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Ch 4 - E-1 and E-2 Visas and Status

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I. Executive Summary

The E visa category allows foreign nationals who are citizens of treaty countries to engage in activities as a treaty trader, as a treaty investor, or as an employee of a qualifying entity that in turn must be a treaty trader or investor. Treaty traders engage in substantial international trade of goods, services, or technology between the treaty country and the U.S. Treaty investors direct and develop a business in which the investor has either already invested or is in the process of investing. E employees should be executives, supervisors, or essential. E status may be valid for up to two years, and E visas are issued for up to five years. The foreign national may apply for new E visas or E extensions as long as he or she continues to engage in appropriate treaty activities. Dependent spouses and minor children of E nonimmigrants also obtain E status, and dependent spouses are eligible to apply for employment authorization.

A. Checklist of Requirements

§ Appropriate treaty between the United States and the country of the trader or investor's nationality

§ Trader: substantial international trade of goods, services, or technology principally between the United States and the treaty country

§ Investor: direction and development of an investment enterprise, where the investment is real (at risk of loss, irrevocably committed, and possessed and controlled by the investor), substantial, and bona fide

§ Employees: executive, supervisory, or essential

B. Documents Necessary to Prepare E-1 Petition

§ Evidence of nationality of the E enterprise

§ Evidence of substantial trade OR

§ evidence of investment

§ Information on corporate relationship between two companies, if applicable

§ Job description for U.S. assignment

§ Basic information about the company

§ Basic biographic information about the employee and his or her family, if applicable

§ Copies of biographic pages of passports of employee and his or her family, if applicable **[[Page 306]]**

C. Checklist of Questions to Ask the Client

§ What is the volume of trade or the amount of investment?

§ Has the E enterprise been established?

§ Is the E enterprise publicly-owned or privately-held?

§ What will be the nature of the foreign national's role at the E business?

§ What was the nature of his or her role at the foreign company, if applicable? (Can explore numerous roles, if applicable.)

§ Will the foreign national provide services to a related corporate entity or pursuant to a contract between the E enterprise and a U.S. entity?

§ Will the E enterprise be a joint venture?

§ Is there a labor dispute or other work stoppage at the worksite?

§ Will the E-2 enterprise hire employees?

§ Does the enterprise have a business plan or financial statement prepared?

II. Requirements and Definitions

The E visa classification allows foreign nationals to visit and reside in the United States, "in pursuance of the provisions of a treaty of commerce and navigation" between the United States and the foreign national's country of citizenship or nationality.[1] There are two subsets of E visa classification: the E-1 is for "Treaty Traders" and the E-2 is for "Treaty Investors."[2] Department of State (DOS) directs consular officers to consider the "spirit" of the "treaties which were entered into, at least in part, to enhance or facilitate economic and commercial interaction between the United States and the treaty country."[3] Although there are similarities between the E-1 and E-2 visa categories, such as the requirement of a treaty or law governing trader and investor activities between the United States and the foreign country, the E-1 and E-2 are not identical; the practitioner is advised to consider the individual requirements, as discussed in the sections below.

Dependent spouses and children also hold the same E-1 and E-2 status, respectively,[4] regardless of their nationality.[5] Dependent spouses are eligible to apply for employment authorization, as discussed below. **[[Page 307]]**

A. Treaty Between the U.S. and the Foreign Country

First and foremost, there must be a "treaty of commerce and navigation" between the United States and the country of the foreign national's nationality.[6] Qualifying treaties "include treaties of Friendship, Commerce and Navigation and Bilateral Investment Treaties."[7] DOS noted that the treaties were negotiated and entered into for the purpose of "develop[ing] international commercial trade."[8]

A treaty country is defined as "a foreign state with which a qualifying Treaty of Friendship, Commerce, or Navigation or its equivalent exists with the United States."[9] In the absence of a treaty, a statute may be in effect to "accord[] treaty visa privileges… by specific legislation,"[10] such

as for Jordan, Chile, and Singapore,[11] or "to give effect to commitments in certain Free Trade Agreements."[12]

E-1 treaty countries	E-2 treaty countries
	Albania
Argentina	Argentina
	Armenia
Australia	Australia
Austria	Austria
	Azerbaijan
	Bahrain
	Bangladesh
Belgium	Belgium
Bolivia	Bolivia
Bosnia and Herzegovina	Bosnia and Herzegovina
Brunei	
	Bulgaria
	Cameroon
Canada	Canada
Chile	Chile
China (Taiwan)	China (Taiwan)
Colombia	Colombia
	Congo (Brazzaville)
	Congo (Kinshasa)
Costa Rica	Costa Rica
Croatia	Croatia
	Czech Republic **[[Page 308]]**
Denmark	Denmark
	Ecuador
	Egypt
Estonia	Estonia
Ethiopia	Ethiopia
Finland	Finland
France	France
	Georgia
Germany	Germany
Greece	
	Grenada
Honduras	Honduras
Iran	Iran
Ireland	Ireland
Israel	
Italy	Italy
	Jamaica
Japan	Japan
Jordan	Jordan
	Kazakhstan
Korea (South)	Korea (South)

	Kyrgyzstan
Latvia	Latvia
Liberia	Liberia
	Lithuania
Luxembourg	Luxembourg
Macedonia	Macedonia
Mexico	Mexico
	Moldova
	Mongolia
	Morocco
Netherlands	Netherlands
Norway	Norway
Oman	Oman
Pakistan	Pakistan
	Panama
Paraguay	Paraguay
Philippines	Philippines
Poland	Poland
	Romania
	Senegal
Singapore	Singapore
	Solvak Republic
Slovenia	Slovenia
Spain	Spain
	Sri Lanka **[[Page 309]]**
Suriname	Suriname
Sweden	Sweden
Switzerland	Switzerland
Thailand	Thailand
Togo	Togo
	Trinidad and Tobago
	Tunisia
Turkey	Turkey
	Ukraine
United Kingdom	United Kingdom
Yugoslavia	Yugoslavia

DOS has provided a list of the treaty countries,[13] or DOS's Reciprocity Schedule may be consulted, although this information may be erroneous.[14] The practitioner is reminded that an individual country may be a party to a treaty for E-1 or E-2 activities rather than both trader and investor activities.[15]

In addition, if the United States imposes an embargo or other economic sanctions on a foreign country, then the trader or investor treaty may be rendered inoperable.[16] It should not be assumed, however, that both trade and investment activities are precluded; a foreign national may be permitted

to engage in E-1 activities even if E-2 activities are forbidden.[17]

B. Nationality

The treaty trader or investor must hold the nationality of the treaty country, as "determined by the authorities of the foreign state of which the alien is a national."[18] If the treaty trader or investor is a business or an employing entity, then nationality "is determined by the nationality of the individual owners of that business,"[19] where "ownership must be traced as best as is practicable to the individuals who are ultimately its owners."[20] At least 50 percent of the business must be owned by nationals of the treaty country,[21] and "shares of a corporation or other business organization owned by **[[Page 310]]** permanent resident aliens cannot be considered in determining majority ownership by nationals of the treaty country to qualify the company for bringing in alien employees" in E status.[22] For E-2 treaty investors, ownership is intertwined with control, as discussed below. For purposes of brevity, this chapter will refer primarily to nationality, since this is the term used in the statute, regulations, and other guidance.

For a small or privately-held company, establishing ownership and nationality may be straightforward. In contrast, entities with larger corporate structures should gather and present evidence of the ultimate ownership and nationality of at least 50 percent of the parent corporation.[23] Similarly, it may be more difficult to demonstrate the nationality of a publicly-traded corporation, as the "nationality of the owners of the stock" will be considered,[24] even if the stock is publicly-traded.[25] And if "a business in turn owns another business, then nationality of ownership must be traced to the point of reaching the 50 percent rule with respect to the parent organization."[26] But "the fact that a firm is incorporated under the laws of a State of the United States does not necessarily determine that it is not a foreign firm";[27] and the "country of incorporation is irrelevant to the nationality requirement for E visa purposes,"[28] because the focus of the inquiry is the ownership nationality.[29]

If the "corporation is sold exclusively on a stock exchange in the country of incorporation, however, one can presume that the nationality of the corporation is that of the location of the exchange";[30] and the foreign national should "still provide the best evidence available to support such a presumption."[31] For larger companies and corporations "whose stock is exchanged in more than one country, then the applicant must satisfy the consular officer by the best evidence available that the business meets the nationality requirement."[32] DOS guidance noted potential "complex corporate structures in these cases" and recommended that consular officers request advisory opinions

when **[[Page 311]]** necessary.[33] Despite a request for updated *Foreign Affairs Manual* (FAM) guidance or DOS instruction to U.S. consulates to accept Officer's Certificates confirming ownership for large multinational corporations that are publicly-traded "with millions of outstanding shares," in place of "voluminous shareholder records," DOS stated a "prefer[ence] to allow the consular officer to evaluate the evidence and determine if it satisfies the nationality requirement."[34]

Appropriate evidence of ownership and nationality include:

§ Articles of Incorporation for corporations;

§ Articles of Organization for limited liability corporations (LLC);

§ "Stock Certificates and Ledgers, Secretary of State certificates, Minutes of Board of Directors' meetings showing who the officers are and the distribution of capital";[35]

§ "[C]ertificate of ownership issued by the commercial section of a foreign embassy";

§ "[R]eports from a certified public accountant";[36]

§ Share certificates;

§ Operating agreement;

§ An organizational chart displaying "the full ownership structure," including legal evidence of the chain of ownership, such as if there are intermediary corporate entities;

§ A copy of the most recent Annual Report, if the company is publicly-owned and traded, listing the stock exchanges where company stock is traded;[37]

§ Copies of the biographic pages of the passports of the owners combined with evidence of their percentage of ownership, such as on tax returns or other corporate documents;[38] **[[Page 312]]**

§ Copies of "stock exchange listings";[39]

§ "An affidavit signed by the appropriate corporate official asserting that the company is traded exclusively on the [treaty country's] Stock Exchange;

§ "A copy of the most recent trading information on the stock";[40]

§ Documents relating to a merger, acquisition, spin-off, or other corporate event;

§ Officer's Certificate or affidavit, or statement from the company's accountant; and

§ Blanket L certification, if applicable.

In almost all cases, the E business must "have only one qualifying nationality," which must also be held by the "owner and all E visa employees of the company."[41] The one exception is if the "enterprise is owned and controlled equally (50/50) by nationals of two treaty countries," as a joint venture, in which case "employees of either nationality may obtain E visas to work for that company,"[42] as discussed below. In addition, individual treaties, such as the treaty between the

United States and the United Kingdom, may extend the treaty to territories or possessions,[43] or may require that the foreign national hold nationality and domicile in the treaty country, such that the foreign national must "reside[] actually and permanently in a given place, and ha[ve] his domicile there,"[44] for both E- and E-2 visa applications.[45] A consular officer from the U.S. Embassy in London "indicated that his unit uses a 'reasonable human standard' in applying the treaty requirement" of residence and domicile, although this may be "waived for a person currently in the U.S. in E or other long-term nonimmigrant visa status."[46]

If the owner or owners have dual nationality, then the individual(s) must select the nationality to be assigned to the E entity, which must in turn be held by the trader, investor, and/or employees.[47] If a dual national "possesses a passport for each country of nationality," then the individual "may have a visa issued in each passport, provided the visas are of different classification."[48] For example, a foreign national may have a B visitor visa in the passport of one country and also an E visa in the passport of another country, as long as the E visa is "issued in the passport of the treaty country,"[49] because **[[Page 313]]** all individuals must "hold themselves as nationals of that country for all E visa purposes involving that company, regardless of whether they also possess the nationality of another E visa country."[50] Employees of E enterprises must also hold the nationality of the E business, as discussed below,

In summary, only one nationality may predominate.[51] If the foreign national has the nationalities of a treaty country and the United States, then E-2 status for an employee is inappropriate if the owner of the E-2 enterprise claimed U.S. citizenship for the purpose of establishing and operating the business, because the owner is ineligible for E-2 status and therefore may not be the employer of an E-2 employee.[52] Similarly, a foreign national may not enter the United States based on his or her nationality of one country that is not a treaty country and then seek E-2 status based on nationality of another country that is a treaty country:

> "It is hereby found that, in the case of a dual national alien nonimmigrant, the nationality claimed or established by him at the time of his entry into the United States must be regarded… as his sole or operative nationality for the duration of his temporary stay in the U.S."[53]

C. Intent to Depart the U.S. upon Termination of Status

A foreign national seeking E status must seek temporary entry, which should be distinguished from the "temporary entry" of foreign nationals seeking admission pursuant to the NAFTA treaty,[54] from the requirement to maintenance of a residence abroad required of other nonimmigrants,[55] and from the explicit dual intent permitted of H and L nonimmigrants.[56] The foreign national's "expression of an unequivocal intent to return [abroad] when the E status ends is normally sufficient, in the absence of specific indications of evidence that the alien's intent is to the contrary."[57] Importantly,

unlike other nonimmigrant visa classifications, the E visa applicant is not required to demonstrate the intent to remain in the United States. "for a specific temporary period of time" or to demonstrate maintenance of a foreign residence.[58] The foreign national may **[[Page 314]]** "sell his or her residence and move all household effects to the United States,"[59] but he or she must also "indicate the intent to depart the U.S. upon termination of status, ceasing business operations or sale of business."[60]

In the event that there are "objective indications" of an intent to remain in the United States beyond the period of authorized stay, then "inquiry is justified to assess the applicant's true intent."[61] It is important to note, however, that E-2 status was granted to a foreign national who had U.S. citizen spouse and children.[62] An E-2 extension was also granted to a foreign national who stated that he traveled to the United States "to immigrate to U.S.A. and go into bussiness [sic]," because this statement was deemed to express a "desire to remain" in the United States which should not "negate his intent to depart upon termination of his temporary status."[63] Despite the holding and dicta of this case, the practitioner is advised against allowing the client to make such expressions, as they may be deemed "objective indications" and result in closer scrutiny. The foreign national in the case also possessed income and property abroad, which the court construed "to show his intent to return there if he must."[64]

Supplementary evidence of the intent to depart may include the following:

§ Title, deed, or mortgage of residence or other property in the home country;

§ Bank or credit card statements from the home country;

§ Professional or personal plans for the time period following completion of the E assignment, such as admission to a professional or educational program abroad;

§ Evidence demonstrating the continued residence of family members in the home country;

§ A copy of the current lease for a residence in the home country;

§ Copies of recent paystubs for the E visa applicant;

§ "[T]he most recent school transcript for each child between the ages of 5 and 18 inclusive"; and

§ "Signed statement of intent to depart the U.S. upon termination of status."[65]

It may also be permissible for an E visa applicant to "be a beneficiary of an immigrant visa petition" and nevertheless "satisfy [the consular officer] that his and/or her intent is to depart the United States upon termination of status, and not stay in the United States to **[[Page 315]]** adjust status or otherwise remain in the United States regardless of legality of status."[66] Unfortunately, the citation offered by the FAM guidance relates to L visa applicants,[67] who may have dual intent,[68] but dual intent is not explicitly permitted for those in E status.[69] DOS guidance formerly stated that "an application for initial admission, change of status, or extension of stay in E classification may not

be denied solely on the basis of an approved request for permanent labor certification or a filed or approved immigrant visa preference petition,"[70] but this statement has since been deleted.[71] Experience has shown, however, that foreign nationals may be able to hold E status for long periods of time, even ten or fifteen years, as long as the other requirements are satisfied.

Legacy INS guidance also states:

"E nonimmigrants have long been able to extend their stay indefinitely in the United States in order to pursue their treaty-based activities and to return to E classification, should an application for adjustment of status be denied.

"Based on the language contained in the statute and the supporting regulations, an E-1 [or] E-2… nonimmigrant alien (and any of such person's derivatives) may maintain status or obtain an extension of temporary stay while, at the same time, pursuing an application for adjustment of status. Therefore, an application for an extension of stay that is timely filed on behalf of an E-1 [or] E-2… nonimmigrant alien may be approved in spite of the alien's pending application for adjustment of status. Note that… E nonimmigrants must continue to observe the requirements of their nonimmigrant status, including limiting employment to the designated employer."[72]

D. E-1 Treaty Traders

As stated by U.S. Citizenship and Immigration Services (USCIS) guidance: "The enterprise (company, corporation, etc.) must be engaged principally and substantially in trade between the U.S. and the treaty country."[73] Specifically, E-1 treaty traders may be admitted "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 **[[Page 316]]** national."[74] When adjudicating an E-1 visa application, consular officers are directed to confirm that:

- "The requisite treaty exists," as discussed above;
- "The individual and/or business possesses the nationality of the treaty country," as discussed above;
- "The activities constitute trade," as discussed below;
- Such trade is "substantial," as discussed below;
- Such trade is "principally between the United States and the treaty country," as discussed below;
- The visa applicant, "if an employee, is destined to an executive/supervisory position or possesses skills essential to the firm's operations in the United States," as discussed below; and
- The visa applicant "intends to depart the United States when the E-1 status terminates," as discussed above.[75]

In addition to being "the actual owner of a qualifying enterprise," an E-1 nonimmigrant may be "an employee of such enterprise working in an executive or supervisory capacity or in a capacity which requires special qualifications essential to the operation of the enterprise," as long the foreign national has "the same nationality as the principal employer,"[76] as discussed below [Employees of E-1 and E-2 Entities].

1. E-1 trade activities

Stated simply, "trade for E-1 purposes involves the commercial exchange of goods or services in the international market place."[77] DOS guidance provides a three prong test for determining what constitutes trade:

§ "Trade must constitute an exchange;

§ "Trade must be international in scope; and

§ "Trade must involve qualifying activities."[78]

Appropriate evidence of the trade includes:

§ Negotiated contracts;

§ "[B]ills of lading, invoices or statements to indicate the current existence of any international trade";[79] **[[Page 317]]**

§ "[C]ustoms clearances, warehouse receipts, [and] sales receipts";[80]

§ "[L]etter of credit;

§ "[T]rade brochures;

§ "[I]nsurance papers, documenting commodities imported;

§ "[C]arrier inventories";[81]

§ "Correspondence showing trading activities;

§ "Purchase orders;

§ "Orders for goods shipped or awaiting shipment";[82]

§ Spreadsheets detailing "every qualifying transaction of international trade between the treaty countries during the last calendar year" and stating "the date, the invoice number, and the dollar value of the transaction," as well as "the total number and value of these transactions";

§ Copies of airbills, shipping receipts, or shipping invoices to demonstrate transfer of the goods or services between the two countries;

§ Calculations of the "total international trade undertaken by the treaty investor business";

§ Financial statements;

§ Copy of the most recent U.S. tax return filed with the IRS;

§ Copy of the business plan;[83]

§ Copies of confidentiality agreements with clients or customers;

§ Copies of consultancy agreements; and

§ Copies of documents discussing projects, processes, or technologies in development and/or in patent review.

a. Exchange of goods, services, or business activities

In order to qualify as trade, the exchange must be "actual," "meaningful," and for consideration.[84] A foreign national "cannot qualify for E-1 status for the purpose of **[[Page 318]]** searching for a trading relationship."[85] Rather: "Trade between the treaty country and the United States must already be in progress on behalf of the individual or firm to entitle one to treaty trader classification."[86] In particular, trade entails an "exchange" of "commodities" between the two countries that in turn "*create* transactions:"[87]

> "Trade is the existing international exchange of items of trade for consideration between the United States and the treaty country. Existing trade includes successfully negotiated contracts binding upon the parties which call for the immediate exchange of items of trade…. This exchange must be traceable and identifiable. Title to the trade item must pass from one treaty party to the other."[88]

Existing trade, however, "does not include transactions merely in the state of negotiation without the existence of a current actual volume of trade."[89] For a discussion of items that may be traded, see below. It is also unclear whether the manufacture of goods in a non-treaty country would disqualify the trade from being between the treaty country and the United States. On the one hand, if title passes from the treaty country to the United States, then the requirement would be satisfied. But on the other hand, if a consular officer considers the origin of the goods, then the E visa application may be denied. The practitioner is advised to research the website of the U.S. consulate to determine and/or contact the U.S. consulate to inquire whether such an approach would be acceptable.

b. International scope of trade activities

Because the objective of the treaties "is to develop international commercial trade between the two countries," the trade activities must be international in scope.[90] Therefore, "[d]omestic trade or the development of domestic markets without international exchange does not constitute trade."[91] Instead, the exchange of goods, services, or business activities must flow between the United States and the treaty country.[92]

c. Qualifying trade activities

Items that may be traded "include but are not limited to goods, services, international banking, insurance, monies, transportation, communications, data processing, advertising, accounting, design and engineering, management consulting, tourism, technology and its **[[Page 319]]** transfer, and some news-gathering activities,"[93] as well as "tourism and other intangible items with intrinsic value."[94]

"Goods" are defined as "tangible commodities or merchandise having extrinsic value."[95] "Services" are defined as "legitimate economic activities which provide other than tangible goods."[96] Notably, DOS acknowledged: "In the rapidly changing business climate with an

increasing trend toward service industries, many more services, whether listed below or not, might benefit from E-1 visa classification…. Essentially, any service item commonly traded in international commerce would qualify."[97] The important requirement is that "the provision of that service by an enterprise must be the purpose of that business and, most importantly, must itself be the saleable commodity which the enterprise sells to clients."[98]

It is insufficient, however, to merely deposit "proceeds from services performed in the United States…. in a bank account in a treaty country," as this "does not necessarily indicate that meaningful exchange has occurred if the proceeds do not support any business activity in the treaty country."[99]

2. The trade is substantial

The E-1 visa classification is inappropriate for trade that entails only "a single transaction, regardless of how protracted or monetarily valuable the transaction."[100] Rather, "[s]ubstantial trade is an amount of trade sufficient to ensure a continuous flow of international trade items between the United States and the treaty country," through "numerous transactions over time."[101] Stated another way: "Substantial trade does not necessarily refer to the monetary value of the transactions but rather to the volume of trade."[102]

DOS guidance directs consular officers to "focus primarily on the volume of trade conducted but… also consider the monetary value of the transactions as well."[103] Although "[t]here is no minimum requirement with respect to the monetary value or volume of each individual transaction," nevertheless the "monetary value of the trade **[[Page 320]]** item being exchanged is a relevant consideration, [and] greater weight will be given to more numerous exchanges of larger value."[104]

Still, the available guidance acknowledges that an E-1 entity may be a "smaller business:"[105]

> "The smaller businessman should not be excluded if demonstrating a pattern of transactions of value. Thus, proof of numerous transactions, although each may be relatively small in value, might establish the requisite continuing course of international trade. Income derived from the international trade which is sufficient to support the treaty trader and family should be considered as *favorably* when assessing the substantiality of trade in a particular case."[106]

The fact that DOS guidance accepts that an E-1 business may only provide income to support the foreign national and his or her family distinguishes the E-1 visa classification from the E-2 classification, where it is insufficient for a business to support only the foreign national and his or her family, as discussed below. In addition, the adjudicator may consider "any conditions" in the foreign national's country "which may affect the alien's ability to carry on such substantial trade."[107]

3. The trade is principally between the United States and the treaty country

As stated by the regulations, "[p]rincipal trade between the United States and the treaty country exists when over 50 percent of the volume of international trade of the treaty trader is conducted

between the United States and the treaty country."[108] The trade must be "conducted by the legal 'person' who is the treaty trader," which may be "an individual, a partnership, a joint venture, a corporation (whether a parent or subsidiary corporation), etc."[109] A subsidiary is considered "a separate legal person/entity," whereas "a branch is not considered to be a separate legal person or trader but part and parcel of another entity."[110] In order to determine the trade conducted by a branch, the consular officer "should look to the trade conducted by the entity of which it is a part, usually a foreign-based business (individual, corporation, etc.)."[111]

Whatever the remainder of the trade conducted by the foreign national or the E-1 entity, it "may be international trade with other countries or domestic trade,"[112] but experience has shown that consular officers are typically most concerned with confirming that the amount of trade conducted between the United States and the treaty country is at least 50 percent of all worldwide international trade, without including the amount of any **[[Page 321]]** domestic trade. In addition, if the E-1 trader satisfied this principal trade requirement, then "the duties of an employee need not be similarly apportioned to qualify for an E-1 visa," as long as the qualifying trade was not conducted by a branch office.[113] For a further discussion of eligibility requirements for E-1 employees, see below.

Appropriate evidence of the trade between the United States and the treaty country include "U.S. customs invoices and/or purchase receipts…, as well as a letter from a company officer certifying" to the amount of trade.[114]

E. E-2 Treaty Investors

E-2 treaty investors may be admitted to the United States "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."[115] The U.S. enterprise must be bona fide.[116] Each of these requirements is discussed in turn, with the distinction between making an actual investment and being in the active process of investing,[117] discussed below. When adjudicating an E-2 visa application, consular officers are directed to confirm that:

§ "The requisite treaty exists," as discussed above;

§ "The individual and/or business possesses the nationality of the treaty country," as discussed above;

§ The visa applicant "has invested or is actively in the process of investing";

§ The enterprise "is a real and operating commercial enterprise";

§ The visa applicant's "investment is substantial";

§ The visa applicant's investment "is more than a marginal one solely for earning a living";

§ The visa applicant "is in a position to "develop and direct" the enterprise";

§ The visa applicant, "if an employee, is destined to an executive/ supervisory position or possesses

skills essential to the firm's operations in the United States," as discussed below; and

§ The visa applicant "intends to depart the United States when the E-2 status terminates," as discussed above.[118]

Stated simply, the investment must be for "a commercial enterprise, thus it must be for profit."[119] For this reason: "E-2 investor status shall not, therefore, be extended to **[[Page 322]]** non-profit organizations."[120] In addition, an E-2 visa may be issued to a physician who will invest in a medical practice.[121] If the physician will engage in direct patient care, then health care certification must be obtained.[122]

1. The investment must be real

The E-2 treaty investor must have already invested or be "actively in the process of investing" capital for a U.S. enterprise.[123] The regulations define investment as "the treaty investor's placing of capital, including funds and other assets (which have not been obtained, directly or indirectly, through criminal activity), at risk in the commercial sense with the objective of generating a profit."[124] The following are also requirements:

§ The investor must possess and control the funds;[125]

§ The investor must put the investment capital at risk;[126] and

§ The investor must irrevocably commit the capital to the E-2 enterprise.[127]

DOS has stated the following regarding the scrutiny of the investment, and the practitioner may wish to convey the sentiments to clients who question the need for extensive evidence of the investment: "The rules regarding the amount of funds committed to the commercial enterprise and the character of the funds, primarily personal or loans based on personal collateral, are intended to weed out risky undertakings and to ensure that the investor is unquestionably committed to the success of the business."[128]

Similarly, one embassy states: "It is important to provide proof of actual purchases and/or signed contracts and leases related to the enterprise, not just wire transfers to a U.S. account."[129] As noted by one consular officer:

> "[T]he most problematic aspect of E-2 visa processing is the manner in which applicants document the underlying investment transaction. Applicants are urged to carefully document every step in the investment chain, from how they initially took possession and control of the capital assets, all the way to the financial arrangement by which these funds have been committed to the E-2 enterprise."[130]

Appropriate evidence of the investment includes: **[[Page 323]]**

- "A complete money trail of the funds invested, including:
  - "Documentation of the original source of the funds (sale of property, inheritance, loans, earnings, sale of business, etc.);
  - "Movement of these funds to a U.S. account";[131] such as "bank drafts, transfers, exchange permits, receipts,"[132] or cancelled checks, with evidence that the funds "exchanged hands directly between the buyer and the seller or a duly appointed agent";[133] and
  - "Use of these funds for qualifying business expenses," including "invoices, cancelled checks, and bank statements showing matching debits," with the figures highlighted;[134]
- "[C]opies of partnership agreements (with a statement on proportionate ownership);
- "[I]nsurance appraisals;
- "[N]et worth statements from certified public accountants;
- "[A]dvertising invoices";[135]
- "[B]ank records, financial statements, personally secured loans, savings, [and] promissory notes";[136]
- "[S]hares, titles, contracts, receipts, [and] licenses";[137]
- "A signed, dated, valid purchase agreement";
- "A binding escrow agreement… that explicitly says where the money goes if the visa is issued, what happens when it does not, and [that it] is signed and dated by all parties," with "cross-reference [to] exactly any relevant purchase agreement";[138] **[[Page 324]]**
- Articles of incorporation or partnership agreement;[139]
- "Signed, dated, valid lease for business premises, including evidence of payments;
- "Evidence of any other funds spent to acquire and set up the business";
- Evidence of purchase of inventory and/or equipment for the enterprise;[140]
- Copies of any relevant contracts for the E enterprise;
- Organizational or staffing charts, or payroll records or IRS Form 941 for the E enterprise;
- "[C]atalogs, sales literature, [and] news articles";[141]
- "[A] signed and dated franchise agreement," as well as "evidence of payment of the franchise fee";
- "[C]opies of debits from bank accounts, checks, [and business] invoices;
- Copies of any necessary and/or "[r]elevant local, state and/or federal licenses";
- "Monthly bank statements for the current calendar year;

- § Copies of the business's U.S. tax returns filed with the IRS for the previous three years, including "all statements and schedules";
- § Copies of Forms "W-2 and/or 1099s" for the previous two tax years;
- § "Profit and loss statements for the current and previous calendar years;
- § "A business plan that analyzes the local market and competition and gives a 5-year projection of profit and loss," as supported "by external sources";
- § "A breakdown of start-up costs necessary for the business to become operational";[142]
- § Copies of confidentiality agreements with clients or customers;
- § Copies of consultancy agreements;
- § Copies of documents discussing projects, processes, or technologies in development and/or in copyright/patent review; and
- § Statements from independent reviewers within the field attesting to the value of the copyright or patent. **[[Page 325]]**

a. Possession and control of the funds or assets

As stated by the regulations: "The treaty investor must be in possession of and have control over the capital invested or being invested."[143] Possession of the funds may be demonstrated by bank statements and bank transfers with the foreign national named as the owner, or by bequeath or inheritance documents, or contest or lottery awards with the foreign national named as the beneficiary.[144] The source of the capital should be "lawful."[145] For such "legitimate means" of earning or receipt of funds, "the proper employment of the funds may constitute an E-2 investment."[146] DOS has acknowledged that E-2 visa applications have been delayed by difficulty in "identifying the source of funding" for "small, family-owned businesses with modest levels of investments."[147]

The foreign national or foreign corporation must also establish ownership of at least 50 percent of the E-2 enterprise,[148] in order to direct and develop the enterprise, as discussed below, because "otherwise, other individuals who do have the controlling interest are in a position to dictate how the enterprise is to be developed and directed."[149] In the event that control of the capital results from possession of the capital, such as if the funds were earned, or were bequeathed or awarded solely to the foreign national, then the foreign national must have "unrestricted use" of the funds invested,[150] and he or she must have control over the use of the investment funds to direct and develop the enterprise,[151] as discussed below. Unsecured personal loans should be considered to be under the possession and control of the investor,[152] but older guidance indicated that "the required element of possession does not apply unless the unsecured loan is paid" and that payment of a loan to a business instead of directly to the foreign national would also be insufficient.[153]

The practitioner should note two points. First, merely inheriting a business "does not constitute an investment" for purposes of E-2 visa eligibility.[154] Second, it is not a **[[Page 326]]** requirement "that the source of the funds be outside the United States."[155] However, if the source of the capital is within the United States, the practitioner is advised to demonstrate how the foreign national, rather than an individual or entity in the United States , has full possession and control.[156]

Other forms of financial transactions, property ownership, or property rights may also be considered to be investments.[157] If the E-2 treaty investor has already spent funds to purchase goods or equipment for the proposed U.S. enterprise, then the amount spent "may be calculated in the investment total."[158] In addition, the "value of the goods or equipment transferred to the United States (such as factory machinery shipped to the United States to start or enlarge a plant) may be considered an investment."[159] But in order for any goods, equipment, or machinery to be considered an investment, the foreign national must establish that any usage "will be put, or are being put, to use in an ongoing commercial enterprise," specifically "for *investment and* not personal purposes."[160]

Similarly, DOS guidance states the following regarding the inclusion of intangible property in the calculation of assets or investment capital:

> "Rights to intangible or intellectual property may also be considered capital assets to the extent to which their value can reasonably be determined. Where no market value is available for a copyright or patent, the value of current publishing or manufacturing contracts generated by the asset may be used. If none exist, the opinions of experts in the particular field in question may be submitted for consideration and acceptance."[161]

Finally, the investment total may include payment of rents or leases of property or equipment, but an important point to note is that the valuation will be of the actual amount paid on a monthly basis rather than an annual basis.[162] The rationale is that "the market value of the leased equipment is not representative of the investment and neither is the annual rental cost."[163] This is because the E-2 treaty investor does not own the equipment or the property and therefore cannot claim the market value to be his or her investment of capital.[164] Instead, the adjudicator will consider the monthly payment of rent or leasing since this should be the actual amount of investment and since some portion of the payments may derive from capital earned from the business rather than exclusively from the investment.[165] The one exception is if the rent or lease payments are **[[Page 327]]** paid in advance, rather than from the proceeds of the business, in which case the actual amount paid should be included in the investment total.[166]

b. Risk of Investment

The E-2 treaty investor must put the investment capital at risk.[167] As stated by DOS guidance:

> "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 financial return…. If the funds are not subject to partial or total loss if business fortunes reverse, then it is not an 'investment' in the sense intended by [the statute]…. In short, at risk funds in the E-2 context would include only funds in which personal assets are involved, such as personal funds, other unencumbered assets, a mortgage with the alien's personal dwelling used as collateral, or some similar personal liability. A reasonable amount of cash, held in a business bank account or similar fund to be used for routine business operations, may be counted as investment funds."[168]

Clearly appropriate investment capital includes "the investor's unsecured personal business capital or capital secured by personal assets."[169] But "*[o]nly indebtedness collateralized* by the alien's own personal assets, such as a second mortgage on a home or unsecured loans, such as a loan on the alien's personal signature may be included, since the alien risks the funds in the event of business failure."[170] Any evidence presented should demonstrate the investor's "financial ability to make the… investment."[171]

However, capital arising from indebtedness secured by the business assets, such as "mortgage debt or commercial loans secured by the assets of the enterprise cannot count toward the investment, as there is no requisite element of risk."[172] This is the case especially when the foreign national pledges the proposed E-2 business as collateral, because all of the "funds from the resulting loan or mortgage are not at risk, even if some personal assets are also used as collateral."[173] In addition, an investment of funds obtained through loans guarantored by an individual other than the E-2 treaty investor are insufficient, even if there is an agreement between the guarantor and the proposed E-2 treaty investor.[174] **[[Page 328]]**

c. Irrevocable commitment of the capital

In order to qualify for an E-2 visa or status, the foreign national must demonstrate that the capital has been irrevocably committed to the proposed E-2 business;[175] the investment must not be "speculative" or unsubstantiated.[176] For enterprises where the funds have already been devoted to the U.S. business, appropriate evidence may include bank statements or transfers. The regulations also acknowledge that use of an escrow account may "also extend personal liability protection to the treaty investor in the event the application for E classification is denied."[177]

In contrast, if the capital has not been provided to the U.S. enterprise, then the foreign national must establish that he or she is "in the process of investing," such that he or she has "reached an irrevocable point to qualify."[178] It may be helpful to view this "irrevocable point" as the stage of undertaking every step necessary to set up the U.S. business except for actually providing the capital, as the foreign national "must be close to the start of actual business operations, not simply in the stage of signing contracts (which may be broken) or scouting for suitable locations and property."[179] In

fact, one Circuit Court has noted that signing a contract may not represent irrevocable commitment, because a contract allows only for a party to sue if the contract is breached or broken, for damages or specific performance but "[r]esolution of the lawsuit could take years, therefore [the plaintiff] would not be close to the start of actual operations."[180] DOS guidance provides the following example:

> "[A] purchase or sale of a business which qualifies for E-2 status in every respect may be conditioned upon the issuance of the visa. Despite the condition, this would constitute a solid commitment if the assets to be used for the purchase are held in escrow for release or transfer only on the condition being met."[181]

The foreign national bears "the burden of establishing such irrevocable commitment."[182] When determining whether the foreign national has demonstrated the commitment, the adjudicator should reject as insufficient the "[m]ere intent to invest, or possession of uncommitted funds in a bank account, or even prospective investment arrangements entailing no present commitment."[183] Because merely having "funds deposited in an idle bank account cannot be considered part of an investment,"[184] the practitioner is advised to present substantiating evidence of the commitment, such as **[[Page 329]]** "lease contracts, how the money would be invested,"[185] or purchase of necessary equipment or goods for the E-2 business.[186] Similarly, purchasing multiple inventory items "by itself, does not show that [a foreign national] is 'actively in the process of investing.'"[187]

2. The investment must be substantial

The investment of capital or assets must be "a substantial amount… as distinct from a relatively small amount of capital… solely for the purpose of earning a living."[188] DOS has stated:

> "The purpose of the requirement is to ensure to a reasonable extent that the business invested in is not speculative, but is, or soon will be a successful enterprise…. Consequently, [the consular officer] must view the proportionate amount of funds invested, as evidenced by the proportionality test, in light of the nature of the business and the projected success of the business."[189]

The "proportionality test" focuses on comparing the amount of qualifying invested funds vis-à-vis "the cost of an established business or, if a newly created business, the cost of establishing a business."[190] The amount of the investment must be sufficient to demonstrate the investor's commitment to the enterprise:[191]

§ By purchasing an appropriate proportion of "an established enterprise" or by applying funds to "creat[e] the type of enterprise under consideration";

§ By ensuring the "successful operation" of the E-2 entity through the commitment of the funds; and

§ By being "[o]f a magnitude to support the likelihood that the treaty investor will successfully

develop and direct the enterprise."[192]

Importantly, DOS guidance states: "No set dollar figure constitutes a minimum amount of investment to be considered 'substantial' for E-2 visa purposes."[193] Instead, the inquiry considers the proportion between the two figures:[194] the "amount of the funds or assets actually invested" and the value of the business,[195] with the evaluation "best… **[[Page 330]]** understood as a sort of inverted sliding scale."[196] For E-2 visa applicants who have made an investment that equals or exceeds the value of the business, then this "investment is substantial," even for "small business of $100,000 or less."[197] In addition, a smaller business that is a joint venture may also qualify as an E-2 enterprise,[198] as discussed below.

DOS acknowledges, however, that the "vast majority of cases involve lesser percentages,"[199] which in turn results in the following caveat: "Generally, the lower the cost of the enterprise, the higher, proportionately, the investment must be to be considered a substantial amount of capital."[200] Although there "are no bright line percentages that exist in order for an investment to be considered substantial," the adjudicator will weigh the nature of the business against the amount of investment made:[201]

> "The value (cost) of the business is clearly dependent on the nature of the enterprise. Any manufacturing business, such as an automobile manufacturer, might easily cost many millions of dollars to either purchase or establish and operate. At the extreme opposite pole, the cost to purchase an on-going commercial enterprise or to establish a service business, such as a consulting firm, may be relatively low. As long as all the other requirements for E-2 status are met, the cost of the business per se is not independently relevant or determinative of qualification for E-2 status."[202]

If the investor purchased an existing business, then the cost is "generally, its purchase price, which is normally considered to be the fair market value."[203] If the investor will set up a new business, then the value is "the actual cost needed to establish such a business to the point of being operational,"[204] which may also be the "total start up costs."[205] In calculating this cost, the adjudicator may consider the purchase price of "necessary assets" already procured and other "cost figures for additional assets needed to run the business,"[206] such as:

§ "Invoices or contracts for substantial purchases of equipment and inventory;

§ "[A]ppraisals of the market value of land, buildings, equipment, and machinery;

§ "[A]ccouting audits; and **[[Page 331]]**

§ "[R]ecords required by various governmental authorities."[207]

DOS has indicated that "small, family-owned businesses with modest levels of investments" may face closer scrutiny.[208] The consular may question the amounts stated in these documents and may request additional evidence "to help establish what would be a reasonable amount," such as "letters from chambers of commerce or statistics from trade associations."[209] But "[u]nverified and unaudited financial statements based exclusively on information supplied by an applicant normally are insufficient to establish the nature and status of an enterprise."[210] The evidence should also remain consistent regarding the value of the investment and the value of the business, as discrepancies in these amounts may result in denial of the E-2 visa.[211]

Investment in a "marginal enterprise" is insufficient for E-2 classification, as stated by DOS guidance and the regulations:

> "A marginal enterprise is an enterprise that does not have 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. An enterprise that does not have the capacity to generate such income but that has a present or future capacity to make a significant economic contribution is not a marginal enterprise."[212]

Evidence of the income to be earned should be submitted if possible,[213] as well as evidence of the "significant economic contribution," if available: "The projected future capacity should generally be realizable within five years from the date the alien commences normal business activity of the enterprise."[214] If the E-2 enterprise is already viable and provides revenue for the investor foreign corporation, then evidence of the business's success and/or growth should be presented.[215] One embassy notes that "the history of a business" is also considered: "For example, in the case of renewal of E-2 registration, if the business has only recently suffered financially but in the past was very successful this is a much better case than a business that has never gotten off the ground."[216] Another embassy stated the following regarding real estate enterprises:

> "When dealing with real estate companies that reflect a loss on income taxes, the Visa Section will consider the fact that depreciation of an asset would not necessarily be indicative of the enterprise's income, which is particularly true of assets like real **[[Page 332]]** property which are subject to market changes (especially during time of economic crisis). However, if even discounting depreciation, the business is still operating at or near a loss, and not generating sufficient income to support more than the applicant, the investor would not be eligible for an E visa."[217]

The expansion of job opportunities for U.S. workers is another factor,[218] but the E-2 entity should clearly demonstrate how the number of full-time employees has increased following the foreign national's investment.[219] For evidence of this factor, "normally the consular officer should only look to I-9 filings" and not copies of U.S. passports or permanent resident cards;[220] or "payroll records" may be considered.[221] The employment of part-time or seasonal workers by the

E-2 enterprise or evidence of net loss of income would most likely be deemed insufficient as a "significant economic contribution."[222] In addition, one Circuit Court stated:

> "Even though [the foreign national's business] produced certain economic advantages to the economy of the United States through the employment of American workers and purchase of American goods, these economic advantages alone will not make his investment 'substantial.' Every investment produces certain benefits to an economy by generating economic activity."[223]

One embassy has cautioned: "The visa applicant may not overcome the 'marginality requirement' by having substantial income from other sources, such that he need not rely on the investment enterprise to provide basic living expenses."[224] But older cases indicate that submitting evidence of other sources of income,[225] or substantial "reserve funds" **[[Page 333]]** may be sufficient to overcome the determination that the enterprise is marginal,[226] as does the instructions of the Form DS-156E.[227] In evaluating whether the reserve funds are substantial, the focus may be on the proportion of the reserve funds to the overall investment.[228]

One Administrative Appeals Unit (AAU) case denied E-2 status to a foreign national who owned $16,500 of a business valued at approximately $20,000, based on former FAM guidance, which stated:

> "A newly-created business, e.g., a consulting firm, might only need $50,000 investment to be set up and to become fully operational. As this cost figure is relatively low, a higher percentage of investment is anticipated. An investment approaching 90–100% would easily meet the test.
>
> "A business costing $100,000 might require an investment of 75–100% to meet the test.
>
> "A small business costing $500,000 would demand generally upwards of a 60% investment, with a $375,000 investment clearly meeting the test.
>
> "In the case of a million dollar business, a lesser percentage might be needed, but 50–60% investment would qualify.
>
> "A business requiring $10 million to purchase or establish would require a much lower percentage. A $3 million investment might suffice in view of the sheer magnitude of the dollar amount invested.
>
> "An investment of $10,000,000 in a $100 million business would qualify based on the sheer magnitude of the investment itself."[229]

Although these figures and percentages of investment are no longer stated in the FAM, they are provided here as potential benchmarks to consider when advising a client on the amount of investment necessary for an E-2 enterprise, as consular officers may nevertheless have been trained on the former guidance, even as it cautions that the proportionality test "is not a simple arithmetic exercise."[230] The practitioner should also note that, in this case, the E-2 visa applicant owned more than 50 percent of the E-2 enterprise but the visa was denied because the investment amount was deemed to be neither substantial nor proportional to the value of the business.[231] **[[Page 334]]**

3. The U.S. enterprise must be bona fide

The proposed E-2 enterprise must be a bona fide business and "must be a real and active commercial or entrepreneurial undertaking, producing some service or commodity,"[232] which operates for the purpose of earning a profit.[233] The business must also comply with "applicable legal requirements for doing business in the particular jurisdiction in the United States."[234]

As noted above, the E-2 entity may not be a "marginal enterprise" that exists solely to provide the foreign national and his or her family with merely "a living."[235] In addition, the business "cannot be a paper organization or an idle speculative investment held for potential appreciation in value, such as undeveloped land or stocks held by an investor without the intent to direct the enterprise."[236]

One embassy requires "[p]roof that the enterprise is currently running or will open its doors imminently" and accepts as evidence "client lists, letters from clients attesting to their involvement with the enterprise, signed contracts with clients, and photographs of the enterprise."[237] Additional evidence of the bona fide nature of the enterprise includes "prior tax returns if the business was purchased from a previous owner, Form 941 and Form I-9 (including proof of legal status)."[238] If the E-2 enterprise will be a new business, then "a business plan for the next five years prepared by a certified C.P.A., including projected expenses and profits," and including confirmation of "the capacity of the enterprise to realize a profit within a maximum of five years" may also be submitted.[239]

4. The foreign national will have executive or supervisory duties in the United States

The E-2 visa applicant must also establish that he or she "does or will develop and direct the investment enterprise," whether as an investor or as the owner of the E-2 enterprise who seeks U.S. admission as an employee of the E-2 entity.[240] Importantly, however, "[t]he test of 'develop and direct' applies only to the investor(s), not to the individual employees."[241] The executive or supervisory scope of the visa applicant's activities may be demonstrated by providing the following evidence:

§ Control over the enterprise based on ownership of at least 50 percent of the E-2 business; **[[Page 335]]**

§ "[O]perational control through a managerial position or other corporate device"; or

§ "[B]y other means,"[242] as discussed below.

Ownership of at least 50 percent of the E-2 entity is especially important for visa applications by investors; without such ownership, it is likely that the adjudicator will presume that "other individuals who do have the controlling interest… [will] dictate how the enterprise is to be developed and directed."[243] The majority ownership and control is especially important if the foreign national will

be an employee of the E-2 enterprise or of a foreign parent corporation,[244] as discussed below. In some situations, it may be difficult to demonstrate that one individual or entity will direct and develop the E-2 enterprise, because "treaty country ownership may be too diffuse," in which case the owners must establish and show the following:

§ "Show that together they own 50 percent of the U.S. enterprise"; and

§ "[D]emonstrate, that at least collectively, they have the ability to develop and direct the U.S. enterprise."[245]

Importantly, the E-2 visa applicant's duties "must be principally and primarily, as opposed to incidentally or collaterally, executive or supervisory in nature," and must "provide the employee ultimate control and responsibility for the enterprise's overall operation or a major component thereof."[246] An executive position should entail "great authority to determine the policy of, and the direction for, the enterprise,"[247] whereas a supervisory position should involve "responsibility for a significant proportion of an enterprise's operations and does not generally involve the direct supervision of low-level employees."[248] To evaluate whether the activities are appropriately executive or supervisory, the adjudicator may consider whether the foreign national has the following attributes:[249]

§ Previous experience or skills as an executive or supervisor;

§ "[A] salary and position title commensurate with executive or supervisory employment";

§ "[R]ecognition or indicia of the position as one of authority and responsibility in the overall organizational structure," such as demonstrated by an organizational chart; and **[[Page 336]]**

§ Discretionary authority to make senior-level decisions, "direct[] and manage[e] business operations, [and] supervis[e] other professional and supervisory personnel."[250]

DOS has acknowledged that "small, family-owned businesses with modest levels of investments" may face difficulty in establishing the E-2 visa applicant's executive or supervisory duties.[251] If the foreign national will engage in hands-on "routine work usually performed by a staff employee," then these activities must be "of an incidental nature."[252] In one case, a circuit court stated that an E-2 investor "may perform some menial tasks without negating his treaty investor status if he primarily acts to direct, manage, and protect his investment," if the foreign national "compete[s] with other entrepreneurs, but [does] not compete in the job market for skilled or unskilled labor."[253] The practitioner should note, however, that the circuit court relied on Board of Immigration Appeals (BIA) cases that addressed the investor activities in the context of applying for permanent residence.[254]

In the event that the E-2 enterprise is a franchise, direction and development may be established if the investor will have authority to hire and fire employees, determine pay scales, and establish the hours of business.[255] Other potentially restrictive factors may nevertheless be overcome by

demonstrating the decision-making ability of the investor, such as the authority to set retail prices and control profit margins even if the products sold must be approved by the franchiser, the authority to purchase necessary goods and materials on the open market even if the usage of the goods is mandated by the franchise agreement, and the authority to select advertising efforts even if the percentage of gross sales that must be committed to local advertising is set forth in the franchise agreement.[256]

F. Managing Client Expectations: Increased Scrutiny for Certain Situations

Certain facts may trigger increased scrutiny by the adjudicator, and it may be helpful to manage client expectations and to prepare the client by discussing these situations in greater detail.

1. Joint ventures

Joint ventures may qualify as E entities, but the practitioner should gather and submit evidence of ownership and control. As noted above, at least 50 percent of the enterprise **[[Page 337]]** must be owned by a citizen of the treaty country. Ownership of 50 percent is typically deemed to be a controlling interest in the E entity, as long as the enterprise is established as a joint venture or equal partnership and as long as both parties "each retain full management rights and responsibilities."[257] DOS calls this "arrangement" by the term "Negative Control," where "each of the two parties possess[] equal responsibilities [and…] each have the capacity of making decisions that are binding on the other party."[258] For joint ventures and partnerships, however, there must be no more than two partners, because "an equal partnership with more than two partners would not give any of the parties control based on ownership, as the element of control would be too remote even under the negative control theory."[259]

As discussed above, E-2 treaty investor applications are specifically required to demonstrate the 50 percent ownership and, by the language of the statute, that the E-2 visa applicant will "through ownership or by other means, develop[] and direct[] the activities of the enterprise."[260] DOS guidance states that the "type of enterprise being sought will determine how this requirement is applied,"[261] but also acknowledges that "[m]odern business practices constantly introduce new business structures," which makes it "difficult to list all the qualifying structures."[262] An "investor (individual or business)" who demonstrates "control of the business through managerial control" and who demonstrates that he or she "is developing and directing the business," should be issued an E-2 visa.[263]

2. Employees of E-1 and E-2 entities

The E-1 and E-2 visa categories are not limited to treaty traders and investors; an employee of a qualifying entity may also apply for E-1 or E-2 status, as long as he or she has the same nationality as the E employer.[264] The E employer may not be a permanent resident of the United States and any ownership interest of a permanent resident may not be counted.[265] The E employer must be either:

[[Page 338]]

§ A foreign national who holds E-1 or E-2 status in the United States or who "would be classifiable" as an E-1 treaty trader or E-2 treaty investor if the foreign national resides outside the United States;[266] or

§ An entity that is owned at least 50 percent by foreign nationals who hold E-1 or E-2 status in the United States or who "would be classifiable" as E-1 treaty traders or E-2 treaty investors if the foreign nationals reside outside the United States.[267]

A foreign national who is the sole proprietor or majority owner of an E-2 enterprise should apply for an E-2 visa as an employee and "must demonstrate that he or she personally develops and directs the enterprise."[268] The development and direction of the E-2 enterprise can be established also in the following situations:

§ If a foreign national will apply for an E-2 visa as a personal employee of the E-2 investor or as an employee of the E-2 business, then the owner must personally develop and direct the business; or

§ If a foreign parent company owns at least 50 percent of the E-2 enterprise, then the foreign parent company, rather than an individual, must develop and direct the enterprise, regardless of whether the foreign national will be an employee of the parent corporation or of the E-2 enterprise.[269]

As discussed above, in situations where ownership is "diffuse" and difficult to establish, collective ownership and authority to develop and direct the E-2 must be demonstrated. In these situations, the E-2 visa applicant may not apply as the investor or as an employee of the owner; instead, the foreign national "must be shown to be an employee of the U.S. enterprise coming to the United States to fulfill the duties of an executive, supervisor, or essentially skilled employee."[270]

For E visa applications by persons other than an individual E-2 investor, the employee's U.S. assignment must entail executive or supervisory duties or duties of "a lesser capacity" that involve "special qualifications that make the alien's services essential to the efficient operation of the enterprise."[271] Legacy INS guidance notes the similarity between the E and L nonimmigrant visa classifications: "The employment must be in a managerial capacity or one which requires special technical knowledge. This employment is not unlike the type of employment which would qualify for an L-1 visa. As stated by USCIS guidance: "Discussions found in various precedent decisions pertaining to L-1 classification are helpful in deciding E-1 cases as well."[272] **[[Page 339]]**

a. Executive or Supervisory Duties

As discussed above, executive or supervisory duties involve broad managerial responsibility and authority over "a large portion of a firm's operations," and the adjudicator should consider the following factors in addition to the duties of E-2 treaty investors:[273]

§ The job title and duties for the proposed U.S. assignment, as well as the role's remuneration and position in the organizational hierarchy;

§ The extent of the visa applicant's "ultimate control and responsibility for the firm's overall

operations or a major component thereof"; and

§ The number of employees to be managed or supervised, as well as the educational, experience, and "skill level[]" of the subordinate employees.[274]

The visa applicant should demonstrate that the executive and/or supervisory duties are "a principal and primary function and not an incidental or collateral function" of the assignment; E classification is inappropriate if the assignment "chiefly involves routine work and secondarily entails supervision of low-level employees."[275] There is no bright line test to determine the weight of the individual factors:

"For example, the position title of 'vice president' or 'manager' might be of use in assessing the supervisory nature of a position if the applicant were coming to a major operation having numerous employees. However, if the applicant were coming to a small two-person office, such a title in and of itself would be of little significance."[276]

E-2 status was denied in the following situations because the duties were not primarily executive or supervisory:

§ Two foreign nationals who lacked experience as managers and who had experience only as entertainers were to train and supervise other employees on ethnic entertainment and on the preparation and service of ethnic foods;[277] and

§ A foreign national would merely provide training to subordinate employees while also performing some hands-on work because these activities entailed only "a modest supervisory role."[278]

b. Essential duties

If the foreign national will not be an executive or supervisor, then the United States role must entail "special qualifications that make the alien's services essential to the efficient operation of the enterprise."[279] "Special qualifications" are defined as "those **[[Page 340]]** skills and/or aptitudes that an employee in a lesser capacity brings to a position or role that are essential to the successful or efficient operation of the treaty enterprise."[280] The inquiry basically entails a two prong test:

"The employee must, therefore, possess specialized skills and, similarly, such skills must be needed by the enterprise. The burden of proof to establish that the applicant has special qualifications essential to the effectiveness of the firm's United States operations is on the company and the applicant."[281]

Just as there is no bright line test to establish an employee's executive or supervisory duties, "[t]he determination of whether an employee is an 'essential employee' in this context requires the exercise of judgment."[282] A foreign national's unique knowledge or experience may be deemed essential if they are necessary in order for the E-2 enterprise to satisfy contractual obligations,[283] but mere knowledge of a foreign language and culture does not, by itself, meet the special qualifications

requirement."[284] The relevant factors to determine whether skills are "essential" include the following:

- The extent of the foreign national's "proven expertise… in the area of operations involved,"[285] as well as the "uniqueness of the specific skills";[286]
- The interrelationship between "the skill or knowledge" and the E entity's "specific processes or applications,"[287] including the "function" of the proposed assignment;[288]
- The level or duration of "experience and training necessary to achieve such skill(s)," including any previous training or experience with the E business, as discussed below;
- "The salary such special expertise can command";
- The existence of the necessary skills or qualifications held by U.S. workers,[289] as discussed below; and
- The anticipated duration of need for the essential skills, as discussed below.

The practitioner should provide as much evidence of the factors as possible. In one case, the E petition was denied based on an absence of documents discussing the job duties and the foreign national's education and experience.[290] Individual U.S. consulates **[[Page 341]]** may have additional requirements; one embassy requests "evidence that employee has essential skills that the enterprise urgently needs, as well as the projected duration of this essentiality" and accepts copies of "relevant diplomas, job training certificates or letters from previous employers in this section."[291] USCIS will also accept "operators' manuals."[292]

In evaluating the essential nature of the visa applicant's proposed duties, the adjudicator should consider all relevant factors,[293] bearing in mind that "the E classification is intended for specialists and not for ordinary skilled workers."[294] U.S. Customs and Border Protection (CBP) guidance also states: "The essential employee must possess special skills including skills which are unique to the operations in the U.S. Such employees are highly and specially trained."[295] The practitioner may note that being "highly and specially trained" seems similar to the "specialized knowledge" requirement for L-1B status. As stated by USCIS guidance, the standard for an essential employee is "somewhat lower than the L-1 'specialized knowledge' qualifications."[296] Nevertheless, an individual consulate may request "[a]n explanation as to why the enterprise was unable to find a qualified U.S. citizen or Legal Permanent Resident to fill the position."[297]

The practitioner should also note that the regulations and DOS guidance seem to intertwine the final two factors, such that there is a balancing test:

> "The question of duration of need will cause variances among the kinds of skills involved…. The availability of U.S. workers provides another factor in assessing the degree of specialization the

applicant possesses and the essentiality of this skilled worker to the successful operation of the business. This consideration is not a labor certification test, but a measure of the degree of specialization of the skills in question and the need for such."[298]

Similarly, the regulations state:

"A skill that is essential at one point in time may become commonplace at a later date. Skills that are needed to start up an enterprise may no longer be essential after initial operations are complete and running smoothly. Some skills are essential only in the short-term for the training of locally hired employees."[299] **[[Page 342]]**

Therefore, for shorter-term E employees, it may be sufficient to explain how the special or essential skills are necessary for the business's operations, such as if the employee's services are needed to set up the E entity and/or train U.S. workers on methodologies not available in the U.S. workforce.[300] A short-term assignment is interpreted as "one or two years… when the purpose of the employee(s) relate to start-up operations (of either the business or a new activity by the business) or to training and supervision of technicians employed in manufacturing, maintenance and repair functions."[301] In one case, E-2 status was granted to a foreign national who had knowledge of a specific type of ethnic cooking, where qualified "chefs [were] scarce in the United States and… the applicant's employer ha[d] been searching for such a chef for several years," and where the foreign national was to train other employees for a period of one year and then return abroad.[302] But E-2 status would most likely be denied if qualified workers could not be located due to the employer's "unwillingness adequately to compensate those available American workers."[303]

As noted above, "'[e]ssential' employees possess skills which differentiate them from ordinarily skilled laborers," but "[i]n some cases, ordinarily skilled workers can qualify as essential employees, and almost always this involves workers needed for start-up or training purposes."[304] Specifically, DOS guidance states:

"A new business or an established business expanding into a new field in the United States might need employees who are ordinarily skilled workers for a short period of time. Such employees derive their essentiality from their familiarity with the overseas operations rather than the nature of their skills. The specialization of skills lies in the knowledge of the peculiarities of the operation of the employer's enterprise rather than in the rote skill held by the applicant."[305]

The practitioner should be aware that if an employee's E visa application states that the foreign national is an "ordinarily skilled" worker who will train U.S. workers, then the adjudicator may require that the E-2 enterprise have a training program for U.S. workers to ultimately replace the E-2 employee,[306] or that the foreign national have gained previous training or experience with a foreign entity with a corporate relationship with the E entity in the United States.[307] Although there is generally "no requirement that an 'essential' employee have any previous employment with the enterprise in question," the guidance seems to refer to the E entity in the United States,[308] and any

such previous **[[Page 343]]** training or employment should be irrelevant since the E entity in the United States is the enterprise that requires the foreign national's services.[309] If the foreign national has "familiarity with the overseas operations… [and] knowledge of the peculiarities of the operation of the employer's enterprise," then that familiarity and knowledge should have been gained with a foreign employer with a corporate relationship with the U.S. enterprise: "The only time when such previous employment is a factor is when the needed skills can only be obtained by that employment. The focus of essentiality is on the business needs for the essential skills and of the alien's possession of such."[310]

In addition, the consular officer may "set a time frame within which the business must replace such foreign workers with locally hired employees."[311] Subsequent visa applications by the foreign national may result in closer scrutiny, especially regarding the hiring of U.S. workers within the stipulated period of time and regarding the reason why the "ordinarily skilled" employee's services continue to be required.[312] The adjudicator may also consider whether other foreign nationals previously held E-2 status in order to train U.S. workers, based on the rationale that "the continued use of foreign workers may function as a means of securing adequate help at less than the prevailing United States wage standards for jobs of comparable complexity."[313] The regulations state:

> "With limited exceptions, it is presumed that employees of treaty enterprises with special qualifications who are responsible for start-up operations should be able to complete their objectives within 2 years. Absent special circumstances, therefore, such employees will not be eligible to obtain an extension of stay."[314]
>
> Similarly, legacy INS guidance states:
>
> "When granting an extension of stay to [an essential employee], or a change of status to that of a treaty trader, the employing firm shall be advised that the action has been taken with the understanding that the employer will utilize U.S. citizens or permanent resident aliens, as such persons become available to make the repairs or to be trained. When the employing firm has been so notified, the alien's Form I-[129] should be annotated to so indicate. If the alien should subsequently apply for a further extension of stay, the adjudicator shall determine what steps the firm has taken to train or employ resident U.S. workers to perform the specialty work. The extension should not be granted if it appears the firm has failed to make serious efforts to comply with the notification."[315] **[[Page 344]]**

In contrast, if the E employee's services are truly "essential for the efficient operations of the treaty enterprise for the long-term, the training of United States workers (for) (as) replacement workers is not required."[316] Long-term need may be "a need for the skill(s) on an on-going basis," such as if "the employee(s) will be engaged in functions such as continuous development of product improvement, quality control, or provision of a service otherwise unavailable."[317] Even though "[s]ome skills may be essential for as long as the business is operating,"[318] DOS guidance acknowledges the closer scrutiny: "Long-term employment presents a different issue, in that what is

highly specialized and unique today might not be in a few years. It is anticipated that such changes would more likely occur in industries of rapid development, such as any computer-related industry."[319] The practitioner is strongly encouraged to provide additional evidence for a longer E assignment:

> "Under certain circumstances, an applicant may be able to establish his or her essentiality to the treaty enterprise for a longer period of time, such as, in connection with activities in the areas of product improvement, quality control, or the provision of a service not yet generally available in the United States. Where the treaty enterprise's need for the applicant's special qualifications, and therefore, the applicant's essentiality, is time-limited, Service officers may request that the applicant provide evidence of the period for which skills will be needed and a reasonable projected date for completion of start-up or replacement of the essential skilled workers."[320]

Whether the need for the E employee's services is short- or long-term, the adjudicating officer should "make a judgment as to whether the employee is essential for the efficient operation of enterprise for an indefinite period or for a shorter period."[321] The visa applicant also bears the burden to demonstrate the projected duration of the need for the essential skills,[322] and also "must prove that he or she possesses these skills, by demonstrating the requisite training and/or experience."[323] The practitioner may also wish to provide evidence or statements from "chambers of commerce, labor organizations, industry trade sources, or state employment services as to the unavailability of U.S. workers in the skill areas concerned."[324] These documents may be particularly important and/or helpful if the foreign national has been previously been issued an E visa or granted E status, because "the consular officer should monitor [whether the skills remain 'highly specialized and unique'] at the time of any application for reissuance" and because the foreign national who engages in a longer-term assignment "bears the burden of **[[Page 345]]** establishing that his or her specialized skills are still needed and that the applicant still possesses such skills."[325]

If the proposed salary or remuneration to the essential employee seems low to the practitioner, then it is likely that it will seem low to the adjudicator. In such a situation, the practitioner may wish to review the prevailing wage, as calculated by the Foreign Labor Certification Data Center Online Wage Library, available at *www.flcdatacenter.com*, by selecting the FLC Wage Search Wizard, the state of intended employment from the drop-down menu, the county of intended employment, and the job code from the drop-down list (or searching by keyword).[326] A print-out of the prevailing wage may be supplied to demonstrate that the proposed remuneration meets or exceeds the wages paid to U.S. workers in comparable positions.[327]

3. Substantive changes of E status eligibility and employment with a related corporate entity

If there is a "substantive change" in the terms and conditions of E status or eligibility, then the substantive change must be approved by USCIS through the approval of an amended E petition or DOS through issuance of a new E visa and re-admission to the United States.[328] Events that are

considered "substantive changes" generally entail "a fundamental change in the employing entity's basic characteristics" and include mergers, acquisitions, or "sale of the division" where the E nonimmigrant is employed.[329] The new petition or visa application should include "evidence of continued eligibility for E classification in the new capacity."[330] The foreign national "is not authorized to begin the new employment until the application is approved,"[331] through issuance of a new Form I-797; and changing E employers without prior approval "will constitute a failure to maintain status."[332] If the foreign national departs the United States, then he or she may be re-admitted after presenting the new Form I-797 and an unexpired E visa.[333] But as discussed below, [E visa application vs. change of status petition], it is preferable for the foreign national to apply for a new E visa and seek readmission rather than wait for USCIS approval of a petition.

The regulations allow E nonimmigrants to "perform work for the parent treaty organization or enterprise, or any subsidiary of the parent organization or enterprise."[334] **[[Page 346]]** Such work "will not be deemed to constitute a substantive change in the terms and conditions of the underlying E treaty employment," as long as the foreign national presented the following evidence with the E visa application or change of status petition:[335]

§ The name of the enterprise and any subsidiaries "where the work will be performed";

§ Proof of the necessary corporate relationship between the parent and subsidiary entities;

§ Proof that the "subsidiary independently qualifies as a treaty organization or enterprise";[336]

§ If the foreign national is an employee of an E enterprise, then evidence of how the assignment "requires executive, supervisory, or essential skills";[337] and

§ Evidence of how the "work is consistent with the terms and conditions of the activity forming the basis of the classification."[338]

For non-substantive changes in E employment or eligibility, neither prior approval nor an amended E petition or visa application need to be filed.[339] Prior approval is also "not required if corporate changes occur which do not affect the previously approved employment relationship, or are otherwise non-substantive."[340] If the client is risk-averse, then it is possible to "facilitate admission" by taking one of the following actions:

§ "Present a letter from the treaty-qualifying company through which the alien attained E classification explaining the nature of the change";[341]

§ File a new E petition with USCIS, "with fee, and a complete description of the change";[342] or

§ Apply for a new E visa at a U.S. consulate abroad.[343]

Importantly, the practitioner may wish to advise the client that a foreign national "who does not

elect one of the three options… is not precluded from demonstrating to the satisfaction of the immigration officer at the port-of-entry in some other manner, his or her admissibility" as an E nonimmigrant.[344] In addition, if the foreign national will be employed by a subsidiary, then "the subsidiary is required to comply with" the regulations regarding control of the employment of foreign nationals.[345] **[[Page 347]]**

It is possible to request advice from USCIS on "whether a change is substantive," by filing an amended E petition, "with fee, and a complete description of the change."[346] If there are multiple employees who will be impacted by "a merger or other corporate restructuring," the request may also be made on a single amended petition, "attaching a list of the related receipt numbers for the employees involved and an explanation of the change or changes," to inquire whether subsequent individual petitions must be filed.[347] If the employees are employed in states that cross multiple jurisdictions, the request should be filed with Nebraska Service Center (NSC).[348]

4. E employees will perform activities pursuant to a contract between a U.S. entity and either foreign corporation or an E-2 entity

As noted above, an E-2 entity may be established in order to perform on a contract for services or goods with a U.S. business.[349] The existence of such a contract, however, should not be construed to entail the creation of a "job shop," which is interpreted as "involv[ing] the providing of workers needed by an employer to perform pre-designated duties."[350] Although a job shop may supply qualified workers on an as-needed basis to a client, DOS guidance states that establishment of an E-2 enterprise in order to perform pursuant to a contract does not "in any way facilitate the creation of job shops under the E-2 visa classification."[351] This is because the E-2 employees would not fill existing positions within the U.S. business but would provide "services which the U.S. business did not have the capacity to perform,"[352] based on a "projected-oriented commodity."[353]

DOS guidance also states: "The fact that the [performing] entity might prepare the design anywhere, even on the sites of contracting business, does not alter the nature of the transaction."[354] Nevertheless, because of increased scrutiny of L-1B nonimmigrants who are sent to third-party websites, the practitioner may wish to supplement the visa application or petition with a copy of the contract and evidence of why the receiving business is unable to perform the contracted services, such as if the receiving company is engaged in different business activities or lacks regular employees who are qualified to perform the contracted services.[355] **[[Page 348]]**

5. Impact of Labor Disputes on Canadian and Mexican Transferees

A Canadian or Mexican citizen may not be admitted in E status if the "Secretary of Labor certifies or otherwise informs the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress at the place where the alien is or intends to be employed,"[356] and if the

admission of the Canadian or Mexican citizen would "adversely affect either:"[357]

§ "The settlement of any labor dispute that is in progress at the place or intended place of employment, or

§ "The employment of any person who is involved in such dispute."[358]

The practitioner should note that the strike or labor dispute must be certified by the Secretary of Labor; otherwise the Canadian or Mexican citizen should be admitted.[359] The United States must consider and apply the "strikebreaker" provision when the E petition is adjudicated, if applicable, when the foreign national applies for an E visa, and when the foreign national applies for admission to the United States at a port-of-entry.[360] The certification or notification from the Secretary of Labor "may include the locations and occupations affected by the strike."[361]

If E admission or visa is denied because of a certified labor dispute, the foreign national must be notified in writing of the reasons; and the foreign national's home country government must also be notified.[362] A foreign national holding E status "shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers," whether the strike or labor dispute is certified by the Secretary of Labor or not.[363] However, the following conditions apply:

§ The foreign national "shall remain subject to all applicable provisions of the Act and regulations applicable to all other E nonimmigrants";[364] and

§ The E status "is not modified or extended in any way by virtue of [the] participation in a strike or other labor dispute involving a work stoppage of workers."[365]

Therefore, "participation by an E nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for deportation"; but the foreign national should not violate E status or remain in the United States after E **[[Page 349]]** status has expired, because these actions should "subject [the foreign national] to deportation."[366] For a further discussion of the intent of the strikebreaker provision, see Chapter Eleven, L-1 Visas and Status.

III. Process

In seeking E status, a foreign national may apply directly for an E visa at a U.S. consulate abroad; it is not necessary to file a petition with USCIS before the visa application,[367] "unless there has been a substantial change in the terms or conditions of E status."[368] DOS guidance directs consular officers "to be flexible, fair, and uniform in adjudicating E visa applications," although they may request additional evidence of eligiblity.[369]

If the foreign national is within the United States, a petition may be filed to request E change of

status.[370] Both approaches are discussed below.

A. Preparing the E Visa Application or Petition

The following documents must be prepared and submitted regardless of which process is selected:

§ Form G-28;

§ Evidence that the foreign national holds the nationality of the treaty country, in the form of the passport or copy of the biographic page of the passport;

§ Evidence that the E enterprise satisfies the requirements for E-1 or E-2 status;

§ Evidence of the business activities of the E enterprise;

§ Evidence of the scope of employment activities;

§ Evidence of the ownership of the E enterprise;[371]

§ U.S. company support statement;

§ Evidence that the foreign national's stay in the United States will be "temporary," which may be in the form of an affidavit or statement from the foreign national, if this is required by the individual U.S. consulate, as discussed below. **[[Page 350]]**

DOS suggests the following for answers to questions on a form: "If an enterprise is not fully operational, estimates and projections should be made concerning the potential income, job creation, volume of sales, etc."[372]

1. Form G-28

It may be helpful to limit the scope of representation to the particular petition, as discussed in Chapter Two, Basic Nonimmigrant Concepts, by completing the "Re" box with the following language: "Company, Inc. – E Visa Application on behalf of Foreign National" or "Company, Inc. – Petition for E Status on behalf of Foreign National."

For E visa applications, the foreign national is the "applicant." For E change of status petitions, the U.S. company is the "petitioner" and the foreign national is the "beneficiary" of an E petition. The addresses for the U.S. company and the foreign national should be provided. The U.S. company representative should sign this form in blue ink to evidence that the document is an original.[373] If there is limited time to prepare and file the petition before the U.S. assignment is to begin, such as if the forms are emailed to and printed by the client, this form may be printed on plain white paper. However, as discussed in Chapter Two, Basic Nonimmigrant Concepts, the Forms G-28 should be printed on blue paper whenever possible, in order to avoid processing delays.[374]

2. U.S. Company Support Statement

The support statement from the U.S. employer should connect the E enterprise's activities with the need for the foreign national's services. For this reason, it is critical to provide the government official with the information necessary to adjudicate the petition for approval and to state important details, as discussed above, in the support statement.

The statement should be on the U.S. company's letterhead and signed by an representative of the U.S. company. One format of a support statement is as follows:

§ Introduction;

§ Information about the employer;

§ Discussion of the E business's activities, project, or reason for need of the foreign national's services for the U.S. assignment;

§ Discussion of the duties of the U.S. assignment;

§ Discussion of the foreign national's educational and experience background; and **[[Page 351]]**

§ Thank you and conclusion.

The most critical parts of the support statement are the paragraphs that address the need for the foreign national's services and the daily job duties. Therefore, the support statement should provide details on the project(s) or initiative(s) that gave rise to the assignment and how the job duties will contribute to the successful completion of the employer's objectives. The final conclusion paragraph may contain the necessary information on the length of the U.S. assignment as the anticipated length of stay, as this is relevant particularly for essential employee assignments and the amount of remuneration for the services.

B. E Visa Application vs. E Change of Status Petition

The main advantage of the E visa application is convenience. If the foreign national is already outside the United States or has plans to visit his or her home country, perhaps to wrap up personal affairs before beginning the E assignment, then this approach is most appropriate. In addition, if E change of status is granted, the foreign national must apply for an E visa abroad in order to return to the United States after international travel; and the U.S. consulate may require the full set of E registration documents even if USCIS approves an E petition,[375] as discussed below. Further, experience has shown that U.S. consulates may apply a stricter de novo standard when adjudicating E visa applications than those considered by USCIS, so a client may find itself in the untenable situation of having established and run a business in the United States for some time but then unable to return to the United States to continue to operate the E business.

USCIS processing times for E petitions are currently two months,[376] and a visa application may should take a similar amount of time, depending on the next available visa appointment and processing time for visa issuance at the individual U.S. consulate.[377] Nevertheless, the processing time may be longer for visa applications, based on high demand during a season,[378] or on the intricacies of reviewing the company's E **[[Page 352]]** registration documents,[379] as discussed above. In addition, certain U.S. consulates are generally known for long processing times.[380]

But if the foreign national initially entered the United States under the Visa Waiver Program (VWP), then he or she must apply for an E visa abroad, as he or she is not eligible for E change of status from VWP. The disadvantages of the E visa application are the cost of airfare for the foreign national and his or her dependent family members, if applicable, and the possibility that visa issuance

may be delayed by the E registration procedure or by administrative processing, as discussed in Chapter Two, Basic Nonimmigrant Concepts.

In contrast, filing an E change of status petition with USCIS has the benefits of saving the costs of international airfare and allowing the E dependent spouse to concurrently file an employment authorization document (EAD) application. This concurrent filing would be an alternative to filing the EAD application after the principal E foreign national has obtained E status. Nevertheless, the practitioner should consider that the timing of the concurrent filing may take longer than applying for the EAD after admission in E status. This is because the EAD application may not be approved until USCIS confirms that the principal foreign national's holds valid E status,[381] and adjudication of the principal's E change of status petition may take several months. The drawbacks of filing an E change of status petition are the absence of employment authorization until the E petition is approved by USCIS, the need to monitor the immigration status of foreign national(s) and file extension(s) if necessary, and the potential increased scrutiny of the E business and its employees. The E Supplement form requests the number of foreign national employees in E and L status, as well as the number of employees who have roles of executive, managerial, specialized knowledge, or essential responsibility, regardless of nationality.[382] In addition, an E-2 change of status may denied if it is requested soon after the foreign national enters the United States in B-2 status.[383]

1. Request for Change of Status

A foreign national is eligible for change of status only if he or she continuously maintained the previous nonimmigrant status.[384] Violation of the terms and conditions, **[[Page 353]]** such as unauthorized employment while in B status, is considered to be failure to maintain valid nonimmigrant status.[385] In addition, there are potential fraud and misrepresentation concerns with requesting a change of status if there has been unauthorized employment. Strategies and issues relating to change of status petitions are discussed in more detail in Chapter Two, Basic Nonimmigrant Concepts. For further discussion of the accrual of unauthorized employment, its impact on subsequent petitions, and strategies to address accrual of unauthorized employment, see Chapter Two, Basic Nonimmigrant Concepts.

If change of status is requested, however, the expiration date of the foreign national's B status should be calendared. Ideally, the E change of status petition will be approved before the beneficiary's B status expires, and premium processing may be requested to maximize the likelihood of timely approval. The practitioner may wish to advise the client on the intricacies of situations where the initial status expires before the change of status petition is approved. As discussed in Chapter Two, Basic Nonimmigrant Concepts, a timely filed request for change of status will extend the beneficiary's period of authorized stay, such that the foreign national should not accrue unlawful presence during pendency of the change of status petition, but a change of status petition will not extend the beneficiary's immigration status.[386] If the change of status petition is approved, then the foreign national will be accorded a new period of authorized retroactive to the date the initial immigration status expired; and he or she would accrue no unlawful presence.[387]

But if the change of status petition is ultimately denied because the beneficiary engaged in unauthorized employment or because the petition is deemed frivolous, then all of the time that the foreign national remained in the United States after expiration of his or her initial grant of admission will be considered unlawful presence.[388] Due to lengthy processing times, it is possible for a foreign national to accrue 180 days of unlawful presence while awaiting adjudication of a change of status petition. Accrual of more than 180 days of unlawful presence will trigger the three-year bar to re-entry to the United States upon departure from the U.S. Accrual of more than 365 days of unlawful presence will trigger the ten-year ban to re-entry to the United States upon departure from the U.S. For a detailed discussion of the three– and ten-year bars, see Chapter Two, Basic Nonimmigrant Concepts, and Volume 2: Chapter One, Basic Immigrant Visa Concepts. **[[Page 354]]**

A request for extension of B status may be filed, but the practitioner should be aware that USCIS may question the validity of a B extension request and whether a legitimate B purpose is being served or fulfilled.[389] Nevertheless, if this strategy is pursued, then following expiration of the initial nonimmigrant status, the change of status petition should be updated with the receipt notice for the timely filed extension request, to evidence that the beneficiary has not failed to maintain lawful immigration status.[390]

2. Canadian and Mexican Citizens

The NAFTA treaty is the applicable treaty for Canadian and Mexican citizens.[391] Unlike other nonimmigrant visa classifications, as discussed in Chapter Two, Basic Nonimmigrant Concepts, Canadian citizens require visas in order to enter the United States in E status.[392] If a Canadian citizen is granted E-2 change of status by USCIS, then he or she must nevertheless apply for an E visa in order to seek re-admission to the United States.[393] Because Canadian citizens require E visas, the concerns regarding temporary entry pursuant to the NAFTA treaty for L-1 nonimmigrants should not apply.[394] As discussed above, it is also critical to note that E admission may be denied if the E visa holder's admission to the United States would "adversely affect" the resolution of a labor dispute or the employment of an individual involved in a labor dispute.[395]

Unfortunately, Mexican citizens applying for E visas may no longer obtain visas valid for up to two years by paying the reciprocity fee of $100 for each year of visa validity.[396] The reciprocity schedule limits the duration of an E visa to 12 months.[397]

C. E Registration and Visa Application at a U.S. Consulate

The practitioner should consult the website of the individual U.S. Embassy or Consulate for the most recent information on visa application procedures. Because E **[[Page 355]]** entities typically need to be registered with the U.S. consulate in the treaty country,[398] visa applications may generally not be made by third-country nationals, although certain consulates accept applications from

foreign nationals who physically reside in the third-country.[399] For example, the U.S. Embassy in London "posts its instructions regarding the format and filing of E visa applications on its web site" and will accept E visa applications by third-country nationals, as discussed in Chapter Two, Basic Nonimmigrant Concepts, "but will want to know why the applicant is not applying in his or her home country."[400]

The supporting documents for the E visa application, whether for the entity's registration and/or the foreign national's visa application, "should be submitted in a binder with a table of contents and tabs."[401] Individual U.S. consulates may also be very particular about how the documents are organized and presented.[402]

The issued visa should be annotated with the name of the U.S. employer. The issued visa may or may not be valid for the full duration of the reciprocity period. As stated by one embassy:

> "[W]hether or not to issue for that length of time is solely the judgment of the consular officer deciding the case. In London, we typically issue the first E-1 or E-2 for two years. We do so because most of the businesses we see are relatively small and small businesses are volatile and often do not succeed. If we renew an E-1 or E-2 visa, we generally do so for the maximum five years although not always. In the case of large companies with high turnover and employing many Americans, we sometimes issue the first visas for five years."[403] **[[Page 356]]**

1. E Registration

First-time E visa applications should typically be accompanied by documents to register the E enterprise with the U.S. consulate.[404] As stated by DOS: "Evaluation of a company for Treaty Trader or Treaty Investor status is not a separate adjudication but is the first step in the adjudication of an E-1 or E-2 application."[405] Similarly, one embassy states:

> "The first step in applying for a Treaty Trader or a Treaty Investor visa is to establish the qualification of the company or operation in the U.S. This process is known as registration. All companies seeking E visas for their owners or employees must be registered with the US Embassy [or Consulate]…."[406]

It may be necessary to schedule a separate appointment with the U.S. consulate to submit the E registration documents.[407] The E visa application process may be delayed for a few weeks, because many U.S. consulates require additional time to review the E registration documents before scheduling a personal interview with the visa applicant.[408] The foreign national may be required to attend two visa interviews, the first to review the company's E registration documents and the second to review the foreign national's eligibility for the visa.[409] For a discussion of E visa renewals after the enterprise has been registered with the U.S. consulate, below.

2. E Visa Application

In addition to the documents discussed above, and in Chapter Two, Basic Nonimmigrant Concepts, The Form DS-156E, Nonimmigrant Treaty Trader/Investor Application, must be submitted. The practitioner should check the website of the individual U.S. consulate and confirm that the E visa application includes all requested documents, in the order and format requested.[410] For example, the U.S. consulate may **[[Page 357]]** require a cover letter describing the E enterprise and the foreign national, a letter from the proposed employer describing the employee's assignment and qualifications, as well as the enterprise's business activities, and a copy of the visa applicant's résumé.[411] The practitioner is advised to strongly encourage the client and/or foreign national to present a detailed business plan: "The E Visa Officer relies heavily on the applicant's business plan which should explain in detail the investor's credentials and plan to develop the business to determine how well the business will do in the U.S."[412] Finally, the practitioner should respond to consular inquiries promptly: "E visa cases are the cases that involve the most interaction between Post and attorneys. Prompt responses from attorneys will allow Post to process these cases as quickly as possible."[413]

If the dependent is stateless, then the E visa should be issued according to the reciprocity schedule of the principal E nonimmigrant.[414] If the dependent's nationality is that of another treaty country, then he or she should be issued an E visa according to the reciprocity schedule of his or her nationality, even if the principal nonimmigrant's nationality has a more favorable reciprocity schedule.[415]

3. Form DS-156E

The Form DS-156E is the basis for the E visa application. If the E enterprise has already been registered with the U.S. consulate, as discussed above, then it may be necessary only to complete Part III for the individual visa applicant;[416] but the practitioner should confirm that documents to update Parts I and II have been provided recently according to any particular processing requests of the individual U.S. consulate.[417] **[[Page 358]]**

a. Part I.

Information about the E business should be provided: name, type of entity, contact information, date of establishment or incorporation in the United States, and type of business activities, including a description of the goods and/or services. If the business is a start up, then the lease address that was used for registering the business in the United States may be provided. The practitioner may wish to also provide the names and contact information for any affiliated and/or subsidiary companies of the U.S. enterprise. If there are more than a few affiliate and subsidiary companies, the other company information may be attached as a separate document to the Form DS-156E, with "Please see attached list of companies" stated in #3. Evidence of the business's date of establishment or incorporation in the United States should also be attached to the Form DS-156E. The description of the business activities may be the same introductory language in the support statement.

If there is a foreign parent corporation, then contact information for that parent should be provided.

In the case of an E-2 registration for an individual investor where there is no foreign parent business, "N/A" may be stated in the address, telephone number, and fax number fields. The names and nationality of the foreign entity or foreign individual owner(s) of the U.S. business should be provided, as discussed above.

The information about the financial statement in #9 should match the information on the financial statement. For larger companies with publicly-available financial information, it may be simpler to state "See attached financial documents" where asked for specific figures and then to tab the relevant pages where the applicable figures are highlighted for the reviewing officer. For smaller clients, the figures and other requested information should be provided. If the E enterprise is a start-up business, then the financial information may be projected or estimated figures, based on anticipated sales, signed contracts, or other accounts receivable; but there should be a note that the figures are projected figures, and supporting documents should be provided.

Information for #10 should be provided only for E-1 entities and should be supported by the documents discussed above. The "optional" number of transactions may be stated as "multiple" or "numerous."

Questions #11 through 13 should be answered for E-2 entities only and should be supported by the documents discussed above. If values of the initial investment are unavailable, such as if entity is part of a larger corporate family that publishes an annual report and/or investor certificates or if the entity has been in business for some time, then only the information on the cumulative investment may be provided, using the most recent annual report, investor certificates, balance sheet, or current financial statements. Conversely, for an E-2 investor start up company, the initial investment figures should be provided.

b. Part II.

Information about the personnel of the E enterprise should be provided and supplemented by a staffing or organizational chart. For larger clients, it may be **[[Page 359]]** permissible to leave #14 blank and include a detailed response in #15, but #14 should be completed in full for smaller companies or if the U.S. consulate specifically requires the information.

c. Part III.

Part III should be completed only if there is an E-1 or E-2 visa application for an individual attached to the E registration application. If the entity will submit only a stand-alone registration application, then "N/A" may be indicated for #16 through 25, although the practitioner should confirm that the U.S. consulate will accept this application for E registration without an individual visa application.

The following information should be provided about the E visa applicant: name, type of role to be held with the E enterprise, duties of current position, name and contact information for the current employer, history of employment with the current employer, education and experience details, description of the proposed E duties, salary and other compensation, and the name and relevant information about the employee being replaced by the E visa applicant, if applicable. If the foreign national has many years of experience, then it may be acceptable to state "Please see attached résumé" for #22 and to attach the résumé.

When discussing the E visa applicant's current position and proposed role in the United States, it is important to note that the language should be consistent, especially if the current position has

provided training, qualification, or relevant experience for the E assignment. As discussed above, the previous experience is a relevant factor in determining whether the foreign national is a qualified executive, supervisor, or essential employee. And for essential employee visa applications, it is critical to connect how the foreign national will apply the same essential skills in the United States that he or she gained and/or applied in the previous position, especially if the previous position was with a company in the corporate family.

Finally, the form should be executed by a responsible officer, and the practitioner may provide his or her own contact information for #27.

D. Admission to the United States

When seeking admission to the United States, the foreign national should present his or her passport, with the E visa. The foreign national should receive an I-94 card with E status valid for up to two years after the date of admission,[418] for every admission regardless of the visa expiration date. Due to the visa reciprocity schedules,[419] as discussed in Chapter Two, Basic Nonimmigrant Concepts, an E nonimmigrant may receive a visa valid for a shorter time period than two years, but E status should not be truncated to the visa expiration date. **[[Page 360]]**

For example, Ethiopian citizens are eligible for E visas valid for no longer than six months but they should be admitted for two years. For applicants for admission with visas valid for a less than two years, the practitioner may wish to reiterate the need to confirm the expiration date on the I-94 card, to ensure that the period of authorized stay is two years. The practitioner may also wish to contact clients with these employees well in advance of the visa expiration date to strategize subsequent visa applications, so the E nonimmigrants may travel internationally and re-enter the U.S. during the remaining time of visa validity.

For all foreign nationals, good follow-up should include requesting copies of visas and I-94 cards, to ensure that all the information is correct, and calendaring the expiration dates to monitor the status of the foreign national(s).

Dependents of E treaty traders or investors may not seek U.S. admission before the E principal and should have the back of the I-94 card annotated "with the dependent's specific relationship to the principal and the principal's name."[420] A "temporary departure" from the United States by the E principal "shall not affect the derivative status" of E dependents, "provided the familial relationship continues to exist and the principal remains eligible for admission" in E status.[421] Once admitted to the United States, the treaty trader or investor "may engage only in employment which is consistent with the terms and conditions of his or her status and the activity forming the basis for the E treaty status."[422]

E. E Change of Status Petition Filed with USCIS

If the client wishes to file a change of status petition with USCIS, then the practitioner should advise that the foreign national may not "perform productive labor or actively participate in the management of the business prior to receiving a grant of E-2 status."[423] E petitions "may be

approved for a period of up to two years."[424] In addition to the documents discussed above, the E change of status petition should include the following:

§ Form I-129;

§ E Supplement;

§ Form I-907, if applicable;

§ Copy of passport biographic page of passport; and

§ Copy of I-94 card to evidence lawful immigration status. **[[Page 361]]**

After preparing the E petition, it should be filed in duplicate, with original signatures, with the USCIS Service Center with jurisdiction over the place of employment (and not the headquarters of the U.S. company, if different), as discussed in Chapter Two, Basic Nonimmigrant Concepts. Practitioners may also find it helpful to write the following in large block letters across the side of the Form I-129: "DUPLICATE PETITION; PLEASE FORWARD TO KCC."

The second set of original documents will be forwarded to the U.S. consulate where the foreign national will later apply for an E visa as supplementary evidence for the Petition Information Management Service ("PIMS"), as discussed in Chapter Two, Basic Nonimmigrant Concepts.[425] Following approval of a petition, USCIS forwards approval notification to the Kentucky Consular Center (KCC), which in turn creates an electronic record to confirm the petition approval;[426] so the information becomes available to a consular officer to verify the petition approval.[427] Although duplicate original documents are not required, preparing and providing them may facilitate the foreign national's visa application in the future.[428]

For example, citizens of Bangladesh are eligible for E-2 visas valid for no longer than three months. Therefore, even though the underlying petition was approved for 24 months, a Bangladeshi citizen will be able to obtain an E-2 visa that is valid for only three months from the date of visa issuance. The Petition Expiration Date (PED) provided in the lower right corner of the visa should, however, match the dates of validity of the petition as stated on the Form I-797 approval notice. For applicants for admission with visas valid for a shorter period of time than the petition, the practitioner may wish to reiterate that an E nonimmigrant should be admitted for a period of two years from the date of admission. The practitioner may also wish to contact clients with these employees well in advance of the visa expiration date to strategize subsequent applications for visas, so the foreign national may be able to re-enter the United States after international travel.

E status is available to H and L nonimmigrants who have exhausted the maximum period in H or L status.[429] There is no appeal from the denial of an E petition.[430] **[[Page 362]]**

1. Form I-129

Part 1: Information on the U.S. company, including name, address, contact person, contact person's telephone number and email address, and Federal Employer Identification Number (FEIN), should be provided.

Part 2: For most E petitions, "New employment" should be checked and change of status

requested.

Parts 3 and 4: Information about the beneficiary, including name, alternate names, date of birth, country of birth and country of nationality, and passport information, should be provided.

If the foreign national is present in the United States when the petition is filed, then the I-94 card information should be provided, even if the foreign national will depart the United States during pendency of the E petition. In this case, consular notification should be requested in Part 2; but to avoid the situation of being subjected to USCIS processing times while the foreign national is abroad and able to apply for an E visa, the practitioner should strategize with the client ahead of time to arrange for an initial E visa application rather than apply for change of status, as discussed above.

An individual must have a passport that is valid for at least six months from the petition's expiration date; otherwise he or she is inadmissible and ineligible for nonimmigrant status.[431] If the trainee does not have such a passport, then the following options are available: either delay filing the E petition until he or she obtains a renewed passport, or file the E petition, have the foreign national apply for a renewed passport in the interim, wait for an request for evidence (RFE), and then submit a photocopy of the biographic page of the renewed passport once it is available. For nationals of countries where passport renewal takes months, the second strategy can prevent the petition from being significantly delayed. If the client is willing to pay an additional $1,225 fee to USCIS, the delay caused by the RFE, which might also be several months, can be addressed by requesting premium processing when submitting the documentation of the renewed passport. But the practitioner should discuss with the client ahead of time whether an E visa application is the better strategy, as discussed above, especially if the foreign national must return to his or her home country to obtain a new passport.

Parts 5 through 8: Information about the job title, worksite, itinerary, compensation, employment dates, and general information about the petitioner should be provided. The petitioner's representative and the practitioner should sign the form.

Part 9: This section may be used to provide additional details or explanation of answers. **[[Page 363]]**

2. E Supplement

The E Supplement requests information similar to that requested on Form DS-156E, which is discussed above. In the introduction section, information about the petitioner, foreign national, visa classification, and treaty country should be provided.

Section 1: If the petition is for an E-2 individual investor, the answers for each of the questions in Section 1 should be "N/A." If the foreign national will be employed by a foreign entity and requires E status for U.S. employment authorization, as discussed in Chapter Two, Basic Nonimmigrant Concepts, then information on the foreign employer should be provided. If there is no foreign employer, then information on the U.S. employer may be provided: name, number of employees, address, type of goods or services provided, and details about the foreign national's assignment. The practitioner may wish to append each of the answers with "(U.S.)" to clarify that the responses refer to U.S. activities. If the visa applicant is not employed by a related foreign entity or by a U.S. company, then the "N/A" may be stated in the "Employee's Position" blank. If information on the "Employee's Position" will be provided, then it may be attached as an addendum to the form and "See addendum" should be stated in the box, or it may be provided in the support statement and "See

company statement" should be stated to refer the reviewing officer to the duty description in the support statement.

Section 2: If the foreign national will be employed by a U.S. entity, then information about the E business should be provided: relationship to the foreign entity, if applicable, date of establishment or incorporation in the United States, nationality of ownership, assets, net worth, and annual income. If the petition is for an E-2 individual investor or the business relationship is not listed (such as privately-owned, start-up, etc.), then "N/A" should be typed beside the options of #1 and the true business type should be stated. If the business is a start up, then the lease address that was used for registering the business in the United States may be provided. Evidence of the business's date of establishment or incorporation in the United States should also be attached. The names and nationality of the foreign entity or foreign individual owner(s) of the U.S. business should be clear, as discussed above. If the E enterprise is a start-up business, then the figures may be projected, based on anticipated sales, signed contracts, or other accounts receivable; but there should be a note that the figures are projected figures and supporting documents should be provided.

As noted above, there are similarities between E and L status, and certain foreign nationals may be eligible for both nonimmigrant classifications. Perhaps because of this fact, and perhaps because the L-1B nonimmigrant visa category has come under increased scrutiny of late, the E Supplement requests information on employees of the E enterprise that hold E or L status.[432] Information on E and L employees, as well as information on managerial, executive, and specialized knowledge employees, regardless of nationality, should be provided and should be supplemented by a staffing or organizational chart where possible. **[[Page 364]]**

The job description of #8 may be attached as an addendum to the form and "See addendum" should be stated in the box, or it may be provided in the support statement and "See company statement" should be stated. When discussing the E visa applicant's current proposed role in the United States, it is important to note that the language should be consistent with the support statement, especially regarding any discussion of any experience necessary for the E assignment that was gained through previous employment or training with a related entity abroad. As discussed above, the previous experience is a relevant factor in determining whether the foreign national is a qualified executive, supervisor, or essential employee. And for petitions on behalf of essential employees, it is critical to connect how the foreign national will apply the same essential skills in the United States that he or she gained and/or applied in the previous position, especially if the previous position was with a company in the corporate family.[433]

Section 3: This section should be completed only for E-1 entities and should be supported by the documents discussed above.

Section 4: This section should be completed only for E-2 entities only and should be supported by the documents discussed above. If values of the initial investment are unavailable, such as if entity is part of a larger corporate family that publishes an annual report and/or investor certificates or if the entity has been in business for some time, then only the information on the cumulative investment may be provided, using the most recent annual report, investor certificates, balance sheet, or current financial statements. Conversely, for an E-2 investor start up company, the initial investment figures should be provided.

3. Form I-907

If the client wishes a response (approval, denial or RFE) within 15 calendar days, then the client may pay USCIS an additional $1225 for premium processing. This request may be filed concurrently with the E petition, or the attorney or the client may request premium processing after the petition has been filed, by submitting Form I-907 with the petition's receipt notice, as discussed in Chapter Two, Basic Nonimmigrant Concepts.

IV. Additional Follow-up

After a foreign national has obtained E status, the practitioner should follow up to request copies of the I-94 cards and the visas, to ensure that all the information is correct and to calendar the expiration dates to monitor the foreign nationals' status, as discussed in Chapter Two, Basic Nonimmigrant Concepts.

It is particularly important to note that although an E principal may have frequent international travel, which would result in recurring admission for two years, E dependents may have less international travel, which would cause members of the family unit to have different dates of status expiration. The practitioner is advised to monitor the **[[Page 365]]** expiration of E status for these dependents and to remind the client of the need to extend the E status of dependents.

A. EADs for E Spouses

Spouses of E treaty traders and investors are eligible to apply for employment authorization documents (EAD).[434] The statutory provision does not, however, extend to dependent children in E status,[435] despite the guidance from the Social Security Administration (SSA).[436] An E spouse may wish to obtain an EAD solely in order to apply for a Social Security Number (SSN).

The following documents should be prepared and filed:

§ Form G-28;

§ Form I-765;

§ Statement from U.S. company, confirming the E employment of the principal foreign national and/or paystubs evidencing current employment;

§ Copy of the principal nonimmigrant's E visa and I-94 card;

§ Copy of biographic page of passport of the E spouse;

§ Copy of E spouse's E visa and I-94 card; and

§ Copy of marriage certificate.

The EAD application may be filed concurrently with an E change of status petition,[437] but these applications must be filed with either the California Service Center (CSC) or Texas Service Center (TSC).[438] Otherwise, the EAD application should be filed with the Service Center with jurisdiction over the spouse's place of residence.[439] Upon issuance of the EAD, the E spouse may be employed by any employer.[440] An EAD renewal application may also be filed concurrently with a dependent spouse's E extension application, but the practitioner should include a copy of the E extension application or receipt notice with the EAD renewal application, to avoid the delay of the transfer of

the **[[Page 366]]** extension application and an RFE.[441] As stated by USCIS: "This will help the I-765 adjudicator to accurately query CLAIMS for the status of the I-129 and/or I-539 (information that the adjudicator needs to have in order to adjudicate the I-765)."[442]

Although legacy INS guidance indicates that E dependent spouses and children "will not be deemed to have violated status" if they engage in unauthorized employment and "so long as the principal E nonimmigrant is maintaining status, no action will be taken to require their departure,"[443] the practitioner is not advised to rely upon this guidance, as it predates the availability of EADs to E spouses.

B. E Visa Renewals

Once the company has been registered with the U.S. consulate, as discussed above, visa renewal applications may be made by the treaty trader, investor, or employee on a streamlined basis. This is because "[p]osts with a high volume of repeat applications from employees of the same company have developed systems for rolling over company information from one application to another in order to save time."[444] But some individual visa applications may nevertheless experience the same processing times as initial E visa applications.[445] Individual consulates may have additional requirements regarding the scope of the registration. For example, one embassy requires that the E business maintain the registration by annually submitting Forms DS-156E and financial statements or tax returns and states that failure to provide updated documents for a period of five years will result in expiration of the E company registration, which means that the company must register again.[446] For a general rule, DOS recommends: "While there is no specific regulation, best practices from posts suggest it would be reasonable for 'E' visa companies for update 'registration' files at post every year."[447]

Employees of registered companies may be able to schedule visa appointments without awaiting review of the E enterprise documents, but they may be required to "present a copy of the business registration letter given to the company by the US Embassy,"[448] or to provide "the date and location of the [company's] initial qualification" **[[Page 367]]** for E status.[449] But, as with initial E visa applications, the practitioner should check the website of the U.S. consulate to confirm that the E visa applications documents are organized in the manner required.[450]

Another embassy states that subsidiaries and affiliates of E-2 enterprises are not "automatically eligible to send employees on E-2 visas"; the subsidiary or affiliate must be registered with the embassy, although the process is streamlined and only requires notification of the related entity's existence and submission of the most recent U.S. tax return and proof of ownership.[451]

An E visa renewal application may need to provide the following:

§ Financial, corporate, tax, and employment documents to update the information required for the initial E visa application, as discussed above;

- § Updated "spreadsheet listing every qualifying transaction of international trade between the treaty countries during the last calendar year… includ[ing] the date, the invoice number, and the dollar value of the transaction [and] [s]how[ing] in a prominent place the total number and value of these transactions";
- § Independent evidence of the transactions, such as copies of invoices, air bills or shipping invoices, and tax returns;
- § Evidence of and an explanation for "any changes of ownership since last issuance";[452]
- § Updated evidence regarding any new investment(s) in the E-2 business;
- § Evidence of purchase of additional businesses, if applicable, in the form of purchase agreements and closing documents;
- § Proof of regular payments towards any promissory notes, if applicable;
- § Proof that the funds placed in escrow prior to issuance of the E-2 visa were disbursed to the E-2 business's seller, in the form of "all closing documents and direct evidence (cancelled checks and corresponding debits from bank statements)";[453] and **[[Page 368]]**
- § Job titles and immigration status of any subordinate employees.[454]

C. E Extensions

In order to establish eligibility for an E extension, the request should include evidence that the foreign national:

- § "Has at all times maintained the terms and conditions of his or her E nonimmigrant classification;
- § "Was physically present in the United States at the time of filing the application for extension of stay; and
- § "Has not abandoned his or her extension request."[455]

Engaging in other employment (in addition to the E activities) that does not relate to the E business has been determined to be a violation of status.[456] An E extension filed with USCIS may be approved in "two-year increments."[457] The regulations state that "there is no specified number of extensions of stay that a treaty trader or treaty investor may be granted," as long as the foreign national continues to have the intent to depart the United States upon the expiration of status and as long as the need for the essential employee's services was not short-term, as discussed above.[458] If a foreign national has been granted multiple extensions, however, the practitioner may wish to discuss the temporary intent requirement, as discussed above. Although reports indicate that extension periods have been limited to one year, the USCIS responded that there has been no policy change.[459]

Unlike the E-3 visa classification, a timely filed E-1 or E-1 extension should provide continued employment authorization for 240 days after the date the initial E status expires.[460] But if the current E status and visa will expire in the near future, then the practitioner may wish to counsel the

client to travel abroad and apply for a new E visa.

D. Change in Duties or Ownership

As discussed above, in the event of a change in duties or ownership of the E enterprise, the practitioner may request an advisory opinion whether an amended petition must be filed if any of these events occurs.[461] The adjudicator should "either recommend the filing of another application, or prepare a new I-797 reflecting the non-substantive **[[Page 369]]** changes."[462] It seems that E status should not be automatically revoked if there is a substantive change but there should be an inquiry into continuing eligibility for E status.[463]

E. Sponsoring an E Nonimmigrant for Permanent Residence

1. Impact of Owner or Majority Shareholder Pursuing Permanent Residence on Other E Employees

If the owner or majority shareholder of an E business obtains permanent residence, then this will likely impact whether foreign nationals are eligible for E status as employees. As noted above, a U.S. permanent resident may not be an E employer and any ownership interest in the E entity by a permanent resident may not be counted towards the majority ownership requirement.[464] This remains the case even if the owner or majority shareholder has commuter permanent resident status and resides outside the United States.[465] If the owner or majority shareholder nevertheless wishes to pursue permanent residence or if there are no foreign national employees in E status, then the path to permanent residence may entail a Form I-526, Immigrant Petition by an Alien Entrepreneur, or, if the foreign national was an executive or manager at a foreign parent, affiliate, or subsidiary for at least one year within the immediate three years preceding the E assignment, Form I-140, Immigrant Petition for Alien Worker, as a multinational manager.[466]

For an E employee who does not qualify under these two categories, a labor certification application may be required.[467] The practitioner should be aware, however, that the Department of Labor (DOL) is likely to audit the application, because of concerns of influence and/or control over the U.S. business by the foreign national:

> "Where an alien for whom labor certification is sought has an ownership interest in, or some other special relationship with, the sponsoring employer, the employer must demonstrate that a bona fide job opportunity exists for qualified U.S. applicants and that, if hired, the alien will not be self employed. Because confusion exists regarding the meaning of these regulations in 'investor' cases, we elected to revisit the issue en banc."[468] **[[Page 370]]**

If the DOL determines that the job opportunity was not truly available to U.S. worker applicants because the job essentially entails self-employment, then the labor certification application will be denied:[469] "'Employment' means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee."[470] Specifically, the

Board of Alien Labor Certification Appeals (BALCA) held: "if the alien or close family members have a substantial ownership interest in the sponsoring employer, the burden is on the employer to establish that employment of the alien is not tantamount to self-employment, and therefore [is] a per se bar to labor certification."[471]

DOL may audit or deny the labor certification even where the foreign national is an employee rather than an owner or shareholder,[472] simply based on the fact that the beneficiary holds an E visa, because the "visa application stresses the importance of the Alien to the Employer's success,"[473] and even where no U.S. worker applicants respond to the recruitment efforts.[474] DOL may also audit the application if there are concerns that the foreign national has a familial relationship with an owner, shareholder, or officer,[475] although this should result first in an audit rather than an outright denial:

> "We did not hold nor did we mean to imply… that a close family relationship between the alien and the person having the hiring authority, standing alone, establishes, that the job opportunity is not bona fide or available to U.S. workers. Such a relationship does require that this aspect of the application be given greater attention."[476]

Even though an individual and a business may have separate legal identities, such as for corporate or taxation purposes, "[c]orporate status does not remove the alien, as part owner…, from control over who is hired and fired."[477] The BIA rejected the principle that a business and its shareholders are separate to the extent that the relationship should be "beyond scrutiny save in cases of fraud:"[478]

> "In matters affecting the public interest, we are not bound to find fraud or sham in order to look behind the corporation to determine the validity of its actions. Public **[[Page 371]]** interest and policy considerations override the immunity given the stockholders under the corporate entity…. Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy…. Labor certification is a matter of important public concern, which requires attention to substance rather than form."[479]

BALCA acknowledged that many E-2 businesses "will have difficulty overcoming this regulatory proscription, [but] we hold that the sponsoring employer can overcome it if it can establish genuine independence and vitality not dependent on the alien's financial contribution or other contribution indicating self-employment."[480] The mere facts of hiring and firing authority or that the foreign national "has such a dominant role in, or close personal relationship with, the sponsoring employer's business… does not establish the lack of a bona fide job opportunity per se."[481]

Instead, BALCA decided that a totality of the circumstances test should be applied. First, "the business cannot have been established for the sole purpose of obtaining certification for the alien, i.e., a sham."[482] Second, factors to be considered "include, but are not limited to, whether the alien:"

§ "[I]s in the position to control or influence hiring decisions regarding the job for which labor

certification is sought;

§ [I]s related to the corporate directors, officers, or employees;

§ [W]as an incorporator or founder of the company;

§ [H]as an ownership interest in the company;

§ [I]s involved in the management of the company;

§ [I]s on the board of directors;

§ [I]s one of a small number of employees;

§ [H]as qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and

§ [I]s so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien."[483] **[[Page 372]]**

The employer-applicant may not claim the lack of authority for personnel decisions by appointing or retaining another individual to conduct the recruitment and interviews if the appointed or retained individual is in turn an employee of the company and therefore an employee of the owner or majority shareholder.[484] DOL may also consider whether the foreign national has "a significant financial interest in the corporation," even if he or she does not have any ownership interest, such as if the foreign national is "a major creditor of the corporation and own[s] debentures."[485] In addition, the absence of majority ownership does not automatically mean the job opportunity was bona fide and available to U.S. workers; in one case, BALCA denied labor certification where the foreign national owned only 10 percent of the business but also had control over the business as a director, manager, and the first individual to organize the company in the United States.[486] Further, DOL may inquire into any ownership interest or managerial or executive responsibility before the labor certification was filed,[487] as a resignation from an executive office alone does not constitute "a legitimate relinquishment of authority and control."[488]

2. Moonlighting under EAD

In addition, if the E nonimmigrant obtains an EAD after filing the application to adjust status, it remains unclear whether the foreign national may "moonlight" with an employer who is not the E entity without losing E status.[489] Legacy INS guidance stated:

"… E nonimmigrants must continue to observe the requirements of their nonimmigrant status, including limiting employment to the designated employer….

An E-1 [or] E-2… nonimmigrant who has filed an application for adjustment of status may choose between working pursuant to their continued nonimmigrant employment **[[Page 373]]** authorization [as an E nonimmigrant]… or filing form I-765 for employment authorization as an adjustment applicant…. E-1 [or] E-2… adjustment applicants choosing to apply for an [EAD]… may continue to work under their unexpired nonimmigrant employment authorization, while waiting for adjudication

and receipt of the EAD. After receiving the EAD, the alien may work for any employer desired and is not subject to E… restrictions. However, such an alien would lose his or her E-1 [or] E-2… nonimmigrant status by working in open-market employment."[490]

Subsequent legacy INS guidance stated that a foreign national would "violate his/her nonimmigrant status if s/he uses the EAD to leave the employer listed on the approved 1-129 petition and engage in employment for a separate employer."[491] At least one interpretation distinguishes between a "separate" employer and an "additional" employer.[492] Unfortunately, the legacy INS guidance specifically addressed the H and L nonimmigrants, following promulgation of the interim final rule that allows H and L nonimmigrants two options for employment authorization (the EAD or the underlying H or L nonimmigrant status). In addition, the guidance specifically stated the agency's desire to "consider[] expanding the 'dual intent' concept to cover long term nonimmigrants, in E… visa classification[], who are visiting this country as traders [and] investors,"[493] which could be construed as indicating that the guidance does not apply to E nonimmigrants. Upon a request for clarification and confirmation that E nonimmigrants who have applied to adjust status may "moonlight" with an additional employer, USCIS responded that it would "take this matter under advisement."[494] Therefore, the practitioner should discuss the risks in detail with the client and/or foreign national.

Although USCIS was requested to promulgate regulations to allow foreign nationals in E status who have filed applications to adjust status to travel without advance paroles and without being considered to have abandoned the underlying nonimmigrant E status, USCIS indicated that this regulation was not a priority.[495] Risk-averse clients and/or foreign nationals may therefore wish to avoid filing E visa applications or petitions after an immigrant visa petition has been filed. The practitioner should also discuss the impact of international travel by the foreign national, as related DOS guidance states that an E **[[Page 374]]** visa applicant must "demonstrate that he or she does not intend to remain or work permanently in the United States,"[496] when applying for admission.

Finally, if the application to adjust status is denied, then the foreign national should be able to return to E status and "will only be subject to removal proceedings if he or she is not otherwise qualifiedto continue to maintain E … nonimmigrant status in the United States," although the EAD would be terminated.[497] **[[Page 375]]**

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[1] INA §101(a)(15)(E).

[2] 9 *Foreign Affairs Manual* (FAM) 41.51 N1.

[3] 9 FAM 41.51 N1.

[4] INA §101(a)(15)(E); 8 CFR §214.2(e)(4).

[5] 8 CFR §214.2(e)(4); *Adjudicator's Field Manual* (AFM) chs. 34.2(a): Treaty Traders and 34.3(a): Treaty Investors.

[6] INA §101(a)(15)(E).

[7] 9 FAM 41.51 N3.

[8] 9 FAM 41.51 N4.3.

[9] 8 CFR §214.2(e)(6).

[10] *Id*.

[11] Pub. L. No. 107-43, §301 (Sept. 28, 2001); Pub. L. No. 108-77, §401 (Sept. 3, 2003); Pub. L. No. 108-78, §401 (Sept. 3, 2003), respectively.

[12] 9 FAM 41.51 N3.

[13] 9 FAM 41.51 Exhibit I.

[14] "AILA/DOS Practice Pointer: U.S., Denmark, and the E Visa," *published on* AILA InfoNet at Doc. No. 10080365 (*posted* Aug. 3, 2010) (stating no E-2 treaty for Denmark).

[15] AFM chs. 34.2(a): Treaty Traders and 34.3(a): Treaty Investors.

[16] 60 Fed. Reg. 24757 (May 9, 1995); *Matter of [name not provided]*, WAC 02 110 53910 (AAO July 14, 2006), *available at www.uscis.gov/err/D7%20-%20Intracompany%20Transferees%20(L-1A%20and%20L-1B)/Decisions_Issued_in_2006/Jul142006_07D7101.pdf*.

[17] Department of State (DOS) Cable, 98 State 128375 (July 8, 1999), *reprinted in* 76 *Interpreter Releases* 1124 (July 26, 1999).

[18] 8 CFR §214.2(e)(7). *See also* AFM chs. 34.2(a): Treaty Traders and 34.3(a): Treaty Investors.

[19] 9 FAM 41.51 N2.

[20] 8 CFR §214.2(e)(7).

[21] 9 FAM 41.51 N3.1; AFM chs. 34.2(a): Treaty Traders and 34.3(a): Treaty Investors; *Matter of N–S–*, 7 I&N Dec. 426 (D.D. 1957).

[22] 9 FAM 41.51 N14.1.

[23] 9 FAM 41.51 N3.1 (noting that "in modern business structures and layered relationships, [consular officers] will have to rely heavily on the evidence presented to adjudicate whether the business entity in question possesses the requisite nationality").

[24] 9 FAM 41.51 N3.1.

[25] 9 FAM 41.51 N3.2 ("In the case of a multinational corporation whose stock is exchanged in more than one country, then the applicant must satisfy [the consular officer], by the best evidence available, that the business meets the nationality requirement").

[26] 9 FAM 41.51 N3.1.

[27] *Matter of N–S–*, 7 I&N Dec. 426 (D.D. 1957).

[28] 9 FAM 41.51 N3.2.

[29] "AILA Liaison Questions for U.S. Embassy, Rome" (Jan. 2010), *published on* AILA InfoNet at Doc. No. 10031064 (*posted* Mar. 10, 2010) (Companies that are applying for an E visa should be advised that just because a company is incorporated in Italy this does not mean the company fulfills the nationality requirement of 9 FAM 41.51 as in complicated corporate structures where the company is sold on the international market, lawyers need to demonstrate that at least fifty percent of the company is Italian owned").

[30] 9 FAM 41.51 N3.2.

[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] "Q&As from March 2007 AILA Liaison/DOS Meeting" (Mar. 2007), *published on* AILA InfoNet at Doc. No. 07041668 (*posted* Apr. 16, 2007).

[35] Websites of U.S. Embassy in Seoul, "Types of visas—Treaty Trader (E1)" and "Types of visas—Treaty Investor (E2), *available at* *http://seoul.usembassy.gov/treaty_trader.html* and *http://seoul.usembassy.gov/treaty_investor.html*.

[36] Instructions for Form I-129, Petition for a Nonimmigrant Worker, E Supplement, *available at* *www.uscis.gov/files/form/i-129instr.pdf*.

[37] Website of U.S. Consulate in Islamabad, "Treaty Traders & Investors (E-1 & E-2)," *available at* *http://islamabad.usembassy.gov/pakistan/niv_treaty_traders_investors.html*.

[38] Website of U.S. Consulate in Tegucigalpa, Honduras, "Treaty Trader and Treaty Investor Visas (E)," *available at* *http://honduras.usembassy.gov/treatytrader_niv.html*; DOS website, "Form DS-156E: Nonimmigrant Treaty Trader/Investor Application," *available at* *www.state.gov/documents/organization/79963.pdf*. An individual consulate may require that the copies be in color. Website of U.S. Consulate in Islamabad, "Treaty Traders & Investors (E-1 & E-2)," *available at* *http://islamabad.usembassy.gov/pakistan/niv_treaty_traders_investors.html*.

[39] DOS website, "Form DS-156E: Nonimmigrant Treaty Trader/Investor Application," *available at* *www.state.gov/documents/organization/79963.pdf*.

[40] Website of U.S. Embassy in London, "Treaty Trader Visa (E-1)," *available at* *http://london.usembassy.gov/cons_new/visa/niv/enew2.html*.

[41] 9 FAM 41.51 N3.3.

[42] 9 FAM 41.51 N3.3.

[43] 9 FAM 41.51 Exhibit I (the treaty with France extends to Martinique, Guadeloupe, French Guiana, and Reunion of France).

[44] *Id*.

[45] "AILA Rome District Chapter Updates from U.S. Embassy, London" (Oct. 17, 2008), *published on* AILA InfoNet at Doc. No. 08102850 (*posted* Oct. 30, 2008).

[46] *Id*.

[47] 9 FAM 41.51 N3.3.

[48] 9 FAM 41.113 N2.4.

[49] *Id*.

[50] 9 FAM 41.51 N3.3.

[51] *Matter of Ognibene*, 18 I&N Dec. 425 (Reg'l Comm'r 1983); *Matter of Damioli*, 17 I&N Dec. 303 (Comm'r 1980).

[52] *Matter of Damioli*, 17 I&N Dec. 303 (Comm'r 1980) (stating "the very existence of the business upon which the applicant seeks treaty investor status would not be possible unless its owner were a citizen of the United States…" and that it is improper for the owner to "secure benefits from one Government agency by claiming to be a United States citizen, and simultaneously secure other benefits from a second Government agency by claiming to be an Italian citizen").

[53] *Matter of Ognibene*, 18 I&N Dec. 425 (Reg'l Comm'r 1983).

[54] For a discussion of the "temporary entry" of the NAFTA Treaty, see Chapter Eleven, L-1 Visas and Nonimmigrant Status.

[55] 9 FAM 41.51 N15.

[56] INA §214(h); 8 CFR §214.2(*l*)(16); 9 FAM 41.54 N4.

[57] 9 FAM 41.51 N15.

[58] *Id*.

[59] *Id*.

[60] 1 U.S. Customs and Border Protection (CBP) *Inspector's Field Manual* (IFM) ch. 15: *Nonimmigrants and Border Crossers*, 14-1

Agency Manuals 15.5.

[61] 9 FAM 41.51 N15.

[62] *Matter of [name not provided]*, EAC 95 173 50884 (AAU Aug. 12, 1999), 21 *Immig. Rptr.* B2-1.

[63] *Lauvik v. INS*, 910 F.2d 658 (9th Cir. 1990).

[64] *Id.*

[65] Website of U.S. Embassy in London, "Treaty Trader Visa (E-1)," *available at* *http://london.usembassy.gov/cons_new/visa/niv/enew2.html*.

[66] 9 FAM 41.51 N15.

[67] *Id.* (citing 9 FAM 41.54 N4).

[68] INA §214(h); 8 CFR §214.2(*l*)(16); 9 FAM 41.54 N4.

[69] Letter correspondence, J. Bednarz (Oct. 1, 1993), *reproduced in* 70 *Interpreter Releases* 1444–45 (Nov. 1, 1993) (commenting that the doctrine of dual intent has been applied to E nonimmigrants in the past and that the proposed regulation would codify this practice) (internal citation omitted).

[70] Former 9 FAM 41.51 N15.

[71] Current 9 FAM 41.51 N15.

[72] Legacy Immigration and Naturalization Service (INS) Memorandum, P. Virtue, "Considerations for Adjustment of Status (HQ 70/6.2.5, 70/6.2.9, 70/6.2612, 70/23.1, 120/17.2)" (Aug. 5, 1997), *published on* AILA InfoNet at Doc. No. 97080580 (*posted* Aug. 5, 1997). See below in this chapter for a discussion of moonlighting by a foreign national who holds E status and who has applied to adjust status.

[73] AFM ch. 34.2(a): Treaty Traders. The terms "principally" and "substantially" are discussed in below.

[74] INA §101(a)(15)(E)(i).

[75] 9 FAM 41.51 N1.1.

[76] AFM ch. 34.2(a): Treaty Traders.

[77] 9 FAM 41.51 N4.5.

[78] 9 FAM 41.51 N4.1.

[79] *Matter of Seto*, 11 I&N Dec. 290 (Reg'l Comm'r 1965); DOS website, "Form DS-156E: Nonimmigrant Treaty Trader/Investor Application," *available at* *www.state.gov/documents/organization/79963.pdf*.

[80] Website of U.S. Consulate in Tegucigalpa, Honduras, "Treaty Trader and Treaty Investor Visas (E)," *available at* *http://honduras.usembassy.gov/treatytrader_niv.html*; DOS website, "Form DS-156E: Nonimmigrant Treaty Trader/Investor Application," *available at* *www.state.gov/documents/organization/79963.pdf*.

[81] Instructions for Form I-129, Petition for a Nonimmigrant Worker, E Supplement, *available at* *www.uscis.gov/files/form/i-129instr.pdf*.

[82] Website of U.S. Embassy in Tokyo, "Treaty Trader (E-1) Company Registration," *available at* *http://tokyo.usembassy.gov/e/visa/tvisa-niv-e1.html*.

[83] Website of U.S. Consulate in Islamabad, "Treaty Traders & Investors (E-1 & E-2)," *available at* *http://islamabad.usembassy.gov/pakistan/niv_treaty_traders_investors.html*.

[84] 9 FAM 41.51 N4.2.

[85] 9 FAM 41.51 N4.4.

[86] *Id*.

[87] 9 FAM 41.51 N4.2 (emphasis in original).
[88] 8 CFR §214.2(e)(9). *Accord* 9 FAM 41.51 N4.2.
[89] *Matter of Seto*, 11 I&N Dec. 290 (Reg'l Comm'r 1965).
[90] 9 FAM 41.51 N4.3.
[91] 8 CFR §214.2(e)(9).
[92] 9 FAM 41.51 N4.3.
[93] 8 CFR §214.2(e)(9). The practitioner is reminded that I status is available to representatives of "foreign press, radio, film, or other foreign information media." INA §101(a)(15)(E)(i); *see also* 8 CFR §214.2(i).
[94] AFM ch. 34.2(f): Treaty Traders.
[95] 8 CFR §214.2(e)(9).
[96] *Id.*
[97] 9 FAM 41.51 N4.5.
[98] *Id.*
[99] 9 FAM 41.51 N4.2.
[100] 8 CFR §214.2(e)(10).
[101] *Id.*; 9 FAM 41.51 N6 ("The word 'substantial' is intended to describe the flow of the goods or services that are being exchanged between the treaty countries. The trade must be a continuous flow that should involve numerous transactions over time"); "AILA Liaison Questions for U.S. Embassy, Rome" (Jan. 2010), *published on* AILA InfoNet at Doc. No. 10031064 (*posted* Mar. 10, 2010).
[102] *Matter of Seto*, 11 I&N Dec. 290 (Reg'l Comm'r 1965).
[103] 9 FAM 41.51 N6.
[104] 8 CFR §214.2(e)(10); 9 FAM 41.51 N6.
[105] 8 CFR §214.2(e)(10).
[106] 9 FAM 41.51 N6 (emphasis in original).
[107] 8 CFR §214.2(e)(1)(i).
[108] 8 CFR §214.2(e)(11).
[109] 9 FAM 41.51 N7.1.
[110] *Id.*
[111] *Id.*
[112] 9 FAM 41.51 N7.
[113] 9 FAM 41.51 N7.2.
[114] Website of U.S. Embassy in Seoul, "Types of visas—Treaty Trader (E1)," *available at* *http://seoul.usembassy.gov/treaty_trader.html*.
[115] INA §101(a)(15)(E)(ii).
[116] 8 CFR §214.2(e)(2)(i).
[117] 9 FAM 41.51 N8.1.

[118] 9 FAM 41.51 N1.2.
[119] 9 FAM 41.51 N9.
[120] 9 FAM 41.51 N8.1-2.
[121] Letter correspondence, J. Schlosser, (Jan. 25, 1994), *published on* AILA InfoNet at Doc. No. 94080490 (*posted* Aug. 4, 1994).
[122] *Cf. Id*. For a discussion of health-care certification, see Chapter Seven, H-1B Visas and Status.
[123] 8 CFR §214.2(e)(2)(i); *Matter of Khan*, 16 I&N Dec. 138 (BIA 1977).
[124] 8 CFR §214.2(e)(12).
[125] 9 FAM 41.51 N8.1-1.
[126] 9 FAM 41.51 N8.1-2.
[127] 9 FAM 41.51 N8.1-3.
[128] 9 FAM 41.51 N10.1.
[129] Website of U.S. Embassy in Seoul, "Types of visas—Treaty Investor (E2), *available at* *http://seoul.usembassy.gov/treaty_trader.html*. *See also Matter of Khan*, 16 I&N Dec. 138 (BIA 1977).
[130] "AILA Rome District Chapter Updates from U.S. Embassy, London" (Oct. 17, 2008), *published on* AILA InfoNet at Doc. No. 08102850 (*posted* Oct. 30, 2008).
[131] Website of U.S. Consulate in Islamabad, "Treaty Traders & Investors (E-1 & E-2)," *available at* *http://islamabad.usembassy.gov/pakistan/niv_treaty_traders_investors.html*.
[132] Website of U.S. Consulate in Tegucigalpa, Honduras, "Treaty Trader and Treaty Investor Visas (E)," *available at* *http://honduras.usembassy.gov/treatytrader_niv.html*; DOS website, "Form DS-156E: Nonimmigrant Treaty Trader/Investor Application," *available at* *www.state.gov/documents/organization/79963.pdf*.
[133] Website of U.S. Embassy in Tokyo, "Treaty Investor (E-2) Company Registration," *available at* *http://tokyo.usembassy.gov/e/visa/tvisa-niv-e2.html*.
[134] Website of U.S. Consulate in Islamabad, "Treaty Traders & Investors (E-1 & E-2)," *available at* *http://islamabad.usembassy.gov/pakistan/niv_treaty_traders_investors.html*.
[135] Instructions for Form I-129, Petition for a Nonimmigrant Worker, E Supplement, *available at* *www.uscis.gov/files/form/i-129instr.pdf*.
[136] Website of U.S. Consulate in Tegucigalpa, Honduras, "Treaty Trader and Treaty Investor Visas (E)," *available at* *http://honduras.usembassy.gov/treatytrader_niv.html*; DOS website, "Form DS-156E: Nonimmigrant Treaty Trader/Investor Application," *available at* *www.state.gov/documents/organization/79963.pdf*.
[137] DOS website, "Form DS-156E: Nonimmigrant Treaty Trader/Investor Application," *available at* *www.state.gov/documents/organization/79963.pdf*.
[138] Website of U.S. Consulate in Islamabad, "Treaty Traders & Investors (E-1 & E-2)," *available at* *http://islamabad.usembassy.gov/pakistan/niv_treaty_traders_investors.html*.
[139] Website of U.S. Consulate in Tegucigalpa, Honduras, "Treaty Trader and Treaty Investor Visas (E)," *available at* *http://honduras.usembassy.gov/treatytrader_niv.html*; DOS website, "Form DS-156E: Nonimmigrant Treaty Trader/Investor Application," *available at* *www.state.gov/documents/organization/79963.pdf*.
[140] Website of U.S. Consulate in Islamabad, "Treaty Traders & Investors (E-1 & E-2)," *available at* *http://islamabad.usembassy.gov/pakistan/niv_treaty_traders_investors.html*.
[141] Website of U.S. Consulate in Tegucigalpa, Honduras, "Treaty Trader and Treaty Investor Visas (E)," *available at* *http://honduras.usembassy.gov/treatytrader_niv.html*.

[142] Website of U.S. Consulate in Islamabad, "Treaty Traders & Investors (E-1 & E-2)," *available at* http://islamabad.usembassy.gov/pakistan/niv_treaty_traders_investors.html.

[143] 8 CFR §214.2(e)(12).

[144] *Matter of Lee*, 15 I&N Dec. 187 (Reg'l Comm'r 1975).

[145] "AILA Liaison Report from the CSC Stakeholder Meeting" (Oct. 27, 2010), *published on* AILA InfoNet at Doc. No. 10112462 (*posted* Nov. 24, 2010); "CSC Stakeholders Meeting" (Apr. 28, 2010), *published on* AILA InfoNet at Doc. No. 10062988 (*posted* June 29, 2010) (USCIS "is concerned about funds being obtained via a lawful means").

[146] 9 FAM 41.51 N8.1-1.

[147] "Q&As from March 2007 AILA Liaison/DOS Meeting" (Mar. 2007), *published on* AILA InfoNet at Doc. No. 07041668 (*posted* Apr. 16, 2007).

[148] 9 FAM 41.51 N12.1 and N12.2; *Matter of Lee*, 15 I&N Dec. 187 (Reg'l Comm'r 1975).

[149] *Matter of Lee*, 15 I&N Dec. 187 (Reg'l Comm'r 1975).

[150] *Matter of Csonka*, 17 I&N Dec. 254 (Reg'l Comm'r 1978).

[151] *Matter of Kung*, 17 I&N Dec. 260 (Comm'r 1970); *Matter of Lee*, 15 I&N Dec. 187 (Reg'l Comm'r 1975).

[152] "AILA Liaison Report from the CSC Stakeholder Meeting" (Oct. 27, 2010), *published on* AILA InfoNet at Doc. No. 10112462 (*posted* Nov. 24, 2010).

[153] "CSC Stakeholders Meeting" (Apr. 28, 2010), *published on* AILA InfoNet at Doc. No. 10062988 (*posted* June 29, 2010).

[154] 9 FAM 41.51 N8.1-1.

[155] 9 FAM 41.51 N8.1-1; "CSC Stakeholders Meeting" (Apr. 28, 2010), *published on* AILA InfoNet at Doc. No. 10062988 (*posted* June 29, 2010).

[156] *Matter of Lee*, 15 I&N Dec. 187 (Reg'l Comm'r 1975).

[157] 9 FAM 41.51 N8.2.

[158] 9 FAM 41.51 N8.2-2.

[159] *Id*.

[160] 9 FAM 41.51 N8.2-2 (emphasis in original).

[161] 9 FAM 41.51 N8.2-3.

[162] 9 FAM 41.51 N8.2-1.

[163] *Id*.

[164] *Id*.

[165] *Id*.

[166] *Id*.

[167] 8 CFR §214.2(e)(12).

[168] 9 FAM 41.51 N8.1-2.

[169] 8 CFR §214.2(e)(12); "AILA Liaison Report from the CSC Stakeholder Meeting" (Oct. 27, 2010), *published on* AILA InfoNet at Doc. No. 10112462 (*posted* Nov. 24, 2010).

[170] 9 FAM 41.51 N8.1-2 (emphasis in original).

[171] *Matter of Lee*, 15 I&N Dec. 187 (Reg'l Comm'r 1975).
[172] 9 FAM 41.51 N8.1-2; *Matter of Ognibene*, 18 I&N Dec. 425 (Reg'l Comm'r 1983).
[173] 9 FAM 41.51 N8.1-2.
[174] *Matter of Csonka*, 17 I&N Dec. 254 (Reg'l Comm'r 1978).
[175] 8 CFR §214.2(e)(12).
[176] *Matter of Lee*, 15 I&N Dec. 187 (Reg'l Comm'r 1975).
[177] 8 CFR §214.2(e)(12).
[178] 9 FAM 41.51 N8.1-3.
[179] *Id.. Cf. Matter of Khan*, 16 I&N Dec. 138 (BIA 1977) ("For example, evidence establishing that an investor claimant is 'actively in the process of investing,' could consist of copies of contracts showing that he is legally committed to making certain expenditures, or similar items").
[180] *Han v. Hendricks*, 949 F.2d 399 (9th Cir. 1991).
[181] 9 FAM 41.51 N8.1-3.
[182] 8 CFR §214.2(e)(12).
[183] 9 FAM 41.51 N8.1-3.
[184] *Matter of Chung*, 15 I&N Dec. 681 (Reg'l Comm'r 1976).
[185] *Id*.
[186] 9 FAM 41.51 N8.2-2.
[187] *Matter of Khan*, 16 I&N Dec. 138 (BIA 1977).
[188] 8 CFR §214.2(e)(2)(i); AFM ch. 34.3(a): Treaty Investors ("The E-2 enterprise (company, corporation, etc.) must involve the investment of a substantial amount of capital, rather than a marginal investment solely for the purpose of earning a living for the investor").
[189] 9 FAM 41.51 N10.1.
[190] 9 FAM 41.51 N10.2.
[191] 9 FAM 41.51 N10.5.
[192] 9 FAM 41.51 N10.2. *See also* 8 CFR §214.2(e)(14).
[193] 9 FAM 41.51 N10.2.
[194] 9 FAM 41.51 N10.4.
[195] 9 FAM 41.51 N10.2.
[196] 9 FAM 41.51 N10.4. *See also* 1 CBP IFM ch. 15: *Nonimmigrants and Border Crossers*, 14-1 *Agency Manuals* 15.5.
[197] 9 FAM 41.51 N10.4.
[198] *See generally* 9 FAM 41.51 N12.
[199] 9 FAM 41.51 N10.4.
[200] 8 CFR §214.2(e)(14)(iii); 9 FAM 41.51 N10.4.
[201] *Matter of Chung*, 15 I&N Dec. 681 (Reg'l Comm'r 1976); 9 FAM 41.51 N10.4 and N13.

[202] 9 FAM 41.51 N10.3.
[203] 9 FAM 41.51 N10.2.
[204] *Id*.
[205] Form DS-156E, Nonimmigrant Treaty Trader/Investor Application, *available at* www.state.gov/documents/organization/79963.pdf.
[206] 9 FAM 41.51 N10.2.
[207] *Id*.
[208] "Q&As from Mar. 2007 AILA Liaison/DOS Meeting" (Mar. 2007), *published on* AILA InfoNet at Doc. No. 07041668 (*posted* Apr. 16, 2007).
[209] 9 FAM 41.51 N10.2.
[210] *Id*.
[211] *Matter of Lee*, 15 I&N Dec. 187 (Reg'l Comm'r 1975).
[212] 9 FAM 41.51 N11; 8 CFR §214.2(e)(15).
[213] *Matter of Lee*, 15 I&N Dec. 187 (Reg'l Comm'r 1975).
[214] 9 FAM 41.51 N11; 8 CFR §214.2(e)(15).
[215] *Matter of Walsh and Pollard*, 20 I&N Dec. 60 (BIA 1988).
[216] "AILA Liaison Questions for U.S. Embassy, London" (Oct. 13, 2010), *published on* AILA InfoNet at Doc. No. 10110960 (*posted* Nov. 9, 2010).
[217] "AILA Liaison Questions for U.S. Embassy, Rome" (Jan. 2010), *published on* AILA InfoNet at Doc. No. 10031064 (*posted* Mar. 10, 2010).
[218] "AILA Liaison Questions for U.S. Embassy, London" (Oct. 13, 2010), *published on* AILA InfoNet at Doc. No. 10110960 (*posted* Nov. 9, 2010); "AILA Liaison Questions for U.S. Embassy, Rome" (Jan. 2010), *published on* AILA InfoNet at Doc. No. 10031064 (*posted* Mar. 10, 2010) ("An investment generally will qualify as more than marginal if it will expand U.S. job opportunities"); "AILA Liaison/DOS Q&As" (Oct. 24, 2007), *published on* AILA InfoNet at Doc. No. 07112732 (*posted* Nov. 27, 2007). The final document states: "This requirement, however, would only be satisfied by creating jobs for qualified U.S. workers." It is unclear what is meant by "qualified," but the response addressed verification of employment eligibility on Form I-9. For a discussion of Form I-9, see AILA's *Guide to Worksite Enforcement and Coporate Compliance Handbook* (AILA 2008).
[219] *Matter of [name not provided]*, LIN 93 143 50157 (AAU Oct. 26, 1993), 12 *Immig. Rptr.* B2-87 (citing former 9 FAM 41.51 N9.3).
[220] "AILA Liaison/DOS Q&As" (Oct. 24, 2007), *published on* AILA InfoNet at Doc. No. 07112732 (*posted* Nov. 27, 2007).
[221] DOS website, "Form DS-156E: Nonimmigrant Treaty Trader/Investor Application," *available at* www.state.gov/documents/organization/79963.pdf.
[222] *Matter of [name not provided]*, LIN 93 143 50157 (AAU Oct. 26, 1993), 12 *Immig. Rptr.* B2-87 (citing former 9 FAM 41.51 N9.3).
[223] *Kim v. INS*, 586 F.2d 713 (9th Cir. 1978).
[224] "AILA Liaison Questions for U.S. Embassy, Rome" (Jan. 2010), *published on* AILA InfoNet at Doc. No. 10031064 (*posted* Mar. 10, 2010).
[225] *Lauvik v. INS*, 910 F.2d 658 (9th Cir. 1990).
[226] *Matter of Kung*, 17 I&N Dec. 260 (Comm'r 1970).

[227] DOS website, "Form DS-156E: Nonimmigrant Treaty Trader/Investor Application," *available at* www.state.gov/documents/organization/79963.pdf (listing "personal tax records" and "evidence of other personal assets and income" as "evidence that the enterprise is not marginal").

[228] *Matter of Kung*, 17 I&N Dec. 260 (Comm'r 1970). In this case, the foreign national invested $53,000 in an enterprise and also had $46,000 in reserve funds.

[229] *Matter of [name not provided]*, LIN 93 143 50157 (AAU Oct. 26, 1993), 12 *Immig. Rptr.* B2-87 (citing former 9 FAM 41.51 N9.3).

[230] *Matter of [name not provided]*, LIN 93 143 50157 (AAU Oct. 26, 1993), 12 *Immig. Rptr.* B2-87 (citing former 9 FAM 41.51 N9.3).

[231] *Id*.

[232] 9 FAM 41.51 N9.

[233] 8 CFR §214.2(e)(13).

[234] *Id*.

[235] 8 CFR §214.2(e)(2)(i).

[236] 9 FAM 41.51 N9.

[237] Website of U.S. Embassy in Seoul, "Types of visas—Treaty Investor (E2), *available at* http://seoul.usembassy.gov/treaty_trader.html.

[238] *Id*.

[239] *Id*.

[240] 8 CFR §214.2(e)(16); 8 CFR §214.2(e)(2)(ii).

[241] 9 FAM 41.51 N13.

[242] 8 CFR §214.2(e)(16).

[243] *Matter of Lee*, 15 I&N Dec. 187 (Reg'l Comm'r 1975).

[244] 9 FAM 41.51 N12.2.

[245] 9 FAM 41.51 N12.3.

[246] 8 CFR §214.2(e)(17). For a discussion of "primarily" executive or managerial duties, see Chapter Eleven, L-1 Visas and Status.

[247] 8 CFR §214.2(e)(17)(i).

[248] 8 CFR §214.2(e)(17)(ii).

[249] 8 CFR §214.2(e)(17).

[250] 8 CFR §214.2(e)(17)(iii).

[251] "Q&As from March 2007 AILA Liaison/DOS Meeting" (Mar. 2007), *published on* AILA InfoNet at Doc. No. 07041668 (*posted* Apr. 16, 2007).

[252] 8 CFR §214.2(e)(17)(iii).

[253] *Lauvik v. INS*, 910 F.2d 658 (9th Cir. 1990).

[254] *Matter of Ruangswang*, 16 I&N Dec. 76 (BIA 1976); *Matter of Ahmad*, 15 I&N Dec. 81 (BIA 1974); *Matter of Ko*, 14 I&N Dec. 349 (BIA 1973). For a discussion of immigrant visa petitions by investors, see Volume 2: Chapter Three, The Immigrant Visa Petition.

[255] *Matter of Kung*, 17 I&N Dec. 260 (Comm'r 1970).

[256] *Id.*
[257] 9 FAM 41.51 N12.
[258] *Id.*
[259] *Id.*
[260] 9 FAM 41.51 N12.1.
[261] *Id.*
[262] 9 FAM 41.51 N12.4.
[263] *Id.*
[264] 8 CFR §214.2(e)(3); AFM ch. 34.2(a): Treaty Traders ("An E-1 alien may be … or an employee of such enterprise working in an executive or supervisory capacity or in a capacity which requires special qualifications essential to the operation of the enterprise. Such employees must have the same nationality as the principal employer"); AFM ch. 34.3(a): Treaty Investors ("An E-2 alien may be the actual owner of a qualifying enterprise or an employee of such enterprise working in an executive or supervisory capacity or in a capacity which requires special qualifications essential to the operation of the enterprise. Such employees must have the same nationality as the principal employer").
[265] 9 FAM 41.51 N14.1; AFM chs. 34.2(f): Treaty Traders and 34.3(f): Treaty Investors.
[266] 8 CFR §214.2(e)(3)(i).
[267] 8 CFR §214.2(e)(3)(ii); AFM ch. 34.2(f): Treaty Traders.
[268] 9 FAM 41.51 N12.2.
[269] *Id.*
[270] 9 FAM 41.51 N12.3.
[271] 8 CFR §214.2(e)(3).
[272] AFM ch. 34.2(f): Treaty Traders; 1 legacy INS *Adjudicator's Field Manual* (AFM), 14-1 *Agency Manuals* 34.2.
[273] 9 FAM 41.51 N14.2.
[274] *Id.*
[275] *Id*.
[276] *Id.*
[277] *Matter of Kobayashi and Doi*, 10 I&N Dec. 425 (Dep. Assoc. Comm'r 1963).
[278] *Matter of Udagawa*, 14 I&N Dec. 578 (BIA 1974).
[279] 8 CFR §214.2(e)(3).
[280] 8 CFR §214.2(e)(18).
[281] 9 FAM 41.51 N14.3. *See also* 9 FAM 41.51 N14.3-2.
[282] 9 FAM 41.51 N14.3.
[283] *Matter of Walsh and Pollard*, 20 I&N Dec. 60 (BIA 1988).
[284] 8 CFR §214.2(e)(18)(i). *See also Matter of Konishi*, 11 I&N Dec. 815 (Reg'l Comm'r 1966). *Cf. Matter of N–S–*, 7 I&N Dec. 426 (D.D. 1957) (stating that the foreign national's "Japanese background and his ability to speak the Japanese and English languages are special qualifications which make his services essential to the efficient operations of the employer's enterprise").

[285] 8 CFR §214.2(e)(18)(i).
[286] 9 FAM 41.51 N14.3-2.
[287] 8 CFR §214.2(e)(18)(i).
[288] 9 FAM 41.51 N14.3-2.
[289] 8 CFR §214.2(e)(18)(i). *See also* 9 FAM 41.51 N14.3-2.
[290] *Matter of Konishi*, 11 I&N Dec. 815 (Reg'l Comm'r 1966).
[291] Website of U.S. Embassy in Seoul, "Types of visas—Treaty Investor (E2), *available at* *http://seoul.usembassy.gov/treaty_trader.html*.
[292] Instructions for Form I-129, Petition for a Nonimmigrant Worker, E Supplement, *available at* *www.uscis.gov/files/form/i-129instr.pdf*.
[293] 8 CFR §214.2(e)(18)(ii).
[294] 9 FAM 41.51 N14.3-1.
[295] 1 CBP IFM ch. 15: *Nonimmigrants and Border Crossers*, 14-1 *Agency Manuals* 15.5.
[296] AFM ch. 34.2(f): Treaty Traders; 1 legacy INS AFM, 14-1 *Agency Manuals* 34.2.
[297] Website of U.S. Embassy in Tokyo, "Treaty Trader (E-1) Company Registration," *available at* *http://tokyo.usembassy.gov/e/visa/tvisa-niv-e1.html*.
[298] 9 FAM 41.51 N14.3-2.
[299] 8 CFR §214.2(e)(18)(ii).
[300] 9 FAM 41.51 N14.3-2 (providing the example of "a TV technician coming to train U.S. workers in new TV technology not generally available in the U.S. market").
[301] 9 FAM 41.51 N14.3-1.
[302] *Matter of Nago*, 16 I&N Dec. 446 (BIA 1978).
[303] *Matter of Udagawa*, 14 I&N Dec. 578 (BIA 1974).
[304] 9 FAM 41.51 N14.3-3.
[305] *Id.*
[306] *Matter of [name not provided]*, EAC 92 256 50312 (AAU Apr. 23, 1993), 12 *Immig. Rptr.* B2-79.
[307] 8 CFR §214.2(e)(18)(i); *Matter of [name not provided]*, EAC 92 256 50312 (AAU Apr. 23, 1993), 12 *Immig. Rptr.* B2-79.
[308] 9 FAM 41.51 N14.3-4.
[309] *Id.* (stating that "[f]irms may need skills to operate their business, even though they don't have employees with such skills currently on their employment rolls").
[310] *Id.* In certain respects, this analysis is similar to the inquiry for specialized knowledge employees seeking L-1B status, as discussed in Chapter Eleven, L-1 Visas and Status.
[311] 9 FAM 41.51 N14.3-3.
[312] *See generally Id*.
[313] *Matter of Udagawa*, 14 I&N Dec. 578 (BIA 1974).
[314] 8 CFR §214.2(e)(20)(ii).

[315] AFM ch. 34.2(f): Treaty Traders; 1 legacy INS AFM, 14-1 *Agency Manuals* 34.2. The guidance references the Form I-539, but this should not apply, since the Form I-129 is now used for E petitions.
[316] 9 FAM 41.51 N14.3-3.
[317] 9 FAM 41.51 N14.3-1.
[318] *Id*.
[319] 9 FAM 41.51 N14.3-2.
[320] 8 CFR §214.2(e)(18)(ii).
[321] 9 FAM 41.51 N14.3-2.
[322] 9 FAM 41.51 N14.3-1.
[323] 9 FAM 41.51 N14.3-2.
[324] *Id*.
[325] *Id*.
[326] For further explanation of how to determine the prevailing wage, see website of U.S. Consulate in New Delhi, *available at http://newdelhi.usembassy.gov/nivdomesemploy.html*.
[327] For a discussion of how to calculate the level of the prevailing wage, see Chapter Six, The Labor Condition Application.
[328] 8 CFR §214.2(e)(8)(iii).
[329] 8 CFR §214.2(e)(8)(iii).
[330] *Id*.
[331] 8 CFR §214.2(e)(8)(vi).
[332] 8 CFR §214.2(e)(8)(vii).
[333] 8 CFR §214.2(e)(8)(vi).
[334] 8 CFR §214.2(e)(8)(ii); AFM chs. 34.2(a): Treaty Traders and 34.3(a): Treaty Investors.
[335] 8 CFR §214.2(e)(8)(ii).
[336] 8 CFR §214.2(e)(8)(ii)(A).
[337] 8 CFR §214.2(e)(8)(ii)(B).
[338] 8 CFR §214.2(e)(8)(ii)(C).
[339] 8 CFR §214.2(e)(8)(iv).
[340] *Id*.
[341] 8 CFR §214.2(e)(8)(iv)(A).
[342] 8 CFR §214.2(e)(8)(iv)(B).
[343] 8 CFR §214.2(e)(8)(iv)(C).
[344] *Id*.
[345] 8 CFR §214.2(e)(8)(vii).
[346] 8 CFR §214.2(e)(8)(v).

[347] *Id*.
[348] *Id*.
[349] *Matter of Walsh and Pollard*, 20 I&N Dec. 60 (BIA 1988).
[350] 9 FAM 41.51 N13.1.
[351] *Id*.
[352] 9 FAM 41.51 N13 and N13.1.
[353] 9 FAM 41.51 N13.1.
[354] *Id*.
[355] *Id*. ("Since the distinction might be clouded in some circumstances, [the consular officer] should exercise care in adjudicating such cases and not hesitate to submit any questionable cases for an advisory opinion").
[356] 8 CFR §214.2(e)(22)(i)(A).
[357] 8 CFR §214.2(e)(22)(i)(B).
[358] *Id*.
[359] 8 CFR §214.2(e)(22)(iv).
[360] NAFTA Implementation 011/Strikerbreaker Prov. (Oct. 17, 1994), *available at* *http://aila.org/Content/default.aspx?docid=14468*.
[361] *Id*.
[362] *Id*.; NAFTA Implementation Cable 003, 1 *NAFTA Handbook* (Nov. 1999), 14-1 *legacy INS Manuals Scope*.
[363] 8 CFR §214.2(e)(22)(ii).
[364] 8 CFR §214.2(e)(22)(ii)(A).
[365] 8 CFR §214.2(e)(22)(ii)(B).
[366] 8 CFR §214.2(e)(22)(iii).
[367] 1 legacy INS AFM, 14-1 *Agency Manuals* 34.3; AFM chs. 34.2(b): Treaty Traders and 34.3(b): Treaty Investors.
[368] AFM ch. 34.1: Background (citing 8 CFR §214.2(e)(8)).
[369] 9 FAM 41.51 N1.
[370] AFM ch. 34.2(b): Treaty Traders; 1 legacy INS AFM, 14-1 *Agency Manuals* 34.2.
[371] 1 legacy INS AFM, 14-1 *Agency Manuals* 34.3; AFM ch. 34.2(b): Treaty Traders; AFM ch. 34.3(b): Treaty Investors
[372] DOS website, "Form DS-156E: Nonimmigrant Treaty Trader/Investor Application," *available at* *www.state.gov/documents/organization/79963.pdf*. Although the guidance specifically relates to the Form DS-156E, the principle should be the same for the USCIS forms as well. *See also* Website of U.S. Consulate in Tegucigalpa, Honduras, "Treaty Trader and Treaty Investor Visas (E)," *available at* *http://honduras.usembassy.gov/treatytrader_niv.html*.
[373] "VSC Practice Pointer: G-28s" (Sept. 4, 2008), *published on* AILA InfoNet at Doc. No. 08090469 (*posted* Sep. 4, 2008).
[374] *Id*.
[375] Website of U.S. Embassy in London, "Treaty Traders and Investors (E Visas)," *available at* *http://london.usembassy.gov/cons_new/visa/niv/e.html*; websites of U.S. Embassy in Tokyo, "Treaty Trader (E-1) Company Registration" and "Treaty Investor (E-2) Company Registration," *available at* *http://tokyo.usembassy.gov/e/visa/tvisa-niv-e1.html* and *at* *http://tokyo.usembassy.gov/e/visa/tvisa-niv-e2.html*.

[376] "USCIS Processing Time Information for our California Service Center" (posted May 15, 2009), *available at https://egov.uscis.gov/cris/processTimesDisplay.do;jsessionid=acbxCanF3us7O-H3upOgs?type=serviceCenter*.

[377] DOS website, "Visa Wait Times," *available at http://travel.state.gov/visa/temp/wait/tempvisitors_wait.php*.

[378] "Q&As from March 2007 AILA Liaison/DOS Meeting" (Mar. 2007), *published on* AILA InfoNet at Doc. No. 07041668 (*posted* Apr. 16, 2007) (stating that "fluctuations in demand for E visa appointments cause variations in applicant waiting time").

[379] *Id*. (noting that "posts that deal with processing small investment cases, especially those involving new companies, are often required to spend more time processing each case").

[380] Website of U.S. Embassy in London, "Overview of the Process," *available at http://london.usembassy.gov/cons_new/visa/niv/enew1.html* (stating that "[c]urrent review time for each case is 60 days").

[381] "Service Center Operations Teleconference" (Dec. 16, 2003), *published on* AILA InfoNet at Doc. No. 03121710 (*posted* Dec. 16, 2003).

[382] Form I-129, Petition for a Nonimmigrant Worker, E Supplement, *available at www.uscis.gov/files/form/i-129.pdf*.

[383] *Patel v. Minnix*, 663 F.2d 1042 (11th Cir. 1981) (denying E-2 status where foreign national purchased a business 15 days after entering the country in B-2 status and requested E-2 change of status 32 days after admission and provided only unsubstantiated affidavits from the applicant and the applicant's brother regarding his intent to visit the United States as a visitor).

[384] 8 CFR §248.1(a) and (b).

[385] 8 CFR §214.1(e). *See also* "USCIS SOPs for I-539 Processing," *published on* AILA InfoNet at Doc. No. 07090760 (*posted* Sept. 7, 2007).

[386] Legacy INS Memorandum, J. Podolny, "Interpretation of 'Period of Stay Authorized by the Attorney General' in determining 'unlawful presence' under INA section 212(a)(9)(B)(ii)" (Mar. 27, 2003), *published on* AILA InfoNet at Doc. No. 03042140 (*posted* Apr. 21, 2003).

[387] Legacy INS Memorandum, M. Pearson, "Period of stay authorized by the Attorney General after 120-day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act (the Act). (AD 00-07)" (Mar. 3, 2000), *published on* AILA InfoNet at Doc. No. 00030774 (*posted* Mar. 7, 2000).

[388] *Id*.

[389] "AILA-VSC Conference Call Minutes" (Mar. 5, 2008), *published on* AILA InfoNet at Doc. No. 08031331 (*posted* Mar. 13, 2008).

[390] *Id*. Note that it is not current USCIS policy to apply the "last action rule," as discussed in Chapter Two, Basic Nonimmigrant Concepts.

[391] North American Free Trade Agreement, U.S.–Can.–Mex. (Dec. 17, 1992), 32 I.L.M. 289 (entered into force Jan. 1, 1994), Chap. 16; 1 CBP IFM ch. 15: *Nonimmigrants and Border Crossers*, 14-1 *Agency Manuals* 15.5.

[392] 8 CFR §214.1(*l*); legacy INS Operations Instruction (OI) 248.8; NAFTA Implementation Cable 007, 1 NAFTA Handbook (Nov. 1999), 14-1 *legacy INS Manuals Scope*; NAFTA Implementation Cable 005, *available at www.aila.org/Content/default.aspx?docid=14462*.

[393] OI 248.8.

[394] For a discussion of the potential issues surrounding L-1 admission as "temporary entry" under NAFTA, see Chapter Eleven, L-1 Visas and Status.

[395] 8 CFR §214.2(e)(22)(i)(B).

[396] DOS website, "Mexico Reciprocity Schedule," *available at www.travel.state.gov/visa/fees/fees_4881.html?cid=3622*. *Cf.* former DOS website, "Mexico Reciprocity Schedule," formerly *available at http://travel.state.gov/visa/frvi/reciprocity/reciprocity_3622.html#B* (link no longer works).

[397] DOS website, "Mexico Reciprocity Schedule," *available at www.travel.state.gov/visa/fees/fees_4881.html?cid=3622*.

[398] *See, e.g.*, website of U.S. Embassy in London, "Treaty Traders and Investors (E Visas)," *available at* http://london.usembassy.gov/cons_new/visa/niv/e.html.

[399] *See, e.g.*, "AILA Liaison Questions for U.S. Embassy, London" (Oct. 13, 2010), *published on* AILA InfoNet at Doc. No. 10110960 (*posted* Nov. 9, 2010); website of U.S. Embassy in London, "Treaty Traders and Investors (E Visas)," *available at* http://london.usembassy.gov/cons_new/visa/niv/e.html; website of U.S. Consulate in Tegucigalpa, Honduras, "Treaty Trader and Treaty Investor Visas (E)," *available at* http://honduras.usembassy.gov/treatytrader_niv.html. *Cf.* website of U.S. Embassy in Tokyo, "Treaty Traders and Investors Visas," *available at* http://tokyo.usembassy.gov/e/visa/tvisa-niv-e.html.

[400] AILA Liaison Questions for U.S. Embassy, London" (Oct. 13, 2010), *published on* AILA InfoNet at Doc. No. 10110960 (*posted* Nov. 9, 2010). The instructions are available at http://london.usembassy.gov/e.html.

[401] DOS website, "Form DS-156E: Nonimmigrant Treaty Trader/Investor Application," *available at* www.state.gov/documents/organization/79963.pdf.

[402] *See, e.g.*, website of U.S. Consulate in Tegucigalpa, Honduras, "Treaty Trader and Treaty Investor Visas (E)," *available at* http://honduras.usembassy.gov/treatytrader_niv.html; websites of U.S. Embassy in Seoul, "Types of visas—Treaty Trader (E1)" and "Types of visas—Treaty Investor (E2)," *available at* http://seoul.usembassy.gov/treaty_trader.html and http://seoul.usembassy.gov/treaty_investor.html; websites of U.S. Embassy in London, "Treaty Trader Visa (E-1)" and "Treaty Investor Visa (E-2)," *available at* http://london.usembassy.gov/cons_new/visa/niv/enew2.html and *at* http://london.usembassy.gov/cons_new/visa/niv/enew3.html; websites of U.S. Embassy in Tokyo, "Treaty Trader (E-1) Company Registration" and "Treaty Investor (E-2) Company Registration," *available at* http://tokyo.usembassy.gov/e/visa/tvisa-niv-e1.html and *at* http://tokyo.usembassy.gov/e/visa/tvisa-niv-e2.html.

[403] Website of U.S. Embassy in London, "Treaty Traders and Investors (E Visas)," *available at* http://london.usembassy.gov/cons_new/visa/niv/e.html.

[404] *See, e.g.*, website of U.S. Embassy in Tokyo, "Treaty Traders and Investors Visas," *available at* http://tokyo.usembassy.gov/e/visa/tvisa-niv-e.html.

[405] "Q&As from March 2007 AILA Liaison/DOS Meeting" (Mar. 2007), *published on* AILA InfoNet at Doc. No. 07041668 (*posted* Apr. 16, 2007).

[406] Website of U.S. Embassy in Tokyo, "Treaty Traders and Investors Visas," *available at* http://tokyo.usembassy.gov/e/visa/tvisa-niv-e.html.

[407] Website of U.S. Consulate in Tegucigalpa, Honduras, "Treaty Trader and Treaty Investor Visas (E)," *available at* http://honduras.usembassy.gov/treatytrader_niv.html.

[408] *See, e.g.*, "AILA Liaison Questions for US Embassy, Rome" (Jan. 2010), *published on* AILA InfoNet at Doc. No. 10031064 (*posted* Mar. 10, 2010); "AILA Liaison Questions for US Embassy, Rome" (Jan. 2010), *published on* AILA InfoNet at Doc. No. 10031064 (*posted* Mar. 10, 2010); website of U.S. Consulate in Tegucigalpa, Honduras, "Treaty Trader and Treaty Investor Visas (E)," *available at* http://honduras.usembassy.gov/treatytrader_niv.html; website of U.S. Embassy in London, "Overview of the Process," *available at* http://london.usembassy.gov/cons_new/visa/niv/enew1.html; website of U.S. Embassy in Seoul, "Types of Visas—Treaty Trader/Investor," *available at* http://seoul.usembassy.gov/investmente1/tradere2.html.

[409] Website of U.S. Embassy in Istanbul, "Treaty Traders and Investors," *available at* http://turkey.usembassy.gov/treaty_trader_investor.html.

[410] "AILA Liaison Questions for U.S. Embassy, Rome" (Jan. 2010), *published on* AILA InfoNet at Doc. No. 10031064 (*posted* Mar. 10, 2010) ("We encourage E visa applicants to submit their applications in a binder divided into sections clearly separated by lettered or numbered tabs, in order to ensure efficient and effective processing (a clear explanation is provided on our website). Applications not complying with this format will be accepted but may experience additional processing delays").

[411] Website of U.S. Consulate in Islamabad, "Treaty Traders & Investors (E-1 & E-2)," *available at* http://islamabad.usembassy.gov/pakistan/niv_treaty_traders_investors.html.

[412] "AILA Liaison Questions for US Embassy, London" (Oct. 13, 2010), *published on* AILA InfoNet at Doc. No. 10110960 (*posted* Nov. 9, 2010).

[413] "AILA Liaison Questions for US Embassy, Rome" (Jan. 2010), *published on* AILA InfoNet at Doc. No. 10031064 (*posted* Mar. 10, 2010).

[414] DOS Website, "Reciprocity Schedule—Footnote 2," *available at* http://travel.state.gov/visa/frvi/reciprocity/reciprocity_3715.html.

[415] "AILA Liaison/DOS Meeting Minutes" (Nov. 5, 2008), *published on* AILA InfoNet at Doc. No. 09022660 (*posted* February 26, 2009).

[416] DOS website, "Form DS-156E: Nonimmigrant Treaty Trader/Investor Application," *available at* www.state.gov/documents/organization/79963.pdf ("All first-time applicants seeking Treaty Trader or Treaty Investor status must complete Parts I and II. Parts I and II must be updated periodically. All individual applicants must complete Part III…").

[417] *Id*. *See also* website of U.S. Consulate in Tegucigalpa, Honduras, "Treaty Trader and Treaty Investor Visas (E)," *available at* http://honduras.usembassy.gov/treatytrader_niv.html.

[418] 8 CFR §214.2(e)(19)(i); 1 CBP IFM, 14-1 *Agency Manuals* 15.4

[419] The Visa Reciprocity Tables, sorted by country, are available at http://travel.state.gov/visa/frvi/reciprocity/reciprocity_3272.html.

[420] 1 Legacy INS AFM, 14-1 *Agency Manuals* 34.3.

[421] 1 *NAFTA Handbook* (Nov. 1999), 14-1 *Agency Manuals Scope*, Sec. 3 "E-1 and E-2 Nonimmigrant Pursuant to NAFTA."

[422] 8 CFR §214.2(e)(8)(i).

[423] OI 214.2. Although the legacy INS guidance refers only to E-2 status, it is highly unlikely that a foreign national could engage in productive labor prior to approval of an E-1 change of status petition. *See, e.g.*, website of U.S. Embassy in London, "Treaty Traders and Investors (E Visas)," *available at* http://london.usembassy.gov/cons_new/visa/niv/e.html.

[424] AFM ch. 34.2(c): Treaty Traders; 1 legacy INS AFM, 14-1 *Agency Manuals* 34.2.

[425] DOS Cable, "Accessing NIV Petition Information Via the CCD" (Nov. 2007), *published on* AILA InfoNet at Doc. No. 08040331; "PIMS Processing Update," *published on* AILA InfoNet at Doc. No. 08032132 (*posted* Mar. 21, 2008).

[426] DOS website, "Temporary Workers," *available at* www.travel.state.gov/visa/temp/types/types_1271.html?css=print; "PIMS Update," *published on* AILA InfoNet at Doc. No. 08081564 (*posted* Aug. 15, 2008); "PIMS Processing Update," *published on* AILA InfoNet Doc. No. 08032132 (*posted* Mar. 21, 2008).

[427] DOS website, "Accessing NIV Petition Information Via the CCD," *available at* http://travel.state.gov/visa/laws/telegrams/telegrams_4201.html.

[428] "PIMS Processing Update," *published on* AILA InfoNet Doc. No. 08032132 (*posted* Mar. 21, 2008).

[429] 8 CFR §214.2(h)(13)(iii)(A).

[430] AFM chs. 34.2(d): Treaty Traders and 34.3(d): Treaty Investors.

[431] INA §212(a)(7)(B)(i). The exceptions to this rule in INA §212(a)(d)(4) are discussed in Chapter Two, Basic Nonimmigrant Concepts.

[432] For a discussion of the increased scrutiny of L-1B petitions, see Chapter Eleven, L-1 Visas and Status.

[433] For a discussion of how to connect the U.S. job duties with any previous experience gained abroad, see discussion above.

[434] 9 FAM 41.51 N18; AFM chs. 34.2(a): Treaty Traders and 34.3(a): Treaty Investors.

[435] INA §214(e)(6); USCIS Memorandum, M. Yates, "Guidance on Employment Authorization for E and L Nonimmigrant Spouses" (Feb. 28, 2002), *reprinted at* 7 *Bender's Immigr. Bull.* 341 (Mar. 15, 2002), and *available at* www.uscis.gov/files/pressrelease/E_LEmpAuthPub.pdf.

[436] Website of Social Security Administration, "Section RM 00203.500 Employment Authorization for Nonimmigrants" (Oct. 17, 2007), *available at* https://s044a90.ssa.gov/apps10/poms.nsf/lnx/0100203500!opendocument#c1 and http://policy.ssa.gov/poms.nsf/links/0100203500.

[437] 71 Fed. Reg. 29662 (May 23, 2006).

[438] USCIS Memorandum, M. Yates, "Guidance on Employment Authorization for E and L Nonimmigrant Spouses" (Feb. 28, 2002), *reprinted at* 7 *Bender's Immigr. Bull.* 341 (Mar. 15, 2002), and *available at* www.uscis.gov/files/pressrelease/E_LEmpAuthPub.pdf.

[439] *Id*.

[440] *Id*.

[441] "Service Center Operations Teleconference" (Dec. 16, 2003), *published on* AILA InfoNet at Doc. No. 03121710 (*posted* Dec. 16, 2003).

[442] *Id*.

[443] 1 *NAFTA Handbook* (Nov. 1999), 14-1 *Agency Manuals Scope*, Sec. 3 "E-1 and E-2 Nonimmigrant Pursuant to NAFTA."

[444] "Q&As from March 2007 AILA Liaison/DOS Meeting" (Mar. 2007), *published on* AILA InfoNet at Doc. No. 07041668 (*posted* Apr. 16, 2007).

[445] Website of U.S. Embassy in Tokyo, "Treaty Traders and Investors Visas," *available at* http://tokyo.usembassy.gov/e/visa/tvisa-niv-e.html.

[446] *Id*.

[447] "AILA Liaison/DOS Meeting Minutes" (Oct. 22, 2009), *published on* AILA InfoNet at Doc. No. 10020230 (*posted* Feb. 2, 2010).

[448] Website of U.S. Embassy in London, "Treaty Traders and Investors (E Visas)," *available at* http://london.usembassy.gov/cons_new/visa/niv/e.html.

[449] Websites of U.S. Embassy in Seoul, "Types of visas—Treaty Trader (E1)" and "Types of visas—Treaty Investor (E2), *available at* http://seoul.usembassy.gov/treaty_trader.html and http://seoul.usembassy.gov/treaty_investor.html.

[450] Websites of U.S. Embassy in London, "Renewal of Treaty Trader Visa (E-1)" and "Renewal of Treaty Investor Visa (E-2)," *available at* http://london.usembassy.gov/cons_new/visa/niv/enew4.html and *at* http://london.usembassy.gov/cons_new/visa/niv/enew5.html.

[451] Website of U.S. Embassy in London, "Frequently Asked Questions," *available at* http://london.usembassy.gov/cons_new/visa/niv/e_faqs.html.

[452] Website of U.S. Embassy in London, "Renewal of Treaty Investor Visa (E-2)," *available at* http://london.usembassy.gov/cons_new/visa/niv/enew5.html.

[453] Websites of U.S. Embassy in London, "Renewal of Treaty Trader Visa (E-1)" and "Renewal of Treaty Investor Visa (E-2)," *available at* http://london.usembassy.gov/cons_new/visa/niv/enew4.html and *at* http://london.usembassy.gov/cons_new/visa/niv/enew5.html.

[454] Website of U.S. Embassy in Tokyo, "Nonimmigrant Visa Application," *available at* http://tokyo.usembassy.gov/e/visa/tvisa-niv-walkin1.html.

[455] 1 *NAFTA Handbook* (Nov. 1999), 14-1 *Agency Manuals Scope*, Sec. 3 "E-1 and E-2 Nonimmigrant Pursuant to NAFTA."

[456] *Matter of Laigo*, 15 I&N Dec. 65 (BIA 1974).

[457] 1 legacy INS AFM, 14-1 *Agency Manuals* 34.2.

[458] 8 CFR §214.2(e)(20)(iii).

[459] "CSC & AILA Working Group Meeting Agenda" (Jan. 28, 2009), *published on* AILA InfoNet at Doc. No. 09012968 (*posted* Jan. 29, 2009).

[460] 8 CFR §274a.12(b)(20).

[461] AFM ch. 34.2(e): Treaty Traders; 1 legacy INS AFM, 14-1 *Agency Manuals* 34.3.

[462] AFM chs. 34.2(e): Treaty Traders and 34.3(e): Treaty Investors; 1 legacy INS AFM, 14-1 *Agency Manuals* 34.3.

[463] Legacy INS Memorandum, R. Scully, "Validity of Certain Nonimmigrant Visas" (Aug. 15, 1996), *available on* www.ailalink.org (search for "Scully" and "LaFleur").

[464] 9 FAM 41.51 N14.1.

[465] Letter correspondence, E. Odom (Aug. 18, 1994), *reproduced in* 71 *Interpreter Releases* 1378 (Oct. 7, 1994).

[466] For a discussion of these immigrant petitions, see Volume 2: Chapter Three, The Immigrant Visa Petition.

[467] For a discussion of this process, see Volume 2: Chapter Two, The Labor Certification Application.

[468] *Matter of Modular Container Systems, Inc.*, 1989-INA-228 (BALCA 1991) (*en banc*) (internal citations omitted).

[469] *Id*.

[470] 20 CFR §656.3.

[471] *Matter of Modular Container Systems, Inc.*, 1989-INA-228 (BALCA 1991) (*en banc*).

[472] *Matter of Driessen Aircraft Interior Systems*, 1993-INA-82 (BALCA 1995) (labor certification initially denied by the Certifying Officer (CO)).

[473] *Matter of Barrio Fiesta Restaurant*, 2000-INA-309 (BALCA Mar. 14, 2001).

[474] *Matter of Rimaco, Inc.*, 89-INA-362 (BALCA 1990).

[475] *Matter of Rainbow Imports, Inc.*, 88-INA-289 (BALCA 1988) (stating that the "CO had reason to believe, based on the alien's status as President of a corporation with an almost identical name as the Employer's and engaged in the same line of business, that the alien may have exercised influence or control over the Employer's business").

[476] *Matter of Paris Bakery Corp.*, 1988-INA-337 (BALCA 1990) (*en banc*) (citing *Matter of Young Seal of America, Inc.*, 1988-INA-121 (BALCA 1989) (*en banc*)).

[477] *Matter of Modular Container Systems, Inc.*, 1989-INA-228 (BALCA 1991) (*en banc*) (citing the decision of the CO).

[478] *Matter of Edelweiss Manufacturing Co., Inc.*, 87-INA-562 (BIA 1988) (*en banc*).

[479] *Id*.

[480] *Matter of Modular Container Systems, Inc.*, 1989-INA-228 (BALCA 1991) (*en banc*).

[481] *Id*.

[482] *Id*.

[483] *Id*. *See also Matter of ATI Consultores*, 2007-INA-00064 (BALCA Feb. 11, 2008); *Matter of Barrio Fiesta Restaurant*, 2000-INA-309 (BALCA Mar. 14, 2001); *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *Matter of Rainbow Imports, Inc.*, 88-INA-289 (BALCA 1988); *Matter of Keyjoy Trading Co.*, 87-INA-592 (BALCA 1987); *Matter of Malone & Asso.*, 1990-INA-360 (BALCA 1991) (*en banc*); *Matter of Young Seal of America, Inc.*, 1988-INA-121 (BALCA 1989) (*en banc*) (deemed unlikely that a wife would hire a U.S. worker in place of her husband); *Matter of Shehrazade, Inc.*, 1988-INA-170 (BALCA 1988) (beneficiary of labor certification application owned 48 percent of the business and the remaining 52 percent was owned by the beneficiary's wife and children); *Matter of Paris Bakery Corp.*, 1988-INA-337 (BALCA 1990) (*en banc*) (fraternal relationship between employer-owner and beneficiary of labor certification deemed irrelevant where the job opportunity represented an expansion of personnel and where there were "not even arguably qualified U.S. applicants"); *Matter of Lignomat USA, Ltd.*, 1988-INA-276 (BALCA 1989) (*en banc*) (beneficiary of labor certification application deemed inseparable from the employer because he and his wife owned 49 percent of the business and were officers of the corporation, he was the President, and he developed technology which the employer sought to market); *Matter of B.F. Hope Construction Inc.*, 1989-INA-162 (BALCA 1990); *Matter of Ocean Paradise of Hawaii*, 1989-INA-188 (BALCA 1989); *Matter of GHR Atlanta Realty, Inc.*, 1989-INA-123 (BALCA 1990) (beneficiary of labor certification was a director and the only employee of the business although not a shareholder); *Matter of Kica Inc.*, 1988-INA-169 (BALCA 1988); *Matter of Medical Equipment Designs*, 1987-INA-673 (BALCA 1988); *Matter of Bulk Farms Inc.*, 1989-INA-51 (BALCA 1990).

[484] *Matter of Malone & Asso.*, 1990-INA-360 (BALCA 1991) (*en banc*).

[485] *Matter of Rainbow Imports, Inc.*, 88-INA-289 (BALCA 1988).

[486] *Matter of Keyjoy Trading Co.*, 87-INA-592 (BALCA 1987).

[487] *Matter of Rainbow Imports, Inc.*, 88-INA-289 (BALCA 1988); *Matter of Lignomat USA, Ltd.*, 1988-INA-276 (BALCA 1989) (*en banc*); *Matter of B.F. Hope Construction Inc.*, 1989-INA-162 (BALCA 1990).

[488] *Matter of B.F. Hope Construction Inc.*, 1989-INA-162 (BALCA 1990).

[489] "AILA/USCIS Q&As" (Apr. 2, 2008), *published on* AILA InfoNet at Doc. No. 08040235 (*posted* Apr. 2, 2008).

[490] Legacy INS Memorandum, P. Virtue, "Considerations for Adjustment of Status (HQ 70/6.2.5, 70/6.2.9, 70/6.2612, 70/23.1, 120/17.2)" (Aug. 5, 1997), *published on* AILA InfoNet at Doc. No. 97080580 (*posted* Aug. 5, 1997).

[491] Legacy INS Memorandum, M. Cronin, "AFM Update: Revision of March 14, 2000 Dual Intent Memorandum (HQADJ 70/ 2.8.6, 2.8.12, 10.18)" (May 16, 2000), *published on* AILA InfoNet at Doc. No. 00052603 (*posted* May. 26, 2000).

[492] "AILA/USCIS Q&As" (Apr. 2, 2008), *published on* AILA InfoNet at Doc. No. 08040235 (*posted* Apr. 2, 2008).

[493] 64 Fed. Reg. 28209 (June 1, 1999).

[494] "AILA/USCIS Q&As" (Apr. 2, 2008), *published on* AILA InfoNet at Doc. No. 08040235 (*posted* Apr. 2, 2008).

[495] *Id*.

[496] 9 FAM 41.51 N16.10.

[497] Legacy INS Memorandum, P. Virtue, "Considerations for Adjustment of Status (HQ 70/6.2.5, 70/6.2.9, 70/6.2612, 70/23.1, 120/17.2)" (Aug. 5, 1997), *published on* AILA InfoNet at Doc. No. 97080580 (*posted* Aug. 5, 1997).