

II. TRADERS AND INVESTORS: TEMPORARY VISAS AND PERMANENT RESIDENCE

§ 12:6 Temporary E-1 trader and E-2 investor visas—Basic concepts

The United States has entered into treaties of commerce and navigation with over 75 countries, and nationals of those countries may enter the United States with E visas in order to carry on substantial trade or to develop and manage capital investments. The INA provides that such a nonimmigrant may enter:

- (i) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United

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¹NSEERS applies to nonimmigrant aliens from the following countries: Iran, Iraq, Libya, Sudan, Syria, Pakistan, Saudi Arabia, Yemen, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Bangladesh, Egypt, Indonesia, Jordan, and Kuwait.

²“Changes to the NSEERS Process,” U.S. Immigration and Customs Enforcement Fact Sheet (Dec. 1, 2003) available at www.ice.gov/pi/news/factsheets/NSEERSFAQ120103.htm.

³68 Fed. Reg. 67578 (Dec. 2, 2003).

⁴“Changes to the NSEERS Process,” U.S. Immigration and Customs Enforcement Fact Sheet (Dec. 1, 2003).

⁵Ira Kurzban, *Immigration Law Sourcebook*, Chap. 3, § IV(K) (10 ed. 2006).

⁶See http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0685.xml. See also www.dhs.gov/us-visit.

States and the foreign state of which he or she is a national;
or

- (ii) solely to develop and direct the operations of an enterprise in which he or she has invested or of an enterprise of which he or she is actively in the process of investing a substantial amount of capital.¹

E visa holders may remain in the United States indefinitely as long as the qualifying investment or trade continues. The DOS recognizes that these foreign nationals may be required to remain in the United States for many years to effectively manage their trade or investments. As they can be expected to sell their homes, close bank accounts, and take other steps to sever ties to their home countries prior to entering the United States, there exists no requirement that E nonimmigrants maintain a residence in their home country. It is sufficient that they simply evidence an intent to return to their home country at the conclusion of their trade or investment activity. Moreover, E nonimmigrants are also permitted to pursue lawful permanent residence in the United States.²

In contrast to applicants for L and H-1B visas, who must first petition the DHS for approval, foreign nationals who wish to secure an E visa may apply directly with a consular post. Prior to filing an application with the consular post, however, E visa applicants should ascertain the particular procedures of the post to which they will apply. Often special forms unique to each post must be completed. Although nonimmigrants already in the United States may apply to the DHS to change their status to the E nonimmigrant category, DHS officials (who adjudicate E applications infrequently) are much less familiar with E requirements and are more likely to delay processing. Moreover, because an E visa will have to be sought from a consular post after a departure from the United States and prior to reentry into the United States, it is standard practice to file E applications initially at a consular post.

The basis for any E nonimmigrant classification rests on a treaty entered into, in part, “to enhance or facilitate economic and commercial interaction between the United States and the treaty country.”³ Accordingly, the INA specifies that an E visa is only available for a national of a country that has entered into a treaty of commerce and navigation with the United States.⁴ Roughly 78 countries have entered into commerce and navigation treaties—or,

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¹8 U.S.C.A. § 1101(a)(15)(E).

²This concept is known as “dual intent;” see INS Memorandum of August 5, 1997, reprinted in 74 Interpreter Releases 1226 (Aug. 11, 1997).

³9 Department of State Foreign Affairs Manual (FAM) § 41.51, n. 1.

⁴8 U.S.C.A. § 1101(a)(15)(E).

as is the case since 1982, bilateral investment treaties (BITs)—with the United States.⁵ Most of these treaties provide for both E-1 trader and E-2 investor visa status, although a handful only permit one or the other.

The following countries have entered into treaties with the United States that permit issuance of E-1 trader visas:

Argentina	Japan
Australia	Jordan
Austria	Korea (South)
Belgium	Latvia
Bolivia	Liberia
Bosnia and Herzegovina	Luxembourg
Brunei	Macedonia
Canada	Mexico
Chile	Singapore ^{5,50}
China (Taiwan)	Netherlands
Colombia	Norway
Costa Rica	Oman
Croatia	Pakistan
Denmark	Paraguay
Estonia	Philippines
Ethiopia	Slovenia
Finland	Spain
France	Suriname
Germany	Sweden
Greece	Switzerland
Honduras	Thailand
Iran	Togo
Ireland	Turkey
Israel	United Kingdom
Italy	Yugoslavia ⁶

The following countries have entered into treaties with the United States that permit issuance of E-2 investor visas:

Albania	Kazakhstan
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⁵The DHS considers BITs to be the equivalent of commerce and navigation treaties for purposes of E visa adjudication.

^{5,50}9 FAM § 41.51, Exhibit I.

⁶9 FAM § 41.51, Exhibit I.

Argentina	Korea (South)
Armenia	Kyrgyzstan
Australia	Latvia
Austria	Liberia
Azerbaijan	Lithuania
Bahrain	Luxembourg
Bangladesh	Macedonia
Belgium	Mexico
Bolivia	Moldova
Bosnia and Herzegovina	Mongolia
Bulgaria	Morocco
Cameroon	Netherlands
Canada	Norway
Chile	Singapore ^{6.50}
China (Taiwan)	Oman
Colombia	Pakistan
Congo (Brazzaville)	Panama
Congo (Kinshasa)	Paraguay
Costa Rica	Philippines
Croatia	Poland
Czech Republic	Romania
Ecuador	Senegal
Egypt	Slovak Republic
Estonia	Slovenia
Ethiopia	Spain
Finland	Sri Lanka
France	Suriname
Georgia	Sweden
Germany	Switzerland
Grenada	Thailand
Honduras	Togo
Iran	Trinidad & Tobago
Ireland	Tunisia
Italy	Turkey
Jamaica	Ukraine
Japan	United Kingdom
Jordan	Yugoslavia ⁷

^{6.50}9 FAM § 41.51, Exhibit I.

⁷9 FAM § 41.51, Exhibit I.

As discussed above, E visa applicants must be nationals of a country that has entered into a treaty of commerce and navigation or a BIT with the United States. A corporation meets this requirement if at least 50 percent of its stock is owned by individuals who are nationals of the treaty country, regardless of the place of incorporation. Thus, joint ventures between nationals of the treaty country and nationals of another nontreaty country may qualify. The shares of a U.S. permanent resident alien, however, are not counted in determining whether or not the corporation is sufficiently owned by treaty nationals.

§ 12:7 Specific requirements for E-1 treaty traders

Research References

West's Key Number Digest, Aliens ☞18, 39, 40

Eligibility for "treaty trader" or "treaty investor" status under sec. 101(a)(15)(E) of Immigration and Nationality Act of 1952 (8 U.S.C.A. sec. 1101(a)(15)(E)), 83 A.L.R. Fed. 790

Fragomen, Del Rey, and Bernsen, *Immigration Law and Business* § 2:74

In addition to the requirements discussed above, the E-1 trader category features three additional hurdles: (1) the U.S. company must engage in foreign trade; (2) the trade must be "substantial"; and (3) the trade must be "principally" between the United States and the treaty country.¹

Meaning of Trade

According to the pertinent regulations, "items of trade" include but are not limited to the following:

goods, services, international banking, insurance, monies, transportation, communications, data processing, advertising, accounting, design and engineering, management consulting, tourism, technology and its transfer, and some news-gathering activities. . . . goods are tangible commodities or merchandise having extrinsic value. Further, . . . services are legitimate economic activities which provide other than tangible goods.²

Trade is an "existing international exchange of items of trade" that includes "successfully negotiated contracts binding upon the parties which call for the immediate exchange of items of trade."³

Substantiality of Trade

The INA fails to define what "substantial" trade means for E visa

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¹8 U.S.C.A. § 1101(a)(15)(E).

²8 C.F.R. § 214.2(e)(9).

³8 C.F.R. § 214.2(e)(9).

purposes, stating only that it is an amount of trade established by the Secretary of State after consultation with other government agencies.⁴ DOS regulations define “substantial trade” as entailing:

the quantum of trade sufficient to ensure a continuous flow of trade items between the United States and the treaty country. This continuous flow contemplates numerous exchanges over time rather than a single transaction, regardless of the monetary value.⁵

DHS regulations agree with the DOS, adding that “[t]here is no minimum requirement with respect to the monetary value or volume of each individual transaction.”⁶ Moreover, in the case of smaller businesses, DHS states that “an income derived from the value of numerous transactions which is sufficient to support the treaty trader and his or her family constitutes a favorable factor in assessing the existence of substantial trade.”⁷

The DOS further indicates that qualifying the trade as substantial is not intended to discourage particular types of trade or necessarily to exclude employees of small companies.⁸ The volume of trade and the monetary value of the transactions are relevant, and proof of numerous transactions, although each may be small in value, might establish the requisite continuing course of international trade.⁹ The DOS further notes that trade income that is “sufficient to support the treaty trader and family” might meet the substantiality requirement.¹⁰

Trade “Principally” Between the United States and the Treaty Country

According to the DOS, over 50 percent of the total volume of trade conducted in the United States must be between the treaty country and the United States.¹¹ The remainder of the trade may be between the U.S. entity and other countries or may be domestic U.S. trade. The requirement that trade exist “principally” between the United States and the treaty country may be met by a U.S. branch office. For example, if the U.S. branch office of an enterprise meets the “over 50 percent” test, it is not material that one or more

⁴8 U.S.C.A. § 1101(a)(45).

⁵22 C.F.R. § 41.51(j).

⁶8 C.F.R. § 214.2(e)(10).

⁷22 C.F.R. § 41.51(j).

⁸9 FAM § 41.51, n. 6.

⁹9 FAM § 41.51, n. 6.

¹⁰9 FAM § 41.51, n. 6.

¹¹9 FAM § 41.51, n. 7.

other offices of the enterprise abroad may be engaged primarily in trade with countries other than the United States.¹²

§ 12:8 Specific requirements for E-2 treaty investors

E-2 investors must enter the United States “solely to develop and direct the operations of an enterprise in which [they have] invested, or. . . [are] actively in the process of investing, a substantial amount of capital.”¹ This statutory language poses several distinct issues: whether or not applicants have invested or are actively in the process of investing, whether or not investments are substantial, whether or not applicants are in a position to develop and direct the enterprise, and whether or not investments are simply marginal.

An Active Investment “At Risk”

According to the DOS, investments must be “at risk” to qualify under the statute:

The concept of investment connotes the placing of funds or other capital assets at risk in the commercial sense in the hope of generating a return of the funds risked. If the funds are not subject to partial or total loss if investment fortunes reverse, then it is not an investment in the sense intended by 8 U.S.C.A. § 1101(a)(15)(E)(ii).²

Thus, uncommitted funds in an idle bank account do not constitute a qualifying investment, while a reasonable amount of cash held for use in the routine operation of an ongoing business may be counted.³ Loans may qualify as at-risk investments so long as they are secured by the foreign national’s own personal assets. Where debts or loans are to be secured by the assets of the enterprise itself, they do not count toward the investment “as there is no requisite element of risk.”⁴

In addition to being at risk, investments must be “active” in a commercial or entrepreneurial undertaking in order to qualify under the statute. The investment funds must go toward the pro-

¹²9 FAM § 41.51, n. 7.2.

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¹8 U.S.C.A. § 1101(a)(15)(E)(ii).

²9 FAM § 41.51, n. 8.1-2. Although the investment must be at risk, DHS regulations make clear that a foreign national may place the invested funds in escrow pending adjudication of the E application, irrevocably committing the funds to the enterprise but extending personal liability protection to the treaty investor if the application is denied. 8 C.F.R. § 214.2(e)(12).

³9 FAM § 41.51, n. 8.1-3. The investment can take the form of goods or equipment as long as they are put to use in an ongoing commercial enterprise. 9 FAM § 41.51, n. 8.2-2.

⁴9 FAM § 41.51, n. 8.2-2, DHS regulations make clear that the investor’s funds may not have been obtained, “directly or indirectly, through criminal activity.” 8 C.F.R. § 214.2(e)(12).

duction of a service or commodity; speculative investments in undeveloped land or stocks, for example, are not active.⁵ For foreign nationals in the process of investing, the enterprise that is the source of the investment must be close to the start of actual business operations, not merely in the stage of signing contracts (which may be broken) or scouting for suitable locations and property.⁶

Substantiality of Investment

In interpreting the statutory requirement of a substantial investment, the DOS has made it clear that no minimum investment amount is required. According to DOS regulations, invested capital is substantial when it is:

- (1) substantial in the proportional sense, i.e., in relationship to the total cost of either purchasing an established enterprise or creating the type of enterprise under consideration;
- (2) sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and
- (3) of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise.⁷

The regulations explain that the substantiality issue in the "proportionality" sense should be understood in terms of an inverted sliding scale; i.e., the lower the total cost of the enterprise, the higher, proportionately, the investment must be to meet these criteria.⁸

The DOS views the issue of whether or not the investment is proportional to the total cost of the enterprise as a largely straightforward calculation: one weighs the investment against evidence of the actual value of the business, such as its purchase price or tax valuation.⁹ However, the relationship between the invested funds and the amount normally considered necessary to create a viable enterprise is less susceptible to precise calculation, and the consular official may seek letters from chambers of commerce or statistics from trade associations to determine what would be a necessary investment to establish the contemplated enterprise.¹⁰

A case upholding the issuance of E-2 visas for the employees of an automotive design company reinforces the proposition that substantial investments may be modest and need only be in an "amount normally considered necessary to establish a viable

⁵9 FAM § 41.51, n. 8.2-2.

⁶9 FAM § 41.51, n. 8.1-3.

⁷22 C.F.R. § 41.51(n)(1).

⁸9 FAM § 41.51, n. 10.4; 8 C.F.R. § 214.2(e)(14)(iii).

⁹9 FAM § 41.51, n. 10.2.

¹⁰9 FAM § 41.51, n. 10.2.

enterprise of the nature contemplated.”¹¹ In that case, the total investment consisted of renting a small office, purchasing office furniture, hiring two U.S. citizen employees, and depositing approximately \$15,000 in a bank account.¹²

Finally, in applying the proportionality test to medium-sized businesses, the DOS has concluded that the substantiality requirement necessarily connotes an investment of more than half the value of the enterprise; however, the dollar amount may be so great that an E-2 visa will be issued even where the investment is not large, proportionate to the total value of the enterprise.¹³

The “Develop and Direct” Requirement

Foreign national investors seeking E-2 status must develop and direct the operations of the enterprises in which they have invested.¹⁴ In essence, this means that the treaty investor must maintain a controlling interest in the investment.¹⁵ According to the DOS, an interest of 50% or less usually will mean that the applicant does not have requisite control.¹⁶ Although an equal share of an investment may not confer a controlling interest, the DOS holds that a joint venture may also meet the “develop and direct” requirement provided that a foreign corporation can demonstrate that it has, in effect, operational control.¹⁷

The Marginality Problem

The DOS takes the position that foreign nationals cannot invest in “marginal enterprises solely for the purpose of earning a living.”¹⁸ Consular officials have various ways of determining whether or not an investment is marginal. For example, if job opportunities are expanded locally as a result of the investment or if applicants have substantial income from other sources, the investment will not be considered marginal. The Board of Immigration Appeals has concluded that an investment is not marginal where the investor

¹¹Matter of Walsh and Pollard, 20 I. & N. Dec. 60, 68, 1988 WL 312511 (B.I.A. 1988). See 9 FAM § 41.51, n. 13, for a discussion of case.

¹²Matter of Walsh and Pollard, 20 I. & N. Dec. 60, 62, 1988 WL 312511 (B.I.A. 1988).

¹³9 FAM § 41.51, n. 10.4.

¹⁴Although the develop and direct requirement applies to applicant investors, it does not apply to executive, supervisory, or essential employees of corporate investors. Thus, enterprises that are incorporated can hire such individuals as employees and avoid the issue entirely. 2 C. Gordon, S. Mailman & S. Yale-Loehr, *Immigration Law and Procedure* § 17.06[4] (rev ed 2003).

¹⁵Matter of Lee, 15 I. & N. Dec. 187, 1975 WL 31471 (B.I.A. 1975).

¹⁶9 FAM § 41.51, n. 12.1.

¹⁷9 FAM § 41.51, n. 12 and 12.4.

¹⁸9 FAM § 41.51, n. 11.

“reasonably expected substantial revenues from its investment far above a living wage.”¹⁹

The regulations define a “marginal” enterprise as one that does not feature “the present or future capacity to generate more than enough income to provide a minimal living for the treaty investor and his or her family.”²⁰ Recognizing that such a capacity may arise in the future, these regulations add “[t]he projected future income-generating capacity should generally be realizable within five years from the date the alien commences the normal business activity of the enterprise.”²¹

§ 12:9 Employees of E-1 traders and E-2 investors

Research References

West’s Key Number Digest, Aliens ☞18, 39, 40

Eligibility for “treaty trader” or “treaty investor” status under sec. 101(a)(15)(E) of Immigration and Nationality Act of 1952 (8 U.S.C.A. sec. 1101(a)(15)(E)), 83 A.L.R. Fed. 790

Fragomen, Del Rey, and Bernsen, *Immigration Law and Business* § 2:74

Fragomen, Del Rey, and Bernsen, *Immigration Law and Business* § 2:75

The employees of an employer who qualifies for an E visa may also be eligible for E nonimmigrant status if: (1) they will be engaged in duties of an executive or supervisory character; or (2) if employed in a minor capacity, they possess special qualifications that make the services to be rendered essential to the efficient operation of the enterprise.¹

Executive or Supervisory Employees

In evaluating whether or not employees are executives or supervisors, the DOS directs consular officers to consider the following: the title of the employee’s position, the employee’s place in the firm’s organizational structure, the duties of the job, the degree to which the employee has control or responsibility of the overall operations or of a major component of the firm, the number and skill levels of supervised employees, the level of compensation, and whether or not the employee possesses executive or supervisory experience.² In addition, it is important that the executive or supervisory element of the position be a principal or primary function of the job. If the

¹⁹Matter of Walsh and Pollard, 20 I. & N. Dec. 60, 68, 1988 WL 312511 (B.I.A. 1988).

²⁰22 C.F.R. § 41.51(o); 8 C.F.R. § 214.2(e)(15).

²¹22 C.F.R. § 41.51(o); 8 C.F.R. § 214.2(e)(15).

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¹22 C.F.R. § 41.51(c).

²9 FAM § 41.51, n. 14.2.

position chiefly involves routine work where supervising is a secondary function, the position will not qualify as executive or supervisory.³ Although the title of an employee as “manager” or “vice-president” might be relevant, particularly if many employees are to be supervised, it is not dispositive of executive or supervisory status.⁴ Although the definitions of “executive” and “supervisor” are somewhat analogous to executive and manager for purposes of L visas, consular officials apparently have greater flexibility in the E context.⁵

Essential Skilled Employees

In order to successfully assert that an employee provides essential skills and services, one must demonstrate that the employee possesses skills that are “essential to the effectiveness of the firm’s United States operations.”⁶ The consular official responsible for determining the nature of an employee’s skills and services is directed to consider the degree of proven expertise of the foreign national in the area of specialization, the uniqueness of the specific skills, the length of experience and training with the firm, the period of training needed to perform the contemplated duties, and the salary special expertise can command.⁷

Where there is a new enterprise in the United States or where there are highly trained technicians brought to the United States from abroad to assist in the development of the enterprise, the consular official will presume that United States workers will be trained in a reasonable period of time and that they will eventually replace any foreign employees.⁸ Although not all essential foreign employees are replaceable by U.S. workers, the burden of justifying the need for foreign employees becomes much greater after the first year.⁹ Consular officials also assess whether or not competent United States workers are available to provide the needed skills, and applicants for E visas may be required to submit statements by

³9 FAM § 41.51, n. 14.2.

⁴9 FAM § 41.51, n. 14.2.

⁵9 FAM § 41.51, n. 14.2.

⁶9 FAM § 41.51, n. 14.3.

⁷9 FAM § 41.51, n. 14.3-2.

⁸9 FAM § 41.51, n. 14.3-3.

⁹“There is an implicit requirement to train only if the skills are of the nature conducive to transfer to the local labor market. . . . Some skills are not readily transferred, and therefore remain essential to the efficient operation of the business for an indefinite period of time.” Matter of Walsh and Pollard, 20 I. & N. Dec. 60, 68, 1988 WL 312511 (B.I.A. 1988), DOS Response to Interrogatory 19, reprinted in 2 C. Gordon, S. Mailman & S. Yale-Loehr, *Immigration Law and Procedure* § 17.04[3] (rev ed 2003).

United States industry trade sources or labor organizations to document the unavailability of qualified United States workers.¹⁰

§ 12:10 Employment authorization for spouses of E-1 traders and E-2 investors

Research References

West's Key Number Digest, Aliens ¶18, 39, 40

Eligibility for "treaty trader" or "treaty investor" status under sec. 101(a)(15)(E) of Immigration and Nationality Act of 1952 (8 U.S.C.A. sec. 1101(a)(15)(E)), 83 A.L.R. Fed. 790

Fragomen, Del Rey, and Bernsen, Immigration Law and Business § 2:74

Fragomen, Del Rey, and Bernsen, Immigration Law and Business § 2:75

The spouse of an E-1 treaty trader or E-2 treaty investor may obtain authorization to engage in employment in the United States.¹ The scope and nature of the authorized employment is unlimited.

It is unclear whether spouses² of E-1 treaty traders and E-2 investors must apply for an Employment Authorization Document (EAD) to obtain work authorization in the United States. The Social Security Administration has announced that E spouses are authorized to work without specific Department of Homeland Security (DHS) authorization and are not required to apply for an EAD to obtain work authorization but must submit proof of marriage to an E visa holder.^{2,20} U.S. Citizenship and Immigration Services (USCIS), however, has yet to promulgate regulations to that effect.

The last time legacy Immigration and Naturalization Service (INS) addressed this issue, it held that "to obtain employment authorization and a document evidencing this authorization, the E or L nonimmigrant spouse must file Form I-765, Application for Employment Authorization."^{2,40} In that same policy pronouncement, however, legacy INS stated that the regulations were to be amended to add spouses of E and L nonimmigrants to the list of categories of aliens who are authorized to be employed in the United States

¹⁰9 FAM § 41.51, n. 14.3-2.

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¹8 U.S.C.A. § 1184(e)(6).

²It should be noted that although spouses of E visa holders are entitled to work in the United States based on their relationship to the principal, the children of the principal are not entitled to work as a result of this relationship.

^{2,20}Record Maintenance (RM) 00203.500C.1 ("Aliens Work Authorized without specific DHS Authorization").

^{2,40}Memorandum of INS Deputy Executive Associate Commissioner William Yates, "Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determinations on the Requisite Employment Abroad for L Blanket Petitions" (Feb. 22, 2002).

without the need for an EAD.^{2.60} Yet, no such amendment to the regulations has been made.^{2.80}

Because it remains unclear whether spouses of E visa holders must secure an EAD to work in the United States, it is advisable to obtain such authorization until this question is resolved. The spouse of an E-1 treaty trader or E-2 investor may apply for an EAD at the DHS Service Center with jurisdiction over his or her place of residence. However, if the EAD application is filed concurrently with the principal's Petition for a Nonimmigrant Worker (E Form I-129), the EAD application should be filed at the California Service Center or the Texas Service Center, depending on the principal's place of employment.

The applicant must provide evidence of his or her spouse's E nonimmigrant status, which may include a photocopy of the pertinent Form I-94 card or a Form I-797 Approval Notice. In any case, a copy of both the principal's and the dependent spouse's I-94 cards (which should be notated to reflect admission as an E dependent) must accompany the application.³ A copy of the couple's marriage certificate must also be included. Once the DHS approves the application, it will issue an employment authorization document (or "EAD" card) usually valid for a period of two years.⁴ Renewal applications should be filed no less than 90 days before the expiration of the EAD to ensure no break in employment authorization.

§ 12:11 Permanent residence for investor entrepreneurs

Research References

West's Key Number Digest, Aliens ☞44, 51.5

Construction and application of sec. 203(a)(3) of Immigration and Nationality Act of 1952 (8 U.S.C.A. sec. 1153(a)(3)) as amended giving preference visas to professionals or persons having ability in arts and sciences, 18 A.L.R. Fed. 287

Federal Procedural Forms § 40:446

While temporary E nonimmigrant visas are available only for

^{2.60}Memorandum of INS Deputy Executive Associate Commissioner William Yates, "Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determinations on the Requisite Employment Abroad for L Blanket Petitions" (Feb. 22, 2002).

^{2.80}See 8 C.F.R. § 274a.12(b).

³Memorandum of INS Deputy Executive Associate Commissioner for Immigration Services, "Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determinations on the Requisite Employment Abroad for L Blanket Petitions" (Feb. 22, 2002).

⁴Memorandum of INS Deputy Executive Associate Commissioner for Immigration Services, "Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determinations on the Requisite Employment Abroad for L Blanket Petitions" (Feb. 22, 2002).

those foreign nationals hailing from the treaty countries discussed above, the INA does feature an “investor” category for nationals of any country who wish to become permanent residents of the United States. Up to approximately 10,000 immigrant visas are available each fiscal year for foreign national entrepreneurs who enter the United States to engage in a new commercial enterprise: (1) in which they have invested or are actively in the process of investing a specific amount of capital; and (2) which will benefit the United States economy by creating at least 10 full-time jobs.¹ The investment must be a minimum of \$1 million or, in specially targeted employment areas, at least \$500,000.² To deter fraudulent applications, permanent residence status is initially conditional and subject to DHS review after two years.³ The essential elements of this investor classification are reviewed below.

New Commercial Enterprise

The enterprise must be for-profit and may take one of three forms: (1) the creation of an original business; (2) the purchase of an existing business that is restructured or reorganized, resulting in a new commercial enterprise; or (3) the expansion of an existing business resulting in a 40 percent increase in its net worth or number of employees.⁴ Multiple foreign national entrepreneurs may pool investments as long as each invests the minimum capital required and creates 10 jobs. Foreign national investors may also join other investors who are not seeking permanent residence.⁵

Investment of Capital

The new investment must have occurred after November 29, 1990.⁶ Although the INA permits foreign nationals actively in the process of investing to qualify, the pertinent regulations specify that prospective investment arrangements are insufficient; inves-

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¹8 U.S.C.A. § 1153(b)(5)(A). The number of available visas cannot exceed 7.1% of the worldwide level of all employment-based immigrant visas.

²8 U.S.C.A. § 1153(b)(5)(C).

³8 U.S.C.A. § 1186b; 8 C.F.R. § 216.

⁴8 C.F.R. § 204.6(h). With regard to the pooling of investments for the expansion of an existing business, the prospective immigrant investor’s contribution to a pool investment, standing alone, need not result in the requisite 40 percent increase in the net worth or the number of employees; it is sufficient that the pool investment, including the foreign national’s individual contribution thereto, result in at least a 40 percent increase. See 73 Interpreter Releases 1617 (Nov. 18, 1996).

⁵8 C.F.R. § 204.6(g).

⁶8 C.F.R. § 204.6(e).

tors must show an actual commitment of the required capital.⁷ The invested capital may take various forms, including cash, equipment, inventory, or other tangible property, cash equivalents, such as certificates of deposits, or an indebtedness provided that the debt is secured by the investors' personal assets.⁸

As with E-2 treaty investors, foreign national entrepreneurs must place the required amount of capital at risk to generate a return. Where cases involve complex limited partnerships and arrangements that appear to remove the required risk from such investments, one should anticipate that the DHS will request additional evidence from the applicant to ensure compliance with the statute.⁹ Furthermore, indebtedness that is secured by the assets of the new commercial enterprise is not considered sufficiently at risk and cannot be used as capital. The capital may be drawn from anywhere in the world (including the United States), but it must have been acquired lawfully.¹⁰ The regulations do not address whether or not the investment may be contingent upon approval of the immigrant visa. The INS has advised in the past, however, that invested funds may be placed in escrow to be released to the enterprise only upon the approval of the petition and visa issuance or adjustment to permanent residence.¹¹ However, the capital in escrow must immediately and unequivocally be committed to the enterprise upon the grant of the conditional permanent residence.¹²

Role of Foreign National Entrepreneurs

Although the statutory requirement of "engaging" in the new commercial enterprise is less stringent than the "direct or develop" stricture for treaty investors, the foreign national must nevertheless either participate in day-to-day management or in policy formulation. Those who serve as corporate officers or directors meet this requirement as do those who are limited partners if the new enterprise is a limited partnership.¹³

Amount of Capital Required

A minimum of \$1 million must be invested in the new commercial enterprise unless the enterprise is located in a targeted employment area where a minimum of \$500,000 is required.¹⁴ Targeted

⁷8 C.F.R. § 204.6(j)(2).

⁸8 C.F.R. § 204.6(e).

⁹See 74 Interpreter Releases 265, 266 (Feb. 10, 1997).

¹⁰8 C.F.R. § 204.6(e).

¹¹See 75 Interpreter Releases 1227, 1238 (Sept. 4, 1998).

¹²75 Interpreter Releases 1227, 1238 (Sept. 4, 1998).

¹³8 C.F.R. § 204.6(j)(5)(ii), (iii).

¹⁴8 C.F.R. § 204.6(f).

employment areas are defined as rural or high unemployment areas whose unemployment rate is 150 percent of the average national rate.¹⁵ The INA requires that at least 3,000 of the approximately 10,000 investor immigrant visas be reserved for targeted areas.¹⁶

Employment Creation of 10 Jobs

The investment in the new commercial enterprise must create full-time positions (at least 35 hours per week) for at least 10 employees. The workers must be employees and cannot be independent contractors.¹⁷ They need not be hired immediately, but a comprehensive business plan must be submitted, projecting the hiring of 10 employees over the initial two years of the enterprise.¹⁸ If a “troubled business” is acquired, the employees must be retained at preinvestment levels for the two-year period.¹⁹ Although part-time employee jobs do not qualify, employees may share full-time jobs.²⁰

Two-Year Conditional Permanent Residence Status

In order to deter fraud, permanent residence status for foreign national entrepreneurs is granted on a conditional basis for two years. Within 90 days prior to the second anniversary of the initial approval, investors must petition the DHS to convert their conditional status into unconditional permanent residence. At that time, the foreign national must demonstrate that: (1) a commercial enterprise was established; (2) he or she invested or was actively investing the requisite capital; and (3) he or she implemented the promised actions during the two-year period.²¹ For foreign nationals who fail to meet this burden, permanent residence is terminated.²² It is important to note, however, that these requirements have been interpreted liberally.²³ For example, conditional status will generally be removed when the foreign national “has, in good faith,

¹⁵8 C.F.R. § 204.6(e).

¹⁶8 U.S.C.A. § 1183(b)(5)(B).

¹⁷8 C.F.R. § 204.6(e).

¹⁸8 C.F.R. § 204.6(j)(4)(B).

¹⁹8 C.F.R. § 204.6(j)(4)(B). A “troubled” business is defined as a minimum two-year-old enterprise that has suffered losses during the last 12- or 24-month period equal to 20% of the company’s net worth prior to the loss. 8 C.F.R. § 204.6(e).

²⁰8 C.F.R. § 204.6(e).

²¹8 U.S.C.A. § 1186b(d); 8 C.F.R. § 216.6(c); 59 Fed. Reg. 26587, 26592 (May 23, 1994).

²²8 U.S.C.A. § 1186b(b)(1). A foreign national whose permanent residence is terminated may request review of the termination in a removal proceeding. 8 U.S.C.A. § 1186b(b)(2); 8 C.F.R. § 216.6(d)(2); 59 Fed. Reg. 26587, 26592 (May 23, 1994).

²³59 Fed. Reg. 26587, 26588 (May 23, 1994).

substantially met the capital investment requirement of the statute and continuously maintained" the capital investment over a two-year period.²⁴ Similarly, if the business has not yet created 10 full-time jobs, the conditional status may be removed where the foreign national "can be expected to create within a reasonable period of the time" the necessary 10 jobs.²⁵

²⁴8 C.F.R. § 216.6(c)(iii).

²⁵8 C.F.R. § 216.6(c)(iv).

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¹8 U.S.C.A. § 1101(a)(15)(L).

²When a "blanket" L-1 petition has been filed, the one year requirement is reduced to six months.

³The employer files a Form I-129 Petition for Nonimmigrant Worker and L Supplement with the DHS Service Center with jurisdiction over the proposed location of employment. That form is accessible at <http://uscis.gov/graphics/formsfee/fo>