

**FLEEING THE MEXICAN DRUG WAR:
FOREIGN INVESTORS' IMMIGRATION ISSUES
The Matrix of U.S. Legal Considerations**

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Background and Context

- Mexico's Drug War
- Drugs going North and Guns going South
- Since President Calderon's election in Dec. 2006, it is estimated there have been over 36,000 deaths
- DOJ considers the Mexican drug cartels as the greatest organized crime threat to the U.S.

Effects

- Temporary and permanent movement of businesses and families to the U.S., e.g. The Woodlands
- Expansion of existing U.S. companies, new businesses and enrollment in schools in Texas
- What is the impact on Texas based lawyers?

Basic Rationales:

- Underpin and Often Drive the Business Choices -

- Investment for Profit & Gain
- Status in the U.S.
- Asset Protection
- Security and Family Safety

Ethics

- Who is the client?
- U.S. immigration matters often involve dual representation
- Dynamic nature of U.S. immigration laws

Complex Network of Investment Consideration and Opening Enterprises

- Issues to Be Aware of -

- entity formation & choices, fiduciary duties
- financing/banking
- taxation
- contracts/transportation/shipping
- employees and U.S./Texas employment law
- immigration considerations

Global Trade Environment & Vigilance: Immigration Laws Important to the Mix

- Complex area of law:
 - 20+ temporary visa categories
 - 5 separate permanent employment-based categories, each with multiple subcategories
- Interaction/Synergies Among Various U.S. Laws

Various Visa Categories Applicable to Investment/Corporate/Business Operations

- Develop Strategies to Maximize Opportunity -

- B-1/ B-2 - Visitor for Business or Pleasure
- L-1 - Intracompany Transferee
- E-1/E-2 - Treaty Trade & investment
- TN – Treaty NAFTA
- H-1B - Professional/Specialty Worker
- O-1 - Outstanding Foreigner

Immigration Hot Topics

- Be Aware -

- Xenophobia & Anti-Foreign Sentiment
- B visa entry – greater scrutiny at Port of Entry
- Children Studying on B-2 Visitor’s Visa
- Note the following from a FAQ issued by the Texas Education Agency
- **19. Can a foreign student attend school in Texas when he enters the country with a tourist visa?**
- **A foreign student cannot attend Texas public schools on a full-time basis with a tourist visa as this would be in violation of his/her visa status. However, the school district cannot deny the student enrollment on the basis of his/her visa status. The student only has to demonstrate eligibility to enroll under a provision of TEC §25.001.**

Immigration Hot Topics (cont)

- Minor Criminal Issues in A Traveler's Past
- Lookout Systems, U.S. Government Concerns & Patriot Act
- Temporary work visas issued for only 1 year to Mexican citizens
- Tax consequences of Long-Term Stays in the U.S.
- Derivative citizenship possibility – parent, GP and GGP – e.g. Carlos Santana and Winston Churchill.

B-1/B-2/BCC & Basic Criteria for Visitor's Entry

- An Often Abused Category, with Severe Consequences –

- Temporary and Brief in Nature
- Traveler Remains Employed Abroad & Will Return Abroad
- Paid Abroad
- Examples:
 - Conferences
 - Negotiations
 - Sales & Business Development
 - Prep for Establishing an Office/Subsidiary

B-1/B-2, & WB Issues:

- “Gray Area” – Court’s Words
- What is “Work” and What is “Business”
 - Distinctions; Less-Than-Clear
- Port of Entry Inspectors Lean toward “Work” if a Question
- Pushing the Limits Could Cost an Employer a Key Employee
- Examples - Installations, Repairs, Training, and Professional Competitions

Treaty-Based Visas (NAFTA)

- *To Facilitate Trade and Investment under Foreign Commerce and Navigation (FCN) Treaties -*

- Nationality of a Treaty Country, e.g., U.S.-Mexico
- A New Birth as a Preferred Way to Transfer:
 - Owners
 - Executives
 - Specialists

E-1 Treaty Traders (NAFTA)

- “Substantial” *Ongoing* Trade
 - Goods & Services Both Considered Trade
 - 50% or More Trade Between U.S. & Mexico
- Owner, or Executive or Essential Employee

E-2 Treaty Investors (NAFTA)

Requirements:

- Nationality of a Treaty Country
- “Substantial” Investment in a
 - Real, Operating Commercial Enterprise
 - Capital Must Be “At Risk”
- Owner, or Executive or “Essential” Employees
- Not Marginal, Solely for Earning a Living

TN Visa (NAFTA)

Requirements

- Mexican citizen
- Nonimmigrant/ temporary intent
- Work in one of the required fields
 - Apply at U.S. Consulate in Mexico
 - Issue for up to 1 year
 - Spouse *cannot* work

0-1 Extraordinary Individuals

- Persons Who Have Achieved Highest Int'l Recognition -

- Outstanding in at Least 3 of 10 Ways
- Int'l Awards (e.g., Nobel, Olympics)
- Recognized Expert in Their Field / Industry
- Patents, Peer-Reviewed Articles
- Int'l Presentations, etc.
 - Hard to Achieve, But Can be Useful

Corporate/Tax Issues

1. Business acquisition structuring, documentation and process
2. Ensuring corporate vehicles and investment is compliant with immigration goals and requirements
3. Understanding existing Mexican legal structure
4. Choice of Entity - foreign investor considerations
5. Real estate specific considerations for foreign investors
6. Permanent establishment, related tax matters, structure of inter-company flows of dividends and funds
7. Distinctions in enforceability of promissory notes, debts and obligations in U.S. vs. Mexico
8. Succession planning and testamentary documentation
9. Securities laws considerations for foreign investors raising cash

Intellectual Property – Protecting the Gold

- Need to Protect Often Simple Things – Brand names, Logos, Slogans, etc -

Patents, Trademarks, and other IP for Investor Companies:

- Investment activity often involves development of new methods, processes, and equipment, and companies need to take precautions and act early to protect their proprietary rights
- Protecting IP is often the key to market penetration and success
- Investigating IP obstacles is a threshold question that can end your US plans
- US IP litigation - offense and defense
- US IP rights include patents, trademarks, copyrights, trade secrets, and other special rights
- Steps for acquiring US IP protection
- Licensing IP in the US
- Noncompete agreements

Permanent Residence – Employment Based

- Be Aware of Application Complexities, Timing and Travel -

- EB1 includes Extraordinary Ability, Advanced Researchers and Professors, and Multinational Managers
- EB2 Advanced Degree Professionals or Exceptional Ability in the Sciences, Arts or Business. Visa holders in this category normally must have a job offer and the potential employer must complete the alien labor certification (PERM) process
- EB3 Skilled Workers and Professionals
- EB-5 – Immigrant Investors

EB-5 Immigrant (Green Card) Investor

1. Types
 - Regional Center
 - Individual Investment
2. Investment
 - \$1 million
 - \$500,000 in targeted employment area
3. Create 10 new jobs
4. Procedures

Summary of Objectives

- Project Promoter Goals:
 - Access to equity investment funds to promote a specific project
 - Ability to maintain critical project decision making
- Investor Goals:
 - Road to permanent residency in the U.S. within 2 years, and conditional residency much sooner
 - Investment opportunity in the U.S.

Regional Center Pilot Program Description

- A regional center is an entity/organization approved as such by USCIS, which is involved with the promotion of economic growth, improved regional productivity, job creation, and increased capital investment within the U.S.
- Note - In Houston there is 1 regional center application approved to date with several pending.
- Practice Pointer – Regional Centers approval is not guaranteed! See USCIS statistics attached.

EB-5 Regional Center Investor Requirements

- Alien investors must demonstrate to USCIS certain economic capabilities of the project such as:
 - Evidence of a “for-profit” commercial enterprise designated as a regional center
 - Evidence, if applicable, that business has been established in a Targeted Employment Area permitting investment minimum of \$500,000 (rather than \$1,000,000)
 - Evidence that investor has invested (or in the process of investing) the required amount
 - Evidence that investment funds were obtained by investor through lawful means
 - Evidence of job creation and active involvement in the commercial enterprise by investor

Legal Specialties Required to Undertake Project

– Immigration

- Regional center project designation/certification and process (local and federal level)
- Regional center project milestone regulation and compliance under immigration laws
- EB-5 visa expertise in the regional center context/review of investor visa application materials

– Securities laws

- Securities regulation and offering requirements
- Domestic and international securities compliance
- Preparation of offering memorandum and related investment documents

– Corporate

- Establishment of workable legal structure providing investors appropriate level of decision-making in the venture from immigration and corporate perspective while maintaining core control at project-level
- Execution of coordinated investments with hundreds of investors
- Management of discussions with investors and their legal counsel and advisors
- Preparation of partnership agreement, escrow agreement and other transactional documents

– Project Specific Matters

- Real estate acquisition
- Preparation and negotiation of construction and service agreements
- Other

Conclusions

- Investment in the U.S. by Foreign Nationals Offers Opportunities
- Multiple, Cross-Discipline Legal Issues When Seeking to Invest
- Consequences of U.S. immigration actions can affect businesses and individuals

Questions ?

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