Immigration Law Tampa Bay
Steven A. Culbreath, Esq.
5027 Central Avenue, St. Petersburg, FL 33710
steve@ImmigrationLawTampaBay.com || www.ImmigrationLawTampaBay.com

N7 Applicant Must Have Invested or In Process of Investing

N7.1 Concept of "Investment" and "In Process of Investing"

(TL:VISA-78; 5-7-93)

The consular officer must assess the nature of the investment transaction to determine whether a particular financial arrangement may be considered an "investment" within the meaning ofINA 101(a)(15)(E)(ii). The core factors relevant to a post's analysis of whether the applicant actually has invested, or is in the process of investing, in an enterprise are discussed below.

N7.1-1 Possession and Control of Funds

(TL:VISA-78; 5-7-93)

The alien must demonstrate possession and control of the funds invested. If the investor has received the funds by legitimate means, e.g., savings, gift, inheritance, contest, etc. and has control and possession over the funds, the proper employment of the funds may constitute an E-2 investment. (It should be noted, however, that inheritance of a business does not constitute an investment.) Furthermore, the statute does not require that the source of the funds be outside the United States.

N7.1-2 Investment Connotes Risk

(TL:VISA-78; 5-7-93)

a. 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. (E-2 investor status shall not, therefore, be extended to non-profit organizations.) 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 byINA 101(a)(15)(E)(ii). If the funds' availability arises from indebtedness, these criteria must be followed:

(1) Indebtedness 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. For example, if the business in which the alien is investing is used as collateral, funds from the resulting loan or mortgage are NOT at risk, even if some personal assets are also used as collateral.
(2) On the other hand, loans secured 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.
b. 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. [See N7.1-3 below for contrast with uncommitted funds.]

N7.1-3 Funds Must be Irrevocably Committed

(TL:VISA-78; 5-7-93)

a. To be “in the process of investing” for E-2 purposes, the funds or assets to be invested must be committed to the investment, and the commitment must be real and irrevocable. As an example, a purchase/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/transfer only on the condition being met. The point of the example is that to be in the process of investing the investor must have, and in this case would have, reached an irrevocable point to qualify.
b. Moreover, for the alien to be “in the process of investing”, the alien 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. Mere intent to invest, or possession of uncommitted funds in a bank account, or even prospective investment arrangements entailing no present commitment, will not suffice.

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