

A NEW IMMIGRATION DEMOGRAPHIC: CONSIDERATIONS FOR THE TEXAS ATTORNEY

Comment

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I. BACKGROUND INFORMATION

The border separating the United States and Mexico “is the most frequently crossed . . . border in the world.”¹ In fact, approximately 350 million

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people legally cross this international border each year.² Historically, many of the Mexican immigrants who made their way into the United States were relatively undereducated and entered low-skilled jobs.³ Recently, however, immigration of wealthy Mexicans into the United States and Texas has greatly increased, as they attempt to escape drug cartel violence.⁴ This new pattern of immigration not only represents a significant shift from one social demographic of Mexican immigrants to another, but it also results in an entirely new set of side effects and consequences for both Mexico and Texas, different than those historically and traditionally felt by these jurisdictions.⁵ This article focuses on the effect that this new immigration pattern will have on estate planning attorneys in Texas, as well as the consequences that accompany it.

A. Cartels, Drugs, and Violence in Mexico

Like many other countries, Mexico has a long history of armed conflicts amongst its citizens, themselves, as well as against other countries and other organizations.⁶ More recently, however, because of the ongoing drug war between Mexican drug cartels, the violence in Mexico has increased dramatically.⁷ “In 2008, more than 5,600 people in Mexico were killed in drug trafficking violence. . . . In the first two months of 2009, the violence grew with almost 1,000 drug-related killings.”⁸

When comparing the number of deaths related to drug trafficking violence in January and February of 2008 to the same months of 2009, the number of

1. BARRY GOLSON WITH THIA GOLSON, RETIREMENT WITHOUT BORDERS: HOW TO RETIRE ABROAD IN MEXICO, FRANCE, ITALY, SPAIN, COSTA RICA, PANAMA, AND OTHER SUNNY FOREIGN PLACES (AND THE SECRET TO MAKING IT HAPPEN WITHOUT STRESS) 75 (2008).

2. *See id.*

3. *See* MARC R. ROSENBLUM ET AL., CONG. RESEARCH SERV., R42560, MEXICAN MIGRATION TO THE UNITED STATES: POLICY AND TRENDS 14 (2012) (“[C]ompared to other foreign-born and native-born populations in the United States, Mexicans are younger, have lower education levels, are more likely to work in lower-skilled occupations, and have lower measures of economic well-being.”).

4. *See* Robbie Whelan, *Affluent Mexicans Flee to Texas*, WALL ST. J. (July 27, 2012, 6:24 PM), <http://online.wsj.com/article/SB10000872396390444840104577549262727715808.html> (“As violence in Mexico has escalated, some affluent Mexicans have fled to border cities in Texas.”); *see also* Teke Wiggin, *Wealthy Mexicans are Increasingly Investing in the U.S. to Escape Cartel Violence*, FOX NEWS (May 21, 2011), <http://www.foxnews.com/us/2011/05/21/wealthy-mexicans-increasingly-investing-escape-cartel-violence> (“[A] rapidly increasing number of wealthy Mexicans [have] attempt[ed] to escape the violence by investing \$500,000 or more in American business projects—thereby earning legal and permanent residency status in the [United States].”).

5. *See e.g.*, Jeremy Schwartz, *Austin Beginning to Compete with Other Texas Cities for Wealthy Immigrants from Mexico*, STATESMAN.COM (June 6, 2011, 5:47 AM), <http://www.statesman.com/news/news/local/austin-beginning-to-compete-with-other-texas-cit-1/nRbdZ>; *see also* Wiggin, *supra* note 4.

6. *See The Mexico Reader: History, Culture, Politics*, in THE LATIN AMERICA READERS (Gilbert M. Joseph & Timothy J. Henderson eds., 2002) (providing a compilation of articles giving a broad chronological history of Mexico, including Mexican wars and conflicts, and specifically discussing the Mexican conquest by the Spanish and the Mexican Revolution).

7. *See* MARK P. SULLIVAN & JUNE S. BEITTEL, CONG. RESEARCH SERV., RL32724, MEXICO-U.S. RELATIONS: ISSUES FOR CONGRESS 15 (2009) (“Drug trafficking violence in Mexico has spiked in recent years as DTOs [(drug cartels)] have competed for control of smuggling routes into the United States.”).

8. *Id.* at 15–16.

deaths increased by 146%.⁹ Because these numbers come from a relatively short period of time, it is helpful to compare them to the number of deaths from the Global War on Terror, which encompasses a time period of over a decade.¹⁰ According to the Department of Defense, since October 7, 2001, the Global War on Terror has claimed the lives of over 6,700 American soldiers.¹¹ While loss of a life in any context is certainly sobering, a comparison of these statistics truly sheds light on just how pervasive the violence in Mexico has been in recent years.¹² While these comparisons are telling, they only begin to reveal the true state of Mexico; for example, during Felipe Calderón's presidency alone—Calderón's presidency began on December 1, 2006, and ended on November 30, 2012—violence related to drug cartels and drug trafficking killed more than 60,000 people.¹³

As the monetary stakes continue to increase, it is not just the amount of violence that continues to grow, it is also the harshness and intensity of that violence.¹⁴ According to Patrick Radden Keefe in his New York Times article, “the reality is that in a multibillion-dollar industry in which there is no recourse to legally enforceable contracts, some degree of violence may be inevitable.”¹⁵ To illustrate the nature and severity of the increased violence, Keefe uses the Zeta cartel—the Zetas are a relatively new cartel to the drug trafficking business in Mexico—as an example.¹⁶ Keefe describes the Zetas as “a rampaging league of sociopaths with a notable devotion to physical cruelty . . . [who] have diversified beyond drugs to extortion, kidnapping and human trafficking.”¹⁷ As Keefe continues his discussion about the growing violence in Mexico, he considers the evolution of the violent acts committed by Mexico's Sinaloa

9. See *id.* at 16.

10. See e.g., *Global War on Terror (OIF, OEF & OND Combined)*, DEF. CAS. ANALYSIS SYS., http://www.dmdc.osd.mil/dcas/pages/casualties_gwt_combined.xhtml (last visited Dec. 12, 2013) (explaining that Operation Enduring Freedom commenced on October 7, 2001).

11. See *U.S. Military Casualties – GWOT Casualty Summary by Casualty Type*, DEF. CAS. ANALYSIS SYS., https://www.dmdc.osd.mil/dcas/pages/report_sum_reason.xhtml (last updated Dec. 13, 2013) (explaining that the Global War on Terror includes the following three different military operations: Operation Enduring Freedom; Operation Iraqi Freedom; and Operation New Dawn). Operation Enduring Freedom is more commonly known as the War in Afghanistan, while Operation Iraqi Freedom and Operation New Dawn refer to two different time periods that are more commonly known as the War in Iraq. See *Operation Enduring Freedom (OEF)*, DEF. CAS. ANALYSIS SYS., https://www.dmdc.osd.mil/dcas/pages/casualties_oef.xhtml (last visited Dec. 12, 2013); *Operation Iraqi Freedom (OIF)*, DEF. CAS. ANALYSIS SYS., https://www.dmdc.osd.mil/dcas/pages/casualties_oif.xhtml (last visited Dec. 12, 2013); *Operation New Dawn (OND)*, DEF. CAS. ANALYSIS SYS., https://www.dmdc.osd.mil/dcas/pages/casualties_ond.xhtml (last visited Dec. 12, 2013). Compare the number of deaths resulting from the Global War on Terror, with *supra* text accompanying note 8, and *infra* text accompanying note 13.

12. See discussion *supra* notes 8–11 and accompanying text.

13. See *Q&A: Mexico's Drug-Related Violence*, BBC NEWS, <http://www.bbc.co.uk/news/world-latin-america-10681249> (last updated Nov. 25, 2013, 7:55 ET) (citing information from the Mexican government; however, due to translation issues, that source was not used directly).

14. See Patrick Radden Keefe, *Cocaine Incorporated*, N.Y. TIMES (June 15, 2012), http://www.nytimes.com/2012/06/17/magazine/how-a-mexican-drug-cartel-makes-its-billions.html?pagewanted=all&_r=0.

15. *Id.*

16. See *id.*

17. *Id.*

cartel, led by billionaire drug trafficker, Joaquin Guzman (El Chapo).¹⁸ According to Keefe, “Chapo and his colleagues were never peaceful types; in the last few years, they have waged vicious wars of acquisition to seize the lucrative smuggling routes through Juárez and Tijuana. But to fend off the Zetas, Sinaloa is resorting to new levels of barbarism.”¹⁹ Clearly, as rival cartels battle for valuable territory in the drug trafficking business, the violence will only continue to increase, both in the number of deaths and in the harshness of tactics.²⁰

B. Political Climate in Mexico

While the violence in Mexico continues to escalate, the government and overall political climate likewise continues to lead Mexico down a path of instability, danger, and corruption.²¹ From 1929 to 2000, the Institutional Revolutionary Party (PRI) dominated Mexican politics.²² The PRI has long had a reputation for being corrupt, allowing the Mexican drug cartels to operate freely.²³ Coincidentally, just as the violence from drug trafficking and drug cartels began to increase in Mexico, the PRI party’s political dominance began to subside.²⁴

In 2000, for the first time in more than seventy years, a non-PRI party candidate won the presidential election.²⁵ The winner of that election, Vicente Fox, was a member of the Conservative National Action (PAN) party.²⁶ His policy on the drug cartels was largely passive, and ultimately, his presidency did not spark a huge surge in cartel violence; however, major changes loomed in the future.²⁷

18. See *id.*

19. *Id.*

20. See *id.*; see also *supra* notes 14–19 and accompanying text.

21. See Ken Ellingwood, *Corruption Hurting Mexico’s Fight Against Crime, Calderon Says*, L.A. TIMES (Dec. 10, 2008), <http://www.latimes.com/news/nationworld/world/latinamerica/la-fg-mexico10-2008dec10.0,2304138.story> (“Mexico has long been rife with corruption, which ranges from the small bribes that motorists pay traffic officers to the suitcases of cash that drug traffickers have delivered to law enforcement authorities.”). In this article, President Felipe Calderón states that, “corruption also hurts Mexicans by undermining the country’s competitiveness and eroding confidence in government institutions.” *Id.*

22. See K. LARRY STORRS, CONG. RESEARCH SERV., RS22368, MEXICO’S POLITICAL HISTORY: FROM REVOLUTION TO ALTERNATION, 1910–2006 2 (2006).

23. See Orion Jones, *Party with History of Corruption Returns to Power in Mexico*, BIG THINK (July 2, 2012, 10:35 AM), <http://bigthink.com/ideafeed/party-with-corrupt-history-returns-to-power-in-mexico>.

24. See SULLIVAN & BEITTEL, *supra* note 7; see also *supra* notes 8–9 and accompanying text.

25. See 1 ELECTIONS IN THE AMERICAS, A DATA HANDBOOK: NORTH AMERICA, CENTRAL AMERICA, AND THE CARIBBEAN 446 (Dieter Nohlen ed., 2005).

26. See *id.*

27. See *e.g.*, SIDNEY WEINTRAUB & DUNCAN ROBERT WOOD, COOPERATIVE MEXICAN-U.S. ANTINARCOTICS EFFORTS: A REPORT OF THE CSIS SIMON CHAIR IN POLITICAL ECONOMY 25 (2010), available at http://csis.org/files/publication/101108_Weintraub_MexicanUSAntinarc_web.pdf; see also *e.g.*, Zane McMillin, *War on Drugs ‘a Total Failure,’ Former Mexican President Vicente Fox Says in Grand Rapids*, MLIVE (Oct. 9, 2012 10:52 AM), http://www.mlive.com/news/grand-rapids/index.ssf/2012/10/war_on_drugs_a_total_failure_f.html (explaining Vicente Fox’s belief that legalizing marijuana will help

In 2006, Felipe Calderón, also a member of the PAN party, won the presidential election.²⁸ Calderón adopted proactive policies to try to crack down on corruption and combat the Mexican drug cartels.²⁹ In one of his first presidential actions, he sent Mexican troops to key areas of drug cartel operations.³⁰ During his presidency, Calderón deployed more than 50,000 Mexican soldiers to areas of Mexico, in an effort to fight the drug cartels with an “iron-fist.”³¹ Unfortunately, however, when the Mexican government updated its drug war death toll in January of 2012, the results were devastating: “47,515 people had been killed in drug-related violence since President Felipe Calderón began a military assault on criminal cartels[,] [soon after taking office,] in late 2006.”³² Compared to historical statistics and numbers, during Calderón’s term, the amount of violence and the rate of murders skyrocketed.³³ Calderón’s administration wanted to install a transparent government, free from corruption, and as a result, many lives were lost.³⁴ While Calderón’s public policy appeared to be an aggressive pursuit to bring down the drug cartels, “[t]here has been speculation in Mexico that the Calderón regime favor[ed] [the] Sinaloa [cartel] over the unhinged Zetas and . . . made a devil’s pact to lay off the [Sinaloa] cartel.”³⁵ Regardless of whether there is any truth behind this supposition, the mere fact that people have raised this possibility, points to the instability in Mexico and illustrates the lack of respect for the country’s governmental institutions; it certainly does nothing to change peoples’ perceptions about the corruption in Mexico.³⁶

In July 2012, the once politically dominant PRI party returned to office, with the election of Enrique Peña Nieto.³⁷ Given the PRI party’s corrupt reputation, one might assume that this party’s return to power would not only cause most Mexican citizens to have a poor outlook about the country’s future, but would also lead to several unwanted, negative consequences for the country, as a whole.³⁸ In actuality, however, when PRI party candidate, Nieto, won the 2012 presidential election, many Mexicans believed that, with the PRI

minimize drug cartel violence). Fox’s position gives an insight into his past strategy towards the cartels—he takes a policy-based position, as opposed to a military-based position. See McMillin, *supra*.

28. See *Profile: Felipe Calderon*, BBC NEWS, <http://www.bbc.co.uk/news/world-latin-america-12242685> (last updated Jan. 21, 2011, 4:21 ET).

29. See *id.*

30. See *id.*

31. See *id.*

32. Damien Cave, *Mexico Updates Death Toll in Drug War to 47,515, but Critics Dispute the Data*, N.Y. TIMES, Jan. 12, 2012, at A4, available at <http://www.nytimes.com/2012/01/12/world/americas/mexico-updates-drug-war-death-toll-but-critics-dispute-data.html>. “Felipe Calderón served as President of Mexico from December 1, 2006, to November 30, 2012.” *Felipe Calderón*, WORLD RES. INST., <http://www.wri.org/profile/felipe-calderon> (last visited Dec. 13, 2013).

33. See Cave, *supra* note 32; see also discussion *supra* Part I.A.

34. See e.g., Cave, *supra* note 32; WEINTRAUB & WOOD, *supra* note 27, at 2, 3.

35. Keefe, *supra* note 14.

36. See *id.*

37. See Richard Fausset, *Mexico’s Enrique Peña Nieto Officially Declared Election Winner*, L.A. TIMES (Aug. 31, 2012), <http://articles.latimes.com/2012/aug/31/world/la-fg-mexico-election-20120901>.

38. See Jones, *supra* note 23 and accompanying text.

party back in power, Mexico would finally be able to regain its stability.³⁹ Because so “[m]any Mexicans look to the PRI as the political force under which Mexicans last had a stable and secure state[,]” most citizens remained optimistic about their country’s future.⁴⁰

While the PRI party’s return to office would initially appear to be a positive for the country—this was a fair historical assessment—in reality, people failed to account for the existence of the following long-term, underlying danger: Mexico still had a powerful set of drug cartels and a corrupt government that lacked credibility.⁴¹ The return of the PRI party to governance seems to be a shortsighted solution, if it can even be classified as a solution at all.⁴²

C. Exodus of Mexicans

Historically, Mexicans have represented one of the United States’ largest groups of immigrants.⁴³ In early times, the majority of Mexican immigrants lacked skills or were undereducated, some even both.⁴⁴ Recently, however, the demographics of this group have shifted; the number of wealthy individuals who are leaving Mexico and immigrating to the United States is vastly increasing.⁴⁵ Many of the wealthier Mexican citizens are no longer willing to risk the lives of their family members or the capital that they have accumulated by staying in their native, yet dangerous and unstable, homeland.⁴⁶ In many cases, when these individuals seek refuge in the United States, they flee to Texas—Texas makes up over half of the international border between Mexico and the United States; as a result of this influx of Mexican immigrants into Texas, there will be a greater demand for legal services, such as estate planning.⁴⁷

Just a few years ago, Jeremy Schwartz wrote an article about a young Mexican immigrant named Miguel, and through Miguel’s story, Schwartz is truly able to illustrate the unfortunate situation that so many Mexican citizens

39. See Elise Dunn et al., *What a Return to a PRI-Dominated Government Would Mean for Mexican Democracy*, COUNCIL ON HEMISPHERIC AFF. (June 28, 2012), <http://www.coha.org/what-a-return-to-a-pri-dominated-government-would-mean-for-mexican-democracy>.

40. *Id.*

41. See Stephano Padilla, *The Government, the People, and the Cartels*, CLAREMONT PORT SIDE (Nov. 1, 2013), <http://www.claremontportside.com/the-war-on-drugs-and-the-mexican-people>.

42. See *id.*

43. See ROSENBLUM ET AL., *supra* note 3, at 1; see also Office of Immigration Statistics, *Legal Permanent Residents*, 2011 Y.B. IMMIGR. STATS. (U.S. Dep’t of Homeland Sec.) 6–15, http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf.

44. See ROSENBLUM ET AL., *supra* note 3 and accompanying text.

45. See Whelan, *supra* note 4 and accompanying text; Wiggin, *supra* note 4 and accompanying text.

46. See Whelan, *supra* note 4 and accompanying text; Wiggin, *supra* note 4 and accompanying text.

47. See JOHN SHARP, BORDERING THE FUTURE: CHALLENGE AND OPPORTUNITY IN THE TEXAS BORDER REGION 5 (1998), available at <http://www.window.state.tx.us/taxinfo/taxforms/96-599/chap01.pdf>; see also discussion *infra* Part I.D–E.

wind up in.⁴⁸ According to Schwartz, even though there was no way for “Miguel [to] know it at the time, . . . those first whiffs of violence [in 2008] would transform Mexico’s wealthiest city into a battleground for warring drug cartels, unleashing a terrifying wave of kidnappings, carjackings and extortion rackets.”⁴⁹

It is important to realize, however, that Monterrey has not always been a lawless border town, full of crime.⁵⁰ Monterrey is not only Mexico’s third largest city, but “Monterrey is [also] known as the Industrial Capital of Mexico” because it ranks “[second] in Mexico for industrial production [and first] in Mexico for business income.”⁵¹ Additionally, Monterrey’s communications systems are well developed, and its workforce is highly educated.⁵² While one would probably not expect a city with characteristics such as these to also be full of warring drug cartels, unfortunately, the city of Monterrey fits both of these descriptions.⁵³

Through their discussion, Schwartz obtained valuable insight about Miguel’s life in Monterrey.⁵⁴ Miguel told Schwartz about the impossibilities of starting a business in a warzone and paying protection money to drug cartels—Miguel originally wanted to open a restaurant in Monterrey, but things changed with the torrent of drug wars.⁵⁵ As a result, Miguel joined the Texas immigration wave, and he and family fled to Austin, where he opened his restaurant.⁵⁶ Miguel is just one man among many wealthy Mexicans who have immigrated to Texas, and while the precise number of immigrants is unknown, there are signs of their rising presence.⁵⁷ Specifically, in Schwartz’s article, he notes that “[p]rivate aircraft traffic between Austin and Mexico has more than doubled since 2006 and is on pace to triple [in 2011] to more than 500 arrivals.”⁵⁸ He also describes how local immigration attorneys have “seen a sudden jump in wealthy Mexican clients seeking visas to live [in Austin]” and how local real estate agents have seen a rise in the number of wealthy Mexicans who are buying or building high-end homes in Austin and its surrounding areas.⁵⁹ In looking at the foregoing information, there is a strong indication that

48. See Schwartz, *supra* note 5 (noting that Miguel moved from Monterrey, Mexico, to Austin, Texas, with his wife and children).

49. *Id.*

50. See, e.g., *Market Spotlight: Monterrey, Mexico*, NAI MEX., <http://naimexico.com/Portals/134/market/monterreyTouch12.pdf> (last visited Dec. 17, 2013).

51. *Id.*

52. *See id.*

53. *See supra* notes 49–52 and accompanying text.

54. *See Schwartz supra* note 5.

55. *See id.*

56. *See id.*

57. *See id.*; see also Cynthia Cisneros, *Wealthy Mexicans Seek Safety in the Woodlands*, KTRK-TV HOUS., ABC LOCAL (May 12, 2011), <http://abclocal.go.com/ktrk/story?section=news/local&id=8125811> (“There has been a recent shift of wealthy Mexican families moving to [t]he Woodlands to escape violence in their homeland.”).

58. Schwartz *supra* note 5.

59. *Id.*

the wealthy demographic of Mexicans is moving to Texas with intentions to stay, which means more business for estate planning attorneys.⁶⁰

The violence and danger in Mexico in recent years is significantly different than the violence and danger that Mexico experienced long ago.⁶¹ These differences have resulted in a wealthier demographic of Mexicans moving into the United States.⁶² This demographic change will not only result in long-term differences that are generally relevant to the legal field, but it will also result in differences for attorneys practicing in the United States, particularly those in Texas.⁶³

Because Mexicans have lived amongst this harsh and brutal violence for years now, many of them have changed perceptions about their country.⁶⁴ These individuals feel that they can no longer stay in Mexico to run their businesses or raise their children because it has become so unsafe.⁶⁵ Additionally, these individuals understand the fact that they do not have a legitimate government to turn to for protection.⁶⁶ Even if Mexico's government was legitimate, at a minimum, most Mexican citizens are unwilling to even hold out hope that it might progress towards establishing a safe living environment for them.⁶⁷ The ongoing cycle of violent, territorial cartel wars, which often take place in neighborhood streets, where innocent Mexicans live, coupled with the fact that there appears to be no end in sight, has caused many wealthy Mexicans to leave their homeland and head to the United States, oftentimes bound for Texas.⁶⁸ After being exposed to the horrors of the drug cartel wars, these individuals cannot stand to take any more risks by staying in Mexico.⁶⁹

D. Money Coming to Texas

The amount of money that accompanies the new, wealthy Mexican immigrants is significant; it cannot be understated.⁷⁰ Many wealthy immigrants obtain employment-based, fifth preference (EB-5) visas to enter the United

60. See *supra* notes 55–59 and accompanying text; see also Cisneros, *supra* note 57 (noting that Mariana Saldana, a Houston real estate agent who helped more than fifty Mexican families find homes in the Woodlands in 2011, has seen a change in her clients' preferences in recent years—“[t]hey're buying more expensive properties[,] . . . properties they're going to live in versus just a vacation home[.]”).

61. See *supra* notes 4–8 and accompanying text.

62. See Wiggin, *supra* note 4; Schwartz, *supra* note 5.

63. See generally Molly Hennessy-Fiske, *Wealthy, Business-Savvy Mexican Immigrants Transform Texas City*, L.A. TIMES (Mar. 24, 2013), <http://articles.latimes.com/2013/mar/24/nation/la-na-sonterrey-20130324> (describing some of the legal services rendered to wealthy Mexican immigrants in San Antonio, Texas).

64. See *supra* note 4 and accompanying text.

65. See *supra* note 4 and accompanying text.

66. See Jones, *supra* note 23; Padilla, *supra* note 41.

67. See Jones, *supra* note 23; Padilla, *supra* note 41.

68. See *supra* note 4 and accompanying text.

69. See *supra* note 4 and accompanying text.

70. See *infra* text accompanying notes 71–79.

States.⁷¹ If approved, an EB-5 visa grants foreigners, as well as their derivative family members, conditional permanent residency in the United States for a two-year period, which puts them on a path to gain their permanent resident status.⁷² From 2007 to 2011, the U.S. Citizenship and Immigration Services (USCIS) issued a total of one hundred fifty-seven EB-5 visas to Mexican immigrants, broken down as follows: six EB-5 visas in 2007; fifteen EB-5 visas in 2008; thirty-three EB-5 visas in 2009; fifty EB-5 visas in 2010; and fifty-three EB-5 visas in 2011.⁷³ At first glance, these numbers may seem small, but after taking into account the EB-5 visa requirements, the level of economic investment immediately becomes apparent.⁷⁴ To obtain an EB-5 visa, there are essentially two main requirements: a job creation requirement and a capital investment requirement.⁷⁵ First, to fulfill the job creation requirement, the foreigner must “[c]reate or preserve at least [ten] full-time jobs for qualifying U.S. workers within two years . . . of the immigrant investor’s admission to the United States as a Conditional Permanent Resident.”⁷⁶ Second, to satisfy the capital investment requirement, the foreigner must make a minimum investment of \$1 million, unless the foreigner makes a capital investment in a “targeted employment area,” which lowers the minimum investment requirement to \$500,000.⁷⁷ Based on simple arithmetic, this means that, at an absolute minimum, the one hundred fifty-seven EB-5 visas that the USCIS issued to Mexican immigrants between 2007 and 2011 generated nearly \$80 million.⁷⁸ The actual amount generated, however, is likely far greater than this amount because the calculation totaling \$80 million not only assumes that every immigrant solely invested in a targeted employment area, which lowers the

71. See Wiggin, *supra* note 4 (“Members of the Mexican elite are filing for EB-5 visas, which can grant the well-heeled financiers and their families green cards in exchange for investments in [certain] projects.”); see also *EB-5 Immigrant Investor*, U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor> (last updated July 3, 2012).

72. See *EB-5 Immigrant Investor Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-process> (last updated May 18, 2011).

73. See U.S. DEP’T OF STATE, REPORT OF THE VISA OFFICE 2007, at tbl. V, pt. 3 (2007), available at <http://www.travel.state.gov/pdf/FY07AnnualReportTableVp3.pdf>; U.S. DEP’T OF STATE, REPORT OF THE VISA OFFICE 2008, at tbl. V, pt. 3 (2008), available at [http://www.travel.state.gov/pdf/FY08-AR-TableV\(Part3\).pdf](http://www.travel.state.gov/pdf/FY08-AR-TableV(Part3).pdf); U.S. DEP’T OF STATE, REPORT OF THE VISA OFFICE 2009, at tbl. V, pt. 3 (2009), available at http://www.travel.state.gov/pdf/FY09AnnualReport_TableV_3.pdf; U.S. DEP’T OF STATE, REPORT OF THE VISA OFFICE 2010, at tbl. V, pt. 3 (2010), available at <http://www.travel.state.gov/pdf/FY10AnnualReport-TableV-PartIII.pdf>; U.S. DEP’T OF STATE, REPORT OF THE VISA OFFICE 2011, at tbl. V, pt. 3 (2011), available at <http://www.travel.state.gov/pdf/FY11AnnualReport-Table%20V-Part3.pdf>. In each report, the EB-5 visa statistics are located in the “Mexico” row, “5th Total” column.

74. See *EB-5 Immigrant Investor*, *supra* note 71 (explaining the capital investment requirements for EB-5 visas).

75. See *id.*

76. *Id.* (noting that an investor may only preserve ten full-time jobs in a troubled business and explaining what constitutes a qualified worker or employee). While there are a few specific requirements and specially defined terms, the essential component of the job creation requirement is the creation of ten full-time jobs. See *id.*

77. See *id.* (“A targeted employment area is an area that, at the time of investment, is a rural area or an area experiencing unemployment of at least 150 percent of the national average rate.”).

78. See *supra* notes 73–77 and accompanying text.

minimum investment threshold to \$500,000, but it also assumes that each immigrant investor only invested the \$500,000 minimum amount and nothing more.⁷⁹

While the aforementioned EB-5 visa statistics are not Texas-specific, there are several reasons to believe that a substantial number of EB-5 immigrant investments have taken place in Texas.⁸⁰ First, over the past few years, when compared to the rest of the United States, the Texas economy has been much stronger and more stable, making investments in Texas relatively more attractive.⁸¹

Second, there are thirty-three EB-5 Regional Centers in the State of Texas.⁸² A Regional Center is any economic unit, public or private, designated by the USCIS as eligible to receive investment capital from immigrant investors; investment through a Regional Center provides immigrant investors the added benefit of the more expansive concept of the job creation requirement, making it possible for them to count jobs created both directly and indirectly for the purposes of meeting the job creation requirement.⁸³ Essentially, Regional Centers recruit money flowing into the United States from EB-5 visas for investment purposes.⁸⁴ Regional Centers in Texas have been successful in recruiting such monies, especially from Mexican investors.⁸⁵ For example, from June 2010 to May 2011, the USA Now Regional Center, in McAllen, Texas, “raised \$90 million from 160 Mexican investors . . . and expect[ed] to have about 280 commitments by the year’s end”; by the end of 2011, the Star of Texas Regional Center, in Houston, Texas, “expect[ed] to land 100 Mexican investors [to] contribute to a \$70 million fund for projects [to] revitalize hurricane-damaged areas of Galveston Bay[.]”⁸⁶ Presumably, because EB-5 visa Regional Centers make the investment requirement more accessible to immigrant investors, more foreigners and more money are coming to Texas.⁸⁷

79. See *supra* notes 73–78 and accompanying text.

80. See *infra* notes 81–90 and accompanying text.

81. See Talmadge Heflin, *Why the Texas Economy is Booming*, DAILY CALLER (Mar. 5, 2012, 2:24 PM), <http://dailycaller.com/2012/03/05/why-texas-economy-is-booming>. From June 2009 to March 2012, “Texas’ economy . . . has added 357,400 jobs, almost triple the number of jobs produced by California, the state that has produced the second-most jobs since June 2009.” *Id.* Thus, the Texas economy has nearly created one of every four new jobs in our country since the recession officially ended. See *id.*

82. See *Immigrant Investor Regional Centers*, U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers> (last updated Dec. 11, 2013). It is important to note that this figure is subject to change; as of December 18, 2013, the date this site was last visited, there were thirty-three, USCIS-approved EB-5 regional centers in Texas. See *id.*

83. See *EB-5 Regional Center*, U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-regional-center> (last updated June 25, 2012); see also *EB-5 Immigrant Investor*, *supra* note 71.

84. See *EB-5 Regional Center*, *supra* note 83.

85. See, e.g., Wiggin, *supra* note 4.

86. *Id.*

87. See *supra* notes 82–86 and accompanying text.

Third, the large Mexican and Hispanic demographic in Texas also makes it an attractive destination for Mexican immigrants; having such a high percentage of Hispanics in the Texas population makes cultural assimilation and adjustments quicker and easier for immigrant investors.⁸⁸

Finally, while the international border between the United States and Mexico stretches approximately 2,000 miles, Texas makes up more than half of that border.⁸⁹ Texas' close proximity to Mexico, as well as its shared border, likely make it an attractive place for Mexican immigrants to resettle their families and businesses.⁹⁰

It is important to note that obtaining an EB-5 visa is only one of a number of different routes available to Mexican immigrants looking to move to Texas.⁹¹ The EB-5 visa method is simply a way that provides a certain level of concrete statistics and that targets wealthy foreigners, by recruiting them to invest their money in the United States, in exchange for temporary legal residency.⁹²

Apart from the EB-5 visa process and the different green card programs offered by the USCIS, there are additional ways in which Mexican money enters the United States.⁹³ For example, imagine a married Mexican couple comes to the United States in the mid-1970s, under a temporary visa, and while the couple is in the United States, the wife gives birth to a child. Soon after the wife gives birth, the couple returns to Mexico, with their newborn son. Now, fast forward to present day. Imagine the child is now in his late thirties or early forties, is still living in Mexico, and is running a very successful business—he either inherited it from his parents or created it on his own. All of his assets, as well as all of his business operations, are in Mexico. Unfortunately, however, because Mexico has become increasingly dangerous from all of the drug cartel violence, it is far too risky for him to stay in Mexico and continue raising his family and running his business. The fact that these cartels have started extorting his friends and his neighbors, even kidnapping their children, has exacerbated the risk.⁹⁴

88. See *State & County QuickFacts: Texas*, U. S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48000.html> (last updated June 27, 2013, 1:52 PM EDT) (indicating that persons of Hispanic or Latino origin comprised 38.2% of the Texas population in 2012).

89. See ROSENBLUM ET AL., *supra* note 3; SHARP, *supra* note 47; Whelan, *supra* note 4.

90. See ROSENBLUM ET AL., *supra* note 3; SHARP, *supra* note 47; Whelan, *supra* note 4.

91. See *Other Ways to Get a Green Card*, U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., <http://www.uscis.gov/green-card/other-ways-get-green-card> (last updated Apr. 16, 2013) (providing a list of different ways that immigrants can get their green card, which allows them to live and work permanently in the United States).

92. See, e.g., Janet Morrissey, *Visas-for-Dollars Program a Boon to Hotel Developers*, N.Y. TIMES, Sept. 7, 2012, at B5, available at http://dealbook.nytimes.com/2012/09/06/visas-for-dollars-program-a-boon-to-hotel-developers/?_r=0 (describing how Marriott Hotels have used the EB-5 visa program to raise capital for investments across the country). Essentially, because the investment is made to gain temporary residency, rather than primarily for financial purposes, the Marriott can offer low interest rates to investors. See *id.*

93. See *U.S. Citizenship*, U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., <http://www.uscis.gov/us-citizenship> (last updated Jan. 17, 2013).

94. See, e.g., Schwartz, *supra* note 5 (providing examples of how things like kidnapping, extortion, and violence have motivated wealthy Mexicans to leave Mexico).

Because the wealthy Mexican in the foregoing hypothetical was born in the United States, he has full citizenship there.⁹⁵ While his spouse and his children might not be United States citizens, because they are immediate relatives of a citizen, they can enter the United States and are eligible to obtain green cards.⁹⁶ In this type of scenario, the actual money and capital that this family brought into the United States was certainly not brought because of any green card or visa.⁹⁷ Nevertheless, the result is the same: the money that this family is reinvesting in the United States, possibly in Texas, is money that has been tied up in the Mexican economy for decades.⁹⁸ In effect, contrary to the scenario where a Mexican immigrant brings in the money through an EB-5 visa, here, we have a Mexican who already has full United States citizenship status bringing in the money.⁹⁹

E. Effects and Ramifications for Attorneys

The movement of a demographic, such as wealthy Mexicans, can significantly affect many things.¹⁰⁰ For example, a large amount of capital leaving Mexico is obviously not a good thing for the communities from which that capital is leaving.¹⁰¹ Some Mexican politicians have even argued that “the migration of Mexico’s biggest spenders [to the United States] could deal a serious blow to its economy—possibly spurring even more illegal immigration to the U.S.”¹⁰² When capital leaves Mexico, it must be reinvested elsewhere, and oftentimes, that reinvestment occurs in neighboring Texas.¹⁰³ While an increase in the number of Texas investments generally provides a boost to the state’s overall economy, the influx of capital, investors, and investments will have a positive impact on certain communities and industries throughout the state.¹⁰⁴ For example, in the legal industry, the demand for legal services will likely increase—new investors will need to hire attorneys to help them set up their new businesses, apply for business-related visas, and manage their investments.¹⁰⁵ But business-related legal services that are catered to setting

95. See U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

96. See *Green Card Through Family*, U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., <http://www.uscis.gov/green-card/green-card-through-family> (last updated May 13, 2011) (explaining that spouses and children of United States citizens can come into the country and obtain green cards because they are immediately related to the United States citizen).

97. See *id.*

98. See *id.*

99. See *supra* notes 95–98 and accompanying text.

100. See Wiggin, *supra* note 4.

101. See *id.*

102. *Id.*

103. See discussion *supra* Part I.D; see also Whelan, *supra* note 4. Regional Centers across Texas have been successful in recruiting Mexican immigrant investors. See *supra* text accompanying note 86.

104. See Wiggin, *supra* note 4 (demonstrating the large amount of money ready to be invested); see also Whelan, *supra* note 4 (explaining how various industries and communities in Texas have benefitted from the influx of Mexican immigrant investors and their investments).

105. See Schwartz, *supra* note 5; Hennessy-Fiske, *supra* note 63.

investments in the United States are not the only legal services that will increase in demand; estate planning attorneys are also likely to see a boom in business because most wealthy Mexican immigrants seem to be coming to Texas with intentions to permanently reside.¹⁰⁶

II. RELEVANT MEXICAN LAWS

The scope of laws potentially involved with moving an entire Mexican family, or even just an individual, and their wealth from Mexico to the United States appears practically limitless.¹⁰⁷ For example, immigration to the United States could potentially have implications on any of the following areas of law: tax; real estate; immigration; intellectual property; and estate planning.¹⁰⁸ For purposes of this discussion, however, the focus will primarily be on the tax and estate planning issues facing Mexican immigrants and the relevant laws that accompany those issues.¹⁰⁹

A. The Mexican Civil Law Tradition and Its Relevance to Client Communication

Any worthwhile analysis of issues between Mexico and the United States, such as cross-border transfer of wealth, is incomplete without at least a brief discussion of the Mexican civil law tradition.¹¹⁰ To gain a better understanding of Mexico's legal traditions and its system, it is helpful to use the United States' common law tradition as a point of reference.¹¹¹

First, the Mexican civil law system is similar to the legal systems in continental Europe, as well as those throughout Latin America.¹¹² The concept of judge-made law and stare decisis, as we know it in the United States, is a much weaker concept and is not nearly as important in Mexico's civil law system.¹¹³ In theory, this means that the legislature is the only body that can

106. See Schwartz, *supra* note 5; Hennessy-Fiske, *supra* note 63; see also *supra* Part I.

107. See KAMAL FATEHI, MANAGING INTERNATIONALLY: SUCCEEDING IN A CULTURALLY DIVERSE WORLD 366 (2008) (illustrating how international business can, on a very macro level, encompass a great range of issues).

108. See *id.* ("Although in the last few decades, we have witnessed the growth of an assortment of international agreements governing a variety of issues, the world remains primarily a community of nation-states, each with its own body of law, interests, and unique outlook.").

109. See *infra* Parts II.A–C, III–IV.

110. See generally STEPHEN ZAMORA ET AL., MEXICAN LAW 186–228 (2004) (providing a general discussion about Mexico's civil law tradition and explaining the historical progression of Mexico's legal system, including its current state and the types of developments that may come about in the future).

111. See Law Offices of Jaime B. Berger Stender, *Mexican Legal System Overview*, MEXONLINE.COM, <http://www.mexonline.com/lawreview.htm> (last visited Dec. 19, 2013) [hereinafter *Mexican Legal System*] (noting that one of the clearest distinctions between Mexico's civil law system and the United States' common law system is that the systems stem from different origins).

112. See *id.*

113. See *id.* ("Another traditional distinction between the two systems . . . is the importance of and reliance on case law precedent (a principle known as stare decisis) in the U.S. at both state and federal levels, compared with the sparse use of the case law in Mexico.").

make law.¹¹⁴ Theoretically, this results in a more rigid system that strikes a different balance between flexibility in the application of the law and predictability in the application of the law.¹¹⁵ Mexico's civil law tradition places a greater amount of emphasis on predictability in the application of the law, whereas the opposite is true in the United States' common law tradition.¹¹⁶ It is essential for practitioners in the United States to be mindful of this disparity because prospective Mexican clients will have a very different mindset from their American counterparts.¹¹⁷ A Mexican client's perception of not only what the actual law is, but also of its role and its application in society, will also be extremely different.¹¹⁸ It is essential American practitioners to be aware of this difference, especially if a meaningful attorney-client relationship transpires.¹¹⁹

B. Cultural Influence on Mexico's Legal System and Its Effect on Client Communication

Mexican culture has greatly influenced the Mexican legal system.¹²⁰ While this is not unlike that of the United States' common law system, oftentimes, people overlook the importance of this fact.¹²¹ To effectively communicate with a Mexican client, one must realize that Mexican culture and American culture emphasize distinct values and ideas and that certain norms

114. See SCH. OF LAW, UNIV. OF CAL. AT BERKELEY, *The Common Law and Civil Law Traditions*, in THE ROBBINS COLLECTION (2010), available at <http://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf> ("Civil Law . . . is codified. Countries with civil law systems have comprehensive, continuously updated legal codes that specify all matters capable of being brought before a court[.]"). The article explains how a judge's role in a civil law system is different than that in a common law system: "The judge's decision is consequently less crucial in shaping civil law than the decisions of legislators and legal scholars who draft and interpret the codes." *Id.*

115. See *Mexican Legal System*, *supra* note 111 ("[O]ne advantage of the Mexican legal system is that the full body of Mexican law . . . is more readily ascertainable and definable in Mexico than in the U.S. In the U.S.[.] lawyers and business people must supplement what a statute says by pouring over numerous cases interpreting the statute.").

116. See *id.*

117. See generally David Luhnow, *Presumption of Guilt*, WALL ST. J. (Oct. 17, 2009, 12:01 AM ET), <http://online.wsj.com/article/SB10001424052748704322004574475492261338318.html> (highlighting key differences in the Mexican legal system, such as detention "without an official warrant for up to [forty] days[.]").

118. See *id.* ("Unlike the U.S., Mexico's legal system has no jury trials. In the majority of cases, there are also no oral arguments, meaning lawyers don't stand in front of a judge to plead their client's case. Judges usually never meet the accused. Everything is done via paperwork.").

119. See *id.*

120. See *Mexican Legal System*, *supra* note 111 ("Mexico's legal system is also influenced by colonial law[.]" which includes "customs . . . that require[] the use of . . . elaborate writings associated with every important act of one's life, such as birth or marriage, and canon law, or religious law, issued by the Catholic Church.").

121. See generally Beth Hawkins, *Four States Deciding Gay-Marriage Issues, In Different Ways*, MINNPOST (Oct. 24, 2012), <http://www.minnpost.com/politics-policy/2012/10/four-states-deciding-gay-marriage-issues-different-ways> (demonstrating an example of how cultural issues interact with the law). Gay marriage debates are merely one example of the many issues that force culture and the law to collide. See *id.*

are different between the two cultures.¹²² American attorneys must realize that cultural differences exist, must identify the major cultural differences relevant to their specific area of law, and finally, they must always consciously take into account those differences when interacting with their clients.¹²³ Without conscious recognition of cultural differences, a gap in communication between a client and an attorney can quickly develop, which could potentially lead to poor representation.¹²⁴

C. Mexican Estate Tax, or Lack Thereof

It is essential to understand how Mexican clients will likely react when they learn about the estate tax in the United States.¹²⁵ The first and most important thing to realize is that there is not an estate tax or death tax in Mexico analogous to that employed in the United States.¹²⁶ Simply stated, Mexico does not have an estate tax.¹²⁷ Because Mexico and the United States handle estate taxes differently, the estate tax in the United States will likely come as a surprise to most Mexican immigrants.¹²⁸ There is a good chance that these individuals will find this tax invasive, and as a result, they may strongly resist it.¹²⁹ This is the exact type of situation where it is absolutely essential for an American attorney to be conscious of the legal and cultural differences that exist between the United States and Mexico.¹³⁰

III. RELEVANT U.S. LAWS

The Internal Revenue Service (IRS) is the primary government authority that American attorneys will work with when setting up estate plans for their

122. See generally Jonathan A. Pikoff & Charles J. Crimmins, *Lost in Translation: Texas Notary Public v. Mexico Notario Publico*, PIKOFF LAW, <http://www.pikofflaw.com/news.php?id=1> (last visited Dec. 19, 2013) (providing an example of how the different legal cultures of Mexico and the United States offer different roles for seemingly the same person within the legal field). In this situation, a misunderstanding by an American attorney and Mexican client can easily occur due to the fact that the messages that each party conveys is easily lost in translation. See *id.*

123. See *id.*

124. See *id.*

125. See INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, OMB NO. 1545-0015, FORM 706: UNITED STATES ESTATE (AND GENERATION-SKIPPING TRANSFER) TAX RETURN (rev. Aug. 2013) [hereinafter FORM 706], available at <http://www.irs.gov/pub/irs-pdf/f706.pdf> (indicating that Form 706 is for citizens and residents of the United States); see also INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, CAT. NO. 16779E, INSTRUCTIONS FOR FORM 706 (rev. Aug. 2013) [hereinafter INSTRUCTIONS FOR FORM 706], available at <http://www.irs.gov/pub/irs-pdf/i706.pdf> (providing information such as the following: which estates must file a return; how to calculate gross estate; citizens or residents versus noncitizens; nonresident tax liability; a list of forms that may be applicable for a particular estate; and many other helpful instructions for people inquiring about the estate tax).

126. See ZAMORA ET AL., *supra* note 110, at 503 (“[I]n contrast with the United States, Mexico has no estate tax, either at the federal, state, or municipal level. This may help to explain the relative concentration of wealth in Mexico.”).

127. See *id.*

128. See *id.*

129. See *id.*

130. See discussion *supra* Part II.A–B.

Mexican immigrant clients.¹³¹ Thus, most of the discussion in Part III focuses on the application of various IRS forms and their implications for purposes of tax liability.¹³²

A. Domiciled v. Non-Domiciled Status

With respect to estate tax liability for noncitizens, the consequences differ depending on whether the noncitizen establishes domicile in the United States.¹³³

Courts use a two-question test to determine domicile.¹³⁴ The first question is whether the person is physically present in the United States.¹³⁵ The second question is whether that person, uninterrupted by other intention, intends to stay in the United States indefinitely.¹³⁶ If at any point in the past the answers to these two questions were simultaneously a yes, then domicile is in the United States.¹³⁷ For example, in *Estate of Nienhuys v. Comm'r*, the court decided that the decedent's domicile was in the Netherlands.¹³⁸ The deceased left the Netherlands during World War II and was unable to return due to Nazi occupation.¹³⁹ However, the court found that, "[a]t all times after the decedent arrived in the United States in 1940[,] he desired to and intended to return to Holland and [wanted] to resume his business and social activities in that country."¹⁴⁰ Thus, "[t]he decedent's domicile at the time of his death was in [t]he Netherlands, and he was a nonresident of the United States within the meaning of the Federal estate tax statutes."¹⁴¹

While courts utilize the two-question test to determine one's domicile, the following question still remains: Why is domicile status an important consideration when dealing with estate tax liability? Essentially, if a person is deemed a non-domiciliary of the United States, then, upon death, the law limits that person's estate tax liability only to property located within the United

131. See generally *Filing Information for Estate & Gift Taxes*, INTERNAL REVENUE SERV., <http://www.irs.gov/Filing/Estate-&Gift-Taxes> (last updated Sept. 3, 2013) (providing hyperlinks to pages that contain the following types of information related to estate and gift taxes: general information related to filing estate and gift tax returns; specific information about gift taxes; specific information about estate taxes; general information about when estate and gift taxes apply; and IRS forms and publications for estate and gift taxes).

132. See discussion *infra* Part III.A–C.

133. See *infra* notes 142–149 and accompanying text.

134. See *Estate of Nienhuys v. Comm'r*, 17 T.C. 1149, 1159 (1952) ("To constitute the new domicile two things are indispensable: First, residence in the new locality; and, second, the intention to remain there." (quoting *Mitchell v. United States*, 88 U.S. (21 Wall.) 350, 353 (1874))).

135. See *id.*

136. See *id.* at 1159–61.

137. See *id.* at 1159 ("Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicile for another. Until the new one is acquired, the old one remains." (quoting *Mitchell*, 88 U.S. at 353))).

138. *Id.* at 1153.

139. *Id.* at 1149–53.

140. *Id.* at 1153.

141. *Id.*

States.¹⁴² For final estate tax liability purposes, however, estates of nonresident, alien decedents that are situated in the United States are not only entitled to certain deductions, but are also allowed a unified tax credit.¹⁴³ Generally, the maximum unified tax credit available to a nonresident alien's estate is \$13,000.¹⁴⁴ However, the maximum unified tax credit available for citizens of United States possessions "is the greater of \$13,000 or [t]he product of \$46,800 times a fraction"; the fraction is broken down as follows: "The numerator . . . is the part of the gross estate located in the United States[,] . . . and the denominator is the entire gross estate[,] wherever located."¹⁴⁵ In general, this means that the first \$60,000 of the non-domiciled alien's gross estate that is located in the United States will be exempt from tax liability.¹⁴⁶

On the other hand, if the law deems a person a domiciliary of the United States, then all of that person's assets, regardless of location, will be subject to estate tax liability.¹⁴⁷ In other words, at death, that person's worldwide estate will be subject to the estate tax.¹⁴⁸ Furthermore, the United States grants a \$5.25 million estate tax exemption for a domiciliary, as opposed to only a \$60,000 estate tax exemption for a non-domiciliary.¹⁴⁹

142. See INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, OMB No. 1545-0531, FORM 706-NA: UNITED STATES ESTATE (AND GENERATION-SKIPPING TRANSFER) TAX RETURN (rev. Aug. 2013) [hereinafter FORM 706-NA], available at <http://www.irs.gov/pub/irs-pdf/f706na.pdf> (indicating that Form 706-NA is for nonresident, non-citizens of the United States); see also INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, CAT. NO. 63118N, INSTRUCTIONS FOR FORM 706-NA, at 1-5 (rev. Aug. 2013) [hereinafter INSTRUCTIONS FOR FORM 706-NA], available at <http://www.irs.gov/pub/irs-pdf/i706na.pdf>. "A nonresident alien decedent is a decedent who is neither domiciled in nor a citizen of the United States at the time of death." INSTRUCTIONS FOR FORM 706-NA, *supra*, at 1. Thus, domicile is the controlling factor in establishing estate tax liability for nonresident aliens. See *id.* When analyzed in conjunction, Form 706-NA and the Instructions for Form 706-NA make clear that one's gross estate located outside of the United States is not subject to the estate tax for non-domiciled, nonresident individuals. See FORM 706-NA, *supra*, at 1-2; INSTRUCTIONS FOR FORM 706-NA, *supra*, at 3-6. "[T]he value of the gross estate of every decedent nonresident not a citizen of the United States shall be that part of his gross estate . . . which at the time of his death is situated in the United States." I.R.C. § 2103 (West 2012).

143. See INSTRUCTIONS FOR FORM 706-NA, *supra* note 142, at 2-6; see also Omer Harel, *Rethinking the U.S. Estate Tax on Nonresident Aliens*, 64 TAX NOTES INT'L 77, 78-79 (Oct. 3, 2011) (indicating that, to arrive at the nonresident alien's final estate tax liability, the estate is entitled to certain deductions, and additionally, the estate is allowed a unified tax credit).

144. See INSTRUCTIONS FOR FORM 706-NA, *supra* note 142, at 5.

145. *Id.* (laying out specific calculation instructions under Part II, "Tax Computation").

146. See Harel, *supra* note 143, at 79 ("Generally the unified credit exempts the first \$60,000 of the taxable estate from taxation.").

147. See INSTRUCTIONS FOR FORM 706, *supra* note 125, at 2 (stating that FORM 706 indicates that the gross estate subject to taxation "includes all property in which the decedent had an interest (including real property outside the United States)."). When Form 706 and the Instructions for Form 706 are analyzed in conjunction, one can establish that the value of the entire estate, wherever located, is subject to tax liability. See FORM 706, *supra* note 125; INSTRUCTIONS FOR FORM 706, *supra* note 125; see also Harel, *supra* note 143, at 78 ("The United States generally taxes the estates of its citizens or residents on a worldwide basis without regard to the situs of each particular asset."). In general, Form 706 is applicable to citizens of the United States, as well as those who are domiciled in the United States at time of death. See INSTRUCTIONS FOR FORM 706, *supra* note 125, at 2.

148. See Harel, *supra* note 143, at 78.

149. See INSTRUCTIONS FOR FORM 706, *supra* note 125, at 2 ("For decedents who died in 2013, Form 706 must be filed by the executor of the estate of every U.S. citizen or resident . . . [w]hose gross estate, plus adjusted taxable gifts and specific exemption, is more than \$5,250,000[.]"); Harel, *supra* note 143, at 79 (indicating that a non-domiciliary will generally have a \$60,000 estate tax exemption); see also I.R.C.

B. Resident v. Nonresident Status

Residency status also affects a Mexican immigrant's exposure to tax liability in the United States; specifically, whether a noncitizen is classified as a resident or a nonresident largely impacts that person's income tax liability.¹⁵⁰ From the perspective of an estate planning attorney, it is important to be mindful of the characteristics of each client's particular financial portfolio, as well as the different methods that determine tax liability.¹⁵¹ Without a conscious awareness of the methods that determine estate tax liability (domicile) and income tax liability (residency), it is impossible to achieve the client's lowest legal, federal tax liability.¹⁵²

Generally, the substantial presence test determines residency—to be considered a resident of the United States for tax purposes, a person must satisfy this test.¹⁵³ To meet the substantial presence test, a person “must be physically present in the United States on at least . . . [thirty-one] days during the current year, and . . . 183 days during the [three]-year period that includes the current year and the [two] years immediately before that, counting” all of the days that the person was present in the United States during the current year, one-third of the days that the person was present in the United States during the year before the current year, and one-sixth of the days that the person was present in the United States during the second year before the current year.¹⁵⁴ However, if the United States deems a Mexican citizen a resident of both the United States and Mexico for tax purposes, then the center of vital interests test determines the Mexican citizen's residency status.¹⁵⁵

If a noncitizen is a resident alien of the United States, then that person's worldwide income is subject to taxation.¹⁵⁶ On the other hand, if a noncitizen is

§ 2010(c)(3) (West 2012) (noting that the basic exclusion amount for estates of United States citizens or residents is \$5,000,000 and explaining that this amount must be adjusted each year to account for inflation).

150. See *infra* notes 156–57 and accompanying text.

151. See *infra* notes 152–57 and accompanying text.

152. See discussion *infra* Part IV.A–B.

153. See INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, CAT. NO. 11368V, INSTRUCTIONS FOR FORM 1040NR, at 2 (Mar. 8, 2013) [hereinafter INSTRUCTIONS FOR FORM 1040NR], available at <http://www.irs.gov/pub/irs-pdf/i1040nr.pdf> (assuming that the person does not have a green card and is in the United States under a different legal scheme).

154. *Substantial Presence Test*, INTERNAL REVENUE SERV., <http://www.irs.gov/Individuals/International-Taxpayers/Substantial-Presence-Test> (last updated Apr. 17, 2013). On average, if a person is physically present in the United States for 122 days during the current filing year, as well as during the first and second years before the current filing year, that person satisfies the substantial presence test, and the law deems that person a resident of the United States. See *id.*

155. See Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Mex., art. 4, Sept. 18, 1992, 1994-34 I.R.B. 4 (stating that when a person is considered a resident of both the United States and Mexico and has a permanent home in both countries, then “he shall be deemed to be a resident of the State with which his personal and economic relations are closer[.]”).

156. See INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, CAT. NO. 15023T, PUBLICATION 519: U.S. TAX GUIDE FOR ALIENS, at 1, 17 (Mar. 7, 2013), available at <http://www.irs.gov/pub/irs-pdf/p519.pdf> (“Resident aliens are generally taxed in the same way as U.S. citizens. This means that their worldwide income is subject to U.S. tax and must be reported on their U.S. tax return.”).

a nonresident alien of the United States, then only that person's "income from sources within the United States and . . . income connected with the conduct of a trade or business in the United States" is subject to taxation.¹⁵⁷

The importance of considering residency, especially residency in conjunction with estate taxes, will be discussed later, in more depth.¹⁵⁸

C. Foreign Account Tax Compliance Act and Its Counterpart, T.D. 9584

In 2010, Congress enacted the Foreign Account Tax Compliance Act (FATCA) to try to combat tax evasion by individuals who purposefully fail to report to the IRS the income they transfer into offshore bank accounts.¹⁵⁹ Because FATCA did not take effect until January 1, 2013, a few of its ramifications are still relatively uncertain.¹⁶⁰ For example, according to one newspaper, "[r]umours [sic] in the market say that some fund managers and banks might refuse to accept [U.S.] clients. Others, however, are adapting to comply with the new rules."¹⁶¹ This reference to some of the rumors floating around the financial industry is a good indicator that there are not only uncertainties surrounding FATCA's implementation, but there are also uncertainties relating to FATCA's effects.¹⁶²

FATCA induces foreign banks to report information to the IRS about Americans who have accounts at their banks.¹⁶³ Section 1471(a) of the Internal Revenue Code states as follows: "In the case of any withholdable payment to a foreign financial institution which does not meet the requirements of subsection (b), the withholding agent with respect to such payment shall deduct and withhold from such payment a tax equal to 30 percent of the amount of such payment."¹⁶⁴ Subsection (b), "Reporting Requirements," makes clear that foreign banks that do not report to the IRS any and all accounts held by Americans in their banks are subject to the withholding penalty set out in

157. *Id.* at 1. "A nonresident alien's income that is subject to U.S. income tax must be divided into two categories: 1. Income that is effectively connected with a trade or business in the United States, and 2. Income that is not effectively connected with a trade or business in the United States." *Id.* at 17.

158. See discussion *infra* Part IV.B.

159. See Robert W. Wood, *IRS Implements FATCA, Ramps Up Tax Evasion Battle*, FORBES (Jan. 19, 2013, 8:49 AM), <http://www.forbes.com/sites/robertwood/2013/01/19/irs-implements-fatca-ramps-up-tax-evasion-battle> ("FATCA is not popular with financial institutions, Americans abroad or foreign governments Enacted in 2010, FATCA targets non-compliance by U.S. taxpayers using foreign accounts."). Wealthy Mexican immigrants in the United States are also unhappy with the effects of FATCA. See discussion *infra* Part IV.C.

160. See generally Sophie Baker, *Ten Things You Need to Know About FATCA*, FIN. NEWS (Jan. 23, 2013), <http://www.efinancialnews.com/story/2013-01-23/ten-things-you-must-know-fatca> (using questions and answers to explain what types of effects FATCA might have on markets in the United States). While some of FATCA's effects are clear and straightforward, others are not so certain; for example, when a question was posed about whether FATCA would cause financial institutions in the United States to withdraw from the client market, the answer was "[p]otentially." See *id.*

161. *Id.*

162. See *supra* notes 160–61 and accompanying text.

163. See I.R.C. § 1471 (West 2012).

164. *Id.* § 1471(a).

subsection (a).¹⁶⁵ Subsection (c) details information that foreign financial institutions are required to report to the IRS.¹⁶⁶ Such information includes the following: the account holder's name, address, and account number; the account balance or the value of the account; and any gross receipts, withdrawals, or payments made on the account.¹⁶⁷ The requirements in this subsection force banks to reveal a lot of information about their American account holders to the IRS, and although this is the basic scheme of FATCA, it only tells half of the story.¹⁶⁸

The United States Government and the IRS implemented T.D. 9584, Guidance on Reporting Interest Paid to Nonresident Aliens, a regulation designed to enforce tax laws by inducing other governments to adopt similar laws, which would result in the creation of formal agreements that allow information exchange about bank accounts.¹⁶⁹ Essentially, T.D. 9584 requires United States banks with accounts held by Mexican citizens to disclose information about their Mexican citizen account holders to the IRS; the IRS would then turn that information over to the appropriate tax enforcement body in Mexico.¹⁷⁰ According to an IRS bulletin, T.D. 9584 "contains final regulations regarding the reporting requirements for interest that relates to deposits maintained at U.S. offices of certain financial institutions and is paid to certain nonresident alien individuals."¹⁷¹

Additionally, the IRS is upfront with the purpose and the motivation behind T.D. 9584: "The reporting required by these regulations is essential to the U.S. Government's efforts to combat offshore tax evasion."¹⁷² The bulletin also explains why it is important that the current laws attempt to allow the IRS to receive information about accounts held by Americans, in foreign banks, in foreign countries.¹⁷³ Finally, the bulletin highlights the need for reciprocal exchange of bank account information with foreign jurisdictions for tax enforcement purposes—"the effectiveness of these measures depends significantly, however, on the United States' ability to reciprocate."¹⁷⁴

The basic result of T.D. 9584 is similar to the results of FATCA; the only difference is that T.D. 9584 targets domestic banks with foreign account holders, whereas FATCA targets foreign banks with American account

165. *Id.* § 1471(b).

166. *Id.* § 1471(c).

167. *Id.*

168. *See id.*

169. *See* T.D. 9584, 2012-20 I.R.B. 900, available at <http://www.irs.gov/pub/irs-irbs/irb12-20.pdf>.

170. *See id.*

171. *Id.* ("These regulations will affect commercial banks, savings institutions, credit unions, securities brokerages, and insurance companies that pay interest on deposits.").

172. *Id.*

173. *See id.* ("[I]t ensures that the IRS can . . . exchange information relating to tax enforcement with other jurisdictions. In order to ensure that U.S. taxpayers cannot evade U.S. tax by hiding income and assets offshore."). Although the bulletin does not explicitly reference FATCA, it is quite clear that FATCA is what the IRS is alluding to. *See id.*

174. *Id.*

holders.¹⁷⁵ The impact of these regulations on wealthy Mexicans who have recently moved to Texas, as well as how an attorney should proceed with such clients, is discussed in greater detail, below.¹⁷⁶

IV. ANALYSIS: WHAT IT ALL MEANS FOR THE PRACTITIONER

A. *Domiciled v. Non-Domiciled: Consequences and Ethical Considerations*

Attorneys must try to ascertain as much information as possible about the long-term living plans of their Mexican immigrant clients.¹⁷⁷ The extent that Mexican immigrants plan on transplanting themselves, their families, and their businesses to the United States can have widespread estate tax ramifications.¹⁷⁸ Providing competent legal representation requires attorneys to explain to their Mexican immigrant clients how domicile status impacts estate tax liability for noncitizens.¹⁷⁹

If, for example, an attorney has a Mexican immigrant client who recently moved to Texas but is unsure whether the move is permanent or temporary, the attorney should advise this client of the estate tax consequences of domicile because these consequences could potentially be a determining factor in the client's decision about the permanency of the move.¹⁸⁰ Advising Mexican clients of estate tax consequences is especially important for attorneys whose Mexican clients maintain business operations in Mexico, or anywhere other than the United States, but are looking to start up a new business in Texas.¹⁸¹ There are a number of reasons why recent Mexican immigrants may be unsure about whether their move will be permanent or temporary; for example, they could anticipate returning to Mexico if the cartel violence subsides, or they could anticipate returning to Mexico after their children graduate from high school.¹⁸²

Thus, if Mexican clients maintain substantial assets outside of the United States and are unsure whether their move to the United States will be permanent—this would determine their domicile and establish their estate tax liability—they may decide to eventually return to Mexico, upon discovery of the expanded estate tax liability in the United States.¹⁸³ On the other hand, if Mexican clients have permanently moved all of their family members, as well as all of their assets, including most of those held internationally, out of Mexico and into Texas, the question of domicile is less important.¹⁸⁴ This is because

175. See *id.*; see also *supra* notes 163–67, 170–71 and accompanying text.

176. See discussion *infra* Part IV.C.

177. See discussion *supra* Part III.

178. See discussion *supra* Part III.A.

179. See discussion *supra* Part III.A.

180. See discussion *supra* Part III.A.

181. See discussion *supra* Part II.C.

182. See Whelan, *supra* note 4.

183. See discussion *supra* Parts II.C, III.A.

184. See discussion *supra* Part III.A.

the estate tax applies to assets held in the United States, regardless of domicile status.¹⁸⁵

Additionally, before advising Mexican immigrant clients about the consequences of domicile status, attorneys must be aware of important ethical issues that could arise.¹⁸⁶ On one hand, it is unethical to advise a client to evade taxes that an attorney knows should be paid.¹⁸⁷ On the other hand, it is necessary for an attorney to inform clients of all tax ramifications associated with certain actions.¹⁸⁸ However, such activities that determine domicile should not be illusory; rather, they should be made with real intention, at least to the extent that an attorney can best evaluate.¹⁸⁹ Realistically, while it is not possible to determine with 100% certainty exactly what clients might be thinking or planning, it is, however, both possible and necessary for an attorney to encourage clients to make decisions in good faith and that comply with the laws of the United States.¹⁹⁰ Thus, attorneys should not only advise their clients about all of the potential estate tax consequences associated with one's domicile status, but they should also encourage their clients to make good faith decisions that comply with the law.¹⁹¹

B. Resident v. Nonresident: Reducing Overall Tax Liability in Light of Estate Planning Decisions

Many of the considerations surrounding a Mexican citizen's residency status for income tax purposes are analogous to those surrounding a Mexican citizen's domicile status for estate tax purposes.¹⁹² Because the emphasis of this article is on estate planning, the following discussion will focus on ways in which estate planning attorneys can advise their clients to best decrease overall tax liability, only after they make a decision about domicile.¹⁹³

To begin this discussion, it is helpful to build upon the example given in the previous section—a Mexican immigrant client maintaining assets in both Mexico and Texas.¹⁹⁴ When advising Mexican immigrant clients, attorneys should first explain how residence is determined under the laws of the United States, and then, attorneys should describe how residence can affect their

185. See discussion *supra* Part III.A.

186. See TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (TEX. STATE BAR R. art. X, § 9).

187. See *id.* at 1.02(c) ("A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent.").

188. See *id.* ("A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.").

189. See *id.*

190. See *id.*

191. See *supra* notes 186–90 and accompanying text.

192. See discussion *supra* Part IV.A.

193. See *infra* notes 194–200 and accompanying text.

194. See discussion *supra* Part IV.A.

income tax liability.¹⁹⁵ If clients maintain strong ties to their business in Mexico after moving with their families to Texas and if they travel frequently between Mexico and Texas, then it may be advantageous for them to maintain nonresident status.¹⁹⁶ This may mean that a Mexican client spends extra time outside of the United States, but if this added time is marginal and the decrease in income tax liability substantial, then such sacrifice may be one worth making.¹⁹⁷ This scenario allows Mexican immigrant clients to operate businesses in both Mexico and the United States, keep their families safe in the United States, and lower their income taxes.¹⁹⁸ This obviously, however, depends on how often a client travels outside of the country to conduct business.¹⁹⁹

When Mexican immigrant clients undertake a more substantial move to the United States, abandoning all or nearly all of their business in Mexico and other foreign countries, then their residency status will be less of a concern because they will likely establish residency fairly easily.²⁰⁰

C. FATCA and Its Progeny, T.D. 9584: Negative Effects for Estate Planners

The increasing number of wealthy Mexican immigrants directly impacts the demand for estate planning attorneys in Texas; specifically, there will be an increase in the demand for these attorneys because, not only will Texans need estate planning services, but Mexican immigrants in Texas will also need them as well.²⁰¹ Much of this increase in business for estate planning attorneys, however, could potentially be undermined by the implementation of FATCA and T.D. 9584.²⁰² In particular, T.D. 9584 makes Texas a much less desirable destination for wealthy Mexicans leaving Mexico.²⁰³ The reporting requirements set out by T.D. 9584 put Mexican immigrants at risk; if Mexican governmental authorities ask the IRS for information about deposit accounts held by Mexican citizens at Texas banks and that information is later leaked to cartels, then “some . . . nonresidents will just move their money [out of Texas banks,] rather than risk kidnapping violence or extortion they believe will follow the new rule.”²⁰⁴

195. See TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(c).

196. See discussion *supra* Parts III.B, IV.A.

197. See discussion *supra* Part III.B.

198. See discussion *supra* Part III.A–B.

199. See discussion *supra* Part III.B.

200. See *id.*

201. See discussion *supra* Parts I.C, I.E.

202. See discussion *supra* Part III.C.

203. See discussion *supra* Part III.C.; see also David Hendricks, *Texas Banks Could See Mexicans Pull Money*, HOUS. CHRON. (Apr. 18, 2012), <http://www.chron.com/business/article/Texas-banks-could-see-Mexicans-pull-money-3493165.php>.

204. Hendricks, *supra* note 203.

As long as T.D. 9584 remains in effect, the increase in demand for estate planning attorneys that stems from wealthy Mexican immigrants will be directly undermined—Texas will lose much of its appeal to Mexican immigrants looking for a new place to settle, and as a result, Texas attorneys will miss out on the possibility of expanding their clientele bases by retaining these Mexican immigrant clients.²⁰⁵ Alienating a large group of wealthy individuals will not only be detrimental to the Texas economy in general, but it will also, and more specifically, be detrimental to estate planning attorneys and tax attorneys in the State of Texas.²⁰⁶ Thus, it is directly beneficial for Texas estate planning attorneys as a group, as well as the Texas legal profession as a whole, to oppose T.D. 9584.²⁰⁷

V. CONCLUSION

The most important thing for estate planning attorneys to notice is that, given the current situation in Mexico, the nature of effective planning for Mexican immigrants encompasses many factors beyond planning for Texans or even planning for other international clients.²⁰⁸ First, attorneys must consider their clients' motivations for moving out of Mexico.²⁰⁹ Second, it is important for attorneys to ask their clients whether they intend to stay in the United States permanently.²¹⁰ Third, attorneys must evaluate the nature and balance of their clients' assets in the United States, versus abroad, as well as the level of involvement their clients have with such assets.²¹¹ Fourth, attorneys must recognize whether the financial decisions made in the United States affect the safety of their clients' families.²¹² Fifth, attorneys must realize the potential for communications with their clients to get lost in translation.²¹³ Finally, when advising clients, attorneys must keep in mind any ethical obligations that could expose them to malpractice.²¹⁴ When dealing with Mexican clients in the estate planning and tax liability arena, these considerations are customary for attorneys and are essential to effective representation for their Mexican clients.²¹⁵ Although business for attorneys will likely increase, the nature of their representation will undoubtedly take on a different flavor as well.²¹⁶

Estate planning attorneys must also be aware of legislative changes that may affect their business.²¹⁷ While understanding changes in the law that best

205. See text accompanying notes 201–04; see also discussion *supra* Parts I.C–E, III.C.

206. See *supra* notes 204–05 and accompanying text.

207. See *supra* text accompanying notes 201–06; see also discussion *supra* Parts I.C–E, III.C.

208. See discussion *supra* Part I.C; see also *infra* text accompanying notes 209–14.

209. See discussion *supra* Part I.C.

210. See discussion *supra* Parts III.A–B, IV.A–B.

211. See discussion *supra* Parts III.A–B, IV.A–B.

212. See discussion *supra* Part IV.C.

213. See discussion *supra* Part II.A–B.

214. See *supra* notes 186–91 and accompanying text.

215. See *supra* Parts II–IV.

216. See discussion *supra* Part I.E.

217. See *supra* Parts I.E, II.A.

serve their clients' interests is an obvious and indispensable part of effective representation for attorneys, it is important to realize that legislative changes will likely have a direct effect on the demand for legal services.²¹⁸ In this sense, attorneys will become much like any other group of individuals with shared economic, business interests.²¹⁹ Attorneys with such economic interests are well within their rights to demand changes from their political representatives that will benefit them economically.²²⁰ The political response will likely be proportionate to the level of constituent support.²²¹ Repeal of T.D. 9584, or at a minimum, substantial reform thereof, will likely cause the demand for legal services provided by estate planning attorneys to increase.²²² Thus, taking action through the political process to bring about such repeal is encouraged.²²³

218. See *supra* Parts III.C, IV.C.

219. See discussion *supra* Part I.E.

220. See *supra* Part IV.C.

221. See generally ZAMORA ET AL., *supra* note 110 (giving a general explanation for the progression of Mexico's legal system and discussing where it is headed in the future).

222. See *supra* Part IV.C.

223. See *supra* Part IV.C.