INTERNATIONAL INVESTORS & U.S. INVESTOR VISAS (2018)

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THE WOLFE LAW GROUP

The Wolfe Law Group is an international array of legal and tax experts providing collaborative services for Global High Net Worth Investors on a per client basis.

Gary S. Wolfe, A Professional Law Corporation has over 35 years of experience providing clients with expertise for IRS Civil and Criminal Tax Audits, International Tax Planning, and International Asset Protection.

Awards
Since 2015 Gary have been the recipient of 29 separate international tax awards from 10 different global expert societies in London/UK including:

International Tax Planning Law Firm of the Year Award (2017) – International Advisory Experts.

International Tax Advisor of the Year (2017) - Global Business Magazine/Prof. Sector Network.

Click here for complete list.

Books
To date Gary has written 18 e-books (available on Amazon) regarding the IRS, International Tax Planning and Asset Protection. Click here for complete list.

Articles
To date Gary has published or been interviewed in 100+ separate articles published by 15 different US and International magazines. Click here for complete list.

Video
In December 2016 Gary was interviewed by California CEO Magazine and RCBNNews.org on the subject of Criminal Tax Evasion and IRS Tax Audits: Civil and Criminal Issues. This 4 part series, which has been published by Lorman Education, can be viewed below:

Criminal Tax Evasion - Part 1
Criminal Tax Evasion – Part 2
Criminal Tax Evasion – Part 3
Criminal Tax Evasion – Part 4

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International Investors & U.S. Investor Visas (2018)

For the last several years, the EB-5 Visa (known by many as the golden visa) has become the almost exclusive domain for Chinese investors. Since 2014, China Investors have absorbed about 85% of the 10,000 available visas annually.

According to world-renowned immigration attorney, Mark Ivener, China in 2018 has about a ten year waiting period for approval of these visas (other countries have about a 2.5 year waiting period). In addition the EB-5 Visas are allotted by approvals so if a family of 3 has an EB-5 Visa approval then they receive 3 Visas (one for each family member). So really, there are visas for about 3,300 approvals.

High Net worth Chinese investors who intend to rely on EB-5 Visas to immigrate to the U.S. now face a rude awakening (i.e. too long a waiting period now up to 10 years). In addition the EB-5 Visa program was due to expire 9/30/17 and is on extension through March 23, 2018 with no clear future, which includes a further extension, new higher minimum investment amounts of $925,000-$1,350,000 and potential investment restrictions.

From an investor standpoint the EB-5 Visa may have punitive tax consequences since once issued, upon entering the U.S. the investor is classified is a U.S. income tax resident (and subject to federal income tax at up to 45% plus state and local income taxes). More compelling the investor is forced to disclose ownership and/or control of worldwide bank accounts (over $10k) worldwide foreign financial assets (over $50k) or face both civil and criminal penalties.

The issuance of an EB-5 Visa requires the investor to confirm that they intend to reside permanently in the U.S. which changes their domicile to the U.S. and subjects them to 40% federal estate and gift tax on transfers over $11.2m (2018) for worldwide assets.

Mark Ivener has prepared the attached summary of different visa investment alternatives which may both be less expensive, quicker and less restricted. In particular, the E-2 Visa (for any of 80 countries who are signatories to the U.S. treaties) may be generally achieved for a $150k plus investment and creation of at least 3 jobs (compared to the EB-5 Visas current amount of $500k-$1m investment and 10

jobs created). The L-1 Visa (an intra-company transfer visa) may be received without either a minimum or maximum investment. Please see Mark's Visa Comparison Summary Chart. For inquiries about EB-5 Visas, E-2 Visas and L-1 Visas please send an email to Mark Ivener at mark@usworkvisa.com

The U.S. tax issues are as follows:

1) Income Tax Issues

Once an EB-5 investor enters the U.S., he becomes a U.S. income tax resident, i.e. a conditional permanent resident immediately subject to tax on worldwide income — income from inside the United States and income earned outside the United States. Upon entry into the U.S. from the date entered, the EB-5 Investor is subject to U.S. Income Tax compliance annually, which includes ling the following:

• Form 1040, report worldwide income;

• Foreign Financial accounts over $10,000 file Form TDF 90-22.1, Report of Foreign Bank and Financial Accounts, "FBAR Filing," due June 30th following tax year (separate tax ling);

• Foreign Financial Assets valued in excess of $50,000 le Form 8938, "Specified Foreign Financial Assets" attached to Form 1040 (Foreign Account Tax Compliance Act "FATCA Filing").

Note that ling Form 8938 (with Form 1040) does not relieve U.S. taxable residents of the requirement to le FBAR Form TDF 90-22.1 if FBAR ling is otherwise due.

For willful failure to report the foreign bank and financial account (under Form 1040/Schedule B (Part III, Foreign Accounts and Trusts) and TDF 90-22.1, the taxpayer faces criminal penalties of up to 10 years in jail, a $500,000 fine and civil penalties of 50 percent of the account balance computed annually. So, for example, if the FBAR is not led for four years, the civil penalty is 200 percent of the account balance. Until such time as the investor receives the EB-5 visa, they are classified as a non- resident alien and are subject to a flat 30

percent tax on U.S. source income that is not effectively connected with the conduct of a U.S. trade or business.

A tax withholding agent must withhold 30 percent of the gross amount paid to a foreign taxpayer, who is subject to tax; unless the withholding agent obtains valid documentation (IRS Form W-8) that the U.S. payee (Foreign National) is a “beneficial owner,” and subject to a tax exemption, or a reduction of tax.

2) Estate and Gift Tax Issues

Once an EB-5 investor becomes a “conditional permanent resident,” it may be considered an indicia of U.S. domicile (i.e., the investor intends to permanently reside in the U.S.). If the investor is audited by the IRS, and is determined to have a U.S. domicile, they will be subject to U.S. estate and gift tax. Domicile is a defined term: “A person acquires a domicile in a location by living there, even for a brief period” with “no definite present intention” of later removing from that location. Treas. Reg. sec. 20.0-1(b)(1)(b)(2), *Estate of Edouard H. Paquette v. Commr.* (T.C. Memo, Par. 83,571 (1983).

EB-5 Investors U.S. Estate And Gift Tax Planning

U.S. citizens and U.S. domiciliaries are subject to U.S. Estate and Gift tax on their world-wide assets. Non-U.S. domiciles are subject to U.S. Estate and Gift Tax on U.S. assets. A non-citizen who holds a green card is a “permanent resident” of the United States subject to U.S. income tax on their world-wide income. Code §7701(a)(30)(A); Treas. Reg. sec. 301-7701(b)-1(b)(1). The immigration laws do not require a green card holder to intend to remain permanently in the U.S. since the definition of a U.S. tax resident, for U.S. estate and gift tax purposes, focuses on intent, a green card holder may be a U.S. income tax resident, but under the residency “intent” test, may not be a U.S. tax resident for estate and gift tax purposes. The EB-5 investor, who is present in the U.S. under an EB-5 visa and intends to permanently remain in the U.S. can be classified as a U.S. resident for estate and gift tax purposes and will be subject to estate and gift

taxes in the U.S.

EB-5 Investors, before they immigrate to the U.S., may be classified as non-resident aliens (“NRA”) with no U.S. domiciles, not subject to U.S. estate and Gift tax except for specified assets: (i.e. U.S. real estate, tangible personal property). EB-5 investors who immigrate to the U.S. may be classified as either a U.S. estate and gift tax resident, or non-resident. An EB-5 Investor who is a non-citizen, and is not domiciled in the U.S., is an NRA for U.S. estate and gift tax purposes. An NRA is subject to U.S. gift tax only on gifts of interests in U.S. real estate and tangible personal property located in the U.S. (e.g. cash, art, jewelry). An NRA is not subject to U.S. gift tax on gifts of intangible personal property (including stock in U.S. corporations) even if that property has a connection to the U.S. Code §2501.

U.S. Estate And Gift Tax (NRA)

Under Code section 2103, the federal estate tax applies more broadly (than gift tax rules) to NRA estates. An NRA estate is subject to U. S. estate tax on property located in the U.S. including: real property, tangible personal property, stock in U.S. corporations, debt obligations of U.S. persons. Property located in the U.S. may include: interests in U.S. partnerships and limited liability companies but the law is not definitive.

An NRA’s U.S. estate will not include proceeds of insurance on the decedent’s life, certain bank ac- counts, and portfolio debt, the income from which is exempt from U.S. income tax. Code §2105. The portfolio debt exception exempts U.S. Company publicly traded debt securities and U.S. government obligations.

Under Code section 2103, the value of an NRA’s gross estate, which at the time of his death is “situated in the U.S.”, is subject to U.S. estate tax. Treas. Reg. 20.2103-1.

NRA estates receive a credit against the U.S. estate tax of $13,000 which shelters $60,000 of property from transfer tax. Code §2102(c). Tax rates are the same as for U.S. citizens and resident aliens. Code

§2001(c).

A marital deduction is allowed for property in the U.S. under Code section 2056, and if applicable, Code section 2056A (assets passing to a decedent's non-citizen spouse, thru a Qualified Domestic Trust, Code §2056(d)(2)(A)). There is no gift tax marital deduction for otherwise taxable gifts to non-citizen spouses. Code §2523, Treas. Reg. Sec 25.2523 (1)-1(a). However, under Code section 2523(i)(2) the annual exclusion amount for gifts to non-citizen spouses is $139,000.

An estate tax of an NRA must file a federal estate tax return if the decedent's gross estate exceeds $30,000. Treas. Reg. §20.6018-1(b).

Resident Aliens

An EB-5 Investor who is a resident alien, and is classified as a U.S. estate and gift tax resident, based on having a U.S. domicile, is subject to U.S. gift tax on lifetime transfer of assets, wherever located, and is subject to U.S. estate tax on their world-wide as- sets. Code §§2001(a), 2031(a).

A resident alien has the same applicable credit and GST exemption as a U.S. citizen. Code §§2010(a), 2505(a), 2631. The same annual gift tax exclusions (Code section 2503), and the same spousal "gift-tax splitting" rights as long as that spouse is a U.S. citizen or resident alien. Code §2513.

Reporting Gifts From Foreign Person

Code section 6039F imposes annual information reporting requirements on any U.S. person who receives a foreign gift (i.e. a gift from a foreign corporation or partnerships) in excess of $14,723 (2012) (Rev. Proc. 2011-52) or receives a gift of $100,000 from a foreign individual or estate (IRS Notice 97-34).

The gift must be reported on IRS Form 3520 (Part IV) describing the

property received, the FMV of the property and the gift date when the do- nor is an individual, an estate, Form 3520 does not require the donor name and address except where the foreign donor is a partnership or corporation.

U.S. beneficiaries who receive distributions from foreign trusts should report the amounts under the trust reporting rules of Code section 6048(c), rather than gift reporting rules of Code section 6039F. U.S. beneficiaries are not required to report contributions by foreign persons to trusts in which the U.S. beneficiaries have an interest, unless the U.S. beneficiaries are treated as receiving the contribution on the year of transfer (the U.S. beneficiary has a Code section 678 power). A domestic trust that receives a contribution from a foreign person must report the gift unless the trust is treated as owned by a foreign person (e.g., a foreign person creates a U.S. revocable trust).

According to IRS Notice 97-34 (and Form 3520 instructions), a U.S. beneficiary who receives a distribution from a domestic grantor trust, owned by a foreign grantor, must report it under Code section 6039F as a gift from a foreign person (i.e. the deemed foreign owner of the domestic trust). A U.S. person who fails to report such foreign gifts will be subject to penalties equal to five percent of each gift for each month of non-compliance (not to exceed 25 percent of the aggregate foreign gifts).

In 2017, U.S. Estate & Gift Tax Rates for U.S. citizens and domiciliaries are as follows:

- Estate tax exemption is $5,490,000 ($10,980,000 husband and wife) excess assets taxed at 40 percent;
- Lifetime gift tax exemption is $5,490,000 ($10,980,000 husband and wife) excess assets taxed at 40 percent ;
- Generation skipping tax (”GST”) exception, assets over taxed at 40 percent;

- Marital deduction gifts up to $149,000 in annual gifts to an alien spouse (non-citizen) are exempt from tax. Rev. Proc. 2011-52, Code §§2503(b), 2523(i);

- Annual gifts received from foreign persons (i.e. foreign corporations and partnerships) are reportable if they exceed $14,723 for the year. Rev. Proc. 2011-52, sec 3.35, 2011-45 I.R. B.;

- Annual gifts received from foreign individuals and estates are reportable once they reach the annual reporting threshold of $100,000 (IRS Notice 97-34);

- Annual Gift Tax Exclusion is $14,000 ($28,000 husband and wife). Gifts in excess of the annual exclusion amount must be reported on Form 709. Taxpayers who fail to attach Form 709, past gift tax returns, to Form 706: Estate Tax Return may trigger an audit. The IRS is aggressively pursuing this tax issue.

"Succession Tax" under Code section 2801, gift tax at the highest applicable gift or estate tax rates, is imposed on the gift recipient, who receives a "covered gift" (i.e. a direct or indirect bequest) from a "covered expatriate." Code section §877A. The Succession Tax (gift tax) does not apply to annual exclusion gifts in 2013: $14,000 per year, or gifts entitled to a marital or charitable deduction.

For EB-5 investors the critical estate and gift tax planning issue is Domicile. Non-Domicile international investors may gift unlimited non-U.S. situs assets with no U.S. Gift Tax. U.S. Domicile international investors are subject to estate and gift tax on transfers of world-wide assets that in 2012 exceed the following exemptions:

- $5,490,000 Estate Tax and Lifetime Gift Tax exemption ($10,980,000 husband and wife);

- $14,000 annual gift tax exemption ($28,000 husband and wife).

Domicile Test

Domicile is determined by the facts (there is no bright-line test). A foreigner living in the U.S. will be treated as domiciled in the U.S. if:

• He or she resides in the U.S. (the “presence test”); and
• He or she intends to reside in the U.S. indefinitely (The “intent test”).

The Intent Test

Under the intent test, a foreigner briefly living in the U.S. with no intention of later leaving the U.S., can lead to a determination of U.S. domicile. If the foreigner has no intention to reside in the U.S. indefinitely, the foreigner can never become domiciled in the U.S. even if he or she lived in the U.S. for many years.

The Presence Test

Under the presence test, the IRS examines facts and circumstances to determine whether foreigners plan to stay in the U.S. The presence test (facts and circumstances) includes:

• Residence location(s), value and size and the amount of time spent on each residence;

• Location of Family and friends;

• Location of personal possessions;

• Location of their businesses;

• Where they are licensed to drive;

• Where they are registered to vote

• Location of their religious organization;

• Location of their social organization;

• Location of any burial plots;

• Terms of immigration status;

• Whether they have a green card or visa;

• Whether they have a U.S. Social Security number;

• Where they declared their residence to be in a will or trust;

• Where they declare their residence in an application for a visa or "green card."

Non-Domicile Status

A foreigner who wants to establish non-domicile status should do the following in their home country:

- Purchase a principal residence and spend as much time there as possible;
- Purchase burial plots;
- Join clubs and religious organizations;
- Engage in business activities;
- Register to vote;
- Obtain a driver's license.

For U.S. gift tax purposes a foreigner who lives in the U.S. and intends to leave is better advised to seek a visa instead of a "green card" (since the green card is an indicia of domicile). If the IRS accepts a foreigner as a non-domicile, they may gift (U.S. gift tax-free) unlimited non-U.S. situs assets (including stock in U.S. corporations). If the foreigner is treated as a U.S. domicile, they will be subject to gift tax on transfer of world-wide assets that exceed applicable exceptions (e.g., $14,000 annually, $5,250,000 lifetime gift tax exemption).

U.S Estate Tax Planning (Non-Domicile)

Non-domicile should reduce possible U.S. estate tax exposure:

- Make unlimited gifts of non-U.S. situs tangible personal property (e.g., shares of stock in non- U.S. corporations, tangible property located outside of the U.S. at the time of the gift (i.e. art, jewelry, cash);

- Make unlimited gifts of shares of stock in U.S. corporations (not subject to U.S. gift tax, would be subject to U.S. estate tax);

- Make unlimited gifts of real property located outside the U.S. If the transfers are within the $5,490,000 gift/ estate tax exemption they will remain tax-free in the event of an adverse domicile determination under an IRS tax audit.

U.S. Gift Tax Planning

U.S. gift tax is imposed on U.S. Real Property and U.S. tangible property (e.g., cash, art, jewelry) physically located in the U.S. as well as stock in U.S. corporations is not U.S. situs property for gift tax purposes (but is U.S. situs property for U.S. estate tax purposes.)

U.**S Gift Tax: Non-U.S. Situs Property**

For U.S. Gift Tax purposes, assets that are deemed outside of the U.S. (non-U.S. situs) include:

• Real, and personal property located outside the U.S.;

• Shares of stock issued by a foreign corporation;

• Life insurance proceeds on a non-resident individual's life;

• Deposits with a foreign branch of a domestic corporation (or partnership) engaged in the commercial banking business;

• Deposits with U.S. commercial or foreign commercial banks; and

• Many types of bonds or notes.

Tax treaties between the U.S. and a foreigner's home country may provide further exceptions which qualify assets as non-U.S. situs for U.S. estate and gift tax purposes.

Spousal Gifts

Spouses who are non-domiciliaries, can make unlimited gifts to each other, outside the U.S., gift- tax free. Non-U.S. citizen foreigner spouses, who are considered to have a U.S. domicile may each only gift the other $149,000 (2017), without using up the $5,490,000 exemption to which they will be subject. If domicile status is unclear, in order to avoid U.S. gift tax exposure the foreigner spouse should:

• Establish an offshore trust (irrevocable trust);

• Establish an offshore account in their name;

• Transfer $5,490,000 to the offshore account in their name;

• Gift $5,490,000 from the offshore account in their name, to the offshore trust account.

In the event of an IRS gift tax audit using the gift tax exemption, there would be no U.S. gift tax exposure on the $5,490,000 gift. For the non-domiciliary, there would be no U.S. gift tax. For the domiciliary, the $5,490,000 gift would be U.S. gift-tax free, using the $5,490,000 lifetime gift tax exemption. A wealthy non-domiciliary may gift non-U.S. property, beyond the $5,490,000 exemption which will be U.S. gift tax-free. This gift would be subject to classification as a non-domiciliary, since if the IRS determines domicile the foreigner will owe gift tax, interest and penalty on the transferred amount that exceeds the $5,490,000 exemption. Cash Gifts (Non-Domiciliary) In order to avoid U.S. gift tax, non-domiciliaries should make cash gifts outside of the U.S. as follows:

• Establish a non-U.S. account in the non-domiciliary's name and transfer funds to it;

• Have the U.S. donee (whether an individual or trust) set up a non-U.S. account in the donee's name;

• Gift from the non-domiciliary's non-U.S. ac- count to the U.S donee's non-U.S. account;

• The U.S. donee may then wire transfer funds from the non-U.S. account to the U.S. donee's account.

Stock: U.S. Corporation (Non-Domiciliary)

A non-domiciliary, who owns stock in a U.S. corporation, should gift the stock while alive so there will be no U.S. estate tax on death. The non-domiciliary's gift of U.S. stock is U.S. gift-tax-free. A non-domiciliary, who is concerned that he or she may be deemed domiciled in the U.S., under an IRS gift tax audit, should gift the stock (under the gift tax exemption i.e. $5,490,000). If the gift is made while alive, it will either be not subject to IRS gift tax audit (with no tax imposed) or if subject to IRS gift tax audit, exempt from U.S. gift tax, up to $5,490,000 in value (if U.S. domicile is deemed established by the IRS, under the audit).