



# Immigration Law Tampa Bay

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## **MARGINALITY**

The U.S. State Department's FOREIGN AFFAIRS MANUAL ("FAM") governs Visa regulations and adjudications, including the E-Visas.

When specifically addressing concerns of "marginality", the basic requirement / element is stated here, as follows:

9 FAM 402.9-6(E) - Enterprise Must Be More Than Marginal  
(CT:VISA-569; 04-06-2018)

*"A **marginal** enterprise is an enterprise that does not have the present or future capacity to generate enough income to provide more than 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. The projected future capacity should generally be realizable within five years from the date the alien commences normal business activity of the enterprise."*

What has caused much back-and-forth during the adjudications process is one of extreme subjective interpretation on part of the Government on determining whether a particular commercial undertaking is "marginal", or above and beyond it.

It's essentially a 2-part test, and oftentimes, we as practitioners, need to remind the adjudicator about it.

PRONG 1: does the E-Visa business have the capacity (current/present OR future) to generate significantly more income than what is required for the Principal applicant (and his/her dependents) to live?

PRONG 2: IF the business fails the first prong, what is the likelihood that the business can and will benefit the local economy substantially? (hiring and employing qualified workers legally authorized to work in the U.S.)

**PRACTICE TIP:** In my E-Visa applications, I try as much as possible to show that the Applicant and the prospective business will be able to satisfy BOTH requirements within the initial 5 years of the Applicant running the business. It's additionally helpful, especially in cases where the Applicant might be purchasing an EXISTING business, to show that the business ALREADY satisfies those two prongs, or if it has in the past, it will soon do so again (in case business has suffered, slumped, etc.).

You always want to make as strong a case as possible, -- without making up facts, or lying in the application --, that the business in question will NOT be marginal, and give as many reasons or circumstances as possible.

IF some of these conditions cannot be met YET, because your Applicant is still abroad and cannot do certain things until AFTER the E-Visa approval and entering the U.S. to fully assume control over the business, then SAY so in your application and give reasonable timelines for completion, so the adjudicator has a sense of knowing what the E-Visa holder will be doing upon his/her arrival in the U.S.

Look out for more marginality scrutiny in cases where the E-Visa business is very small, a one-man-show, or a tightly held family business. DOS and USCIS both have unofficial biases against these.

#### SAMPLE FACT PATTERNS:

- A. Olaf Svensson is a gifted kitchen cabinet maker and installer. He has registered a new entity in U.S. State X and will eventually hire a subcontractor or two to help with installations. His investment covers start-up costs, legal and professional fees, a vehicle, a trailer, and tools. His financial projections show annual gross revenues of \$45,000.

- B. Giovanni has purchased an existing, but struggling commercial cleaning business, which currently has 3 workers, down from 6 when times were good. His investment covers the purchase of the business, the assets and customer-base, 2 newer vans. He plans on growing the staff back to 6 within the first 12 months, and adding some 3 more workers in the following year after.
- C. Bradley and his wife have purchased an old commercial premises, which used to house a motel, and plan on revitalizing the property to become a hip Bed & Breakfast. They will eventually bring over wife's sister to be a manager, and also hire 2 part-time staff within 6 months. The renovations initially will be substantial and expensive. Bradley and his wife will take minimal compensation, as they have other sources of non-U.S. income.
- D. Pierre and Jean-Claude are 50-50 partners in their new business venture. They have invested substantially into their new tech start-up in the U.S. They will initially hire a part-time office support staff member, and also outsource a lot of work overseas (e.g. India, China). Eventually, they wish to develop a U.S.-based franchise and open multiple independent locations throughout the U.S. Their formal compensation will be minimal, but they will receive substantial year-end profit distributions, according to the financial projections. In the day-to-day operations, they will hire several third-party services and product vendors to support their operations.

*{{ ANSWERS ON THE FOLLOWING PAGE }}*

## ANSWERS:

- A. This may very well be considered “marginal”. This could possibly be denied. He may also succeed initially on the first application, but receive a lesser E-visa (shorter duration). This would definitely be problematic on an extension/renewal for lack of staff/workers. Also problematic is the problem of growth and scalability. Without additional workers, there is only so much work 1 person can handle. It does not presently have a lot of growth potential, and the income projections barely exceed reasonable living expenses.
- B. This would probably NOT be considered “marginal” and would be regarded favorably, especially because adjudicators like the scenarios where foreign investment is used to save struggling business, AND preserving (not just growing) U.S. jobs.
- C. In most situations like this, and given the size of the investment (before and after the visa application), cases like this tend to get approved and not be seen as “marginal”. The modest staff might be a small issue, but generally if you can show that the staffing level is appropriate or sufficient, you should be ok. It’s generally best to NOT be over-staffed, or significantly UNDER-staffed. The outside sources of income do not really affect marginality concerns, but it still helps to plant that seed in the adjudicator’s mind, because they still view it as income and “security” (not becoming a welfare case, especially becoming a potential ‘public charge’). I would also add the employment of construction contractors as “indirect employment” and job-creation as a positive factor.
- D. This could go either way, depending on the adjudicator, or possibly where the case is seen and decided, as some Consular posts are stricter than others. The outsourcing of labor, while common, is still frowned upon to some extent because it doesn’t directly benefit a U.S. economy. The year-end profit taking is ok, but you want to show how they support themselves otherwise throughout the year. Also, the potential for growth and expansion in the future (the franchise concept) is a large potential plus in terms of positive economic impact. The use of other local companies is also beneficial and a way to show keeping other U.S. business (and their workers) going.