Chapter 15

"E" Treaty Trader and Investor Visas

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One of the most popular visas for foreign nationals seeking to live and work in the United States is the E visa for treaty traders or investors. The United States has entered into reciprocal treaties with 79 countries, permitting foreign businesspeople to obtain E-1 and/or E-2 visas [1] to develop and direct businesses.

Procedures for E-1 and E-2 visas. An application for an E-1 or E-2 visa is made to an American consulate on Form DS-160 [2] (or DS-156 and, if necessary, DS-157 and/or DS-158) and other forms required by the consulate. The applicant also must submit the DS-156E supplement form parts I, II, and III; proof of the company's substantial trade or investment; a business plan; and a letter describing the company's business, the position the foreign national will fill, and his or her qualifications for the position. A consulate also may have its own individual E-1 or E-2 visa questionnaires that must be submitted with the application. U.S. Citizenship and Immigration Services (USCIS) does not need to approve any petition, and there are no numerical limits on the number of E visas issued annually.

If the foreign national is in the United States, he or she may apply for change of status using Form I-129 and E Supplement. If change of status is granted, the foreign national is issued an I-797 Notice of Action approving the change and an I-94 form denoting E-1 or E-2 status. After departing the United States, the foreign national must apply for an E visa at an American consulate as described above; it is not sufficient merely to present the I-797 (as with an H-1B or L-1). Some consuls may accept E visa applications by mail while the foreign national is in the United States, but the applicant must appear at the consulate for an interview before the visa stamp will be issued. Most consuls will preprocess and "register" the enterprise as a qualifying business for its owners and employees to apply for E visas before the foreign national appears at the consulate for the visa stamp. E visa stamps may be extended by a consul on a showing that the enter- **[[Page 190]]** -prise is successful and the foreign national still qualifies for the visa. Before filing the application it is suggested one check the consulate's webpage for detailed instructions on the order of the evidence and special items that may be required.

While foreign nationals setting up new enterprises may be issued E visas valid for up to five years, [3] it is common for consuls to issue a one– to two-year visa based on a new enterprise. An essential employee may be granted only a one– or two-year visa. Extensions are available indefinitely. When the foreign national presents the visa at the border, admission is usually granted for two years, even if the visa stamp is about to expire. The foreign national must intend to depart the United States when his or her E-1 or E-2 status terminates, but need not establish that he or she will maintain a foreign residence. [4] Consular officers usually require a written statement verifying departure intent.

The most useful and important regulations for E visas are contained in the *Foreign Affairs Manual* (FAM). [5] USCIS regulations [6] have been conformed to the Department of State's (DOS) rules.

B-1 to set up enterprise. A foreign national may be issued and admitted with a B-1 visa to set up an E enterprise. [7] The foreign national may not run the enterprise on a day-to-day basis while in B-1 status, but must be engaged only in creating the business.

Pending immigrant petitions. The FAM states that an E visa applicant may have an I-140 immigrant petition filed and yet be issued an E visa. However, the applicant must prove to the consul his or her intent to

depart the United States upon termination of status and not adjust status in the United States. [8] This may not be easy, especially in developing countries such as the Philippines. **[[Page 191]]**

E-1 AND E-2 ELIGIBILITY; LIST OF TREATY COUNTRIES

For an E-1 and E-2 visa, each of the following criteria must be met.

§ A treaty [9] between the United States and the country of the foreign national's citizenship (not birth) must exist. The North American Free Trade Agreement (NAFTA) [10] also provides for E visas. Some treaties provide for both E-1 and E-2 visas, while others provide for only one. Here is a list of E visa treaty countries: [11]

Albania (E-2)	Ethiopia (E-1/E-2)	Netherlands [12] (E-1/E-2)
Argentina (E-1/E-2)	Finland (E-1/E-2)	Norway [13] (E-1/E-2)
Armenia (E-2)	France [14] (E-1/E-2)	Oman (E-1/E-2)
Australia (E-1/E-2)	Georgia (E-2)	Pakistan (E-1/E-2)
Austria (E-1/E-2)	Germany (E-1/E-2)	Panama (E-2)
Azerbaijan (E-2)	Greece (E-1)	Paraguay (E-1/E-2)
Bahrain (E-2)	Grenada (E-2)	Philippines (E-1/E-2)
Bangladesh (E-2)	Honduras (E-1/E-2)	Poland (E-1/E-2)
Belgium (E-1/E-2)	Iran (E-1/E-2)	Romania (E-2)
Bolivia (E-1/E-2)	Ireland (E-1/E-2)	Senegal (E-2)
Bosnia & Herzegovina (E-1/E-2)	Israel (E-1)	Singapore(E-1/E-2)
Brunei (E-1)	Italy (E-1/E-2)	Slovak Republic [15] (E-2)
Bulgaria (E-2)	Jamaica (E-2)	Slovenia [16] (E-1/E-2)
Cameroon (E-2)	Japan [17] (E-1/E-2)	Spain [18] (E-1/E-2)
Canada (E-1/E-2)	Jordan (E-1/E-2)	Sri Lanka (E-2)
Chile (E-1/E-2)	Kazakhstan (E-2)	Suriname [19] (E-1/E-2) **[[Page 192]]**
China (Taiwan) [20] (E-1/E-2)	Korea (South) (E-1/E-2)	Sweden (E-1/E-2)
Colombia (E-1/E-2)	Kyrgyzstan (E-2)	Switzerland (E-1/E-2)
Congo (Brazzaville) (E-2)	Latvia (E-1/E-2)	Thailand (E-1/E-2)
Congo (Kinshasa) (E-2)	Liberia (E-1/E-2)	Togo (E-1/E-2)
Costa Rica (E-1/E-2)	Lithuania (E-2)	Trinidad & Tobago (E-2)
Croatia [21] (E-1/E-2)	Luxembourg (E-1/E-2)	Tunisia (E-2)
Czech Republic [22] (E-2)	Macedonia (E-1/E-2)	Turkey (E-1/E-2)
Denmark [23] (E-1)	Mexico (E-1/E-2)	Ukraine (E-2)
Ecuador (E-2)	Moldova (E-2)	United Kingdom [24] (E-1/E-2)
Egypt (E-2)	Mongolia (E-2)	Yugoslavia [25] (E-1/E-2)
Estonia (E-1/E-2)	Morocco (E-2)	

§ The foreign national visa applicant seeking E status must have the same nationality as that of the majority owners of the enterprise or firm. Also, the majority ownership of the business must be held by nationals of the treaty country. In the case of large joint ventures, when the enterprise is owned

equally by citizens of two separate treaty countries (50/50 ownership), the FAM says that foreign nationals with citizenship from either treaty country may qualify for an E visa. [26] The control of the business must be in the hands of citizens of the foreign treaty country. "Negative" control is sufficient (*i.e.*, the party has the power to stop major decisions). [27] **[[Page 193]]**

§ The enterprise must not be marginal, *i.e.*, an enterprise solely generating a living for the owner(s). The FAM now emphasizes the company's profits for determining that the enterprise is not a marginal one.

§ The foreign national must be coming to the United States to work as an executive, manager, or "essential" worker.

Ownership. The business owners' nationality is demonstrated by presenting copies of the shareholders' stock certificates and passports or birth certificates. For large and public companies, a letter from an executive explaining that the company's stock is traded exclusively on the stock exchange of the treaty country is usually sufficient evidence of the nationality of the enterprise.

Owners in the United States in a visa status other than E (including U.S. permanent residents) cannot have their ownership shares considered in determining the nationality of the enterprise. [28] Usually, the percentage of ownership matches the amount of funds invested. In some cases, contributions of a small amount of "sweat equity" will be recognized to explain the disparity between the cash invested and percentage of ownership.

Marginality. For both E-1 and E-2 visas, it must be proven that the enterprise is not a marginal one. For a new business enterprise, the regulations require a business plan with income and expense projections for five years. [29] It is also good practice for a new small venture to develop a plan to identify potential business problems. Today, no one can effectively make accurate financial predictions five years in advance, and thus fulfilling the requirement for a five-year plan involves some degree of speculation. Consuls usually exempt large companies from this requirement.

DOS says the projected future earning capacity generally should be realizable within five years from the date the foreign nationals' enterprise commences normal business activity. Whether the investment has the capacity to generate the required return is a question of fact that is within the discretion of a consular officer to determine. It has been reported that a consular officer in London required a certified public accountant to provide an assessment of the firm's financial projections.

Foreign nationals often will ask counsel how much trade or investment is required to prove that a business is not marginal. The FAM does not provide a specific dollar amount or profit margin. The FAM says if, after expenses, the company's income is sufficient to pay the foreign national a standard salary plus a **[[Page 194]]** reasonable rate of return on the investment, the marginality requirement should be satisfied. [30]

For established firms seeking E-2 visas for the first time or seeking to extend visa stamps, tax returns, financial statements, and proof of trade or assets are submitted. In some cases, the consul may require proof of the entrepreneur's other assets [31] and income to show that the E-visa enterprise does not exist solely for the purpose of earning a living. [32] This requirement does not preclude a small business from being an E-2 enterprise. Proving profitability, expanding job opportunities, and an entrepreneur's business track record are important factors.

TREATY TRADER E-1 VISA

For a treaty trader (E-1) visa, the company must prove it is engaged in "substantial" trade principally between the United States and the foreign worker's country of nationality. [33] Over 50 percent of the total volume of international trade conducted must be between the United States and the treaty country of which

the foreign national is a citizen. If a U.S. subsidiary of a foreign firm is engaged principally in trade between the United States and the treaty country, it is not material that the office also engages in third-country or intra-U.S. trade, or that the firm's headquarters abroad is engaged primarily in trade with other countries. [34] Branch offices, however, are not treated as distinct entities for this purpose; their trade is determined by the trade conducted by the entity of which they are a part. [35]

If an E-1 qualified enterprise's trade between the treaty country and the United States falls below 50 percent of the enterprise's total international trade volume, it no longer is a qualified E-1 company, even if the change in percentage of trade is an anomaly due to a large one-time contract. In this event, change of status to E-2 or another visa classification should be sought until the balance of trade shifts to a majority with the treaty country.

Trade services. Trade in services is permissible for E-1 visas. Trade services include, but are not limited to, banking, insurance, transportation, communica- **[[Page 195]] -**tions and data processing, advertising, accounting, design and engineering, management consulting, tourism, and technology transfer. [36]

Proving substantial trade services may not be easy. A DOS cable recommends to consuls: "The applicant should be asked to submit a summary or audit of international accounts and transactions and, if necessary for verification, contracts …." [37]

TREATY INVESTOR E-2 VISA

For a treaty investor E-2 visa, the applicant or employing company must have invested or be in the process of investing a substantial amount of capital in the business enterprise. [38] Goods, machinery, or other noncash assets may be included as capital. [39] The FAM sets forth the "proportionality test," which requires the investment to be an amount normally considered "necessary" to establish an enterprise. [40] The FAM states:

> The amount invested in the enterprise should be compared to the cost (value) of the business by assessing the percentage of the investment in relation to the cost of the business. If the two figures are the same, then the investor has invested 100% of the needed funds in the business. Such an investment is substantial. The vast majority of cases involve lesser percentages. The proportionality test can best be understood as a sort of inverted sliding scale. The lower the cost of the business the higher a percentage of investment is required, whereas, a highly expensive business would require a lower percentage of qualifying investment. There are no bright line percentages that exist in order for an investment to be considered substantial. Yet, as stated above, the lower the cost of the business the higher the percentage of qualifying investment is anticipated. Thus, investments of 100 percent or a higher percentage would normally automatically qualify for a small business of $100,000 or less. Yet, a business of this size involving two equal partners or joint ventures may prove qualification for E-2 status. At the other extreme, an investment of $10 million or a $100 million business would likely qualify, based on the sheer magnitude [o]f the business itself. [41] **[[Page 196]]**

PRACTICE POINTER

FQ Can an E-2 visa be issued to a manager to set up a new liaison office in the United States that will conduct market research on U.S. products and markets and act as a clearinghouse for information about the overseas enterprise, but will not directly buy or sell products or services?

FQ A liaison office is not a qualifying enterprise for an E visa because E-2 visas are for the owners or employees of a commercial company to do business–i.e., make, market, sell, or buy services or products. If the company has other offices or plants in the United States conducting business, employment by a liaison office is a permissible E visa activity.

See 9 FAM 41.51 N9

The FAM also acknowledges that service businesses (consulting, marketing, and so forth) may not need such large amounts of capital. [42]

The substantial investment relates to the total cost of the business. For example, if an E-2 visa applicant pays $100,000 for a 51 percent interest in a U.S. business, the investment is 100 percent of the 51 percent interest, but this may not satisfy the proportionality test. DOS policy is that "total cost" means the value of the entire enterprise, and not merely the portion being purchased by the E-2 investor. [43]

In the past, investments of $60,000 to $80,000 often qualified as substantial investments. In *Matter of Walsh and Pollard,* [44] the Board of Immigration Appeals (BIA) found a $15,000 cash reserve and office equipment constituted a substantial investment. However, the expected investment was projected to increase, and the enterprise was expected to employ 300 people. Moreover, the venture involved the General Motors Corporation. Today, given inflation in the 15 years since *Walsh/Pollard* and the post-9/11 restrictive attitude of many consuls, a larger investment may be needed.

Often, consuls will grant E-2 status to a well-documented application by an experienced entrepreneur with a cash investment of about $125,000 to $150,000. The amount may be less for a service company. [45]

Noncash assets. Expert testimony by accountants, lawyers who specialize in business acquisitions, or appraisers may be useful to prove the substantiality of the investment, especially for those businesses involving less capitalization or when the capitalization is a noncash asset, such as machinery. The DOS Visa Office has recognized that intellectual property such as patents, copyrights, or software may be a capital asset. [46] Valuing intellectual property may be challenging **[[Page 197]]** and may require expert testimony. Although the "goodwill" of a business may be purchased and included as part of the amount invested, goodwill (as an asset to an enterprise) is not considered in the value of the business for E-2 purposes, because valuing this type of asset is too speculative.

Small business example. An equestrian from France worked here for five years on a P-1 athlete visa, competing on the Grand Prix horse show circuit. She formed a U.S. corporation, leased a stable, hired a groom, and invested in her new corporation about $50,000 cash (a personal loan from her mother), her truck, horse trailer, tack, horse show equipment, and three horses (two young prospects and an experienced show champion), which cumulatively were valued at about $100,000. The application was documented with horse-show magazine articles about her, a list of her equipment with receipts for some (*i.e.*, saddles), purchase receipts and checks for the truck and trailer, and a professional valuation of the horses. The application included a letter from the applicant describing her management of the new stable enterprise and expansion plans, statement of intent to depart, business plan with income and expense projections, and business license. The application was granted.

In the processing of investing. The FAM provides that a foreign national may be issued an E-2 visa while in the process of establishing the E-2 enterprise. [47] The foreign national must have made substantial progress toward opening or purchasing the business and not merely have an intent to create a company. Some consuls claim putting the funds in the new enterprise's U.S. bank account does not satisfy the requirement that the funds are "at risk." [48] Satisfying a consul can be challenging for a start up, as the foreign national cannot run the new business until he or she has a work visa to do so. In one successful case, an entrepreneur investing $170,000 set up a U.S. corporation, rented an office, spent $25,000 on a domain name, and spent about $50,000 on software development before submitting his E-2 application. Other factors proving funds are at risk may be an office lease, hiring of employees, contracts, fees and retainers paid to consultants for services, and evidence of other business commitments.

A visa may be issued to a foreign national purchasing a business for which he or she has entered into a contract with a clause to finalize the transaction when the E-2 visa is issued. It is recommended that such a clause require the visa to be issued in 90 days and state that if it is not, the contract becomes void and the foreign national is entitled to return of any deposit unless the parties agree to further **[[Page 198]]** extension of time for visa issuance. Depositing funds in an escrow account is suggested to prove the capital is at risk.

For a foreign national entrepreneur to obtain an E-2, he or she must prove possession of the invested funds. [49] The foreign national may borrow funds to contribute toward the substantial investment. The loan agreement (note) from the lender, however, must be a personal loan, not one by which the business can be seized first in the event of default. [50] The foreign national may put up a home or other asset as collateral for the loan, but not the E enterprise. Some consuls require the applicant to provide documents showing the source of the funds invested in the E visa enterprise. Recommended evidence includes savings accounts or the sale of a prior asset and wire transfer of the funds from the applicant's bank accounts to the new business.

Real estate investments pose problems for E-2 visas because they usually involve large loans secured by the real estate, which may lead to a finding that the investment does not satisfy the proportionality test. Further, real estate investments raise the issue whether the investor will manage the enterprise. Many real estate investments can be run by a local real estate firm, which collects the rent, fixes the plumbing, and so forth, and do not need the investor in the United States to direct the investment. [51] An investment in passive land is not a qualifying E-2 enterprise. [52] On the other hand, many successful E-2 investors have purchased a hotel or motel that they are managing themselves.

If the investment is in multiple real estate projects and the investor plans to buy and sell properties, the investment may be in a real estate management company. Providing the consul evidence of the investor's past buying and selling practices will be important to show that the applicant will be managing an active enterprise [53] as opposed to a passive investment.

Job creation. There is no requirement in the FAM that a new E-1 or E-2 enterprise (as opposed to a ongoing U.S. business that is purchased) create new employment in the United States. However, often consuls expect to see that the enterprise will create employment. Extension applications should be supported by **[[Page 199]]** evidence of any direct and indirect [54] job creation, including payroll records, checks to independent contractors, and so forth.

EXECUTIVES AND MANAGERS

E visas are available to executives and managers of the E enterprise. The consul or USCIS examiner may look behind a managerial title to ascertain the precise duties. The applicant must demonstrate ability to do the particular job. There is, however, no requirement of work experience with the firm's company abroad. The criteria for proving that E-2 positions are executive or supervisory are substantially similar to those governing L-1A petitions. [55]

ESSENTIAL PERSONNEL

E visas are also available to "essential personnel." The following factors are used to determine whether a foreign national has essential skills or provides essential services:

- § The worker must be essential to the firm's U.S. operations and not an ordinary skilled worker.
- § The foreign national must have a degree of proven expertise in the area of specialization, unique, specific skills, and/or lengthy experience or training with the firm.
- § The period of training needed to perform the duties, and the salary, must be commensurate with the

level of expertise.

The FAM gives the following guidance for specialized and essential personnel:

> In assessing the specialized skills and their essentiality, the consular officer should consider such factors as the:
>
> – Degree of proven expertise of the alien in the area of specialization;
> – The uniqueness of the specific skills;
> – The function of the job to which the alien is destined; and
> – The salary such special expertise can command.
>
> In assessing the claimed duration of essentiality, the consular officer should look to the period of training needed to perform the contemplated duties and, in some cases, the length of experience and training with the firm. [56] **[[Page 200]]**

In *Matter of Kobayashi and Doi,* [57] the legacy Immigration and Naturalization Service (INS) district director held that two former line dancers hired to train and supervise entertainers in Japanese art, culture, and tradition and to instruct and supervise waiters and waitresses in the art of preparing and serving Japanese food were not essential personnel. Legacy INS said the positions did not appear to be of the type contemplated by the treaty, the salaries were low, and there was no evidence that the applicants had any managerial experience. Legacy INS found that the employees would have little to do with directing the operations of the enterprise.

Start-up companies and new enterprises. The FAM previously said that employees needed for the start-up of an enterprise derive their "essentiality from their familiarity with the overseas operations rather than the nature of their skills." This criterion usually was applied "where the established foreign firm seeks to use some skilled foreign personnel in the early stages of a U.S. investment, usually for a period not to exceed one year." Today, the FAM says:

> Short-term need—The employer may need the skills for only a relatively short (*e.g.*, one or two years) period of time 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. [58]

Interestingly, the FAM says that there is no requirement that an essential employee have any previous employment with the enterprise's overseas operations. [59]

Highly trained technicians. The FAM provides that highly trained and specially qualified technicians may be employed by the treaty firm to train or supervise personnel employed in manufacturing, maintenance, and repair functions. The FAM says:

> In some cases, ordinarily skilled workers can qualify as essential employees, and almost always this involves workers needed for start-up or training purposes. 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 **[[Page 201]]** rote skill held by the applicant.
>
> To avoid problems with subsequent applications, consular officers might find, at the time of the original application, that it is best to set a time frame within which the business must replace such foreign workers with locally hired employees. Some of the factors used in the 9 FAM 41.51 N14.3-2 analysis would be drawn upon again to reach such an agreement. [60]

PRACTICE POINTER

Proving essential skills is similar to documenting a specialized knowledge L-1B visa.

While the standard is not identical, the discussion of the L-1B visas and new case law is instructive for proving the criteria are satisfied.

See chapter 22.

Shortage of U.S. workers. While the law does not require a labor certification or proof that there is a shortage of ready, willing, and qualified U.S. workers to perform the job in question, the FAM does instruct the consular officer to consider conditions in the American labor market. [61] If the necessity for a particular worker is questionable, statements from industry trade sources or state employment services as to the unavailability of U.S. workers in the skilled areas concerned should be submitted. The employer also may run a newspaper ad and provide a statement about the results.

The BIA in *Walsh/Pollard* [62] relied on the skills, importance of the job, and high qualifications of the two engineers. It found that the engineers were going to be employed in "highly creative jobs involving independent judgment" and therefore were employed in "responsible" positions, with "special qualifications" "essential" for the company to meet its contractual obligations.

Some consular officers require substantial proof that younger visa applicants have essential knowledge. While there is no degree requirement for an E-2, consular officers may question whether the applicant's degree is related to the occupation in assessing the applicant's qualifications for the position.

Chefs sometimes qualify as essential personnel, provided that prevailing wages are paid and the U.S. employer demonstrates there is a shortage of U.S. workers. [63] They also may qualify as managers, depending on the size of the restaurant. **[[Page 202]]**

DEPENDENTS

The spouse and children of principal E visa holders may be issued dependent visas. There is no distinction in the E visa stamp or status designation for dependents (such as there is with H-1B visa holders, whose dependents are issued an H-4 visas and status). A dependent of an E-1 nonimmigrant is issued an E-1 visa and status, and a dependent of an E-2 nonimmigrant is issued an E-2 visa and status. Dependents of an E-1 or E-2 principal who are of nontreaty nationality also are entitled to an E-1/E-2 visa with the same validity period as the principal's. [64]

Work authorization. Spouses of E-1 and E-2 visa holders can obtain work authorization by filing an I-765 Application for Employment Authorization with a USCIS service center, with a copy of the applicant's I-94, proof of the principal's status (I-94), a copy of the marriage certificate, the filing fee, and photos. Verification that the principal continues to be employed by the E enterprise also is recommended. **[[Page 203]]**