Business Broker vs. Business Attorney

Some foreign E-2 clients ask what are the different roles between a business broker vs. a business attorney. And the underlying question is ... do I need both? The answer is ... generally yes.

In broad terms, a business broker is a sales agent, who helps a buyer to locate a business for purchase. A good broker will also advise a buyer on the value of the business, and help negotiate the key terms of the acquisition. But once a business is located, it is important (and sometimes necessary) to engage a good business attorney to (i) negotiate the terms of the Asset Purchase Contract; (ii) coordinate inspections and evaluations of the business; (iii) hold escrow (if required by the US Embassy); (iv) negotiate an Assignment of Lease; and (v) consummate the ultimate closing (completion) of the transaction.

The distinction gets murky, however, because the roles often *overlap*. For example, many business brokers also draft the Asset Purchase Contracts. A purchaser may ask ... is it okay to let my broker prepare the contract? Or do I need an attorney? Buyers typically weigh different factors. A broker won't charge additional fees to prepare the contract, and an attorney will. So, as a practical matter, most buyers purchasing smaller businesses (e.g., a coffee shop, priced under \$85,000) will prefer for their broker to prepare the contract. But buyers may wish to have a business attorney involved where the investment is higher, or the details of the purchase are more complex. For example, buyers are more likely to engage an attorney for a business (i) that is priced higher (i.e., \$150,000 or more); (ii) that requires a significant third-party approval (e.g., a patent licensor); (iii) that involves intellectual property; (iv) where a seller operates two locations, but wants to sell just one location (i.e., who gets the website?); (v) where the buyer needs a real estate loan in order to finance their business purchase; (vi) where the buyer is buying just 50% of the business (and, therefore, needs a "partnership agreement" with the seller); (vii) etc.

Another example where brokers and attorneys sometimes "overlap" is in securing a lease assignment. A business that is dependent upon a specific location cannot operate without an assignment of the seller's lease. Again, this is generally an issue of cost and complexity. If your seller has a nine (9) year lease with his landlord, for a small retail space, and the landlord is easy to deal with, then it may well be simpler (and cheaper) for a business broker to help facilitate this. But if there is only one (1) year left on the lease, then a good attorney can help negotiate renewal options. Also, landlords hate to have to "think". It makes their heads hurt. They understand how to sign a new lease; but an assignment will sometimes immobilize a landlord. For example: (i) who will guaranty the assigned lease (US landlords don't know how to check-credit on foreigners); (ii) who owns the equipment being sold (e.g., in a restaurant, does the seller or landlord own the equipment); (iii) when does the assignment become effective (some US embassies ask to see the landlord's signature on a lease assignment at the time of visa application ... which could be 3-6 months before the tenant takes over the business); (iv) what if the seller is "behind" in paying rent ... when is it better for a landlord to allow an assignment, vs. finding a new tenant? A good business attorney can "speak-the-language" of a commercial landlord (i.e., anticipate their concerns), and help break-through-the-logiam.

In both the Purchase Contract and the Assignment of Lease, it's crucial for foreign buyers to have these deals contingent upon getting their visas. When you sign a Purchase Contract, your deposit could be at risk, if you fail to close in time. Be sure you have the right to terminate, before your funds are at risk. Also, for E-2 buyers, the closing date should never be a specific

calendar date; instead, it should be tied to the visa issuance (e.g., 15-20 days after the visa is issued).

Of course, there are matters a business attorney will handle that do *not* overlap with a business broker. We work with brokers all of the time. There are things a broker can do better than most attorneys – e.g., find businesses, help with valuations, facilitate certain licenses, etc. If a broker handles the Asset Purchase Contract, the broker will want to refer the buyer to a business attorney to close the transaction. As a "closing attorney", this typically means (i) preparing closing documents; (ii) searching the public records for UCC liens or judgment liens; (iii) paying off any lenders or lienholders; (iv) coordinating signatures; and (v) monitoring the funds between buyer and seller for the final closing. Also, for E-2 candidates, the immigration attorneys often recommend that the purchase price be held in escrow, for the benefit of the US Embassy (i.e., to demonstrate that the buyer has the ability to invest the funds).

Which brings us to a final point. A business attorney is separate from an immigration attorney. A business attorney doesn't file visa applications. For an E-2 candidate, a business purchase may help you to achieve your "visa goal" (to live and work in Florida); and for that, you will need a good immigration attorney to guide you through the visa process. But remember that you will also have "business goals" (to invest profitably). If you're making a sizable investment to purchase a business, you will want no surprises. And a business attorney can help with that.

We wish you the best in exploring your opportunities in Florida. And we hope that, in the future, we will be able to say ... Welcome to America ... or ... Bienvenue à l'Amérique ... or ... Willkommen in Amerika ... or ... Bienvenidos a los Estados Unidos de América ... etc.!

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