
MEMORANDUM

RE: SUMMARY: E-2 VISA

E-2 VISA: Significant investment required (e.g., \$200,000 plus), extended every 5 years, allows foreign national to remain in the United States on an open-ended basis (without a green Card) subject to the work limitations with the Visa. Although there is no employee hiring requirement, a total lack of employees may be evidence that the business is marginal. If the E-2 employee is a manager (rather than an investor), managing other employees may be expected as part of their job duties.

This type of Visa will be particularly valuable for foreign nationals who wish to visit the United States for up to 122 days per year (less than 183 days in any one year), and who do not require a Green Card (in order to avoid U.S. income taxation on their world-wide income). The E-2 Visa is particularly suited for international investors who would like a second home in the U.S.

Treaty Investor (E2 Visa)

Section 101(a)(15)(E) of the US Immigration and Nationality Act provides for visa status for nationals of countries that maintain an appropriate treaty of commerce and navigation with the United States or that is considered to be a treaty country under US law. The applicant must be coming to the United States to carry on substantial trade or to develop and direct the operations of an enterprise in which the national has invested, or is actively in the process of investing, a substantial amount of capital.

Treaty Trader and Investor visas are nonimmigrant categories. They do not confer permanent residency in the US nor do they lead to US citizenship, although they permit the applicant and qualified family members to live in the US for an extended period. For permanent residency in the United States, there is a separate program based on investment.

To qualify as Treaty Investor (E-2):

- The investor (either a real or corporate person) must be a national of a treaty country.
- The investment must be substantial. It must be sufficient to ensure the successful operation of the enterprise. The percentage of investment for a low-cost enterprise must be higher than the percentage of investment in a high-cost enterprise.
- The investment must be a real operating enterprise. Speculative or idle investment does not qualify.
- The investment must not be marginal. It must generate significantly more income than needed to provide a living to the investor and family, or it must have a significant economic impact in the United States.
- The investor must have control of the funds, and the investment must be at risk in the commercial sense. For the purpose of measuring the investment, loans secured with the assets of the investment enterprise are not counted.
- The investor must be coming to the US to develop and direct the enterprise. If applicants are not the principal investors, they must be employed as a supervisor, executive, or as the possessor of highly specialized skills.

What is a substantial amount of capital? There is no fixed amount which is considered "substantial." A substantial amount of capital constitutes that amount which is ample to ensure the investor's financial commitment to the successful operation of the enterprise as measured by the proportionality test. The proportionality test compares the total amount invested in the enterprise with the cost of establishing a viable enterprise of the nature contemplated or the amount of capital needed to purchase an existing enterprise.

Such comparison constitutes the percentage of the treaty applicant's investment in the enterprise. That percentage must

compare favorable in the fashion of an inverted sliding scale starting with a high percentage of investment for a lower cost enterprise. The percentage of investment decreases at a gradual rate as the cost of the business increases. An amount of capital invested in an enterprise is merely presumed to be substantial when it meets or exceeds the percentage figures given in the following examples (amounts shown are in US dollars):

- **75% investment in an enterprise costing no more than \$500,000 (if the cost of the enterprise is substantially lower than \$500,000, 85-90%, or even 100% investment may be required).**
- **50% investment in an enterprise costing more than \$500,000 but no more than \$3,000,000.**
- **30% investment in any enterprise costing more than \$3,000,000.**

A multi-million dollar investment by a large foreign corporation is normally considered substantial, regardless of the examples given above.

The investment must do more than merely yield a return capable of supporting the investor and family. A marginal enterprise is an enterprise which does not have the capacity to generate significantly more than enough income to provide a living for the investor, family and other alien employees.

Are joint ventures permitted? Yes, provided that the business or individual investor applying for the visa is in a position to "develop and direct" the enterprise. The applicant is in such a position by controlling the enterprise through ownership of at least 50% of the business, possessing operational control through a marginal position or other corporate device, or by other means showing the applicant controls the enterprise.

How long may the Treaty Investor stay in the US? The applicant must have the intention of departing the US upon

conclusion of the commercial activities. Nevertheless, holder of E-visas may reside in the US as long as they continue to meet E-visa qualifications.

"Essential employees" may remain only as long as their skills are required to operate the business, and only as long as the owner can show either that US workers cannot be trained to duplicate the skills or that the owner is making reasonable efforts to train US workers as replacements.

On initial entry, immigration officials normally authorize a stay of up to one year in the US, with extensions generally available for as long as the E-visa holder and family maintain their E-visa status. The initial visa for an investor in an existing business may be up to 5 years; new U.S. business may be up to 2 years. A new business may require a Business Plan with financial projections.

E-2 Visa Application Process

The E-2 visa application process may vary from one country to the next. Different formatting rules, different forms and fees, different processing times, should be expected. (For example, Vancouver is currently testing the DS-160 form rather than the DS-156/156E forms; Istanbul says it can review an E-2 in about a week while other Consulates and Embassies may take up to 12 weeks; Some Embassies and Consulates require hand delivering the petition at a pre-review interview while others allow the petition to be mailed in advance of the interview; etc.) Filing within the U.S. as a "change of status" is possible but if the alien leaves the U.S., the alien will need to complete the Embassy or Consulate review of their application and have their visas processed before they are allowed to return to the U.S. on their E-2 status. Consequently, if they are from a country with a long review time, the alien needs to make arrangements to start the review so it concludes in time for their reentry.

Is a visa available to the applicant's wife and children?
Yes. Spouses and children under age 21 qualify for derivative E-visas based on the principal applicant's qualification. It is not necessary that they hold the nationality of the principal applicant. However, when the surnames of a spouse or children (as appearing on their passports) differ from that of the principal applicant, copies of

marriage certificates, birth certificates, or other legal documentation must be submitted to establish the relationship. De-facto spouses and fiance(e)s do not qualify for derivative status. Dependent E-visa holders are allowed to work in the United States.

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