THE E-2 TREATY INVESTOR VISA CATEGORY

Overview of the "E-2" Visa Category:

The "E" visa category is a nonimmigrant visa that is based upon a treaty of friendship, commerce and navigation, or a Bilateral Investment Treaty. Corporations or citizens of a qualifying country may qualify for an "E-2", Treaty Investor visa.

See the "List of E-2 Countries" above to determine whether your country of citizenship may qualify you as a Treaty Investor.

Section 101(a)(15)(E) of the Immigration and Nationality Act describes the "E" visa category as follows:

"an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign of which he is a national, and the spouse and children of any such alien if accompanying or following to join him:

(i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or

(ii) has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital . . ."

So long as eligibility continues, "E" status not only permits the alien to engage in the qualifying trade, but permits incidental activities as well, and to stay in the United States indefinitely, so long as the alien engages in the qualifying "E" employment.

An "E" Visa allows the spouse and children to accompany or to join the principal alien in the same visa status. Spouses of "E" principles can work after receiving authorization from the U.S. Citizenship & Immigration Services by separate application, and children may attend school without any formal application or additional student visa.

The nationality of the spouse and children is immaterial to their "E" status. Only the nationality of the principal alien is an issue. Note, however, that children lose their "E" classification when they turn 21 years of age, and must thereafter qualify for admission to the United States as an independent adult.

The basic requirements for an "E-2"category visa are:

1. Both the employer and the employee must have the nationality of a country which has a treaty of commerce and navigation or a bilateral investment treaty with the United States of America. (Note, however, that a U.S. permanent resident owner of a business, who is a national of a treaty country, does **not** qualify as a "national" of the treaty country for purposes of any "E" visa.)

2. The alien must either be an "executive" or a "manager", or have a "essential skills" necessary to the operation of the employer's business.

Do not confuse the E-2 Treaty Investor Visa category with the true Investor Visa that normally requires an investment of $1,000,000.00, and results in permanent residence.

The E-2 Treaty Investor visa is based on a qualifying trade treaty between the United States and various other countries of the world. This visa category is designed for the small businessperson and is intended to allow foreign nationals to come to the United States and own a business. This visa category cannot be used as the prerequisite for an application for permanent residence by the Treaty Investor, because the law prohibits the investor from petitioning himself for permanent residence. However, this is a very good nonimmigrant visa category, because it allows a foreign national to remain in the United States and run or work in the business so long as it is owned by a citizen of the treaty country.

The statutory language dealing with "E-2" Treaty Investor status requires that the alien (including a corporate entity of the same nationality as the treaty country) must be coming to the United States, ". . . solely to develop and direct the operations of an enterprise in which he or she (including a corporate entity) has invested, or of an enterprise in which the alien (including a corporate entity) is actively in the process of investing, a substantial amount of capital . . ."

The Meaning of "Invested" or "Process of Investing":

The funds or other capital assets of the investor must be at risk to generate a profit. The "E-2" category was not designed for retirees, for philanthropists, or for the employees of nonprofit organizations. Being "actively involved in the process" requires something more than a mere intention to invest. The alien must be involved in the start-up of actual business operations, not merely in the state of signing contracts or scouting for suitable locations and property. The "B-1" visa would be the appropriate nonimmigrant visa for these purposes, and then a change of status to "E-2" accomplished after the enterprise is up and running.

Of course, there is always the risk that the "E-2" visa will be denied. Therefore, careful planning in the formation of the investment must be used to insure it meets all the criteria established by the regulations - if it does, the visa should be approved, however, consular officers at many U.S. Embassies and Consulates around the world exercise independent discretion in approving "E" visas, and there is no guarantee that the visa will be issued.

Since the alien must be making the investment with assets that he or she controls, acquiring the enterprise directly by gift or inheritance does not count as an investment. However, purchasing an investment with the proceeds of a gift or inheritance would qualify. Also, borrowed funds may be used for the investment, but there are strict rules limiting the use of the assets of the investment business as collateral for the loan. It does

not matter where the assets come from, so long as they truly belong to the investor, or the investor is **"at risk"** for those assets, the assets are invested in a qualifying business enterprise.

The enterprise must be a real and active commercial or entrepreneurial undertaking, producing some service or commodity. A paper organization or passive speculative investment, likes stocks or undeveloped land, do not qualify since they do not require the intent to direct or develop a commercial enterprise. Non-committed funds in a bank account will not qualify.

What is a "Substantial Investment"?

The Proportionality Test It is clear that there is no minimum figure required, and investments in small and medium-sized businesses are contemplated in the Foreign Affairs manual. In determining what is a substantial investment a two-tier "proportionality test" is applied. The amount invested is weighted against either: The total value of the enterprise, usually where a going business is bought; or the amount normally needed to establish a viable enterprise of the kind the applicant is in the process of organizing. The investment only has to be substantial when weighted against either of these standards, not both of them.

The investment may not be a "marginal investment designed solely to support the alien and his family". It is expected that the enterprise will provide jobs to United States residents, and will produce profits.

If your company does not qualify under the test for "substantial investment", and you principally trade between the USA and a qualifying "E" country, and if you are a citizen of that qualifying country, you might want to look at an "E-1" Treaty Trader visa.

"E-2" visas are very complex. We recommend seeking the advice of qualified immigration/business counsel, not only for the preparation of the immigration paperwork, but in the formation of the underlying U.S. business entity, or the purchase of an already existing U.S. business.

E-2 BUSINESS QUALIFYING FACTORS:

E-2 visa registration applications should demonstrate that:

1. There has been and will be a substantial capital investment in the US. There is no specific cash threshold defined, but $40,000 is probably an absolute minimum, and any investment below $100,000 would need a very strong case to support it.

2. Risk Capital has been Committed; the investment must entail some risk to the investor (it may not be all in the form of unguaranteed credit). At a minimum, there must be a long-term lease of an office in the US The investor will control his/her investment. In this respect control is considered to entail owning over 50% of the US enterprise.

3. The cash invested is not marginal when compared to the total investment. In general, unless it is common to the industry to have higher amounts of 'leveraging' (such as in the property industry), 51% of the investment should be in the form of cash equity.

4. Where debt is secured against other assets of the investor, it is considered to be 'at risk', and may be considered as part of the equity invested. The enterprise is (or will be) active.

5. In order to be 'Directing and Developing' their investment, the investor will require an enterprise that involves active management. US workers are (or will be) employed.

6. The treaties envisage more than just creating a job for the principal investor, but there is no requirement to employ a particular number of US citizens.

7. Obviously, employment of large numbers of US citizens would be viewed very favorably.

8. The enterprise, or its principal investor, has a past history of successful trading.

9. That the 'investor' has sufficient acumen to direct and develop the investment enterprise.

10. That the principal investor, and any other E2 staff, are able and willing to leave the United States upon termination of their E2 status.

For a List of E-1 & E-2 Visa Countries See: http://foia.state.gov/masterdocs/09fam/0941051X1.pdf