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### **GLOBAL TRENDS ON CITIZENSHIP AND NATIONALITY**

### **ACQUISITION OF CHINESE NATIONALITY IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION AND EXPATRIATION UNDER U.S. LAW**

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## **ACQUISITION OF CHINESE NATIONALITY IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION AND EXPATRIATION UNDER U.S. LAW**

The immigration landscape has evolved a great deal since the writer first began to specialize in the practice of immigration law more than 35 years ago, when he became member 229 of the now 11,500-strong American immigration lawyers Association.

Among the desirable immigration destinations which included stable Western democracies such as Canada, Australia, the United Kingdom, and New Zealand, the United States was then the "Holy Grail" of immigration jurisdictions. With its stable democracy, robust economy, top educational system, high quality of life and abundant employment opportunities, people from all over the world flocked to the United States in pursuit of the "American Dream".

However, since 2008, as a result of the global financial crisis led by the meltdown of the U.S. economy stemming from the bursting of the U.S. housing bubble, the over-valuation of subprime mortgages, and the threat of total collapse of financial institutions and the ensuing global recession and deteriorating economic conditions in many of the western economies, many wealthy and successful businessmen in Asia no longer contemplate emigration to the west, and especially not to the U.S. Instead, they seek citizenship in a jurisdiction with lenient or no residency requirements for citizenship as a hedge against political uncertainties in their home countries as an alternative to uprooting themselves to actually settle in a destination country.

For these businessmen, and for U.S. citizens who have settled in Hong Kong or have been on extended employment assignments here, the acquisition of permanent residency or "right of abode" in Hong Kong and Chinese nationality and a Hong Kong SAR Passport have become increasingly attractive options even though Hong Kong permanent residency requires seven years of continuous "ordinary residence".

With its proximity to Mainland China and its low tax regime, Hong Kong, a Special Administrative Region ("Hong Kong SAR") of the People's Republic of China, is a strategic gateway to the many business opportunities in Mainland China. In addition to its well-established infrastructure, the Hong Kong SAR is a free economy with a simple and low tax regime. It has no capital gains tax, no tax on dividends and interest income from bank deposits, no sales tax, and no estate tax. The corporate tax rate on assessable profits of corporations is 16.5% and the standard salaries tax, at 15%, is among the lowest in the world.

Many American professionals in the banking and financial industry, as well as entrepreneurs and investors, have settled in Hong Kong as it is a global financial center with a world-class transport infrastructure, port management, and logistics services. Some of these executives and businessmen are native-born Americans while others are skilled professionals originally from Taiwan, Mainland China, Korea, and India who had settled in the U.S. after their studies and became naturalized U.S. citizens who have been assigned by their multinational employers to work in Hong Kong.

These Americans are taking a hard look at the costs and benefits of keeping their U.S. citizenship and contemplate acquiring another nationality if they are not already dual nationals so as not to be rendered stateless should they decide to relinquish U.S. citizenship.

Hong Kong is attractive as, in addition to its low tax regime, it only taxes its residents on profits from a Hong Kong source, unlike the U.S., which taxes its citizens on a worldwide basis. The U.S. system of taxation is unique in that it taxes its citizens and persons with U.S. lawful permanent resident ("green card") status on worldwide income regardless of their actual place of residence. Almost all other countries in the world taxes its citizens on a territorial basis, i.e., only if they are resident within that country's territory.

While the recent shutdown of the U.S. government to avoid a U.S. government default has resulted in the temporary raising of the US\$16.7 trillion debt limit through February 7, 2014 so that the U.S. can continue paying its creditors, regardless of what budgetary compromise is eventually brokered with the Republicans in the House of Representatives, it is highly likely that the Obama Administration will have to increase taxes to deal with the United States' growing deficit which, according to the Treasury Department, was US\$755.3 billion for the 11 months through the fiscal year ending September 30, 2013.

This, coupled with the fact that Americans residing abroad are required to file U.S. income tax returns and complicated information returns which carry costly penalties<sup>1</sup> even if they have little or no tax obligations due, have been the impetus for an increasing number of Americans to consider renouncing their U.S. nationality if they have no intention to return to the U.S.

In Hong Kong, there are also many "returnees", persons originally from Hong Kong who had left for the U.S. because of the fear of communist rule in the lead-up to 1997 who have returned to pursue careers in Hong Kong. These returnees, although naturalized U.S. citizens, may still be Chinese nationals under Article 4 of the Nationality Law of the People's Republic of China (hereinafter "the Nationality Law") and qualify for a Hong Kong SAR passport if they were born in Hong Kong to a Chinese national or are Chinese nationals who moved to Hong Kong from Mainland China and acquired the right of abode or permanent residency in Hong Kong by being "ordinarily resident" in Hong Kong for seven continuous years before emigrating to the U.S.

#### **ACQUISITION OF CHINESE CITIZENSHIP BY BIRTH IN CHINA**

Under Article 4 of the Nationality Law of the People's Republic of China (hereinafter, "the Nationality Law"):

*Any person born in China whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality.*

The People's Republic of China has always considered Hong Kong as part of China. Thus, a person born in Hong Kong, whether before or after the handover in 1997, is regarded by the People's Republic of China as a person born in China and will be deemed to be a Chinese national if either of his parents was a Chinese national under the Chinese Nationality Law in force at the time of his parent/parents' birth.

Persons who have Chinese nationality under the Chinese Nationality Law thus include Hong Kong residents and former permanent residents of Hong Kong who are of Chinese descent born in the Mainland of China or Hong Kong, even if they hold or have held Hong Kong British Dependent Territories Citizen passports, British National (Overseas) passports, or any other foreign passports.

The People's Republic of China has specifically indicated in the Chinese Memorandum accompanying the Sino-British Joint Declaration 1984 that:

*"...all Hong Kong Chinese compatriots, whether they are holders of the 'British Dependent Territories Citizens' Passport' or not, are Chinese nationals...The above Chinese nationals will not be entitled to British consular protection in the Hong Kong SAR and other parts of the People's Republic of China on account of their holding the above-mentioned British travel documents."*

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<sup>1</sup> For example, a failure to report a foreign bank account on Form TD F 90-22.1 as required by the Department of Treasury Regulations 31 CFR 1010.35 (formerly 31 CFR 103.24) carries a fine of \$10,000. Other civil or criminal penalties can involve a fine of \$500,000 and imprisonment of not more than five years in certain circumstances.

The position stated in the Chinese Memorandum was incorporated in the “Explanations of Some Questions by the Standing Committee of the National People’s Congress Concerning the Implementation of the Nationality Law of the People’s Republic of China in the Hong Kong Special Administration Region”, which was adopted at the Nineteenth Session of the Standing Committee of the Eighth National People’s Congress on 15 May 1996.

**EXPLANATION FROM THE STANDING COMMITTEE OF THE NATIONAL PEOPLE’S  
CONGRESS CONCERNING IMPLEMENTATION OF CHINESE NATIONALITY LAW IN  
THE HONG KONG SAR<sup>2</sup>**

Taking into account the historical background and the existing circumstances of Hong Kong, the Standing Committee gave the following explanations concerning the implementation in the Hong Kong Special Administrative Region of the Nationality Law of the People’s Republic of China:

- “1. Where a Hong Kong resident is of Chinese descent and was born in the Chinese territories (including Hong Kong), or where a person satisfies the criteria laid down in the Nationality Law of the People’s Republic of China for having Chinese nationality, he is a Chinese national.*
- 2. All Hong Kong Chinese compatriots are Chinese nationals, whether or not they are holders of the “British Nationals (Overseas) passport”. With effect from 1 July 1997, Chinese nationals mentioned above may, for the purpose of travelling to other countries and territories, continue to use the valid travel documents issued by the Government of the United Kingdom. However, they shall not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People’s Republic of China on account of their holding the above mentioned British travel documents.*
- 3. According to the Nationality Law of the People’s Republic of China, the British Citizenship acquired by Chinese nationals in Hong Kong through the “British Nationality Selection Scheme” will not be recognised. They are still Chinese nationals and will not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People’s Republic of China.*
- 4. Chinese nationals of the Hong Kong Special Administrative Region with right of abode in foreign countries may, for the purpose of travelling to other countries and territories, use the relevant documents issued by the foreign governments. However, they will not be entitled to consular protection in the Hong Kong Special Administrative Region and other parts of the People’s Republic of China on account of their holding the above mentioned documents.*
- 5. If there is a change in the nationality of a Chinese national of the Hong Kong Special Administrative Region, he may, with valid documents in support, make a declaration at the authority of the Hong Kong Special Administrative Region responsible for nationality applications.*
- 6. The Government of the Hong Kong Special Administrative Region is authorised to designate its Immigration Department as the authority of the Hong Kong Special Administrative Region responsible for nationality applications. The Immigration Department of the Hong Kong Special Administrative Region shall handle all nationality applications in accordance with the Nationality Law of the People’s Republic of China and the foregoing provisions.”*

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<sup>2</sup> Note that the English translation text above was prepared by the Department of Justice, Government of the Hong Kong Special Administrative Region. It is for reference purposes and has no legislative effect.

## **ACQUISITION OF CHINESE NATIONALITY BY BIRTH ABROAD**

The offspring of a Chinese national born abroad may acquire Chinese nationality under Article 5 of the Chinese Nationality Act, which provides that:

*Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. But a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.*

If the Chinese national had the right of abode in Hong Kong, the child of such a person is also entitled to right of abode and the coveted Hong Kong SAR passport. Such a person may also be eligible for a Chinese “Hui Xiang Zheng” (home return permit), and an identity card which permits the holder to enter China without visa restrictions.

Some Americans and other foreign nationals who have settled in Hong Kong and acquired the right of abode or permanent residency apply for naturalization as Chinese nationals as, upon approval of their applications, they would qualify for a Hong Kong SAR passport which permits visa-free or visa-on-arrival privileges to some 147 countries and territories.<sup>3</sup>

Under Article 7 of the Chinese Nationality Law, a foreign national or a stateless person who is willing to abide by China’s Constitution and Laws may apply for naturalization as a Chinese national if:

- *they have near relatives who are Chinese nationals;*
- *they have settled in China; or*
- *for other legitimate reasons.*

Note that an American-born Chinese who is the offspring of a Chinese national who does not qualify for Chinese nationality under Article 5 of the Nationality Law because his Chinese parents have already “settled abroad” can nevertheless apply for naturalization under Article 7.

Under Article 18 of and Annex III to the Basic Law of the Hong Kong SAR of the People’s Republic of China, the Nationality Law of the People’s Republic of China is applied in the Hong Kong SAR effective July 1, 1997.

Under Cap 540 S 3, the Chinese Nationality (Miscellaneous Provisions) Ordinance, nationality applications are filed with the Immigration Department of the Hong Kong SAR (“Hong Kong Immigration Department”).

## **FACTORS CONSIDERED IN APPLICATION FOR NATURALIZATION**

There are many factors considered in an application for naturalization and each application will be considered on its own merits. These factors include:

- *whether the applicant has a near relative who is a Chinese national with the right of abode in Hong Kong;*
- *whether the applicant has the right of abode in Hong Kong;*
- *whether the applicant’s habitual residence is in Hong Kong;*
- *whether the principal members of the applicant’s family (spouse and minor children) are in Hong Kong;*
- *whether the applicant has a reasonable income to support himself and his family;*
- *whether the applicant has paid taxes in accordance with the law;*

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<sup>3</sup> <http://www.gov.hk/en/residents/immigration/travel/doc/hksarpassport/visafreeaccess.htm>

- *whether he is of good character and sound mind;*
- *whether he has sufficient knowledge of the Chinese language;*
- *whether he intends to continue to live in Hong Kong once the naturalization application is approved;*
- *whether there are other legitimate reasons to support the application.*

The Hong Kong Immigration Department has a great deal of discretion in adjudicating naturalization cases, with emphasis given to different factors at different points in time based on policy and security considerations.

Under Cap 540 S 5 of the Chinese Nationality Law (Miscellaneous Provisions) Ordinance, the discretionary decision of the Director of Immigration in naturalization applications shall not be subject to appeal to, or review in, any court, and there shall be no need to assign any reason for the decision but the discretion shall be exercised without regard to the race, color or religion of any person who may be affected by its exercise.

A successful applicant will be granted a certificate of naturalization on payment of the prescribed fee. The Director of Immigration may cancel the certificate of naturalization if the Director is satisfied on reasonable grounds that the certificate was obtained by fraud, false representation, or the concealment of any material facts.

In 1997, when Hong Kong first reverted to the People's Republic of China, it was virtually impossible for a foreigner to acquire Chinese nationality unless the applicant had a Chinese spouse and had Chinese language proficiency. At the present time, however, many foreign nationals successfully naturalize even though they do not have close relatives who are Chinese nationals and lack Chinese language proficiency, especially if they are highly educated senior business executives who pay substantial taxes in Hong Kong or entrepreneurs who have shown their commitment to Hong Kong and have been permanently settled for many years here and are of benefit to and an asset to the Hong Kong community.

### **DUAL NATIONALITY NOT RECOGNIZED**

The present processing time for a naturalization application is about eight to ten months. A case can only be 'approved in principle', subject to the applicant furnishing proof that he/she has renounced his/her present nationality.

This is because Article 3 of the Nationality Law of the People's Republic of China provides that the People's Republic of China does not recognize dual nationality for any Chinese national.

More to that point, Article 8 of the Nationality Law of the People's Republic of China specifically states that any person who applies for naturalization whose application has been approved shall not retain foreign nationality.

Thus, a successful applicant for naturalization as a Chinese national will be required to renounce his present nationality before he can become a Chinese national. This is so even if the successful applicant's present country of nationality permits and recognizes dual nationality.

Some American citizens who originally had Chinese nationality and the right of abode in Hong Kong made a "Declaration of Change of Nationality" with the Hong Kong Immigration Department when they returned to Hong Kong in order to be treated as foreign nationals in the Hong Kong SAR for the purpose of consular protection.

Such persons, after the declaration of change of nationality have been approved by the Hong Kong Immigration Department, may continue to enjoy the right of abode in Hong Kong so long as they had such a right before July 1, 1997 or they return to settle in Hong Kong within 18 months from July 1, 1997 or on the date they return to settle in Hong Kong have not immediately before that date been absent from Hong Kong for a continuous period of more than 36 months. They are, however, no longer entitled to Hong Kong SAR passports as such passports are only issued to Chinese nationals with the right of abode in Hong Kong.

### **RESTORATION OF CHINESE NATIONALITY**

Under Article 13 of the Nationality Law, foreign nationals who once held Chinese nationality may apply for restoration of Chinese nationality if they have legitimate reasons but if approved, shall not retain foreign nationality.

Among the circumstances which the director of Immigration would normally accept as having a legitimate reason are the following:

- *whether the applicant has the right of abode in Hong Kong;*
- *whether he/she is living in Hong Kong;*
- *whether he /she is of good character and sound mind;*
- *whether it was necessary for the applicant to renounce Chinese nationality or declare a change of nationality to enable him/her to retain or acquire some other citizenship or nationality, and the reasons why the person wishes to restore Chinese nationality now;*
- *whether the applicant followed his/her parents' or one of the parent's nationality when he/she was under the age of 18, and the reasons why the person wishes to restore Chinese nationality now;*
- *whether there are other legitimate reasons to support the application.*

A successful applicant will be granted a certificate of restoration of Chinese nationality upon furnishing proof that he/she has renounced his/her current foreign nationality as, like a naturalization applicant, he/she cannot retain foreign nationality if the application for restoration of Chinese nationality is approved.

The successful applicant will also enjoy the right of abode in Hong Kong after approval of the application for restoration of Chinese nationality and be entitled to a Hong Kong SAR passport if:

- (a) *the applicant had the right of abode in Hong Kong before July 1, 1997; or*
- (b) *he/she is able to meet the criteria applicable to a Chinese national, namely:*
  - (i) *he/she was born in Hong Kong before or after the establishment of the Hong Kong SAR if his/her father or mother was settled or had the right of abode in Hong Kong at the time of the applicant's birth or at any later time;*
  - (ii) *he/she has ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong SAR;*
  - (iii) *he/she was born outside Hong Kong to a parent who was a Chinese national having the right of abode in Hong Kong at the time of his/her birth.*

For Americans, a successful applicant for Chinese nationality must renounce his nationality pursuant to Section 349(a)(5) of the Immigration & Nationality Act, 8 USC 1481 (a)(5) before a Certificate of Naturalization as a Chinese national and a Hong Kong SAR passport issued.

Several years ago, the U.S. Consulate in Hong Kong had refused to permit a U.S. citizen to renounce his nationality because he would be rendered stateless if he did not have another nationality. Thus, the prospective renunciant was required to present the passport of another country before his application for renunciation would be processed.

Upon clarification with the State Department's Office of Policy Review and Interagency Liaison Office of the Overseas Citizenship Division (now renamed the Office of Legal Affairs of the Overseas Citizen Services), the Director opined that an individual's resulting statelessness will not, in and of itself, necessarily preclude the approval of the renunciant's Certificate of Loss of Nationality. However, the Department will take note of that status in determining whether or not the individual has manifested the requisite intention to relinquish his/her citizenship.<sup>4</sup>

It is thus clear that an American citizen may proceed with renouncing his U.S. citizenship prior to being granted naturalization by his new country of nationality.

There is also judicial and administrative precedent to support the position that statelessness will not preclude a person from the legal right to renounce citizenship. In Davis v. District Director, 481 F. Supp. 1178 (DDC 1979), the U.S. District Court of the District of Columbia held that a U.S. citizen can renounce citizenship without acquiring another nationality even if the expatriation results in statelessness.

Furthermore, in Matter of Davis, 16 I&N Dec. 514 (BIA 1978), the Board of Immigration Appeals pointed out that even the United Nations Convention on the Reduction of Statelessness (to which the U.S. is not a signatory) allows for the voluntary renunciation of citizenship with resulting statelessness if the renunciant gives "definite evidence of his determination to repudiate his allegiance".

The right to renounce despite being rendered stateless is now clearly stated in 7 FAM 1215 e., which states "...*We will accept and approve renunciations of persons who do not already possess another nationality.*"

Perhaps because of the increasing numbers of Americans who have decided to renounce their U.S. citizenship, 7 FAM 1210 et seq. which deals with Loss and Restoration of U.S. Citizenship, and 7 FAM 1260 which deals with Renunciation of U.S. Citizenship, were extensively updated in 2012 and 2013.

Before renouncing citizenship, a person contemplating expatriation should obtain independent legal advice concerning both the tax and immigration consequences. Although American citizens are giving up their U.S. citizenship in increasing numbers, it is not unusual for some consular officers never to have processed an expatriation case despite a long career in the Foreign Service.

While consular officers will advise the renunciant that the decision to renounce citizenship is a serious and irrevocable one, and must be a voluntary decision, the consular officer should not be expected to give detailed advice about the legal pros and cons of expatriation or the non-immigrant visa categories available to the renunciant and the limitations of these visa options post-expatriation, especially where the client has continuing business or personal interests in the U.S.

The writer has recently encountered some clients who acted hastily because of the influence of a spouse and regret their decision.

Although the Foreign Affairs Manual does not require that consular officers advise potential renunciants to consult a lawyer before proceeding with renouncing their citizenship, the State Department values the important role an attorney may play in advising an individual of the consequences of renouncing his/her citizenship and strongly encourage potential renunciants to consult with an attorney before taking the Oath of Renunciation. To that end, it has included language

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<sup>4</sup> Letter from Edward A. Betancourt, Director, Office of Policy Review and Interagency Liaison, Overseas Citizens Services, Department of State to Eugene Chow (October 4, 2004)

in Form DS-4079, Request for Determination of Possible Loss of United States Citizenship, advising the executor of the document to consult with an attorney.

### **IMMIGRATION AND TAX CONSEQUENCES OF EXPATRIATION**

Unlike Hong Kong, where a former Chinese national with the right of abode in Hong Kong can retain his right of abode or permanent residency in Hong Kong after a declaration of change of nationality to another nationality is approved, a naturalized U.S. citizen cannot return to U.S. permanent resident status after he relinquishes U.S. citizenship.

This point was made in a letter from E.B. Duarte Jr., Acting Chief, Naturalization and Special Projects Branch Adjudications, to AILA member Donna Becker:

*“Persons who gained United States citizenship through naturalization may relinquish United States citizenship; however, they do not revert back to the immigrant classification that they held prior to their naturalization. They would either return to being a citizen of the country of prior citizenship; or if they lost citizenship in that country when they naturalized as a United States citizen, they may in fact become stateless.”*<sup>5</sup>

A person who retains continuing business interests or close family relationships in the U.S. must therefore consider the non-immigrant visa options available to them to return to the U.S. and understand the limitations of the activities they may undertake in certain visa categories once they have relinquished their citizenship.

More importantly, Section 212(a)(10)(E) of the Immigration & Nationality Act, 8 USC §1182(a)(1)(E) provides that a former citizen of the U.S. who officially renounced U.S. citizenship for the purpose of tax avoidance is ineligible for a visa to the U.S. While the regulations implementing this statute have never been published in the Federal Registry and most consular officer routinely issue visas to former U.S. citizens despite this provision of law being on the books, some less enlightened consular officers at certain posts have improperly refused to grant visas to former U.S. citizens based on this provision, although the denials were subsequently overturned after input and clarification from the Legal Affairs Office of the State Department.

As a result of the media attention focused on Facebook co-founder Eduardo Saverin’s reported tax savings when he moved to Singapore and renounced his U.S. citizenship, Senators Charles Schumer of New York and Bob Casey of Pennsylvania introduced the Ex-PATRIOT Act, S. 3205 in the 112<sup>th</sup> Congress on May 12, 2012 to provide that persons renouncing citizenship for a substantial tax avoidance purpose shall be subject to a 30% withholding tax on capital gains from U.S. investments and banned from admission to the U.S. under either immigrant or non-immigrant visa categories.<sup>6</sup> Senator Schumer’s view was that Section 212(a)(10)(E) of the Immigration & Nationality Act was ineffective as it lacked a mechanism for the Attorney General to make a finding of inadmissibility of tax-motivated renunciants and needed to be remedied with additional legislation.

Although S. 3205 died in committee, Senator Schumer joined with Senator Jack Reed in the 113<sup>th</sup> Congress to put forward Senate Amendment 1252 (known as the “Reed-Schumer” Amendment) to a major immigration reform bill, the Border Security, Economic Opportunity, and Immigration Modernization Act, to apply an automatic exclusion to ex-citizens with either a net worth of US\$2 million or an average annual income tax liability of US\$148,000 over the last 5 years. However, the amendment was not included in the version of the bill that passed the Senate on June 27, 2013.<sup>7</sup>

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<sup>5</sup> Letter from E.B. Duarte Jr. To Donna Becker (April 4, 1995) quoted in Nationality & Citizenship Handbook, p. 80-81, edited by Robert A. Mautino and Gary Endelman, (American Immigration Lawyers Association, 1996)

<sup>6</sup> Ex-PATRIOT Act (Introduced version) – GovTrack.us (<https://www.govtrack.us/congress/bills/112/s3205/text>)

<sup>7</sup> Bill Summary & Status, 113<sup>th</sup> Congress (2013-2014): S. 744, The Library of Congress (Thomas, 6/27/2013)

While high profile and wealthy individuals such as Eduardo Saverin who renounced their U.S. citizenship attract a great deal of media attention, many individuals who decide to expatriate are actually ordinary middle-class persons who have settled abroad who are bewildered by the increasingly complex tax and information filing rules of the U.S. which will only be exacerbated when the Foreign Account Tax Compliance (“FATCA”) legislation becomes effective on July 1, 2014.

Some Americans are finding it difficult to open a bank or brokerage account in their country of residence because of their U.S. citizenship. Others complain of having to incur costly professional accountancy fees to prepare complicated tax returns even though their foreign wages and salary are below the foreign earned income exclusion amount which would render them liable for U.S. taxes (the exclusion amount is US\$97,600 for calendar year 2013 and indexed for inflation for future years).

While relinquishing U.S. citizenship should not be taken lightly and many foreign nationals still spend years and significant sums of money to successfully emigrate to the U.S. and to become U.S. citizens, for many Americans whose lives have taken them abroad, retaining U.S. citizenship has become quite burdensome. This is especially true for “accidental” Americans who acquired U.S. citizenship by operation of law simply because they were born in the U.S. or if they acquired U.S. citizenship by descent through birth to an American citizen abroad but have no ties or contact with the U.S. whatsoever.

Such persons are nevertheless obligated to file U.S. tax returns, to pay taxes, and to report on foreign bank accounts and make other burdensome informational filings concerning their assets as part of their tax returns.

In addition to the immigration consequences of their action, renunciants should be advised that under the Heroes Earnings Assistance and Relief Tax Act of 2008, Pub L No. 110-245, 122 Stat. 1624 (the “HEART” Act) §877A of the Internal Revenue Code imposes an exit tax on certain U.S. citizens (and long-term residents) of the U.S. who are “covered expatriates”.

Any U.S. citizen or a long-term resident who is a lawful permanent resident of the U.S. who held lawful permanent resident status for at least eight taxable years during the 15-year period ending with the taxable year during which he renounces citizenship or abandons lawful permanent resident status is a “covered expatriate” under Section 877(a)(2) of the International Revenue Code.

A “covered expatriate” is a person who meets any of the following three tests:

- 1) *The individual’s average annual net U.S. Federal income tax liability for the five years ending before the date of expatriation is US\$155,000 or more for a person who expatriates in 2013.*
- 2) *The individual has a net worth of US\$2 million or more as of the date of expatriation.*
- 3) *The individual fails to certify under penalty of perjury on Form 8854 that he/she has complied with all U.S. federal tax obligations for the preceding five years.*

The exit tax treats the appreciated assets of a “covered expatriate” as having been sold at their fair market value even though there has been no actual sale of the assets. For those expatriating in 2013, the first US\$668,000 gains are exempt from the expatriation taxes. (Rev Proc 2012-41) and the excluded amount is allocated pro rata among all assets included in the exit tax base, with any gain over this figure subject to U.S. income taxes.

## CONCLUSION

In calendar year 2012, a total of 1274 applications for naturalization as Chinese nationals were received by the Hong Kong Immigration Department.<sup>8</sup>

The writer has not been able to obtain any data on how many applications for Chinese naturalization in Mainland China has been received or processed. The numbers are not likely to be large, however, as becoming a Chinese national in Mainland China is simply not that attractive an option to most foreign nationals because of questions about the rule of law, the political uncertainty, and the high income tax regime in China, as well as the lack of visa waiver privileges accorded to Chinese nationals holding the People's Republic of China passport. However, for foreign nationals who have acquired the right of abode in Hong Kong, naturalization as a Chinese national is an extremely attractive option, as, under the "One Country, Two Systems" formula, Hong Kong has a totally different tax regime and Chinese nationals who hold the right of abode in Hong Kong are entitled to a Hong Kong SAR passport which accords the bearer visa-free or visa-on-arrival privileges to some 147 countries and territories.

In an increasingly globalized world, many naturalized or natural-born American citizens who are permanent residents in Hong Kong and who have developed very successful careers in Asia have discovered that for them, it makes sense to give up their American citizenship and to become naturalized Chinese citizens in Hong Kong and to obtain a Hong Kong SAR passport.

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### **About the author:**

**Eugene Chow** is the principal of Chow King & Associates, a firm specializing in U.S., Hong Kong and international immigration matters. Admitted to practice law in Pennsylvania in 1976 and in California since 1978, Mr. Chow has been a California State Bar Board Certified Specialist in U.S. Immigration & Nationality Law since 1989.

Mr. Chow has been consistently recognized as one of the top 15 most highly regarded corporate immigration lawyers globally by "The International Who's Who of Corporate Immigration Lawyers" and speaks regularly on immigration law topics in Asia and the U.S. He is fluent in Cantonese and Mandarin, and has published numerous articles on Immigration Law and served as a contributing author or assistant editor for many legal publications. Formerly a daily columnist on immigration for the Sing Tao Daily from 1991 – 1997 and the Oriental Daily News from 1998 – 2009, he is also the author of "The Pathway to Immigration", a book published in Chinese.

A native of Hong Kong, Mr. Chow's boutique firm has, for more than twenty-five years, represented business investors in securing permanent residence in the U.S. and Hong Kong and other jurisdictions. The firm also represents corporate multinational clients in the transfer of key personnel into the U.S. or Hong Kong on employment visas, as well as assists individuals in the acquisition of a

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<sup>8</sup> <http://www.immd.gov.hk/en/facts/naturalisation-nationality.html>

second citizenship to facilitate visa free travel, for tax planning purposes, or as a hedge against negative economic or political developments in their countries of origin.

With the increasing number of American citizens interested in giving up their citizenship, the firm has also developed a niche practice in providing customized advice to Americans on the pros and cons and legal consequences of expatriation, advising on the acquisition of an alternative citizenship to ensure the person will not be rendered stateless, including performing due diligence to ensure the legislative basis and legality of a recommended passport program is sound, liaising and strategizing with tax professionals on tax consequences, and assistance with the application of a long-term multiple entry visa to permit easy access to the U.S. after expatriation. The firm also works with expert professional contacts in various jurisdictions to put into place options in alternative jurisdictions post-expatriation to serve the sophisticated multi-jurisdictional immigration needs of clients in this globalized world.

## APPENDIX

### **Nationality Law of the People's Republic of China**

(Adopted at the Third Session of the Fifth National People's Congress, promulgated by Order No. 8 of the Chairman of the Standing Committee of the National People's Congress and effective as of September 10, 1980)

**Article 1:** This law is applicable to the acquisition, loss and restoration of nationality of the People's Republic of China.

**Article 2:** The People's Republic of China is a unitary multinational state; persons belonging to any of the nationalities in China shall have Chinese nationality.

**Article 3:** The People's Republic of China does not recognise dual nationality for any Chinese national.

**Article 4:** Any person born in China whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality.

**Article 5:** Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. But a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.

**Article 6:** Any person born in China whose parents are stateless or of uncertain nationality and have settled in China shall have Chinese nationality.

**Article 7:** Foreign nationals or stateless persons who are willing to abide by China's Constitution and laws and who meet one of the following conditions may be naturalised upon approval of their applications:

1. they are near relatives of Chinese nationals;
2. they have settled in China; or
3. they have other legitimate reasons.

**Article 8:** Any person who applies for naturalisation as a Chinese national shall acquire Chinese nationality upon approval of his application; a person whose application for naturalisation as a Chinese national has been approved shall not retain foreign nationality.

**Article 9:** Any Chinese national who has settled abroad and who has been naturalised as a foreign national or has acquired foreign nationality of his own free will shall automatically lose Chinese nationality.

**Article 10:** Chinese nationals who meet one of the following conditions may renounce Chinese nationality upon approval of their applications:

1. they are near relatives of foreign nationals;
2. they have settled abroad; or
3. they have other legitimate reasons.

**Article 11:** Any person who applies for renunciation of Chinese nationality shall lose Chinese nationality upon approval of his application.

**Article 12:** State functionaries and military personnel on active service shall not renounce Chinese nationality.

**Article 13:** Foreign nationals who once held Chinese nationality may apply for restoration of Chinese nationality if they have legitimate reasons; those whose applications for restoration of Chinese nationality have been approved shall not retain foreign nationality.

**Article 14:** Persons who wish to acquire, renounce or restore Chinese nationality, with the exception of cases provided for in Article 9, shall go through the formalities of application. Applications of persons under the age of 18 may be filed on their behalf by their parents or other legal representatives.

**Article 15:** Nationality applications at home shall be handled by the public security bureaus of the municipalities or counties where the applicants reside; nationality applications abroad shall be handled by China's diplomatic representative agencies and consular offices.

**Article 16:** Applications for naturalisation as Chinese nationals and for renunciation or restoration of Chinese nationality are subject to examination and approval by the Ministry of Public Security of the People's Republic of China. The Ministry of Public Security shall issue a certificate to any person whose application has been approved.

**Article 17:** The nationality status of persons who have acquired or lost Chinese nationality before the promulgation of this Law shall remain valid.

**Article 18:** This Law shall come into force as of the date of its promulgation.