if the spouse becomes a US citizen before that time, then the martial deduction can be available in that circumstance as well.

Qualified Domestic Trust ("QDOT"). A qualified domestic trust (QDOT) is a trust that meets the following requirements:

(1) The trust instrument must require that at least one trustee (the "U.S. trustee") of the trust be an individual citizen of the United States or a domestic corporation. For this purpose, a domestic corporation is defined as a corporation that is created or organized under the laws of the United States or under the laws of any state or the District of Columbia.

(2) The trust instrument must provide that no distribution (other than a distribution of income) may be made from the trust unless a trustee who is an individual citizen of the Unite States or a domestic corporation has the right to withhold from the distribution the estate tax imposed on the distribution.

(3) The trust must meet the requirements of regulations to ensure the collection of any estate tax imposed on the trust.

(4) The decedent's executor must elect that the trust be treated as a QDOT.

Also, if the value of the trust as finally determined for estate tax purposes exceeds $2MM, the trust must also have certain security arrangements. Either the US trustee must be a bank, or the trustee provides a strictly defined surety bond or letter of credit. See Treas. Reg. 20.2056A-2(d)(1)(i). If there is more than one QDOT, they are aggregated for purposes of determining whether these security arrangement are required.

## VI. ABANDONMENT OF LPR, AKA "GREEN CARD" STATUS.

1. Immigration Consequences – A "Green Card" can be lost and is not necessarily forever.

2. Subjective versus Objective Intent

   A. Subjective intent is a persons personal feelings and beliefs.

   B. Objective intent includes maintaining a residence, bank accounts and filing and paying required U.S. taxes.

3. Absences

   A. Less than 6 months.

   B. More than 5 months and less than 1 year.

C. More than 1 year.

4. Procedures

A. The abandonment of LPR status can be intentional or unintentional.

B. The process for abandonment can be initiated (unintentionally) upon application for admission to the U.S., i.e. at the time of arrival, or during an naturalization interview.

C. An alien can apply affirmatively for abandonment only at a U.S. Consulate abroad. **PRACTICE POINTER** – Consider the U.S. tax consequences, and simultaneous application for a U.S. "visitor's" visa.

5. Advance Planning.

A. An LPR does not file a U.S. tax return as an NRA.

B. Do I really want to become an LPR if I will not stay permanently?

C. What is the ultimate goal, i.e. U.S. citizenship? **PRACTICE POINTER -** Preserving residence for LPR purposes is different than preserving residence for naturalization purposes.

## VII. U.S. CITIZENSHIP.

1. Ways to Acquire U.S. Citizenship.

A. Citizenship at Birth. U.S. citizenship is granted at birth based on: (1) birth in the U.S. or certain other places; (2) the citizenship of one or both parents; and (3) a combination of location and parent's citizenship. U.S. citizenship is also granted to persons after their birth based upon a combination of the parents' citizenship and later residence and by naturalization based upon various factors.

B. By Derivation through the Naturalization or U.S. Birth of One Parent. A child born outside the U.S. may become a USC as a matter of law by virtue of his or her parent or parents' birth or naturalization.

C. Certificate of Citizenship.

D. By Naturalization Petition. A party who meets certain requirements, which include residence, presence, good moral character, and legal status and is 18 or over may file with USCIS an application for naturalization.

2. Eligibility for Naturalization by Application.

A. Criteria for Naturalization include:

i. Must be an LPR.

ii. Must be 18 years old, unless applicant's age is waived due to military involvement.

iii. Required Physical Presence.

iv. Must have resided for at least three months within the state in which the petition was filed.

v. Good Moral Character.

i. Effect of arrests and convictions.

ii. Statutory Bar and Removal Proceedings. In addition, a crime that does not result in a statutory bar (e.g., an aggravated felony occurring before Nov. 29, 1990) may still be a ground for removal. **PRACTICE POINTER -** A person who applies for naturalization can be placed in removal proceedings which may result in his/her removal from the U.S.

vi. Civics and English language requirement.

B. Application Procedures.

3. U.S. Passport.

A. Person who believes s/he is eligible for a U.S. passport may apply for one directly to the passport office without submitting an application for certificate of citizenship.

B. If a passport is granted it is conclusive (not just prima facie) proof of U.S. citizenship and not subject to collateral attack in an administrative proceeding.

4. Dual Citizenship.

5. Loss of Citizenship.

i. Voluntary Relinquishment

ii. Revocation of Naturalization/Passports.

iii. Administrative Revocation.

iv. Denaturalization.

6. A US Citizen is taxed on the worldwide estate for estate tax purposes regardless of residence.

7. <u>Income Tax Rules Applicable to the Expatriate</u>. Code section 877 contains rules governing income taxation of US citizens who renounce US citizenship <u>prior to June 17, 2008</u>.

**NOTE: See new section 877A described below for rules governing expatriation on or after June 17, 2008.**

NOTE: Section 877(c)(2) expressly exempts an individual from application of this tax provision if the individual (A) was by birth a citizen of the US and another country and after renouncing US citizenship continues to be a citizen of that other country, and (B) has had no substantial contacts with the US. "No substantial contact" with the US means in this context that the individual was never a US resident under the § 7701(b) tests, never held a US passport, and wasn't present in the US for more than 30 days during any calendar year in one of the ten years preceding the individual's loss of citizenship. § 877(c)(2)(B).

If an expatriate is not exempted, then generally, the expatriate is subject to tax under Code section 871 (the US income tax applicable to non-resident aliens) or section 877 (US income tax attributable to US expatriates), whichever is greater, for the 10-year period following the renunciation of citizenship. Code section 877(a)(1). The rules of § 877 are intended to prevail over any conflicting income tax treaty rules that may apply to an expatriating taxpayer. Notice 97-19.

Section 877 generally taxes a pre June 17, 2008 expatriate on his or her US source income (defined below) in the same manner and using the same rates as are applicable to US residents or citizens. Deductions are generally allowed only to the extent they are connected with the income subject to tax under § 877. Charitable contributions are also generally allowed. Capital loss carryovers are not allowed. Code section 877(b). As mentioned above, the section 877 tax is only imposed if and to the extent that tax under § 877 exceeds the tax that would otherwise be imposed on the taxpayer under section 871 for the same income.

Under § 877(d)(1), certain income items are treated as US source income, including:

> Gains on the sale of property (other than stock or debt obligations) located in the US;
>
> Gains on the sale of stock issued by a domestic corporation;
>
> Gains on the sale of debt obligations issued by the US, political subdivisions of the US, or US persons;
>
> Income or gain from a controlled foreign corporation ("CFC") if, at any time during the 2-year period ending on the date of expatriation, the taxpayer (or persons whose ownership would be attributed to the taxpayer) owned more than 50% of the combined voting power of all classes of the corporation's stock, or 50% of the total value of the corporation's stock. Income or gain for this purpose will be limited to the CFC's earnings and profits for periods before the date of expatriation during which the ownership requirement above is met.

Section 877 will generally apply to US source income for the 10-year post-expatriation period whether the asset or interest giving rise to the US source income was acquired before or after expatriation. H.R. Rep. No. 104-736, pg. 325. There are some exceptions to this 10-year rule, such as with respect to CFC income, as described in the preceding paragraph.

<u>Immediate Gain Recognition</u>. In addition to the tax described above, § 877 imposes a tax on the pre June 17, 2008 expatriate on the conversion of property that would generate US source income into property that would generate income that is not US source income, even if the form of the transaction is one that would otherwise not require recognition of gain. The tax is imposed as though the US source property were sold for its fair market value. § 877(d)(2)(A). This tax also applies to the removal of appreciated tangible personal property from the US if the aggregated market value of that property exceeds $250,000, and any other occurrence that results in a change in the source of income or gain from the US to a foreign source. Notice 97-19.

In determining the application of this rule: the source of gain on the disposition of tangible personal property is based on its location; the source of gain from the disposition of stock is based on the place of the issuer's incorporation (except with respect to some CFCs that could generate US source income); the source of gain from the disposition of debt obligations is based on the residence of the issuer; and the source of gain on disposition of a partnership interest is based on the partnership's underlying assets. § 877(d)(1); Notice 97-19. Other transactions that are mentioned in Notice 97-19 as being within the type of transactions that may be covered by regulations on this topic include the sale of a US principal residence within the 5-year period preceding expatriation followed by the purchase of a foreign principal residence, and contribution of assets to a foreign trust.

Transactions covered by this rule include dispositions of US property for foreign property that occur during the 5-year period prior to expatriation, as well as the 10-year period following expatriation. If the transaction occurs prior to expatriation, the gain is recognized in the year in which expatriation occurs. If the transaction occurs in the 10-year period following expatriation, the gain is recognized in the year of the transaction. *See* Notice 97-19; § 877(d)(2)(D). The period during which transactions are covered is extended for any period of time that the taxpayer enters into a hedge transaction (put, call, collar, short sale, etc.) or other device designed to lessen the taxpayer's risk of ownership of the property. § 877(d)(3).

Under certain circumstances a taxpayer may enter into an agreement with the IRS that any gain from the disposition of the foreign assets into which the US asset is converted will be US source income, and thereby avoid the rule imposing the immediate gain. Such an agreement will also state that if the person who acquired the US source property in the first transaction disposes of that property, the agreement will terminate and gain will be recognized at that time. § 877(d)(2)(C).

Controlled Foreign Corporations. These rules also cover the situation where the taxpayer contributes US source income assets to a corporation that would have been a controlled foreign corporation had the taxpayer been a US taxpayer were it not for his or her expatriation. If the corporation is covered under this rule, gain on the disposition of assets held in the CFC will be treated as though the assets belonged directly to the taxpayer. § 877(d)(4). The rule applies to disposition of property received by the corporation in a like-kind exchange, etc., or disposition of the CFC stock itself while the corporation holds these assets. The transactions covered by this rule include those occurring during the 5-year period prior to expatriation and the 10-year period following expatriation. Notice 97-19.

Individuals Subject to § 877. The statute sets forth three alternative tests for determining whether section 877 applies to an expatriate; an affirmative response to any of the tests subjects the expatriate to the alternative tax. § 877(a)(2). (1) his or her average annual net income tax for the 5 taxable years ending before the date of the loss of US citizenship is greater than $139,000 (for 2008); (2) his or her net worth as of such date is $2,000,000 or more; or (3) he or she fails to certify under penalty of perjury that he or she has met his or her tax filing requirements for the 5 preceding taxable years or fails to submit such evidence of such compliance as the IRS may require.

Income Tax Reporting Requirements. Obviously the enforcement of these provisions depends on the US having information about the taxpayer on which to base actions. As a first line of defense, the State Department and Treasury share information about expatriates, and the names of individuals who relinquish their citizenship are published in the Federal Register. Any agent of the US that collects the requisite information under § 6039G (explained below) must share that with the IRS, as well as the name and any other available information on a US citizen who refuses to submit the statement. § 6039G(d).

Any citizen who expatriates is required to furnish to the US government a **Form 8854, Initial and Annual Expatriation Information Statement**. The form calls for a great deal of information about the expatriate's assets, income and travels both before and after expatriation. The form is required to be filed under penalties of perjury, making misrepresentations on the form a potential criminal offense. We have attached a copy of the form and its instructions for your reference.

Section 7701(n) provides that a US citizen will continue to be taxed as a US citizen until the individual gives notice of an expatriating act or termination of residency (with the requisite intent to relinquish citizenship or terminate residency) to the Secretary of State, and until the individual provides a statement in accordance with § 6039G. § 7701(n). The statement that is required under § 6039G must include: (1) the taxpayer's TIN; (2) the mailing address of the individual's principal foreign residence; (3) the foreign country in which the individual is residing; (4) the foreign country of which the individual is a citizen; (5) information detailing the income, assets, and liabilities of the individual; (6) the number of days during any portion of which that the individual was physically present in the United States during the taxable year; and (7) any other information that may be prescribed by the Secretary. § 6039G(b).

A taxpayer who is required to file such a statement for any taxable year who fails to do so or who fails to include all of the required information or includes incorrect information is subject to a penalty of $10,000 unless the failure is due to reasonable cause and not due to willful neglect. § 6039G(c).

Any individual who is subject to § 877 for any tax year must provide a statement for that tax year that includes the information as required under § 6039G(b). This annual return is mandatory even if no US tax is due.

Physical Presence in the US. Another provision of § 877 deals with the impact of the expatriate's physical presence in the US. Unless an exception applies, if in the 10-year period following expatriation the individual is physically present in the US for more than 30 days in the calendar year, the pre June 17, 2008 expatriate is taxed as a US citizen and resident rather than under the expatriation rules. § 877(g)(1). According to the Committee Reports, none of the general exceptions to the § 7701(b) presence test apply. A day of physical presence (but not in excess of 30 such days during any calendar year) is disregarded if the individual is performing services in the US on that day for an employer, but only if (1) the individual has certain ties to countries other than the US; and (2) the individual had minimal prior physical presence in the US. §877(g)(2)(B) and (C). A day of presence will not be disregarded, however, if the employer is related to the individual or if the employer fails to meet any requirements that the Service may prescribe to prevent avoidance of the expatriate rules. §877(g)(2)(A)(i) and (ii).

An individual has certain ties to countries other than the US if (1) the individual becomes, after a reasonable period after losing US citizenship, a citizen or resident of the country in which the individual was born, or, if the individual is married, in which the individual's spouse was born, or either of the individual's parents were born; and (2) the individual becomes fully liable for income tax in that country. § 877(g)(2)(B).

An individual qualifies as a person who had minimal prior physical presence in the US if, for each year in the 10-year period ending on the date of loss of US citizenship or termination of residency, was physically present in the US for 30 days or less. For this purpose, the exception under § 7701(b)(3)(D)(ii) applies, so that an individual won't be treated as being present in the US on any day that he or she cannot leave the US because of a medical condition that arose while he or she was in the US. § 877(g)(2)(C).

8. Transfer Tax Rules Applicable to an Expatriate. A US citizen or resident who has expatriated is generally subject to the rules applicable to a NRNC, except that if that person dies within 10 years after expatriation, then in addition the decedent may be taxable on his or her stock in a CFC that holds US assets. § 2107. The controlled foreign corporation shares that may be included under this rule are computed as follows:

> Does the decedent directly own 10% or more of the voting power of the corporation? Under this part of the test, ownership held by the decedent through any foreign corporation, foreign trust, foreign partnership or foreign estate will be treated as owned proportionately (and directly) by the shareholders, beneficiaries or partners.
>
> Does the decedent directly or indirectly own 50% of the total combined voting power of all classes of stock of the entity, or 50% of the total value of the entity? Under this part of the test, all shares owned by the decedent's spouse, parents, children, and grandchildren, and

by corporations, partnerships and trusts to the extent of the decedent's interest, will be considered as owned indirectly by the decedent.

If the corporation is considered as controlled for purposes of § 2107, the amount of the corporation's value includible in the decedent's estate will be the percentage of the corporation's value attributable to the decedent's shares, and that is attributable to US property. For example, if the corporation were worth $100, being $50 of US property and $50 of non-US property, and the decedent owned 75% of the corporation, the taxable value of the decedent's interest in the corporation's shares would be $37.50 (50% of 75%).

Enforcement of Estate Taxes. One method of enforcement the IRS has developed with respect to US property held by US persons is the Transfer Certificate, Form 5173. Before the US custodian of stock or other US taxable property held for a non-resident alien decedent will release that property, they will require that the taxpayer obtain a Form 5173 showing that the IRS has released its statutory lien on the property. This form is issued by the IRS itself upon application from a taxpayer who represents the decedent's estate.

Gift Tax Rules Applicable to the Expatriate. Transfers of intangible property by a nonresident alien are not subject to the gift tax; however, the gift tax does apply to transfers of US-situated intangible property by an expatriate who is subject to § 877 for the tax year in which the transfer occurs. § 2501(a)(3)(A). The expatriate will receive credit for any foreign gift taxes actually paid with respect to such gift. § 2501(a)(3)(B).

Also, where stock in a controlled foreign corporation is transferred by an expatriate who is subject to § 877 for the tax year in which the transfer occurs, the gift tax applies without regard to whether the stock is situated in the US. § 2501(a)(5). The determination of the applicability of this rule to stock in a controlled foreign corporation is achieved by using the same criteria as for the parallel estate tax rule under § 2107, and the determination of the asset value for gift tax purposes is also parallel to the estate tax valuation.

9. **New law**. The Heroes Earnings Assistance and Relief Tax Act of 2008 includes certain "revenue raisers" dealing with expatriates from the US.

A. Expatriate Income Taxation. The act imposes mark-to-market taxation on the property of U.S. citizens who relinquish their citizenship and long-term residents who terminate their U.S. residency (such as foreign workers returning to their home countries after leaving U.S. employment) to the extent the property gain exceeds $600,000, adjusted for inflation. The legislation requires 30 percent withholding (rather than relying on the person to pay the tax himself or herself) from:

- Qualified retirement plans, 403(a) and 403(b) plans, 457(b) plans, SIMPLE plans and simplified employee pension plans
- Any interest in a foreign pension plan or similar retirement program
- Deferred compensation plans
- Any property or right to which the individual is entitled in connection with performing services to the extent the property was not previously included in income under tax code section 83

Amounts held in so-called specified tax-deferred accounts — health savings accounts, Archer medical savings accounts, IRAs, section 529 accounts and Coverdell ESAs — will be treated as if they had been distributed the day before the expatriation date (although they will not be subject to early distribution penalties).

The provisions generally apply to expatriations on or after June 17 and override existing tax treaties

B. Expatriate Transfer Taxation. The HEART act imposes a special transfer tax on "covered gifts or bequests" received by a U.S. citizen or resident from a "covered expatriate." Code section 2801.

A **covered gift or bequest** is any property acquired directly or indirectly (1) by gift from an individual who is a covered expatriate at the time, or (2) by reason of the death of an individual who was a covered expatriate immediately before death. A covered gift or bequest doesn't include (i) any property shown as a taxable gift on a timely filed gift tax return by the covered expatriate, (ii) any property included in the gross estate of the covered expatriate for estate tax purposes and shown on a timely filed estate tax return of the estate of the covered expatriate, and (iii) any property for which a marital or charitable deduction would be allowed for estate or gift tax purposes. Code section 2801(e) )

An individual is a "**covered expatriate**" if (1) his or her average annual net income tax for the 5 taxable years ending before the date of the loss of US citizenship is greater than $139,000 (for 2008); (2) his or her net worth as of such date is $2,000,000 or more; or he or she fails to certify under penalty of perjury that he or she has met his or her tax filing requirements for the 5 preceding taxable years or fails to submit such evidence of such compliance as the IRS may require. A person is not a covered expatriate if the person was a dual citizen at birth and after expatriation remains a resident and subject to tax in his or her other country of citizenship.

New Code sections 877A and 2801 provides a new mark-to-market deemed sale rule for expatriates, subject to exceptions such as for certain nongrantor trusts. The tax, which applies on a calendar year basis, is calculated as the product of (1) the highest marginal rate of tax specified in the estate tax rate table or, if greater, the highest marginal rate of tax specified in the gift tax rate table, both as in effect on the date of receipt of the covered gift or bequest; and (2) the value of the covered gift or bequest. The tax is reduced by the amount of any gift or estate tax paid to a foreign country for a covered gift or bequest. The tax applies to covered gifts and bequests received on or after June 17, 2008 from transferors (or from the estates of transferors) whose expatriation date is on or after that date. (Act §301(g)(2)).

The tax is payable by the recipient of the covered gift or bequest, and applies only to the extent that the total value of covered gifts and bequests received by the recipient during a calendar year exceeds the amount of the gift tax annual exclusion under for that calendar year ($12,000 for 2008).

For a covered gift or bequest made to a domestic trust, the tax applies as if the trust is a U.S. citizen, and the trust is required to pay the tax. For a covered gift or bequest made to a foreign trust, the tax applies to any distribution from the trust (whether from income or corpus) attributable to the covered gift or bequest to a recipient that is a U.S. citizen or resident, in the same manner as if the distribution were a covered gift or bequest. The recipient is entitled to deduct the amount of the tax for income tax purposes to the extent the tax is imposed on the portion of the distribution that is included in the recipient's gross income. For purposes of these rules, a foreign trust may elect to be treated as a domestic trust and the election may not be revoked without IRS's consent.

C. Trusts under HEART act. Effective on or after June 17, 2008, new income tax rules apply for an expatriate's interest in a nongrantor trust, instead of the new mark-to-market rule.

Grantor to Nongrantor trust. If the covered expatriate is treated as the owner of all or a portion of the trust under the grantor trust provisions (determined immediately before the expatriation date), the assets in that portion of the trust are subject to the mark-to-market tax, and the trustee must deduct and withhold an amount equal to **30%** of the taxable portion of the trust. If a trust that is a grantor trust immediately before expatriation later becomes a nongrantor trust, the trust remains a grantor trust for purposes of this provision.

If the covered expatriate is a trust beneficiary. The mark-to-market tax will not apply to the portion of a trust that is not treated as owned by a covered expatriate immediately before expatriation. Rather, for any direct or indirect distribution from the non-grantor portion of a trust to a covered expatriate, the trustee must deduct and withhold from the distribution an amount equal to **30%** of the portion of the distribution which would be includible in the gross income of the covered expatriate if the covered expatriate continued to be subject to tax as a citizen or resident of the US, and that portion of the distribution is subject to tax under Code section 871. The covered expatriate is treated as having waived any right to claim any reduction in withholding under any treaty with the US. Code section 877A(f)(4). If the nongrantor trust distributes appreciated property to a covered expatriate, the trust must recognize gain as if the property were sold to the covered expatriate at its fair market value.

If a trust that is a nongrantor trust immediately before the expatriation date later becomes a grantor trust for which a covered expatriate is treated as direct or indirect owner, that conversion is treated as a distribution to such covered expatriate to the extent of the portion of the trust of which the covered expatriate is treated as the owner.

## VIII. WHO IS THE CLIENT?

1. Engagement Letter.

2. Potential Need for Alien’s separate/ independent accounting and legal counsel.

## IX. CHANGES IN EMPLOYMENT/ CIRCUMSTANCES.

1. Planning.

2. Risk to the Company and/or the Employee.

## X. STRATEGY.

1. Short Term versus Long Term Goals – Planning, Timing and Periodic Review.

2. Visa Processing Delays and Risks.

3. Freedom of Information Act Request and FBI Background Check.

   A. **PRACTICE POINTER** - If there are any questionable issues in the applicant's prior immigration or legal history, I recommend the attorney submit a FOIA request to the USCIS, USICE, and/or USCBP on Form G-639 and an FBI background check to determine if there any adverse factors which may impact upon the applicant's eligibility.

   B. There can be delays in the USCIS, USCBP, and USICE response to a FOIA.

## XI. ADDITIONAL PRACTICE POINTERS.

1. Diversity Visa Lottery.

2. Benefits to Other Family Members.

3. Employment of Family Members and Attending School.

4. "Age Out" of Children.

5. Overstay and "Unlawful Presence" - There can be severe legal consequences in the event an individual overstays his/her period of authorized admission to U.S. and/or engages in activities not authorized under the terms and conditions of the particular visa.

6. Change of Address Requirements and Form. See http://uscis.gov/graphics/howdoi/address.htm and http://uscis.gov/graphics/formsfee/forms/files/ar-11.pdf .

7. Dynamic Nature of U.S. immigration laws.

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