

E-1 Treaty Trader And E-2 Treaty Investor Visas

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For those wishing to invest in the United States and promote international trade and commerce to the benefit of the economy, as well as create jobs and infuse much needed capital, the E visa has a number of distinct advantages, especially given the significant difficulties and pitfalls of other nonimmigrant options. This visa category is available to principal investors, traders, and managers, as well as essential employees.¹ It serves several functions including: (1) increasing foreign direct investment,² and (2) creating jobs in the United States.³ The E visa is also one of the only nonimmigrant visa options that permit a foreign national to engage in self-employment. Moreover, E visas are issued for an initial period of five years,⁴ but they can be renewed, often in five-year increments, as long as the qualifying activity continues. Another advantage of the E visa is that the principal applicant's spouse is permitted unrestricted employment authorization.⁵ Lastly, since the E visa is based

¹ Note that the E-3 category that permits applicants to enter the United States to perform a specialty occupation only applies to Australian citizens.

² The United States defines foreign direct investment as the ownership or control, directly or indirectly, by one foreign person (individual, branch, partnership, association, government, etc.) of 10% or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise. 15 CFR §806.15(a)(1).

³ U.S. Department of Commerce, *Visas and Foreign Direct Investment: Supporting U.S. Competitiveness by Facilitating International Travel* (Nov. 2007), at page 8 (“Such investors are important to U.S. economic growth and job creation.”).

⁴ Practice pointer: given that E visas are treaty-based and therefore negotiated, it is always imperative to check visa reciprocity for each country. For instance, Australians can obtain E-1/E-2 visas for four years. Polish and Mexican citizens can only obtain E visas for one year.

⁵ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §1184) (INA §214(e)(6)).

on bilateral treaties, this classification may be more resilient to recent attempts to restrict specialized workers from entering the United States.⁶

The statutory provision for the E nonimmigrant visa classification is found at Immigration and Nationality Act (INA) §101(a)(15)(E).⁷ Both the U.S. Department of State (DOS) and the U.S. Citizenship and Immigration Services (USCIS) have published regulations, 8 Code of Federal Regulations (CFR) §214.2(e) and 22 CFR §41.51, pertaining to this classification. USCIS regulations are now substantially consistent with DOS positions, and USCIS has traditionally deferred to DOS on complex E visa interpretation issues.⁸ Hence, the DOS-published *Foreign Affairs Manual* (FAM), 9 FAM 41.51 and notes, is the most comprehensive and authoritative government publication outlining the requirements for E visas. The authors here wish to focus the discussion on those E visas within the category which focus on international investment and commerce. Specifically, there are two types of E nonimmigrant visas meeting this description: E-1 Treaty Trader and E-2 Treaty Investor. The Immigration and Nationality Act at §101(a)(15)(E) defines an E nonimmigrant as:

“...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 state 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, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national;

⁶ It is perhaps for this reason that consular officers are required to adjudicate E applications within the “spirit” of economic enhancement and facilitation that underpins the economic treaties that form their foundation. Accordingly, the Department of State (DOS) has instructed consular officers to “exercise a great amount of judgment and discretion” in applying regulatory requirements, and should be “flexible, fair, and uniform” in adjudications. 9 FAM 41.51, N.1, 22 CFR §41.51. We see no such comity with respect to any other visa category in the present restrictive, adjudicating environment.

⁷ 8 USC §1101(a)(15)(E).

⁸ *E.g.*, *Kim v. District Director*, 586 F.2d 713 (9th Cir. 1978). This deference is probably well founded, given that E visas are based on international treaties, which are traditionally the sphere of DOS. *See Klasko*, “Proposed E-visa Regulations: No Treaty Between the INS and the State Department,” 68 *Interpreter Releases* 1417 (Oct. 11, 1991), for further discussion. Note further that the comity between DOS and USCIS has not always existed. For instance, in the seminal case of *Matter of Walsh and Pollard*, 20 I&N Dec. 60 (BIA 1988), legacy INS challenged DOS’s granting of an E-2 visa, by virtue of its contrary interpretation of the substantiality and essential skills requirements. This resulted in two different proposed regulations published in 1991, which could potentially have created different standards for consular processing than for extensions and change of status petitions. INS proposed regulations were published in 56 Fed. Reg. 42952–57 (Aug. 31, 1991), while the DOS proposed regulations were published in 56 Fed. Reg. 43565–71 (Sept. 3, 1991).

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

The E visa category’s key advantages over the other nonimmigrant categories are:

1. **Direct Filing with the Consular Post.** Unlike most other nonimmigrant work visas such as the H-1B, the E visa does not require a favorable determination by the U.S. Citizenship and Immigration Services (“USCIS”) in the United States prior to submission of the visa application at a U.S. Department of State (“DOS”) Consular Post. Depending upon the processing times, it can be faster to obtain an E visa than other nonimmigrant visas.
2. **The Ability to Remain in the United States Indefinitely.** Unlike other nonimmigrant work visas such as the L-1 and H-1B which specify a maximum period of time that a person may remain in the United States, in most cases, an E visa holder may continue to seek extensions of stay in E classification and/or visa renewals indefinitely, as long as the E visa holder and the U.S. employer continue to qualify.
3. **Prior Work Experience or Obtainment of Academic Degrees Not Required.** The applicant does not need any prior employment experience with the overseas parent, subsidiary or branch office of the U.S. enterprise before applying for an E visa. Similarly, the applicant is not required to possess a Bachelor’s or higher degree to work in the occupation in the U.S.
4. **Not Subject to Quota.** There are no statutory limitations to the number of visas that can be issued in the E-1 and E-2 categories.

As mentioned above, the E visa is based upon a Treaty of Friendship, Commerce and Navigation, Bilateral Investment Treaties or other arrangements (e.g. North American Free Trade Agreement (“NAFTA”), which have been entered into between the United States and the country of which the visa applicant is a national. Depending upon the reciprocity requirements with each treaty country, E visas are generally issued as *multiple entry visas* (which allow the holder to make unlimited trips to the United States during the duration of the visa) valid for a period of five years. Upon applying for admission to the United States, an E applicant can receive an initial period of authorized stay (as evidenced by the Form I-94 Arrival/Departure Record) of up to two years. Extensions of stay are granted by the USCIS

for periods of up to two years. In most cases, E visas (and corresponding Forms I-94) can be extended indefinitely as long as the E visa holder and the U.S. employer continue to qualify.

A. **REQUIREMENTS**

As with most work related visas, it is necessary for both the employer and the individual to satisfy certain criteria in order to qualify for the visa.

1. ***Nationality of Employer***

The employer must have the nationality of the treaty country. The employer can be an individual or an organization. If the employer is an individual, he/she must have the nationality of the treaty country. The nationality of a U.S. Lawful Permanent Resident (“Green Card” holder) does not qualify in this determination.

An organization qualifies for the nationality of the treaty country if it is at least 50% owned by persons (including individuals and business organizations) having the nationality of the treaty country. Where the foreign enterprise is a publicly held corporation and the actual percentage of ownership cannot be determined, the corporation’s nationality is presumed to be that of the country in which its stock is principally listed and traded on a stock exchange.

2. ***E-1 Treaty Trader Classification***

a) **Nature of Trade**

In order to qualify for E-1 Treaty Trader classification, the U.S. enterprise must be engaged in substantial trade between the treaty country and the United States. “Trade” generally requires the direct international exchange of goods for money between the United States and the treaty country. Trade that is conducted through an independent trading company or on a commission basis does not qualify as “trade.” Goods are defined as the tangible commodities or merchandise having extrinsic value. The definition of “trade” also includes trade in services and technology so that activities such as international banking, insurance, transportation, communications and data processing, advertising, accounting, design and engineering, management consulting, tourism, technology transfer and news gathering are included as E-1 trading activities. “Services” should be interpreted “in an expansive fashion” according to the DOS.

b) **Trade must be “Substantial”**

The term “substantial trade” is defined to mean that the number of international transactions conducted and the monetary value of the transactions are sufficient to ensure a continuous flow of items of trade between the United States and the treaty country. This continuous flow contemplates numerous exchanges over time rather than a single transaction, regardless of value. Greater weight is given to more numerous exchanges of larger value than the monetary value of any single trade item. Domestic trade is not counted in this determination.

c) **Trade must be Principally between the United States and the Treaty Country**

The international trade must be principally between the United States and the treaty country. “Principally” means that more than 50% of the total volume of international trade of the United States enterprise must be between the United States and the treaty country.

3. ***E-2 Treaty Investor Classification***

a) **Investment or In the Process of Investing**

In order to qualify for the E-2 Treaty Investor visa, the foreign investor or enterprise must have invested or must be actively in the process of investing in a U.S. enterprise. “Investment” is the placing of capital, including funds and other assets, at risk in a commercial enterprise in expectation of generating a profit. The treaty investor must be in possession of and have control over the capital. The capital invested must be irrevocably committed to the U.S. enterprise and subject to partial or total loss if the investment does not succeed. The capital must be the investor’s unsecured personal business capital or capital secured by personal assets. Uncommitted funds in a bank account are not sufficient. Placing funds in escrow pending approval of the E visa with legal mechanisms that irrevocably commit funds but also protect the investor if the application is denied is permissible.

b) **Bona fide Enterprise**

The investment must be in a real and active enterprise that produces goods or services for profit. For example, uncommitted funds in a bank account do not represent an investment unless other evidence of business activity exists to demonstrate that the funds are used in the

routine operation of the business such as payment of bills or purchase of inventories. Similarly, an investment of money in the stock of publicly traded companies or a mutual fund would not be considered an active investment (unless, of course, the investor is purchasing the stock with a view toward acquiring the company).

c) **Investment must be “Substantial”**

At the present time, there is no minimum dollar amount used to determine whether an investment is “substantial.” In practice, this determination varies greatly from post to post. However, the following guidelines are generally used in order to determine substantiality:

i) The “Proportionality Test”

An investment must be substantial in the proportional sense, meaning the amount of investment in relationship to the total cost of either purchasing an established enterprise or creating the type of enterprise being considered. The proportionality test compares the amount of the investors’ investment to the total cost of the enterprise so that the lower the total cost of the enterprise, the higher, proportionately, the investment must be to meet the substantiality requirement.

The investment must also be sufficient to ensure the treaty investor’s financial commitment to the success of the enterprise and sufficient to support the likelihood that the treaty investor will successfully develop and direct the enterprise.

ii) The “Marginality Test”

The enterprise must have the present or future capacity to generate income in excess of what is required to provide a minimal living for the E-2 visa applicant and his or her family. Even without this capacity, an enterprise that has a present or future capacity to make a significant contribution is not a marginal enterprise. But the projected future capacity should be realizable within five years.

d) **Developing and Directing the Enterprise**

The E-2 treaty investor must “develop and direct” the enterprise by controlling the enterprise. Control can be established through ownership of at least 50% of the business, by possessing operational control through a managerial position or other corporate device, or by “other means.” For example, the develop and direct requirement may be satisfied if the E-2 treaty investor can demonstrate that it has, in fact, operational control, even though it may be an equal or minority owner in the U.S. enterprise, provided that the nationality requirements are satisfied.

4. ***Qualifications of an Individual Applicant***

If the U.S. enterprise meets the qualifications for either E-1 treaty trader or E-2 treaty investor status, the foreign national applying for the visa must qualify as an executive or supervisor or possess special qualifications that are essential to the operation of the U.S. enterprise. The basic qualifications for each position are as follows:

a) **Executive/Supervisor**

A person applying as an executive or supervisor must show that the executive or supervisory element of the position is a principal and primary function of the position and not an incidental or collateral function. See 8 C.F.R. §214.2(e)(17). Executive and/or supervisory duties grant the employee ultimate control and responsibility for the enterprise’s overall operations or one of its major components.

An executive position provides the employee great authority to determine the policy of and direction for the enterprise.

A supervisory position grants the employee supervisory responsibility for a significant proportion of an enterprise’s operations and does not generally involve the direct supervision of low-level employees.

Individuals applying for E visa classification as executives or supervisors must demonstrate executive or supervisory qualifications based upon the following criteria:

- i) Executive or supervisory duties and responsibilities in the proposed position in the United States;
- ii) Executive or supervisory control over the U.S. enterprise’s overall operations, or a major component thereof;

- iii) Skill levels and number of employees supervised commensurate with the position;
- iv) Prior executive or supervisory experience which will be brought to the U.S. position; and
- v) A salary to be paid for the proposed position commensurate with the position.

b) Non-Supervisory Persons with Special Qualifications Essential to the Continuing Operation of the U.S. Enterprise

Certain essential, nonsupervisory employees, such as highly trained technicians or engineers who possess special qualifications, are also eligible for E visa classification. In order to qualify as an employee with special qualifications, the applicant must demonstrate that he or she has special skills or qualifications that are essential to the successful or efficient operation of the U.S. enterprise. See 8 C.F.R. §214.2(e)(18). An essential employee's skills do not have to be "unique" or "one of a kind" but rather "indispensable to the success of the enterprise." Knowledge of foreign language and culture, by itself, is not an essential skill, but can be a factor in determining whether the applicant has special qualifications for the position.

The essential nature of the employee's skills is determined by assessing a variety of factors including the following:

- i) The alien's degree of proven expertise in the targeted area of operations;
- ii) The uniqueness of the specific skill or aptitude;
- iii) The length of the alien's experience and/or training with the treaty firm;
- iv) The period of training or other experience necessary to effectively perform the proposed duties;
- v) The salary that the special qualifications can command; and
- vi) The availability of U.S. workers.

E visas issued on the basis of special qualifications may be time-limited. Furthermore, a skill that is unique at one point may later become commonplace. For example, skills to start up an enterprise may not be essential after the operation is running smoothly. Some skills may be essential only for the short-term training of employees. However, long-term essentiality can be established in connection with continuous activities such as product improvement, quality control, or the provision of a service not generally available in the United States.

B. PRACTICAL CONSIDERATIONS**1. *Duration of Stay in the United States***

The E visa is generally issued for five years, although Consular Posts may issue it for less than five years, particularly in the case of a newly established company. Regardless of the duration of the visa, upon entering the United States, an individual should receive an authorized stay of two years, as evidenced by the Form I-94 arrival/departure record. The individual may extend his or her authorized stay by submitting an application for extension of stay with the USCIS. In applying to extend stay in the United States, a person may request up to two years. Dependents of the E visa holder will be allowed to extend their stay to coincide with that of the principal visa holder. An extension of stay may not be denied solely on the basis of an approved immigrant visa petition or PERM application.

2. *Change of Employers/Change of Status/Change in Employment*

Employers should be conscious of the difference between the E-1 treaty trader visa and the E-2 treaty investor visa in requesting a change of employer or a change of status. A foreign national who wishes to transfer from an E-1 treaty trader company to an E-2 treaty investor company (or vice versa) without leaving the United States, will be required to file an application to change status with the USCIS. If approved, the foreign national will also need a new visa from the DOS in order to engage in international travel. However, transferring from one E-1 treaty trader company to another E-1 treaty trader company (or from one E-2 treaty investor company to another E-2 treaty investor company) without leaving the United States requires an application to the USCIS to “change employers.” Once approved, the alien may travel internationally utilizing the prior visa, assuming that it is still valid, and the Form I-797 authorizing the change to a different employer. They may also choose to apply for a new visa to reflect the new employer but are not required to do so.

E visa holders *may* perform work for affiliated companies without prior application to the USCIS if the following circumstances have been met: 1. the subsidiary/affiliate where the work is to be performed has the required parent/subsidiary relationship and independently qualifies as a treaty enterprise; 2. The work for the subsidiary/affiliate company is executive, supervisory, or requires special qualifications; and 3. At the time the E visa status was initially determined, the application included the subsidiary/affiliate company, and information about this possible employment was disclosed.

An application with and prior approval from the USCIS may also be required if there is a “substantive change” in employment. While the USCIS does not define “substantive change,” it does state that a fundamental change in the employing entity’s basic characteristics, such as a merger, acquisition, or sale of a division where the E visa holder is employed will be considered a substantive change.

A non-substantive change does not require USCIS approval, but often is recommended to facilitate international travel. A non-substantive change is also undefined, but the USCIS indicates that corporate changes that do not affect the previously approved employment relationship are non-substantive.

3. ***Dependent Spouse Employment Authorization***

The dependent spouse of an E nonimmigrant is eligible to apply for an employment authorization that will be issued by the USCIS, valid for the period of admission and/or status of the spouse not to exceed two years. The dependent spouse may renew the employment authorization document as long as the principal visa holder remains in valid E status. The employment authorization is not restricted to any field or specific employer. Dependent children are *not* eligible for employment authorization.

4. ***Dual Intent Not Explicitly Recognized By Statute***

An E applicant must have an intent to depart the United States upon completion of the authorized employment. An applicant’s statement of his/her intent to depart should be sufficient for the consular official. The applicant does not need to maintain a foreign residence. Admission to the United States, a change of status or extension of stay will not be denied because the E nonimmigrant has a PERM application or immigrant petition filed or approved on his/her behalf. However, because dual intent is not explicitly recognized for E nonimmigrants in the Immigration and Nationality Act, they must obtain an advance parole travel document and employment authorization document as part of the adjustment of status process in order to continue to travel internationally and work in the United States during this last stage of the “green card” process if they complete the last stage in the United States (instead of through the consular post abroad).