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US IMMIGRATION & NATIONALITY LAW

THE PERILS OF CLAIMING THE FOREIGN EARNED INCOME EXCLUSION WHEN SPONSORING AN IMMIGRANT ON AN AFFIDAVIT OF SUPPORT

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Although most U.S. citizens and lawful permanent residents must pay U.S. taxes on their worldwide income, the foreign earned inclusion exclusion ("FEIE") allows some U.S. citizens and residents to exempt income earned outside the country from U.S. taxes. In order to avail of the FEIE, the taxpayer must be "a U.S. citizen who is a bona fide resident of a foreign country or countries for an uninterrupted period that includes an entire tax year, a U.S. resident alien who is a citizen or national of a country with which the United States has an income tax treaty in effect and who is a bona fide resident of a foreign country or countries for an uninterrupted period that includes an entire tax year, or a U.S. citizen or a U.S. resident alien who is physically present in a foreign country or countries for at least 330 full days during any period of 12 consecutive months". Salaries, wages, and self-employment income may be excluded as foreign-earned income, but other types of income, such as pay received from the U.S. government, may not. In 2023, those to whom the FEIE applies may exclude a portion of their foreign-earned income – up to $120,000 for 2023 – from their worldwide income.

Difficulties can arise, however, when a U.S. citizen or lawful permanent resident who can avail of the FEIE intends to sponsor a family member for permanent residence and must submit Form I-864, Affidavit of Support, in order to demonstrate that they have the financial means to support the individual they are sponsoring. Most sponsors must demonstrate that their income meets 125% of the HHS Poverty Guidelines for the relevant year and household size. The USCIS looks to see the "total income" indicated in item # 9 on Form 1040,

US Individual Tax Return. The FEIE, however, could result in a sponsor's total income appearing as a negative number on the tax return even if the wages reported in item # 1 of Form 1040. This may be the case even if the wage income indicated in item # 1 of the Form 1040 may be sufficient. Moreover, a sponsor who qualifies for the FEIE at the time of filing the I-864 may not even be considered domiciled in the US for purposes of the I-864 under 8 CFR 213a.2(c)(1)(ii), which requires that their principal place of residence be in the U.S. A sponsor who finds themselves in this scenario would need to show that they have taken steps to make the U.S. his immediate principal place of abode. It would be preferable if a sponsor who has taken advantage of the FEIR in a previous year is presently residing in the U.S. at the time of filing the I-864 and no longer claiming the FEIR for the current tax year.

Based on anecdotal experience, even if it is explained that the total income was negative because of the FEIE but the wages reported in item #1 of the 1040 were sufficient to meet the income requirements, both the USICS in cases where an I-485 adjustment of status is being filed or the National Visa Center (NVC) of the State Department in cases where the applicant is consular processing overseas for the immigrant visa, reject the sponsor's I-864 when the total income in item # 9 is insufficient because of the FEIE. It would be unfortunate for a sponsor who is legitimately entitled to take the sizable deduction from their taxable income afforded by the FEIE to forego it in order to demonstrate that they have sufficient income to meet 125% of the poverty line to satisfy the income requirement for Form I-864.

Sponsors who are in this predicament may want to rely on their assets in addition to the income and report those assets on Form I-864. If the sponsor is unable to meet the income requirement through income or assets, then it may need to be necessary to include an I-864 from a joint sponsor. Many joint sponsors are reluctant to file I-864 applications as they are fearful of being held liable in case the beneficiary of the petition becomes reliant on public benefits.

If the sponsor on an I-864 claiming the FEIE is a lawful permanent resident, this LPR may also be jeopardizing their ability to naturalize in addition to not being able to show sufficient income if the FFIE takes up a large proportion of the reported income in item # 1 of Form 1040. IRS Form 2555 allows taxpayers to indicate whether they are making an election under the bona fide residence test or the physical presence test. An LPR who is claiming the FEIE based on being a bona fide resident must be a citizen of a country that has a treaty with

the U.S. According to a previous blog posted on October 1, 2012, claiming the FEIE based on being a bona fide resident for one year in the foreign country is more harmful than claiming the FEIE based on being physically present for 330 days in a foreign country for maintaining continuous residence for naturalization purposes. This blog was based on the guidance in the USCIS Adjudicator's Field Manual (AFM) at 74(g)(9)(B). On the other hand, the newer USCIS Policy Manual, which is replacing the AFM does not include any caveats on claiming the FEIE for maintaining continuous residence although USCIS could still consider its prior policy in determining whether an applicant has demonstrated continuous residence to qualify for naturalization. Thus, for the permanent resident sponsor of an I-864 who has claimed the FEIE, there is a double whammy as they may not be able to sponsor an intending immigrant and may have also jeopardized their ability to naturalize.

It makes no sense for both the USCIS and State Department to take such a rigid position. If the sponsor can show that they earned an income through wages or other means that was sufficient to meet 125% of the HHS Poverty Guidelines, why should it matter if the income gets deducted based on the FEIE? This is a paper deduction as the sponsor has received the requisite income in hand already and can support the noncitizen beneficiary of an I-130 petition, and in some cases, and I-140 petition. We do hope that the USCIS and DOS will pay heed and stop rejecting I-864s if the total income in the 1040 income appears to be insufficient, when it is actually not. There is no statute or regulation authorizing the government to take such an arbitrary and irrational position, which deprives noncitizen beneficiaries of approved I-130 and I-140 petitions from being able to immigrate to the US as permanent residents.

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