Immigration Law Tampa Bay

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About the Author

Since 2003, the primary focus of my professional career is and has been the practice of U.S. Immigration Law, having successfully served hundreds of clients worldwide. I run a very busy immigration practice which is located in St. Petersburg, Florida, in the greater Tampa Bay metropolitan area.

I assist my clients with living, working and conducting business, or studying in the United States, helping each client make the United States their new home, either temporarily or permanently. From time-limited Visas, to permanent residence ("Greencard"), to U.S. Citizenship, whatever YOUR path in the United States may be. I truly enjoy sharing my knowledge and expertise on matters of U.S. immigration law, visa policy, business law and business practices, and issues surrounding business consulting.

Being a registered member of the American Immigration Lawyers Association (AILA), and having earned the prestigious "AV-Rating" from Martindale-Hubbell, and the "10/10 Superb Rating" from Avvo.com, I am considered by many peers very experienced and well-trained in U.S. Immigration matters.

I am a fully licensed and accredited attorney in Florida. My immigration practice involves virtually all offices of USCIS in the United States, and many U.S. Embassies and Consulates around the globe.

Over the years, I have authored many articles, including 3 books related to U.S. Immigration Law on AMAZON, on various aspects of U.S. immigration law, including visa strategies, legislative and regulatory updates, de-mystifying government agencies, and providing insight into government practices.

I also have served as an Adjunct Professor at St. Petersburg College in the Paralegal Studies department in recent years, teaching an introductory immigration law course to paralegal students seeking a Bachelor's Degree.

I am also a volunteer attorney on the Florida Bar's Committee of Unlicensed Practice of Law (UPL) for my local judicial district, helping combat fraud and malpractice committed by unlicensed individuals on members of the public.

Having spent 20 years of my formative years in Germany, I am a native-speaker of German. I am a 1998 graduate from the University of South Florida cum laude with a B.A. in Political Science and Int'l Affairs, and a 2000 graduate from Stetson University College of Law.

When I am not "at work", I spend my spare time as a Beekeeper, engage in fencing and Krav Maga, among various other interests and pursuits. More details about me, my law practice in general, my value-added representation and case management can all be found online:

http://www.immigrationlawtampabay.com/

Stay on top of current developments and issues in U.S. Immigration Law and Policy by connecting with my Firm's Facebook page:

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FOREWORD

Foreword

I want to congratulate you on taking this awesome step in growing your professional law practice this year!

Your commitment, your "leap of faith", shows me that you truly care about your value to your clients and you are willing to make a substantial investment in your Self, to grow and expand into a new area of immigration practice, thus far unfamiliar to you.

Exciting Times!! Now is as good of time as ever!

I've put together this toolkit for you, based on my 15+ years of successful, heavy E-Visa practice, and an average overall final approval rate of +/- 85%, between DOS and USCIS. Over the years, E-Visa cases have been my "bread and butter" cases, claiming a solid 50-60% share of my immigration practice, the other 40%-50% being distributed among other types.

It is my hope that using this E-Visa Toolkit will give you enough to start your E-Visa journey with more confidence and direction, and that you will be able to sign your first E-Visa client very soon, and feel good about the consultation(s) and putting together the case.

As part of this Toolkit, I've also committed to you, to act as your mentor and advisor through your first couple of E-Visa cases, until you get "the hang" of them, or a good feel for them. Keep in mind that no 2 cases are ever truly alike, and that even after many E-visa cases, your learning in this area will never cease.

Let's dive on in!

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REASONS TO ADD E-VISAS TO YOUR PROFESSIONAL LAW PRACTICE

1. Reasons to add E-Visas to YOUR law practice

The E-Visa category, although limited in terms of which clients may apply for it, based on existing treaties between the United States and certain nations, can be a very exciting and beneficial tool in your arsenal.

Oftentimes, with some creative, "outside the box" lawyering and well-laid strategy, the E-Visa can potentially open a crucial door toward a client's own "American Dream", and consequently to you, as a lawyer, more revenue and more happy clients.

In my years of practice, the E-Visa is often overlooked or too quickly dismissed, by other fellow lawyers, and by potential clients. This stems either from un-familiarity, not to say "ignorance", or from wrong assumptions about whether the client may qualify, or some combination of these.

Your first case in any new or unfamiliar category (E-visas, or otherwise) will always seem overwhelming and daunting, but generally, once you've been through the "trial by fire", and you've run the gauntlet of your first one, the next ones don't seem so bad.

Use ME as a resource. I'm more than happy to field questions and discuss issues, at all stages of your E-Visa case. By getting this E-Visa toolkit, you also get me as part of the deal, as your mentor, advisor and coach.

You will quickly realize the immense benefits of being able to competently advise your clients and handle these types of cases, E-1 and E-2 Visas.

Depending on your geographic coverage area, and local practice (incl. other practitioners in your area), "average" or "common" **legal fees for individual E-Visa cases can range between $4,500 on the very Low end, up to around $8,500+ on the higher end of the fee-spectrum**, depending on varying factors.

Since fee discussions are generally a "no-no" among lawyers, one can gleam much of this through informal discussions with peers, clients' first-hand knowledge, and "hearsay" about what others might or have charged.

Absent uncharacteristic outliers on both ends of the fee-spectrum, those who are 'ridiculously low' and wanting to race quickly to the fee-bottom, "giving away" their labor, and those who charge exorbitant fees at criminally unconscionable levels, you will need to determine for yourself a "comfortable" fee-level, as you do with other case types.

Keep in mind, of course, that your first 2-3 E-visa cases might be your least profitable ones, in terms of time and effort (on your part), due to the learning curve. This toolkit is certainly going to significantly reduce that learning curve, and you will surely regain your initial investment in my toolkit with your first E-Visa case!

The better and more competent you will become in E-Visas, the more efficient (and MORE PROFITABLE) you will be with each case, absent any unforeseen monkey wrenches thrown into a particular case.

Yes, that will happen from time to time. Be ready for it! But do not let yourself become discouraged, ever.

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SCREENING CLIENTS FOR A POSSIBLE E-VISA CASE

2. Screening Clients for E-Visas

Keep in mind that although a client may qualify for other categories, he or she, depending on the situation, should always be evaluated by you for multiple categories, so you can adequately determine the "best fit", and have viable "Plan B", and if possible, "Plan C".

Sometimes, in my practice, we have to initially start with one category, in order to specifically lay the groundwork for a later different category, to perhaps later be followed by another.

It helps in your consultations to take a view of 3. (1) What is the initial, immediate concern within the next 3-6 months, then (2) for the initial 12-24 months, then (3) beyond 2-3 years etc.?

Your first concern should be based on the Client's present citizenship(s).

- Which citizenship does the client possess?
- Does the client possess more than one simultaneously?
- Has client previously held other citizenship(s) and lost, relinquished or abandoned it/them?
- Is client currently eligible to obtain any other citizenships (based on national origin, family ties, ancestry claims, residency issues, etc.)?
- Is client married? If YES, be mindful of answering these same questions for spouse.

The Citizenship questions above will tell you (and the client) if the client is even ELIGIBLE for a possible E-Visa to begin with. E-Visas are limited to nationals / citizens of an enumerated list of countries. (listed below, in a later chapter)

If your client is a citizen of a qualifying country, you're already in a good place to proceed with your analysis and the possibility of signing a potential E-Visa case.

If your client is NOT a citizen of such a qualifying country, you should examine possibilities – through the above questions and analysis – to try and find ways to GET the client a qualifying citizenship.

I've had clients who initially did not possess a qualifying passport, but who, after lengthy consultations and discussions, and some effort on client's part, were able to obtain another qualifying citizenship… or ride on the tails of a qualifying spouse's citizenship to proceed with an E-Visa case.

> **EXAMPLE 1:** Indian client with Indian passport, long-time legal resident of CANADA, decided to apply for and obtain Canadian naturalization, and once CDN-passport in-hand, do an E-Visa application for the U.S.
>
> **EXAMPLE 2:** Venezuelan client with Venezuelan passport, had valid claim to SPANISH citizenship, decided to apply for and obtain Spanish citizenship based on descent through a parent, and once Spanish passport in-hand, do an E-Visa application for the U.S.

You will quickly gain an initial knowledge of "common" E-Visa countries, AND those who do NOT qualify. It's always good to have quick access to the list when you have a potential E-Visa consult for reference, if you're unsure about a particular citizenship, you might not otherwise encounter often.

Once you have determined that a potential client might qualify for an E-Visa application based on Nationality / Citizenship (incl. that of the spouse), you will need to elicit a bunch of other information to fully qualify a client for such a case. More on these later.

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OVERVIEW OF THE E-VISA CATEGORY AND ITS GENERAL REQUIREMENTS

3. Overview of E-Visa Category

The E-Visa category is one that is relatively well-established in pretty well-settled. This makes it nice and fairly "predictable" on the one hand, but on the other hand there is very little to no actual evolution of this category over time, as in other areas of U.S. immigration law. There are very little to no changes in practice or procedure in the E-Visa arena.

If there IS an area within E-Visa practice that requires some diligence on our part as practitioners is the way Consular Posts overseas handle and process these applications, as their procedures change (update) with some degree of regularity, with little to no public notice. But more on this later.

The E-Visas discussed in this toolkit relate directly to the E-1 (for Treaty Traders) and the E-2 (for Treaty Investors).

This kit will NOT discuss the E-3 category for Australian professionals, because it is more akin to H-1B and TN visas for degreed professionals and specialty occupation workers.

E-Visas are based on diplomatic treaties and agreements between the United States and a particular foreign nation. The existing compact between the U.S. and participating Country "X" will determine the terms of the E-Visa, its duration, its fee, whether citizens of Country "X" can do only E-1 or only E-2 or BOTH, or any other special provisions or restrictions.

For most intents and purposes, in your daily E-Visa practice, the basic requirements for an E-1 will generally be the same, and the requirements for an E-2 generally the same. Your analysis of facts and information and your presentation of the case will be the same in most E-1s or most E-2s.

The DIFFERENCES will generally be among the Consular Posts where the case is handled and in the U.S. State Department Visa Fee(s) charged and specific validity durations of a Visa-Document foil, based on the Reciprocity Tables.

When you process E-Visa Status petitions in the United States, through USCIS, there will be generally no noticeable differences in processing, as USCIS fees and

status durations within the U.S. are uniformly applied, and not normally country-of-origin-specific.

More on the differences between consular processing and stateside USCIS processing later, in further chapters.

Whether you're doing an E-1 (Trader) or an E-2 (Investor), it's important to keep in mind (AND THE CLIENT'S MIND!) that this is a NON-immigrant visa, i.e. limited in time-duration, purpose and scope. The Beneficiary is coming to the U.S. for a limited time, for a specific limited purpose related to his/her commercial business enterprise in the U.S.

In theory, although no "immigrant intent" is permitted, the E-Visa is infinitely renewable and extendable into perpetuity, so long as the applicant and his business enterprise continues to qualify. There is no max. horizon in the E-Visas, as opposed to other categories, like H-, L-, O-, etc. classifications.

PRACTICE POINTER: However, USCIS and DOS have both acquiesced in situations where an E-Visa Holder can benefit from LPR-status, be it through marriage, or through family ties, or through Diversity Lottery, or any possible employment-based options. The E-visa category is one where "immigrant intent" generally does NOT pose a problem.

About the intricacies of durations, extensions, renewals, and changes in circumstances, more will be written, in later chapters.

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E-1 TREATY TRADER

a. E-1 Trader

The E-1 Treaty Trader Visa is a non-immigrant visa which permits an alien to live and work in the U.S. for a limited time. The visa is usually issued for 1-5 years at first (dep. On specific treaty provisions), and can be renewed thereafter in 5-year max. increments (or less!). There is no limit to the number of renewals that are permitted, as long as the applicant continues to qualify for the visa.

Requirements: To qualify for E-1 Visa, an applicant must meet all of the following:

1. **There must be a treaty between the U.S. and Trader's country of citizenship;**

   The U.S. has commerce treaties with most countries in Western Europe, but only some of the countries in Eastern Europe, Asia, Africa and Latin America. Some treaties have unique rules, such as the treaty with the U.K., which requires visa applicants to be residents of the British Isles, or the treaty with Switzerland, which permits visas to be issues only four years at a time (rather than the usual five years). *– Consult the Treaty Nations List and also the DOS Visa Reciprocity Schedules.*

2. **The U.S. enterprise must be at least 50% owned by persons who come from the treaty country and the applicant must come from the treaty country.**

   The applicant can be the *Trader (owner of at least 50% of the business)*, an *executive or supervisory employee* from the same country as the Trader, or an *employee with essential skills* from the same country as the Trader. In many cases, several workers can come to the U.S. based on a single investment. For example, the Italian owner of at least 50% of an Italian restaurant in the U.S. can qualify for an E-1 Visa as the *Trader*. A prospective employee with essential skills (such as a chef) and/or a supervisor (management-level) employee from Italy could also qualify for E-1 Visas to work in the same Italian restaurant. All applicants may bring their *spouses* and *children* under 21. Spouses (*but not children!*) can obtain

employment authorization cards once they enter the U.S. with their E-1 visa.

3. The Trader must demonstrate the existence of trade between the U.S. and the home country before submitting the visa application.

Trade is defined as "the existing international exchange of items of trade for consideration between the U.S. and the treaty country." Domestic trade is not international trade and is therefore not counted when considering what is substantial trade.

Items of trade 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 transfer, and some news-gathering activities.

Goods are tangible commodities or merchandise having extrinsic value.

Services are legitimate economic activities which provide other than tangible goods. Service is interpreted in an expansive fashion.

4. The trade must be “principal”, “substantial”;

In order to make a successful application for the E-1 visa, the Applicant must demonstrate that his trade is both principal, in terms of its trading partners, and substantial, in terms of overall volume and frequency.

Principal

(a) Trade must be principally between U.S. and treaty country.
(b) More than 50% of total volume of international trade between U.S. and treaty country.
(c) Domestic trade not counted in calculation of "more than 50%."
(d) If business does more than 50%, each E-l owner does not need more than 50% trade.
(e) If it is only a U.S. branch office, then the foreign company has to have more than 50% of its trade with the U.S. since it is not considered a

separate legal entity. However, a U.S. subsidiary is considered independently from its foreign company owner.

Substantial

(a) "An amount of trade sufficient to insure a continuous flow of international trade between the U.S. and the treaty country."

(b) Cannot be based on a single transaction, regardless of how protracted or monetarily valuable.

(c) Trade can be binding contracts which call for the immediate exchange of items of trade.

(d) Volume of exchanges is given more weight than the value of the exchanges. No minimum requirement for either.

(e) Smaller businesses. Income derived from the value of numerous transactions which is sufficient to support trader and her family constitutes a favorable factor in assessing existence of substantial trade.

(f) Sources of proof include, but are not limited to, bills of lading, customer receipts, letters of credit, insurance papers documenting commodities imported, purchase orders, carrier inventories, trade brochures, insurance papers documenting commodities imported, purchase orders, courier inventories and sales contracts.

5. **The U.S. business must be a real and operating commercial enterprise;**

The U.S. business must sell goods or services with the goal of earning a profit. The company cannot be passive, such as owning vacant land without plans for developing it.

Applicants have to provide evidence that the business is active, such as: a lease or deed for business premises, photographs, permits, licenses, tax returns or other financial documents, business contracts, and employee tax records. First-time visa applicants must provide a business plan with financial projections. The projections should cover five years and should show the business will eventually earn a profit exceeding a minimal living for the applicant.

6. **Applicant is in a position to "develop and direct" the enterprise;**

If the applicant is the *Trader*, then he or she must show a controlling interest in the U.S. business via ownership interest and management position. Generally, the applicant must own at least 50% of the business to qualify as the *Trader.* He or she must also provide information about management qualifications.

7. **Applicant, if an employee, is destined to an executive/supervisory position or possesses skills essential to the firm's operations in the United States;**

   If the applicant is an employee who comes from the same country as the Trader, then the applicant must show that he or she will perform an executive/supervisory (management-level) job *or* a job that requires essential skills. The applicant must provide a resume and other documents to show that he or she is qualified to do the job. The applicant should be paid a salary by the Trader.

   If an applicant owns less than 50% of the business, he may qualify as an executive/supervisory employee (rather than as an Trader) *if* the business is owned at least 50% by investors from the same country. For example, if three brothers from Germany each own 33.3% of a business, no one qualifies as the Trader, because no one owns 50%. However, one brother could possibly qualify for an E-1 Visa as an executive/supervisory employee.

8. **Applicant intends to depart the United States when the E-1 status terminates.**

   All applicants (excluding children under 16) must sign a Statement of Intent to Depart U.S. upon Expiration of Nonimmigrant Status. This document confirms that the applicant intends to leave the U.S., if his or her E-1 Visa expires or becomes invalid.

Application procedures:

Normally, E-1 Visa applications are made at the U.S. consulate located in the applicant's home country.

Each consulate has its own rules for submitting the applications. Processing times usually are between eight and twelve weeks, though some consulates are faster.

Before the visa is issued, the applicant and any family members over the age of 16 will have to attend a brief interview at the consulate for security purposes.

All applicants (including children) must have their own passport, which must be valid for at least six months into the future.

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E-2 TREATY INVESTOR

b. E-2 Investor

The E-2 Treaty Investor Visa is a nonimmigrant visa which permits an alien to live and work in the U.S. for a limited time. The visa is usually issued for 2-5 years at first, and can be renewed thereafter in 5 year increments. There is no limit to the number of renewals that are permitted, as long as the applicant continues to qualify for the visa.

Requirements: To qualify for E-2 Visa, an applicant must meet all of the following:

1. **There must be an investment treaty between the U.S. and investor's country of citizenship;**

   The U.S. has investment treaties with most countries in Western Europe, but only some of the countries in Eastern Europe, Asia, Africa and Latin America. Some treaties have unique rules, such as the treaty with the U.K., which requires visa applicants to be residents of the British Isles, or the treaty with Switzerland, which permits visas to be issues only four years at a time (rather than the usual five years). We can provide information about your country upon request.

2. **The U.S. investment must be at least 50% owned by persons who come from the treaty country and the applicant must come from the treaty country.**

   The applicant can be the *investor (owner of at least 50% of the business)*, an *executive or supervisory employee* from the same country as the investor, or an *employee with essential skills* from the same country as the investor. In many cases, several workers can come to the U.S. based on a single investment. For example, the Italian owner of at least 50% of an Italian restaurant in the U.S. can qualify for an E-2 Visa as the *investor*. A prospective employee with essential skills (such as a chef) and/or a supervisor (management-level) employee from Italy could also qualify for E-2 Visas to work in the same Italian restaurant. All applicants may bring their *spouses* and *children* under 21. Spouses (*but not children*) can obtain

employment authorization cards once they enter the U.S. with their E-2 visa.

3. **The investor must make and investment or be actively in the process of investing before submitting the visa application;**

   Generally, the investor has to make the investment *first* and apply for the visa *second*.

   There is one exception to this rule: if the investor is purchasing an existing business, then investor can make a contract to purchase the business, which is contingent upon approval of the visa application. This means that the purchase is completed only after the visa is approved. However, to ensure that the purchase is actually completed, the government requires that the investor transfer the purchase funds to the U.S. and deposit the funds in an attorney trust account or escrow account prior to making the visa application. Once the visa is approved, the funds should be paid directly to the seller of the business.

   The investment can consist of money or other assets that have a value. We have obtained E-2 Visas for applicants whose "investments" consisted of the following: art work, antiques transferred to the U.S., websites, investment or development rights, patents, goods or equipment produced outside of the U.S. and transferred here, etc.

   The investor has to provide documents that show the source of his or her investment funds, such as: contracts for sale of foreign property, wire transfer documents, foreign and U.S. bank records, shipping documents for equipment sent to the U.S., loan documents or a letter confirming that the investor received the funds as a gift.

4. **The U.S. business must be a real and operating commercial enterprise;**

   The U.S. business must sell goods or services with the goal of earning a profit. The investment cannot be passive, such as owning vacant land without plans for developing it.

In some cases, owning and renting real estate can be viewed as a passive investment. To avoid problems, we suggest a business activity that requires more involvement by the applicant—such as land development, real estate rentals *plus* some other activity (consulting can sometimes work as an additional activity, but not always), short term vacation rentals, or property renovations.

Applicants have to provide evidence that the business is active, such as: a lease or deed for business premises, photographs, permits, licenses, tax returns or other financial documents, business contracts, and employee tax records. First-time visa applicants must provide a business plan with financial projections. The projections should cover five years and should show the business will eventually earn a profit exceeding a minimal living for the applicant.

5. **The investment must be "substantial";**

   There is no minimum amount that must be invested. Investors purchasing an existing business should show that they have invested *at least* 50% of the total cost of the business. Investors creating a new business must show that they have invested enough money or other assets for the business to operate.

   Loans that are <u>secured by the investment assets</u> are a problem. For example, if an applicant buys a convenience store and pays $25,000 cash and takes a bank loan for $250,000. There would be a problem if the bank loan was secured by the convenience store. There would *not* be a problem if the bank loan is secured by the investor's house, which is unrelated to the business.

6. **The investment cannot be a "marginal" business solely for earning a living;**

   The investment business must benefit the U.S. economy and not just earn money for the investor. To show this, the applicant must show that, within five years, the business will earn *more* than enough income to provide a

minimal living for the investor *or* that the business will make a significant economic contribution by creating employment for U.S. workers.

To determine whether a business is marginal, first, look at company tax return (under the present or former owner of the business). See whether the business paid the owner a salary and still earned a profit. Second, look at the tax return to see if the business paid salaries to employees. If yes, this information can be used to show that the business is not marginal. If no, then the applicant must use a business plan, financial projections, and other information to show that the business will pay the owner a salary and will earn a profit (and, hopefully, will have employees) within the next five years.

In some cases, an applicant can also use documents to show that the business indirectly creates employment, for example, proof of payment to independent subcontractors.

7. Applicant is in a position to "develop and direct" the enterprise;

If the applicant is the *investor*, then he or she must show a controlling interest in the U.S. business via ownership interest and management position. Generally, the applicant must own at least 50% of the business to qualify as the *investor.* He or she must also provide information about management qualifications.

8. Applicant, if an employee, is destined to an executive/supervisory position or possesses skills essential to the firm's operations in the United States;

If the applicant is an employee who comes from the same country as the investor, then the applicant must show that he or she will perform an executive/supervisory (management-level) job *or* a job that requires essential skills. The applicant must provide a resume and other documents to show that he or she is qualified to do the job. The applicant should be paid a salary by the investor.

If an applicant owns less than 50% of the business, he may qualify as an executive/supervisory employee (rather than as an investor) *if* the business

is owned at least 50% by investors from the same country. For example, if three brothers from Germany each own 33.3% of a business, no one qualifies as the investor, because no one owns 50%. However, one brother could possibly qualify for an E-2 Visa as an executive/supervisory employee.

9. **Applicant intends to depart the United States when the E-2 status terminates.**

   All applicants (excluding children under 16) must sign a Statement of Intent to Depart U.S. upon Expiration of Nonimmigrant Status. This document confirms that the applicant intends to leave the U.S., if his or her E-2 Visa expires or becomes invalid.

Application procedures:

Normally, E-2 Visa applications are made at the U.S. consulate located in the applicant's home country.

Each consulate has its own rules for submitting the applications. Processing times usually are between eight and twelve weeks, though some consulates are faster.

Before the visa is issued, the applicant and any family members over the age of 16 will have to attend a brief interview at the consulate for security purposes.

All applicants (including children) must have their own passport, which must be valid for at least six months into the future.

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DERIVATIVE E-VISAS FOR PERSONS OTHER THAN THE PRINCIPAL APPLICANT

4. Derivative E's (dependents, workers, etc.)

Aside from the Primary E-Visa applicant, you can certainly also obtain derivate E-Visa/Status for the immediate dependent(s): (1) spouse, and (2) children under 21. These derivatives are straight-forward and can generally qualify quickly and easily, provided they are not otherwise ineligible (by criminal, security, etc. grounds).

Note: the spouse and/or child(ren) DO NOT have to possess the same nationality, or a qualifying nationality.

Problems can arise for spouse and child(ren) when the primary holder's eligibility for an E-Visa/Status ceases. Keep a lookout for issues of passport validity, visa validity (in the passports), and consequently also on any I-94 documents (CBP or USCIS), or specific E-Visa Status validities issued by USCIS.

We will specifically address some common issues and problems in a later chapter.

In addition to the Spouse and Child(ren) of the primary E-Visa/Status-holder, you can also obtain additional E-Visa/Status for (1) MANAGERS and (2) OTHER ESSENTIAL EMPLOYEES, And their immediate derivatives (spouse + child/ren).

The CAVEAT is that the MANAGER or ESSENTIAL EMPLOYEE MUST SHARE THE SAME NATIONALITY OF THE PRIMARY APPLICANT.

Example: IF a GERMAN national has an E-Visa/Status, and he owns his company in the U.S. to 50% or more, then for purposes of the E-Visa provisions the U.S. company is "GERMAN" in ownership and control, and therefore the U.S. treaty with GERMANY will govern. If the Applicant wishes to employ a MANAGER or ESSENTIAL EMPLOYEE, the worker must also be GERMAN.

HYBRID E-VISA APPLICATIONS WHICH BEAR ELEMENTS OF BOTH E-1 AND E-2

5. Hybrid Applications

Generally, when you strategize and assemble an E-Visa case to the Government for consideration, you need to decide early on whether you're going for E-1 (Trader) or E-2 (Investor).

Oftentimes, your discussions with the client will fairly strong lean one way or the other. Depending on the client's plans and ambitions for the U.S. business, will tend to fit more in one category than the other.

I do, however, often encounter cases, where it's not entirely clear, or where it's really a toss-up whether it's an E-1 or E-2. Particularly, when there is a mix between products, services, and investment. In these situations, I often structure my application as a hybrid (or combo?), and I present my case deliberately in such a way, that the adjudicator can essentially pick whether to see it as an E-1 OR E-2.

Generally, for real-life purposes of the Applicant (and his/her family), it makes little to no difference if their Visa or Status is "E-1" or "E-2". The durations are generally no affected. ***This obviously only works in situations where the qualifying nationality (and the treaty tied to it) allows for BOTH E-1 AND E-2***.

In those special cases, where you have a client whose nationality only allows for E-1 OR E-2 , but NOT BOTH, you will have to structure your case and the client's business accordingly to fit into the one allowed category. No hybrid/combo.

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B-1 BUSINESS VISITOR VISA FOR PROSPECTIVE E-1 TRADER / E-2 INVESTOR

6. B-1 for Prospective Trader/Investor

Assume for the moment that you have a client who appears E-Visa eligible, or who could be eligible within 6-12 months from now, but is NOT YET in present-day position to apply for an E-Visa directly within the next 6 months, the regulations allow for a special B-1 Visa to be issued to the Applicant, as a "PROSPECTIVE E-1 TRADER" or "PROSPECTIVE E-2 INVESTOR". This is a fantastic planning tool in your arsenal, and often of tremendous benefit to your client.

In essence, this special visa goes above and beyond the regular constraints of a normal B1/B2 visa, in that this visa allows someone to spend 12 months (generally) in the U.S., for the specific purpose of planning and doing everything necessary to set up a proper business enterprise in the U.S. and getting everything required in order, to specifically make an application for an E-Visa/Status at a later time when the requirements will likely be met.

Questions will invariably arise as to what is allowed in the U.S. under the terms of a B-1 for Prospective Trader/Investor: Generally anything connected to the eventual operation of a U.S. business enterprise, with the exception of personal compensation of the primary applicant (i.e. "gainful employment").

The Applicant is not to take personal compensation from U.S. company funds or assets before he/she has the actual E-Visa/Status.

The Applicant, CAN, however, hire and employ any necessary U.S. workers (incl. foreign workers already legally authorized to work in the U.S.). This is particularly helpful for getting the U.S. business running and have an initial staff, as needed or required.

Once the Applicant has done everything feasible to lay the groundwork for the business enterprise in the U.S., within the allotted time of his/her special provisional B-1 visa, the Applicant can then, with your help, make the necessary application to the Consular Post (or a change of status petition to USCIS) for the requisite E-1 or E-2.

There are limited, special circumstances where a Prospective Trader/Investor might need more time than the initial 12 months on the initial B-1 visa. This could be remedied commonly with an extension of status petition (I-539) with USCIS, or also with a Visa Renewal/Extension at the Consular Post, but CAVEAT: the Applicant should be in a good position to show:

- what has already been accomplished in the initial months prior,
- what is still necessary to accomplish in the near future (6-12 mo.),
- the good-faith likelihood to complete those tasks, and make the required E-Visa/Status application,
- the continued non-immigrant intent, NOT to remain in the U.S. indefinitely,
- and keep the requested additional time to a reasonable minimum. (don't ask for more time than necessary. Less is better. Asking for another full 12 months would increase the risk of scrutiny, suspicion and possible denial.)

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CONCERNS OF TREATY NATIONALITY

7. Nationality / Treaty concerns

As previously discussed in the Chapter on "Screening Clients for E-Visas", Nationality and the treaty provisions are paramount in your initial discussions with your client.

You should make yourself familiar with certain citizenships/nationalities that you might likely encounter within your practice, and become accustomed to knowing who might qualify under E-Visa treaties and who definitely does NOT.

The list is in the U.S. Department of State's Foreign Affairs Manual. The list does NOT change very often. Many of the requisite treaties or agreements are decades old.

a. Treaty Participants *(REMINDER: some countries only have either E-1 or E-2, but not both.)*

Country	Classification	Effective Date
Albania	E-2	January 4, 1998
Argentina	E-1	October 20, 1994
Argentina	E-2	October 20, 1994
Armenia	E-2	March 29, 1996
Australia	E-1	December 16, 1991
Australia	E-2	December 27, 1991
Austria	E-1	May 27, 1931

Austria	E-2	May 27, 1931
Azerbaijan	E-2	August 2, 2001
Bahrain	E-2	May 30, 2001
Bangladesh	E-2	July 25, 1989
Belgium	E-1	October 3, 1963
Belgium	E-2	October 3, 1963
Bolivia	E-1	November 09, 1862
Bolivia	E-2	June 6, 2001
Bosnia and Herzegovina	E-1	November 15, 1882
Bosnia and Herzegovina	E-2	November 15, 1882
Brunei	E-1	July 11, 1853
Bulgaria	E-2	June 2, 1994
Cameroon	E-2	April 6, 1989
Canada	E-1	January 1, 1993
Canada	E-2	January 1, 1993

Chile	E-1	January 1, 2004
Chile	E-2	January 1, 2004
China (Taiwan)	E-1	November 30, 1948
China (Taiwan)	E-2	November 30, 1948
Colombia	E-1	June 10, 1848
Colombia	E-2	June 10, 1848
Congo (Brazzaville)	E-2	August 13, 1994
Congo (Kinshasa)	E-2	July 28, 1989
Costa Rica	E-1	May 26, 1852
Costa Rica	E-2	May 26, 1852
Croatia	E-1	November 15, 1882
Croatia	E-2	November 15, 1882
Czech Republic	E-2	January 1, 1993
Denmark	E-1	July 30, 1961
Denmark	E-2	December 10, 2008

Ecuador	E-2	May 11, 1997
Egypt	E-2	June 27, 1992
Estonia	E-1	May 22, 1926
Estonia	E-2	February 16, 1997
Ethiopia	E-1	October 8, 1953
Ethiopia	E-2	October 8, 1953
Finland	E-1	August 10, 1934
Finland	E-2	December 1, 1992
France	E-1	December 21, 1960
France	E-2	December 21, 1960
Georgia	E-2	August 17, 1997
Germany	E-1	July 14, 1956
Germany	E-2	July 14, 1956
Greece	E-1	October 13, 1954
Grenada	E-2	March 3, 1989

Honduras	E-1	July 19, 1928
Honduras	E-2	July 19, 1928
Iran	E-1	June 16, 1957
Iran	E-2	June 16, 1957
Ireland	E-1	September 14, 1950
Ireland	E-2	November 18, 1992
Israel	E-1	April 3, 1954
Israel	E-2	May 1, 2019
Italy	E-1	July 26, 1949
Italy	E-2	July 26, 1949
Jamaica	E-2	March 7, 1997
Japan	E-1	October 30, 1953
Japan	E-2	October 30, 1953
Jordan	E-1	December 17, 2001
Jordan	E-2	December 17, 2001

Kazakhstan	E-2	January 12, 1994
Korea (South)	E-1	November 7, 1957
Korea (South)	E-2	November 7, 1957
Kosovo	E-1	November 15, 1882
Kosovo	E-2	November 15, 1882
Kyrgyzstan	E-2	January 12, 1994
Latvia	E-1	July 25, 1928
Latvia	E-2	December 26, 1996
Liberia	E-1	November 21, 1939
Liberia	E-2	November 21, 1939
Lithuania	E-2	November 22, 2001
Luxembourg	E-1	March 28, 1963
Luxembourg	E-2	March 28, 1963
Macedonia	E-1	November 15, 1882
Macedonia	E-2	November 15, 1882

Mexico	E-1	January 1, 1994
Mexico	E-2	January 1, 1994
Moldova	E-2	November 25, 1994
Mongolia	E-2	January 1, 1997
Montenegro	E-1	November 15, 1882
Montenegro	E-2	November 15, 1882
Morocco	E-2	May 29, 1991
Netherlands	E-1	December 5, 1957
Netherlands	E-2	December 5, 1957
Norway	E-1	January 18, 1928
Norway	E-2	January 18, 1928
Oman	E-1	June 11, 1960
Oman	E-2	June 11, 1960
Pakistan	E-1	February 12, 1961
Pakistan	E-2	February 12, 1961

Panama	E-2	May 30, 1991
Paraguay	E-1	March 07, 1860
Paraguay	E-2	March 07, 1860
Philippines	E-1	September 6, 1955
Philippines	E-2	September 6, 1955
Poland	E-1	August 6, 1994
Poland	E-2	August 6, 1994
Romania	E-2	January 15, 1994
Serbia	E-1	November 15,1882
Serbia	E-2	November 15,1882
Senegal	E-2	October 25, 1990
Singapore	E-1	January 1, 2004
Singapore	E-2	January 1, 2004
Slovakia	E-2	January 1, 1993
Slovenia	E-1	November 15, 1882

Slovenia	E-2	November 15, 1882
Spain	E-1	April 14, 1903
Spain	E-2	April 14, 1903
Sri Lanka	E-2	May 1, 1993
Suriname	E-1	February 10, 1963
Suriname	E-2	February 10, 1963
Sweden	E-1	February 20, 1992
Sweden	E-2	February 20, 1992
Switzerland	E-1	November 08, 1855
Switzerland	E-2	November 08, 1855
Thailand	E-1	June 8, 1968
Thailand	E-2	June 8, 1968
Togo	E-1	February 5, 1967
Togo	E-2	February 5, 1967
Trinidad & Tobago	E-2	December 26, 1996

Tunisia	E-2	February 7, 1993
Turkey	E-1	February 15, 1933
Turkey	E-2	May 18, 1990
Ukraine	E-2	November 16, 1996
United Kingdom	E-1	July 03, 1815
United Kingdom	E-2	July 03, 1815
Yugoslavia	E-1	November 15, 1882
Yugoslavia	E-2	November 15, 1882

b. Primary nationality

Remember also our previous discussion that you need to verify the Applicant's first and foremost nationality to see if it's on the above list.

If it's on the list, GOOD! Move forward with your E-visa consult and analysis.

In order for an E-Visa case to succeed and be possible, the Primary E-Applicant needs to have the qualifying citizenship/nationality, and essentially own and control a U.S. business entity (Corporation or LLC, etc.) at least in 50% share. This qualifying ownership and control of 50%+ gives the company entity the required "nationality" to unlock it for an E-Visa/Status.

c. Secondary nationality

Occasionally, you will have a client who possesses or could easily possess 2 or more nationalities simultaneously, being a "dual-citizen" or "multi-citizen". In these cases, you need to examine which of these qualify for E-Visa, and if more than one, there might be considerations why to choose one over the other.

EXAMPLE 1: Possible client is Dual national UK and CANADA. Discussions might bring to light which of the 2 makes more sense to apply under. Perhaps clients lives/resides mostly in Canada, with little to no residence in UK. Then use the CDN citizenship for the E-Visa application. (and submit to Toronto)

EXAMPLE 2: Possible client is Dual national of GERMANY and AUSTRIA. Client lives equally between the 2, his wife is AUSTRIAN as are his children. Business is primarily in Austria. Essentially a "toss-up", but probably more appropriate and convenient to apply as AUSTRIAN (and submit in Vienna).

The possibilities here are endless…. There are innumerably many scenarios. You should explore all possible avenues, in terms of which passport to use, where they ought to apply (based on their primary residence), and also consider their ties to where they mostly live and work.

As previously mentioned, also keep a lookout for possibilities of obtaining a second or other qualifying nationality that the client may or may not be aware of. (what is their ancestry? Where are their parents from? Etc.)

d. Chargeability issues

Under the E-Visa provisions governing the nationality of the applicant, and consequently, the U.S. business enterprise to which the E-1 or E-2 will be registered, be mindful of being able to "piggy-back" on a qualifying nationality of the spouse, if client is married, or likely to get married soon.

Sometimes, at first glance, the potential client might not qualify for an E-Visa, because he/she does not possess a qualifying citizenship. But under the assumption that they are (or soon would be) married to a spouse who DOES have a qualifying citizenship, the E-Visa application is still viable.

In these cases, you can structure the application in such a way that both spouses can qualify for the E-Visa classification sought.

> **EXAMPLE 1:** Client is from Uruguay and does NOT alone qualify for E-Visa, but is married to spouse who is from Colombia, which DOES qualify.
>
> **EXAMPLE 2:** Client is from Italy which does qualify and is also married to spouse from France which also qualifies. Essentially, they would use either treaty with FRANCE OR with ITALY for the application.

However, be mindful potential Status problems when a foreign national enters the U.S. on passport of COUNTRY "X" and then wishes to change his status to E-1/E-2 based on his second citizenship with COUNTRY "Y". This is not permissible. He would have had to enter the U.S. on passport of COUNTRY "Y", and NOT on passport of COUNTRY "X".

e. Treaty Entity Ownership Issues

The Primary E-Applicant needs to have the qualifying citizenship/nationality, and essentially own and control a U.S. business entity (Corporation or LLC, etc.) at

least in 50% share. This qualifying ownership and control of 50%+ gives the company entity the required "nationality" to unlock it for an E-Visa/Status.

The Ownership of ANY PRIMARY E-Visa holder ***needs to be 50% (or more)***, but in no event ever LESS THAN 50%, as the requisite control element would no longer be met.

However, DERIVATIVE E-Visa holders (like spouse, or children between 18-21), or Managers/Essential Employees of E-Visa businesses can hold a share of LESS THAN 50%, so long as the PRIMARY E-Visa holder maintains his/her status as such.

> **EXAMPLE 1:** Client is the primary and owns 51%, spouse is derivative and co-owns the company at 49%. (this is ok)
>
> **EXAMPLE 2:** Client is primary and owns 50%, the other 50% are owned by his business partner. (this is ok also) – the business partner could be U.S. citizen, or LPR, or other valid NIV-holder, or another E-Visa holder, or no visa holder of anything at all.
>
> **EXAMPLE 3:** Client 1 (Swedish) owns 40%, Client 2 (Swedish) owns 30%, and Client 3 (German) owns 30%. -- this is problematic as NO ONE satisfies E-Visa provisions. No one has requisite ownership or control of the entity. At this point, NONE would qualify for an E-Visa.

Again, there are endless many variations on these issues of ownership and control, and you need to get used to thinking in terms of the ownership shares of the people who need an E-Visa, whether they are Primary or Derivative. Generally, for the Primary(-ies), each needs to hold 50% or more. In cases where there are 2, then EACH needs to hold a 50% share. Shares below 50% can only exist for Derivatives or Managers / Employees.

Your lights should go off, as soon as there are 3 or more aspiring E-Visa primaries. Generally, 1 or 2 primaries is NOT a problem, as long as the nationality concerns are met.

When you have 3 or more, the nationalities need to fall into place, AND you need to be creative and make #3 and #4, etc. either Manager(s) or Essential Employee(s).

> **EXAMPLE 1:** Primary Client #1 (British) owns 50%, Primary Client #2 (British), want to bring in Client #3 (British),… cannot have shares with diluting either #1 or #2 below required 50% level. But #3 can be a Manager or Essential Employee (and not have shares).
>
> **EXAMPLE 2:** Primary Client #1 (British) owns 50%, Primary Client #2 (British) currently also holds 50%. Both want to bring in Client #3 (British),… so #2 transfers 25% to #3, now falling below required 50% level, losing qualifying primary E-Visa Status as Trader/Investor. But now #2 (25%) AND #3 (25%) can be Manager(s) or Essential Employee(s), but NOT primaries.

As with all other previous examples thus far, you can twist and turn this into many different configurations, making for a great mental exercise!

As you begin to work more in the E-Visa case arena, you will begin to make these mental exercises very quickly and easily.

f. Foreign Entity Issues

You can have even more creative fun, when the ownership of the U.S. E-Visa enterprise entity is not a person but actually a foreign-registered corporation, held by your client(s).

> **EXAMPLE:** You have a prospective E-Visa client. Let's say she is from PANAMA. For reasons of business planning, tax planning and other considerations, she does not wish to hold the U.S. company in her name. She owns a significant ownership share in a PANAMANIAN company. This PANAMANIAN Company could now own the U.S. company in 50% or more, and Client can STILL qualify for E-Visa under Treaty provisions between U.S. and Panama.

Be mindful of issues where the company and ownership structures are very complex and hard to follow. The harder they are, the more complex or nestled they are, expect the Adjudicator to raise issues about it (or not understand).

Be particularly mindful of situations, where the foreign entity outside the U.S. is held by numerous individuals, whether closely held, or within a group of investors, or larger groups of shareholders. Generally, the smaller the circle of ownership, the better your case presentation.

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PLANNING AND STRATEGIZING YOUR E-VISA CASE – GATHERING NECESSARY INFORMATION --

8. Business Concerns and Planning

Assuming your client has the requisite nationality and you will be able to demonstrate his required ownership and control, you will need to address the various concerns regarding how to structure and set up the U.S. company entity which will serve as the Treaty Enterprise, to which the E-Visa will be registered.

It is generally the U.S. company entity who formally makes the E-Visa Application (to the Consular Post abroad), or the E-Status Petition (to USCIS in the U.S.). The applicant is essentially the "beneficiary" of that filing, along with any immediate derivatives (spouse and child/ren).

a. Eliciting the necessary information

Depending on how the prospective E-visa client reaches out to you, and the stage of your information-gathering, you will need to elicit lots of this required information through thorough Q-&-A with the prospective client. In my experience, much through emails, one or two in-person consults, and loads of follow-up emails after.

Personally, I find that a written trail of Q-&-A in these types of cases is most helpful and beneficial, along with written notes you take from phone calls.

The more information you elicit, the more answers you will receive, and in turn, this will invariably lead to more questions for more information, etc.

The types of information you will need to elicit for your case planning and strategy would include the following: (*in no particular order*)

- What is the prospective E-Visa client's current professional background? *(including schooling, training, employment history, accomplishments, etc.)*
- What is that of client's spouse? business partner(s), etc.? *(including schooling, training, employment history, accomplishments, etc.)*
- What types of business/industry does the client have experience in?
- What are his / her primary interests, passions, causes, etc. they care about?

- What is the level of their sophistication? Are they managerial/executive? Are they solo-flyers at heart? Are they corporate? artsy? Self-employed?
- What is their financial situation in their home country? (business funds and assets, personal funds and assets, etc.)
- What is their experience with having, supervising and directing employees?
- What are their motivations for moving their activities to the U.S.?
- What are their "ideal case" visions and ambitions for their U.S. venture?
- Do they have specific timeframes or time-horizons for beginning?
- Do they have a formulated exit strategy or end-game in mind?
- What type of business is the E-Visa going to be premised on?
- What lead the client(s) to this particular business venture / idea?
- What is the nature of anticipated or expected trade or investment?
- Etc.?

This list of questions is *by no means exhaustive* in any way. There could be infinitely more questions. But getting answers to questions like these will get you AND THE CLIENT thinking in the right direction. It's good to lay out a road map of action steps.

This helps the client moving forward in their goals to start their U.S. business, and it also helps YOU, the practitioner, to lay out the proper preparation strategy for the visa/status going forward.

b. Formulating a Business Plan with Financial Projections

I find it tremendously helpful to advise clients VERY EARLY ON in the beginning stages to invest significant time in a proper Business Plan, which covers critical information for the first 5 years of the U.S. business' operations.

This business plan is not only an essential component for every E-Visa case, which MUST INCLUDE a proper 5-year financial projections plan, but also gives every aspiring E-Visa client that quintessential roadmap for his or her own U.S. business.

This business plan will address the critical Who? What? Where? When? And How? Regarding the E-Visa Applicant and the business enterprise.

The client, depending on their sophistication and command of the English language, can either:

- Write and formulate their own business plan, OR
- Use a sample model document, and revise it to make it his/her own, OR
- Hire a third party to write a professional plan.

Generally, in my own professional experience, I rarely have clients write their own complete business plan, unless they've majored in MBA, finance, or economics, or similar fields. You will occasionally encounter some. Reserve your professional judgment to review it for suitability for the E-Visa filing. Do NOT assume that the document will be "perfectly suited" for your filing purpose "as is".

I further find it to be most advantageous to provide most E-Visa clients with a decent sample model document, and instruct them to revise it as needed, to make it fully "theirs", for their purpose and using their own knowledge of the enterprise.

Sites such as www.bplans.com are a great place to start. You can also get good information from places like SCORE.

PRACTICE POINTER: Encourage them to email you the versions of their revisions, proof-read and edit their document, and go back and forth a few times, until YOU feel that the document is suitable.

I advise clients to think long and hard about their business, the numbers (financial projections and other data), and the specifics (content), which we, as lawyers, normally know little to nothing about. I DO NOT provide clients with specific numbers, as it is not MY business but THEIRS. The clients need to know where the money will come from, how the business will earn and spend, etc. Lawyers should not advise as to $$$-figures or sales performance.

My revisions and edits to a client's business plan is usually stylistic, grammatical, or perhaps strategic (presenting information in the light most suitable for the client's visa application, while NOT misrepresenting or lying).

Generally, I'm not a huge "fan" of hiring a third party for a professionally written business plan, unless the client is unable (or unwilling) to do it him-/herself.

Oftentimes, professional business plans are very generic, not overly specific to the client's wants and needs in terms of the aspired business enterprise, but mostly such professional plans are frequently far too detailed and overkill in terms of analysis, charts and figures, to the extent that they will overwhelm any normal adjudicator, unless he/she has an MBA.

Based on my 15+ years' experience in handling E-Visa cases, a well-written business plan with the 5-year financial projections can be presented within 10 pages. You should discourage your client from going far above it. Certainly not over 20 pages. (*think of the burden of reading placed on the adjudicator!)*

c. Financial Projections (5 years)

Your client's business plan needs to include good financial projections for the first 5 years' of business operations in the United States. While this is NOT explicitly stated in any official government regulations, it has become widely accepted practice between applicants and adjudicators alike, to be a constant within the application package of supporting documents.

The 5-years financial projections will address the treaty enterprise's potential to become and remain a profitable business, and thus address and refute any concerns by the U.S. government that this enterprise is "solely marginal", meaning the business exists solely to support the living expenses of the principal owner and his dependents, and does little to nothing to create jobs or otherwise significantly benefit the local economy.

By including sound financial projections, you are also signaling to the Adjudicator of your case, that the Applicant has essentially done his/her homework, and is not embarking on a senseless dream without substance.

It's often helpful to structure the financial projections in such a way that the first 12 months (or 24 months) are detailed in a MONTHLY fashion, with the remaining years shown in ANNUALIZED figures.

My advice to clients, with regard to financials and performance figures, is to aim high BUT REALISTIC. Setting realistic, achievable, meaningful goals. Show numbers that you can defend and explain. The numbers should be a reflection of the visions and goals of the client, IF the business would develop as envisioned.

No one business is ever perfect and has double-digit (or higher) growth and expansion all the time. There will also be slow-downs and pitfalls.

If numbers appear "too good to be true" or if the projections appear "out of this world", then the adjudicator will not take them seriously, or give them much weight in his / her decision-making.

The combination of the business plan and the financial projections shows the adjudicator the applicant's commitment to the venture, the investment into the line of business or the familiarity with it (or the specific industry), and the dealing with issues such as:

- What is the product or service in question?
- What makes this product or service Unique? Different?
- Where and how will it be sold?
- Who is the intended market or customer?
- Who are the likely competitors?
- What is the likelihood of commercial success?
- What are the likely and most probable obstacles, etc.?
- Etc. etc.

Upon reviewing the business plan and the financial projections, the adjudicator of your case should be clearly able to answer this question:

"HOW LIKELY IS THIS APPLICANT TO SUCCEED WITH THIS PARTICULAR BUSINESS?" *(answering it of course in the affirmative = Approval!)*

d. To Start New? To Buy Existing? Solo or J.V.?

This is going to be one of the most important conversations to have with your E-visa client, once it becomes apparent that they might be interested in pursuing an E-Visa/Status application.

They have several options, depending on their preferences (wishes), their business acumen and interests, their financial abilities, their age and physical abilities, their taste for risk/reward, etc.:

- Starting a completely new business enterprise from scratch, either based on an idea in their mind ("I've always wanted to _____"), or

- Starting a completely new business enterprise from scratch, based on an existing business idea/venture they know of or are already involved in ("wouldn't it be great to do this _____ in America?"), or

- Purchasing and taking over an EXISTING business, which is for sale ("change in ownership"), or

- Joining an existing business which someone else is already operating ("becoming a business partner / part-owner").

This will surely make for some very interesting conversations, as oftentimes, you may be raising questions and issues that the prospective client did not think of. (which is GOOD!)

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FINDING A BUSINESS FOR SALE / PURCHASING AN EXISTING BUSINESS

PURCHASING AN EXISTING BUSINESS:

If your client is considering the purchase of an existing business, then you will want to steer him in the direction of business brokerages, as they have access to an MLS-like system where lots of businesses are listed for sale/purchase.

In these types of situations, there are seriously tricky issues to be mindful about and to discuss with the client:

- What type of business is the client interested in? and why? (it is something the client is already familiar with, or is this a lifelong ambition to do something new and different? --- good question for possible interview at the Consulate!)
- What are the client's motivations for choosing a particular business type or industry?
- Will the client be very hands-on in the business, or more a passive owner/investor?
- How much can the client reasonably invest? What is the client's available investment capital?
- Where does this capital come from? (cash savings? Sales proceeds? loans? Real estate holdings? Business earnings? Sale of assets? etc.)
- Can the client prove lawful possession and control over the funds? (where are the funds now?)
- Can the client adequately prove lawful source / origin? (not "dirty money", as a result of criminal activity, etc.

These are very important issues and considerations which also will need to be addressed in your application packet, and consequently, in your supporting documentation, particularly regarding the financial aspects of the investment.

You won't be able to rely on your go-to regular Realtor©, as the vast majority only handle residential properties and not commercial, let alone business sales.

Generally, as an added value to your client, you will want to have a trusted network of certain professionals, as you will need these often, when dealing with E-Visa clients:

- Business Brokers (for purchases/sales of businesses)
- Commercial Real estate agents (for find suitable business premises, appropriately zoned, etc. when your client is NOT purchasing existing space or leasing space yet)
- Residential real estate agents (for the client's private use and living)
- CPAs who are skilled in multinational taxation
- Business Valuation Experts
- Real Estate / Land Use attorneys for handling complex transactions
- Criminal attorneys who are used to representing foreign clients and have familiarity with immigration consequences of criminal activity
- Bankers who are skilled at handling foreign banking clients
- Etc.

You always want to be VERY MINDFUL about skirting that line of giving professional advice to your E-Visa client outside of your scope of practice!!! They usually tend to trust us with EVERYTHING, and respect our opinions, so it's very easy to fall for the "what do you think?" or "what would you suggest?" traps!

CAVEATS!!!!

- DO NOT GIVE TAX ADVICE!
- DO NOT GIVE INVESTMENT ADVICE!
- DO NOT GIVE ADVICE ON WHETHER A PARTICULAR PURCHASE IS A GOOD OR BAD IDEA! (whether business or personal purchase)
- DO NOT GIVE SPECIFIC RECOMMENDATIONS REGARDING BANKING!

You should limit yourself to advising on how best to qualify them for this E-Visa application (or any other immigration benefit) and help them make their own decisions.

In my experience, when the client is prospecting possible businesses to purchase for the purpose of an E-Visa, it's always important to look at the factors and circumstances surrounding the listed business for sale:

- WHY is the business for sale to begin with? Is the owner old, his/her health failing? Is there a succession issue and no one suitable to take it over? Are they simply trying to retire? Are they moving away? Unloading

an unprofitable headache? Or selling a well-oiled cash-machine at a premium price?

- HOW is the business performing? NOW? in the past? What is its history? How well-known or –established is it within the local community?

- How DEPENDENT is the business on the departing owner/seller? What is the chance of the client/buyer being able to successfully carry it forward? (keep in mind possible non-compete issues, and the owner setting up shop elsewhere close-by, poaching all the clients.)

- How is the business PRICED? How was the price determined? How long has it been on the market, etc.? Is it a "super bargain"? -- Buyer Beware ("caveat emptor") applies here certainly. If the price sounds too good to be true, it is. If it's priced really high, then either you have an unreasonable seller, OR the business is a gold-mine of a cash-cow and should command top dollar!

In these situations, it's crucial that your client, you and the business broker are on the same page in terms of what your client needs to secure an E-Visa. Many business brokers claim to "know" and often skirt the line about giving legal advice. Many brokerages now even add the ubiquitous "THIS BUSINESS MAY QUALIFY FOR A VISA" line on virtually every one of their listings.

Be ready for some push-back from some listing agents, as their ultimate goal is of course to quickly close a sale and earn their sales commission.

In my experience, IF and WHEN your client has a suitable business (or a few) in mind to choose from, obtaining reliable, verifiable business records (especially financial ones!) can be a real challenge.

DO NOT allow your client to rely solely on what's provided in the sales listing! The sales listings are no guarantee for accurate or truthful information. Your client may need to make a good faith deposit and/or sign some Non-Disclosure documents or other letters of intent, before a listing broker will procure documents to examine, if there even are any!

Depending on the type of business, and the previous owner's (Seller's) level of sophistication, you may find that the business records are anywhere between (a) non-existent, (b) minimal and appalling, (c) reasonably clean, to all way (d) meticulous / OCD.

Of course, as with any other significant purchase, nothing should be purchased sight-unseen. An in-person visit and inspection of the business by the client to me is a "must have".

IMPORTANT STRATEGY POINTERS:

Once the client has made a decision in favor of a particular business to purchase, the client will need to *make a reasonable written offer to the Brokerage, to be transmitted to the Seller, often along with a good faith deposit*, which the brokerage will hold in Trust/Escrow.

It is generally my advice to clients to make a reasonable offer (w/deposit) in order to secure their position as prospective Buyer, *AND to expressly add a CONTINGENCY PROVISION to the offer that the entire contract for the purchase is expressly contingent on U.S. government approval of the E-Visa/Status AND successful entry INTO the U.S. (if client is abroad)*, before the Closing can take place and the client assume the business.

You really DON'T want the client fully purchase and close on the transaction, before the visa/status for the E-1 or E-2 is APPROVED.

You, as the immigration lawyer for the client, -- or another transactional lawyer, if your client also hires a business attorney for the purchase of the business, -- would then *hold the bulk of the purchase funds in TRUST during the pendency of the visa application until the visa is approved and issued*, and the client is able to physically attend the closing. The funds would then be released to the Seller.

By structuring your client's business purchase that way, making a deposit with an offer contingent on successful E-Visa issuance, the Client is "only" risking the good-faith deposit, and in the event of a significant delay or even denial, the business for sale remains on the market and the clients could walk away from

the purchase, and not have to go through closing and having to perhaps turn around and sell off the business.

If the deal was NOT structured this way, and the client purchased the business outright, which he could, before the E-Visa is approved, in the worst-case scenario, if the filing were DENIED, the client would be stuck, for a while at least, legally owning a business which he/she cannot legally operate or manage.

This could impose significant hardship and economic loss on the client until such time that he can secure an E-Visa approval or cut his losses and sell it off, probably for less than what he just purchased it for.

PRACTICE POINTER: Your E-Visa client SHOULD NEVER agree to purchase an existing company entity in terms of a shares transfer, etc. But rather it should always be conducted as an ASSET PURCHASE along with the required Goodwill (incl. customers, etc.). You want to avoid setting up your client for the possible legal problems and liabilities of the Seller!!

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CREATING AND STARTING A NEW BUSINESS VENTURE "FROM SCRATCH" (INCL. JOINT VENTURES)

CREATING/STARTING A NEW BUSINESS:

Many of your E-Visa clients will also choose (or prefer?) to start their own new business venture, and NOT purchase something existing.

Provided they have a really good, not to say "unique" business idea, and their preliminary market research or feasibility studies confirm that they have a great concept, they should be in a good position to present a good and strong E-Visa case, provided they really plan ahead, cross their "T"s and dot their "I"s.

e. U.S. entity issues

One of the first things you need to do is to register a new U.S. company entity. This should be in done in line with where the client wants to reside and predominantly conduct his / her business in.

Many different discussions could be had whether the client should opt for a Corporation (INC) or Limited Liability Company (LLC). I usually stay away from other type of entities for purposes of E-Visas.

PRACTICE POINTER: For purposes of proper business structure, taxation, liability and other legal concerns, I NEVER EVER recommend a Sole Proprietorship where the owner is solely and personally liable.

Of course, you want to also charge your client for the registration and setup of the company entity, which should include the required State filing, the application for the FEIN / EIN through the IRS, as well as basic documents, such as Operating Agreement, Ownership Member/Stock Certificate(s), etc.

In my own discussions with clients, I generally advise against standard C-Corporations for clients, if there is no intention or requirement to ever sell stocks publicly or to secure outside investors/shareholders.

Particularly in situations, where the company will be held by a very small, select number of people (like 2 spouses, or 2-3 family members, etc.), the LLC is a good

choice, as it blends the simplicity of a partnership with the shielding protection of a corporation.

If you feel that your client has specific, unique requirements, you may also want to consult with a knowledgeable CPA who is well-versed with foreign company ownership and its tax implications (in the U.S. and abroad).

f. Foreign entity issues

Be mindful that regardless of what type of U.S. company entity you set up for your E-Visa client, there might be special tax planning and/or estate planning considerations, even in the client's own home country, as disclosure requirements and possible double-taxation could also rear their ugly head.

This is especially noteworthy in situations where the U.S. business entity (the enterprise for purposes of the E-Visa), is also part-owned or majority-owned by a foreign company entity, under the control of your client(s).

It will be very helpful – not to say necessary --, to secure the assistance of a knowledgeable U.S. CPA for the analysis of cross-border taxation issues.

g. Ownership / Control issues

As a good E-Visa practitioner, you will really want to keep an eye on your E-Visa client's ownership and control over her E-Visa enterprise.

If your client has total (100%) control over the entity, there is not too much to worry about, other than possible continuity issues, should something happen to your client.

In situations, where your client shares the ownership and control with one or more additional people, all is generally well, as long as everyone gets along. "All is well in marital bliss". But what happens when there is "trouble in paradise", and the business partnership is falling apart?

This problem can quickly come up on Joint Venture or Business Partnership situations, especially when the co-owners are not close to one another.

It's tantamount to counsel your client that she needs to maintain 50% (or higher) of proportional share at all times, or risk losing the E-Visa/Status.
No matter how much a client feels compelled to dilute her share below 50% or to otherwise redistribute shares within the company, whether to avoid strife or to cash out for substantial profit, the primary visa holder could quickly destroy her entitlement to the E-Visa/Status, without ever really wanting to.

I've had several E-visa clients who sold off substantial shares in their treaty enterprise only to tell me so *after the fact*, then asking me if that was OK for their visa/status, which of course it turns out it was NOT.

PRACTICE POINTER: In situations, where a spouse is the primary visa applicant and essentially owns the company alone, I do usually counsel them to at least transfer 10% or more to their spouse, if for no other reason but to ensure the business continuity in the event of the Primary holder's incapacity or death. The spouse holding the minority share is NOT required to have any active role in the company, at least not while the primary holder is in charge.

h. Compensation issues

A major component of E-Visa cases is the requisite showing that the treaty enterprise is more than solely "marginal". This basically means that the company will generate significantly more income than what the principal visa holder (and his family) would require for their own living expenses.

A solid E-Visa business will not only cover its overhead AND pay the visa principal a significant financial benefit, but it will also employ eligible workers (those authorized to work in the U.S. legally) and benefit the local economy by virtue its bona fide business operations.

Ideally, the visa principal will also be able to take regular draws or profit distributions and the business STILL generates a profit!

EXAMPLE 1: Client wants to run an E-2 company doing "X". Based on the financial forecast and business plan, in its first 3 years, the company will make about 13x what Client needs monthly to live on per year. There are no plans to hire any workers, and Client does all work himself. --- This business would be considered marginal, and likely NOT qualify.

EXAMPLE 2: Client wants to run an E-Visa company he purchased with 2 existing employees. The business was struggling under the previous owner. Client has turned the business upside-down with fresh ideas, wants to hire 1 more worker in his first year of operating, and another the year after, all while taking a modest salary. Client will leave unearned profits in the company for further growth. --- This business would probably qualify easily and NOT be considered marginal.

It's especially important in INITIAL applications for E-Visa/Status to show how the business (whether it was an existing business, or a new startup) will NOT be marginal and that the other requirements of profitability will all likely be met within the first statutory period (usually 5 years of business operations as E-Visa enterprise).

i. Assets

You should note that for purposes of an application for E-1 or E-2, your client may not only add money into the pot, but also any assets which are destined for the business. (but nothing for personal / household use).

Clients should be prepared to show the replacement value (if older assets), or purchase costs (if newly acquired assets) of any assets he will be bringing to the U.S. for use and benefit of the U.S. company. Bills, invoices, receipts, and any other probative documents will suffice.

Consulates and USCIS are generally very generous when "throwing everything but the kitchen sink" into the proverbial E-Visa "pot". However, they will frequently DISALLOW (i.e. not consider) the following types of expenditures:

- Personal travel expenses (flights, hotels, car rentals, etc.)
- Personal vehicle purchase
- Personal real estate purchase or rental
- School / tuition expenses for dependents
- Purchases for other "non-business" equipment, if client cannot show that it really is intended for the benefit of the U.S. business.

If in doubt, if you can make a "straight-face" (bona fide) argument for a particular purchase or asset that it truly IS for the U.S. business, and it is plausible, and you can document it, you will probably prevail.

Generally, in E-Visa cases, this is NOT an area of large contention or resistance by the adjudicators.

As with most areas in the E-Visa practice, you want to document the assets of the E-Visa enterprise well, especially when being imported from abroad to the U.S. If the client is purchasing an existing business, this should be easier, but is equally important.

j. Staffing / Personnel issues

Staffing problems might be avoided initially, in situations of a first-time application, because the Applicant is NOT legally required to already have staff in place at the time of application to USCIS or DOS.

Your client, however, needs to make reasonable hiring provisions in his or her business plan and show how many hires are projected within a certain timeframe, and what the proper staffing levels will be for the company to operate most efficiently, given its growth over time.

In my experience, having a severely OVER-staffed company is detrimental, counter-productive and financially wasteful, while being chronically UNDER-staffed is detrimental also, because the business cannot blossom and more burden falls on the owner and/or the existing workers. Being chronically understaffed will also not be seen favorably by the government, especially at times of extensions or renewals.

Experience tells that your client will have a hard time finding and retaining good quality staff, unless she agrees to pay them well and offer above-average working conditions.

Small E-Visa businesses should also take some care not to exclusively hire family members for their business. This is, although commonplace, frowned upon by the government as it is seen as side-stepping the intended benefit to the local economy. (also bear in mind, that the Client should be able to show I-9 compliance!)

k. Intellectual Property issues

If your client is in the fortunate position to have ownership and authorship of intellectual property, such as patents, those have significant value and can also weigh heavily in a favorable way when making the E-Visa application, as it has a real and tangible, marketable benefit.

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CONSULAR PROCESSING ISSUES

9. Consular Processing Issues

a. Foreign Affairs Manual ("FAM")

The Consular Posts use the "Foreign Affairs Manual" as their single go-to source of authority when dealing with visa issues and processing.

You should spend time to familiarize yourself with the sections that relate to E-1 and E-2 visas and related sections, the language employed, the terms used, and the examples given. It will decipher for you how the consulate thinks and what they use when they're in doubt.

The particular section is 9 FAM 402.9 → https://fam.state.gov/fam/09FAM/09FAM040209.html

b. Consular Processing and Considerations

It's important to remind yourself (and to educate the client) that the U.S. State Department and the U.S. Department of Homeland Security are two separate and independently functioning federal agencies.

The State Department ("DOS") oversees and manages all U.S. foreign diplomatic missions outside the United States, which includes Embassies and Consulates. The Consulates handle matters concerning visa issuance and foreign-travel to the United States.

DOS has its own processes and procedures and its own fees. The legal framework and the methods of application differ somewhat from what their U.S. counterpart USCIS (under DHS) does.

The DS-160 electronic application form.

The basic non-immigrant visa application form is the online DS-160. → https://ceac.state.gov/GenNIV/Default.aspx

This online form can be a real hassle and cause grief to the practitioner, because outages and glitches are quite common. If you are experiencing problems:

- Erase your browser cookies
- Install additional different browsers and try different ones
- If necessary, access the form from a different computer
- SAVE YOUR PROGRESS VERY FREQUENTLY!!! I save after every page!

Another thing to be mindful about is that the contents of the DS-160 can and does change without notice to the public and you may encounter new questions/fields you haven't seen before. You will also see that the form itself is adaptive and will build and change depending on your input.

Electronic Passport Photos.

When you get ready to start a NEW DS-160 form online, start with your selection of the Consular Post which will receive the application from their drop-down box.

If enabled, based on your previous selection, if you can upload a passport-style electronic photo of the applicant, start with it and upload a photo into the photo verifier tool to see if the system will accept it. (the photo should ideally be a *.JPG or *.JPEG file, in color and measure at least 500x500 pixels at a resolution of 300 dpi.

(1) If the client cannot supply a suitable image file of his passport-style photo, or
(2) you do not have the ability to make the image file suitable with a photo-editing program or app.,

then proceed on the DS-160 WITHOUT uploading a photo, and instruct the client to bring traditional passport photos (in hardcopy, U.S. format, 5cm x 5cm or 2" x 2") to the visa interview.

DOS Photo requirements online → https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/photos.html

You can then begin completing the DS-160 itself. (without uploading photos)

PRACTICE POINTER: The DS-160 is very time-consuming and can be a real bottleneck in E-Visa case preparation. DO NOT entrust the client with completing their own!! DO IT FOR THEM!

When you begin the DS-160, Make a note of the Applicant's LAST NAME, their DATE OF BIRTH, the special security question and answer you select, and the unique Application Number (which looks something like this: AA007998866) – *You WILL need this information to regain access to it, if you quit (or get kicked off) the form before it is completed and submitted.*

Visa Application Fees / MRV-fees.

The payable visa fee will vary based on the requested visa classification. For all E-Visa applications the ***consular fee is USD $205.- per person***. (essentially per passport in which a visa-foil will be glued into).

Depending on the statutory visa reciprocity fee schedule (→ https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country.html), and the country of nationality of your E-Visa client, *sometimes additional fees must be paid at or following the visa interview*.

Consulates always have very specific payment instructions on their websites, and typically the client needs to create a special online profile through the appointment and visa fee payment portal of the State Department (which will be listed on the specific consulate's website. → https://ais.usvisa-info.com

c. Processing (preparation, submission, management, adjudication)

Generally, your E-Visa applications should contain the following items, the order and organization of which may vary slightly, depending on specific requirements of a consular post:

HOUSEKEEPING DOCS:

- Attorney Cover Letter detailing what application is being submitted by which company on behalf of which applicant(s), essentially your "Notice of Appearance". (think of it as a letter of introduction)

- Signed USCIS Form G-28 on behalf of the principal visa applicant, and one additional form for every person over 16. (minors under 16 can be included on the form of adult guardian or parent)

- The Attorney-prepared, client-signed, treaty company letter, which details all the legal requirements and how those requirements are met, basically walking the adjudicator through the case, element by element.

ABOUT THE APPLICANT(S):

- A Notarized Statement of Intent to Depart from the principal visa Applicant. (confirming their non-immigrant intent)

- The DS-160 Submission Coversheet for each Applicant.
- The DS-156 E-Supplement.
- Printouts of the online paid MRV fees for each Applicant.

- The passport copies of each Applicant. (all non-blank pages)
- Birth Certificates of each Applicant. (including any children)
- Marriage Document if Applicant is married.
- Any documents of legal name change, adoption etc.
- Travel History and Most recent I-94 Record from CBP online (https://i94.cbp.dhs.gov/I94/#/home) -- for each Applicant.

- Principal Applicant's Resume/C.V.
- Principal Applicant's Educational Credentials, Certificates/Diplomas

ABOUT THE E-VISA ENTERPRISE:

- Documents of Incorporation (INC) or Organization (LLC)
- Proof of IRS-issued (F)EIN
- Proof of Ownership (stock certificate(s) / member certificate(s))
- *Proof of Premises (purchased, or leased), incl. interior & ext. photos [**1**]*
- Detailed Business Plan
- 5-Year Projected Financials
- Any local licenses or permits, if already available
- Asset Inventory
- Proof of Expenditures, Purchases, etc.
- Marketing / Advertising materials
- Company homepage printout
- Etc.

_____

NOTE: [**1**] *The U.S. State Dept. recently updated its FAM to no longer require proof of physical office or business premises, where appropriate.* – This was in direct response to the COVID-situation and the ability or necessity to operate from remote locations or home office situations.

> ***9 FAM 402.9-4(D) Physical Office Space***
> *(CT:VISA-1111; 07-17-2020)*
>
> *"An applicant does not necessarily need a physical office space to qualify for an E visa. Although having physical office space may be relevant in determining whether the requirements for an E visa have been met, it is not a requirement to qualify for the visa."*

This is NOT feasible in ALL business situations. Use your own best judgment. A potential client coming to the U.S. to open a "french bakery" will still need to show appropriate business/commercial space to operate a bakery from, even if they have a baker shop located on the same property as their residential home.

Discuss your client's business type and specific needs, and still have the appropriate discussions about the need for commercial/business space, whether it's an office, sales space, manufacturing, warehousing, storage, etc. etc. *The FAM-change is not a "blank check" for clients to avoid any kind of commercial space purchase or lease*.

FOR EXTENSIONS AND RENEWALS -- ADDITIONAL:

- Recent federal business income tax returns, e.g. 1120, etc.
- Quarterly 941 Federal Returns
- All W-2 and/or 1099 Statements
- Proof of Staff, organizational chart
- Proof of Payroll (for workers and owners)
- Personal Federal Income Tax Returns (1040, etc.) – For Owner(s)
- Bank Statements of U.S. Enterprise's operating account
- Copies of current local licenses/permits of the business
- Updated forms of marketing / advertising
- Sample selection of customer invoices (accts receivable)
- Sample selection of expenses (accts payable)

FOR INITIAL APPLICATIONS -- REGARDING THE INVESTMENT:

- Proof of investment into the Enterprise
- Documents showing origination and source of funds abroad:
    - Wire Transfers
    - Deposit Records
    - Bank Statements
    - Declarations (if gift)
    - Sales receipts (if a personal asset is sold for cash)
    - Loan documents *(Loans can be used as valid investments for E-2 purposes ONLY IF the loan is secured by personal collateral; have attorney review loan documents to see if within requirements.)*

- Documents showing the flow and movement of funds from abroad to the United States
- Account statements showing where and how investment funds are held and/or being used
- IF a business is being purchased, copies of business sales listing, contract/offer, escrow/trust account statement confirming funds, etc.

Once you have sorted and assembled your documentation, you need to be very MINDFUL of the consular posts preferred/required page limitation. On average, the consulates are starting to limit submissions to about 100 single-sided pages.

Many consular posts are now requesting the application packet to be emailed to them via a single PDF-file. Some also request an ADDITIONAL hardcopy (1:1) of the PDF-file to be sent to them via courier (FedEx, UPS, DHL, etc.).

PRACTICE POINTER: In the event that a consular post only wants a hardcopy, *BE SURE TO SCAN the entire file BEFORE you send it out!* – in my practice, NOTHING goes out to the government, or the client, without first being run through a document scanner!

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USCIS PROCESSING ISSUES

10. USCIS Processing Issues

a. Code of Federal Regulations ("CFR") / Adjudicator's Field Manual ("AFM")

USCIS uses the "CFR" as their primary go-to source of authority when dealing with visa classifications and processing, as well as the USCIS internal Adjudicator's Field Manual.

You should also spend some time to familiarize yourself with the sections that relate to E-1 and E-2 visas and related sections.

The particular sections are:

- https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-15724.html#0-0-0-561
- for E-1: https://www.uscis.gov/working-united-states/temporary-workers/e-1-treaty-traders
- for E-2: https://www.uscis.gov/working-united-states/temporary-workers/e-2-treaty-investors

b. Initial vs. COS vs. EOS

As mentioned in the previous section regarding consular processing, it's important to remember that the USCIS are two separate and independently functioning federal agencies.

The I-129 petition form.

The primary form for all E-Visa Status petitions with USCIS is the I-129 form and its E-Supplement which is contained within it. It doesn't matter if it's an initial filing, or a change of status, or an extension of existing status.

The standard filing fee for the petition is USD $460.-, which is for the primary Applicant (the Beneficiary) and the underlying E-Visa company enterprise, which is the Petitioner.

Optional Expedite through Premium Processing Service.

If USCIS permits E-Visa petitions to be Premium Processed ("expedited"), then the client can opt to fork over the additional USD $1,225.- to force USCIS to adjudicate the case faster. The form for this case upgrade is I-907. (*Remind the client that they are not "Buying" an approval with this fee!*)

PRACTICE POINTER: While USCIS does accept e-filing and credit card payments for filing fees, in my practice experience, doing things "old school" still works far best with USCIS. This means hardcopy petition filings to the lockbox address along with paper printed checks from my office payable to USCIS.

The I-539 form.

The accompanying form for any dependents (spouse, children U-21), usually filed contemporaneously with the I-129. The filing fee is USD $370.-, and covers all individuals listed on the form.

In certain special cases, it could conceivably be filed later, after the I-129 was separately approved, but you probably will not come across this very often.

These are the only forms you will need, aside from your normal G-28 Form as appointed attorney representative, just as you would in any other case.

c. Processing (preparation, submission, management, adjudication)

The preparation of an E-Visa Status petition to USCIS does *not* materially differ from that made to a Consular Post. I would say that 90% of the meat and bones are the same.

Presently, USCIS has not implemented any kind of page limit in the petition packages, nor does USCIS require a specific upload of PDF files.

As for the required supporting documents, you can use the above list of documents that was listed for Consular Processing as your guide for USCIS filings also, to contain the following items:

HOUSEKEEPING DOCS:

- Attorney Cover Letter to USCIS, detailing what application is being submitted by which company on behalf of which applicant(s), essentially your "Notice of Appearance". (think of it as a letter of introduction)

- Signed USCIS Form G-28 on behalf of the principal visa applicant, and one additional form for every person over 16. (minors under 16 can be included on the form of adult guardian or parent)

- The Attorney-prepared, client-signed, treaty company letter, which details all the legal requirements and how those requirements are met, basically walking the USCIS-adjudicator through the case, element by element.

ABOUT THE BENEFICIARY(-IES):

- A Notarized Statement of Intent to Depart from the principal visa Applicant. (confirming their non-immigrant intent)

- The I-129 Petition form w/ E-Supplement.
- The optional I-907 Premium Processing Request form.
- The I-539 for Dependents (spouse + child/ren).
- A separate USCIS fee check for each Form.

- The passport copies of each Applicant. (all non-blank pages)
- Birth Certificates of each Applicant. (including any children)
- Marriage Document if Applicant is married.
- Any documents of legal name change, adoption etc.

- Travel History and Current I-94 Record from CBP online (https://i94.cbp.dhs.gov/I94/#/home) -- for each Applicant.

- Principal Applicant's Resume/C.V.
- Principal Applicant's Educational Credentials, Certificates/Diplomas

ABOUT THE E-VISA ENTERPRISE:

- Documents of Incorporation (INC) or Organization (LLC)
- Proof of IRS-issued (F)EIN
- Proof of Ownership (stock certificate(s) / member certificate(s))
- Proof of Premises (purchased, or leased), incl. interior & ext. photos
- Detailed Business Plan
- 5-Year Projected Financials
- Any local licenses or permits, if already available
- Asset Inventory
- Proof of Expenditures, Purchases, etc.
- Marketing / Advertising materials
- Company homepage printout
- Etc.

FOR EXTENSIONS AND RENEWALS --- ADDITIONAL:

- Recent federal business income tax returns, e.g. 1120, etc.
- Quarterly 941 Federal Returns
- All W-2 and/or 1099 Statements
- Proof of Staff, organizational chart
- Proof of Payroll (for workers and owners)
- Personal Federal Income Tax Returns (1040, etc.) – For Owner(s)
- Bank Statements of U.S. Enterprise's operating account
- Copies of current local licenses/permits of the business
- Updated forms of marketing / advertising
- Documents showing further investments into the business
- Sample selection of customer invoices (accts receivable)
- Sample selection of expenses (accts payable)

FOR INITIAL APPLICATIONS -- REGARDING THE INVESTMENT:

- Proof of investment into the Enterprise
- Documents showing origination and source of funds abroad:
    - Wire Transfers
    - Deposit Records
    - Bank Statements
    - Declarations (if gift)
    - Sales receipts (if a personal asset is sold for cash)
    - Loan documents *(Loans can be used as valid investments for E-2 purposes ONLY IF the loan is secured by personal collateral; have attorney review loan documents to see if within requirements.)*

- Documents showing the flow and movement of funds from abroad to the United States
- Account statements showing where and how investment funds are held and/or being used
- IF a business is being purchased, copies of business sales listing, contract/offer, escrow/trust account statement confirming funds, etc.

Once you have sorted and assembled your documentation, scan the entire package, then mail your hardcopy (1:1) to the appropriate USCIS location, via courier (FedEx, UPS, DHL, etc.).

At the time of this writing, all E-Visa Petitions are submitted to the **California Service Center**:

USPS:

USCIS California Service Center
Attn: I-129 E-1 / E-2
P.O. Box 10129
Laguna Niguel, CA 92607-1012

FedEx, UPS, and DHL deliveries:

USCIS California Service Center
ATTN: I-129 E-1 / E-2
24000 Avila Road
2nd Floor, Room 2312
Laguna Niguel, CA 92677

I-129/I-907 Premium Processing

USPS:

Premium Processing Service
USCIS California Service Center
Attn: I-129 E-1 / E-2
P.O. Box 10825
Laguna Niguel, CA 92607

FedEx, UPS, and DHL deliveries:

Premium Processing Service
USCIS California Service Center
Attn: I-129 E-1 / E-2
24000 Avila Road
2nd Floor, Room 2312
Laguna Niguel, CA 92677

Premium processing email address: csc-premium.processing@dhs.gov

PRACTICE POINTER: *BE SURE TO SCAN the entire file BEFORE you send it out!* – in my practice, NOTHING goes out to the government, or the client, without first being run through a document scanner! USCIS is known to lose or misplace documents, and often silly RFE's result.

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GENERAL APPLICATION STRATEGIES, HOW TO's AND CAVEATS

11. Application Strategies / How To's / Caveats

a. Post by Post issues

While the application of E-Visa regulations is fairly uniform across consular posts, as they are all governed by FAM and other applicable federal regulations, different consular posts have post-specific procedures in how they handle E-Visas.

The manner of organization or presentation of the same legal requirements may differ between and among posts, e.g. London, Paris, Frankfurt, Toronto, etc. Each consular post will have its preferred, customary way of structuring and presenting the supporting documentation with other required components, such as a G-28, the DS-156E, the online DS-160, passport photos, etc.

As soon as you have determined that your client needs to submit an application to a specific consulate, you need to either refer to that consular post's own website for instructions, and if there aren't any, -- *or you cannot find them,* -- then you need to reach out to the consulate directly for submission guidelines and requirements.

Some consular posts are quite lenient about you deviating from their preferred format, while other posts are very strict and require strict compliance.

PRACTICE POINTER: My format, although it deviates from some of the post guidelines, has generally been accepted by virtually every consulate I submit to. Sometimes, I get an email with the proverbial "finger wag", admonishing me to read through their submission guidelines. ☺

Generally, consular posts who are accustomed to handling lots of E-Visa applications per year, will have much more guidance and experience in dealing with E-Visas and have better procedures in place. In addition, these posts usually also have a dedicated staff for adjudicating E-Visas, consisting of 1-2 vice consuls, and some civilian support staff.

If and when you present an E-Visa application to a consular post which is not ordinarily accustomed to handling these types of cases, you will often find the overall process to even be easier and less hassle, simply because they don't really know how to pick apart your case, or look for common pitfalls and deficiencies, etc.

Basically, they're going through the case more swiftly (superficially?), because they really don't know what to look for, because they don't see a lot of these normally... (this is generally to our advantage!)

As you start doing more E-Visa cases, you will quickly get a feel for different consular posts' style and "flavor" in terms of how they work through cases, and how easy they are to work and communicate with.

Generally, in E-Visa practice, it has been the experience in the past, that Consular Posts, particularly those with *HIGH E-Visa application volumes*, like LONDON, TORONTO, FRANKFURT, PARIS, etc. are generally among the most strict and rigid, in their handling of these cases.

And those smaller posts, who do not normally handle a lot of E-Visas generally, those tend to be surprisingly easy-going, not to say "lax" (I don't want to jinx it!).

Returning to the issue of "nationality" and also regarding "forum shopping" when considering consular applications, GENERALLY speaking an E-Visa applicant is to submit her application package *to the Consular Post which has jurisdiction over the applicant's place of residence abroad*. Of course, for many clients, this means in their home country.

SIDE NOTE: Even in countries where there might be more than one U.S. Consulate, there is generally only ONE which will accept and handle E-Visas. You need to be aware of that.

EXAMPLE: German Applicant has to submit E-Visa to FRANKFURT only, and cannot submit it to Munich or Berlin.

Forum Shopping:

In some instances, however, a national of "Country X" will actually legally reside in "Country Y". In this case, it's more appropriate, usually, for the client to submit his application to the U.S. Consulate in "Country Y" where living.

Of course you can complicate matters for yourself and the client, if the client literally has 2 separate residences, splitting the year equally between "Country Y" and "Country Z". You could arguably submit in either place, having to weigh potential pros and cons.

A good consideration in these scenarios is also the native language of where the consular post is located, and the native language of the Applicant. Generally, the adjudicating and interviewing consular officers (aside from their native American English, of course) will speak the local language of where they are currently stationed, and not necessarily the Applicant's native language. Here are some examples, to clarify:

EXAMPLE: German applicant applies at U.S. Consulate in Frankfurt, Germany. The documents which are either in English or German do NOT require any translation, and the interview could be conducted in English, German or both.

EXAMPLE: German applicant lives in Spain. Wishes to submit his E-Visa application to U.S. consular post in Madrid. Any documents NOT in Spanish or English (i.e. those in German), WOULD need to be translated, AND the applicant can expect to be interviewed in English or Spanish, BUT NOT in German.

TCN-Processing Overseas:

Now that we've covered the normal consular post submission considerations, in terms of where an Applicant is from or where an Applicant is residing, what, however do you do in those cases where you wish (or client wishes) to submit an E-Visa to a U.S. Consulate where the client (A) Neither lives, nor (B) is from???

This is called *"THIRD COUNTRY NATIONAL" (TCN) processing*. Some posts allow it and accept such cases, but many posts do NOT.

This often arises when you have a client in the U.S., already on E-Visa status or some other NIV-status, and you are now submitting an E-Visa application abroad, to either renew/extend, or to amend the visa due to a chance in circumstances, or to accommodate a necessary trip abroad (thus invalidating any remaining status in the U.S. upon departure), or any other possible reason now necessitating the need for an E-Visa application at a consular post.

Coupled with this need to obtain a new E-Visa abroad, client will often present reasons why he or she CANNOT, or WILL NOT, return to their home country for simple visa processing there. These reasons could be personal, financial, political, criminal, etc. or any combination thereof. So the obvious choice of where to send the application is "out". And to complicate matters for you, the lawyer, even more, Client does NOT have any foreign residence/domicile elsewhere.

So NOW what!?! You NEED to send an E-Visa application SOMEWHERE, but the client doesn't have any foreign residence anywhere anymore, AND refuses to fly "home" to his/her home country…

The only option you as a brilliant and skilled lawyer have, is to virtually knock on the doors of several other U.S. Consular Posts (where the client would be willing and able to travel to), and ASK FOR PERMISSION (from the consulate) to submit an E-Visa application there for consideration, under TCN-processing provisions.

You need to locate each possible Consulate's NIV-email address or dedicated E-Visa Section email address, explain your client's situation (make it plausible!) and ask them kindly if they would accept this particular E-Visa filing on a one-time basis.

Depending on the Consulate, it's 'mood' and workload, and whether there is an officer there who is familiar (or willing?) to handle an E-Visa case, some say "yes", while others say "no". And yet other posts do not respond at all.

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b. USCIS Processing Specifics

While the underlying legal framework for USCIS is similar to that of the State Department (the Consulates), many practitioners in the past have considered the application of the laws and the adjudication by USCIS to be more lenient than at the consulates.

While E-Visas at the Consulate can be issued in spans ranging from 6 mo. to 60 mo., depending on visa reciprocity and the consular officer's discretion, the E-visa STATUS issued by DHS/CBP on the I-94 or approved by USCIS on their Notice of Action are limited to 24 months, regardless of nationality of the primary holder. (the exception being if the passport expires sooner)

It is also VERY IMPORTANT to remember (and to tell the client) that a prior E-status approved by USCIS in the United States is NOT LEGALLY BINDING on a consular post overseas, if and when an application for an E-VISA is being considered!!

The consulate may take a previous E-Status in the U.S. under advisement, but it's NOT bound by USCIS in this category, unlike other categories, like the H-, L-, O- or other petition-driven categories, where pre-approval by USCIS is required.

The other oddity to remind the client about, is the disconnect between VISA VALIDITY in the passport and STATUS VALIDITY in the United States. They are not linked. The Visa can have duration "x" and each E-1/E-2 status in the U.S. can have duration "y" (usually 24 months, unless special conditions exist).

Your E-1/E-2 status will always be applied for on form I-129 and the corresponding E-Supplement within it. Depending on whether USCIS is currently allowing this category to also be Premium Processed, you may also file I-907 with it. Dependents always are filed on accompanying I-539. (don't forget your own G-28 as attorney).

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c. Small business / Family business / Multinational Corporation

Both USCIS and DOS both have a demonstrated bias against small business. They will never admit such, but an astute observer of adjudication practices of both agencies will clearly see the bias in how cases are handled and decided.

One-man businesses or small family businesses often have an uphill battle to fight when trying to secure an approval. The Bias is often expressed in terms of the adjudicator's heightened scrutiny, lack of confidence in the business, and the increased doubts regarding the financials.

The agencies would of course prefer all applications to be submitted by larger, multi-million dollar businesses with sizeable staff in multiple countries.

However, given that this is certainly far from realistic, and that the true economic backbone of America IS SMALL BUSINESS, we need to work very hard to make strong and well-documented, solid cases.

Good screening and good information-gathering and the optimal presentation of facts and circumstances will help us make the best case possible for our clients.

PRACTICE POINTER: Always put on your "adjudicator's hat" and put yourself in the shoes of the USCIS officer or Consular officer reviewing your client's file. Which WEAKNESSES do you find? What UNFAVORABLE facts or info can you see? What HOLES can you poke in the case? -- play devil's advocate!

d. Common pitfalls and issues ("Monkey Wrenches")

In my experience with E-Visa cases, you will become aware of problems usually at the stage when your client needs to either renew the E-Visa overseas, or extend the E-Status with USCIS, or take a trip abroad and re-enter the U.S. with the E-Visa, etc.

Clients have this propensity to NOT inform us lawyers or keep us abreast of anything going on in their day-to-day involvement in their business, when no filings are needed.

The other typical problem arises when clients do something that is questionable, or unfavorable, or even detrimental to their Status or Visa, and then somehow you are made aware of this AFTER THE FACT, because they never thought to seek your advice on the issue, BEFORE they took any action.

This can range from minor annoyance and turn out to be fairly benign, albeit inconsiderate on part of the client, to outright shooting themselves in the foot, and causing a major defect in their immigration situation, which you are now called upon to remedy.

Another issue which presents itself with some frequency is that the client fails to actually perform his end of the deal, once the E-1 or E-2 was approved:

- They fail to take important further steps to direct and develop their business.

- They fail to follow through on future investments, expenditures, purchases, business deals, etc. (including paying themselves!)

- They fail to hire the workers they had laid out to hire in their business plan and staffing projections. – this could have varying reasons.

- They quietly change business objectives/purposes because the original idea did not pan out as originally envisioned.

- They make major changes to the business operations or legal structure, or ownership and control of the company, without or before talking to you.

- They otherwise fail to comply with or otherwise willfully violate terms of their E-1 or E-2 visa status.

This list is by no means exhaustive, but gives you a good idea as to how clients can sometimes derail their own cases. (and yes, expect YOU to fix it for them!)

e. Changes in Circumstance issues (business vs. personal)

Generally, USCIS or DOS must approve any "substantive change" in the terms or conditions of E-visa/status.

A "substantive change" is defined as a *fundamental change in the employer's basic characteristics, such as, but not limited to, a merger, acquisition, or major event which affects the treaty investor or employee's previously approved relationship with the organization.*

If in the U.S. on E-Status, the treaty enterprise must generally notify USCIS by filing a new Form I-129 with fee, and may simultaneously request an extension of stay for the treaty principal or affected employee. The Form I-129 must include evidence to show that the treaty investor or affected employee continues to qualify for the E-classification.

It is not required to file a new Form I-129 to notify USCIS about non-substantive changes.

It is generally NOT required, while in the U.S. on valid E-Visa status to affirmatively notify the U.S. Department of State (the consular post who issued the E-Visa) of any substantive changes as long as the treaty enterprise continues to operate and the visa holders are still connected to that enterprise.

This would be best handled at a future E-Visa application, like an extension or renewal, when you have to submit considerable supporting documents anyhow.

The types of issues that I would be on the lookout for are:

- Changes in registered company NAME
- Changes in registered company's LEGAL STRUCTURE
- Changes in registered company's OWNERSHIP & CONTROL
- SALE or CLOSURE of business!

These should probably be disclosed to USCIS during any period of E-Visa Status in the U.S., along with significant changes in business nature.

These should also be reported to the Consular Post, generally, because the Visas in the Passport are endorsed specifically with the U.S. enterprise's information, and a mismatch might cause issues with the client travelling through U.S. port-of-entry. (under the COMMENTS / ENDORSEMENTS field of the visa)

EXAMPLE: Client has E-1 visa registered to "ABC Trading Company, LLC.", but recently moved from Colorado to California, and restructured the company to now be registered as "ABC Golden State Imports, Inc." -- this should be reported and the travel documents updated, especially if Client travels a lot cross-border.

Other things, which usually need NOT be reported in between renewals / extensions are things like:

- Changes in Location (address, etc.)
- Changes in the number of Locations (expanding, reducing)
- Changes in Logo / Trademark etc.
- Changes in Non-NIV staff
- Changes in Visa Holder's Marital Status
- Changes in Owner compensation / benefits
- Changes in Staff levels, compensation / benefits
- Changes in Non-NIV management personnel
- Changes in Business Purpose (switching from restaurant to cigar bar, etc.)
- Adding or removing subsidiary businesses (same or different purpose)
- Financial Performance swings
- Issues of day-to-day business operations and decision-making

f. Business Continuity & Succession Problems

You should also have serious conversations with your clients to seek good legal advice in terms of Estate Planning in the U.S., particularly in the U.S. State of their residence.

Many foreign clients already have documents in place in their home country, and often falsely assume that their U.S. assets and interests might also be covered.

You should address difficult, plausible issues concerning the client and her family, should something unforeseen happen.

- Who will continue the business if the primary Visa Holder is unable, incapacitated or dead?

- How has or might the Visa Holder's situation change in terms of relationship, family, change in health, etc.?

- If the primary investor AND the spouse or business partner, etc. ALL are unable to continue the business, who is in a position to wind down the company?

- How Is the principal visa holder able to continue the management from abroad, if a return to the U.S. is temporarily not possible or feasible?

You should also raise issues of possible business continuity if there is a significant change in family circumstance, just as an impending marriage, or divorce.

If your client is the primary E-Visa holder and is married (to a Non-USC / Non-LPR), -- in the event of a lengthy incapacitation or in the event of death --, will the spouse be able to carry on and continue the business and step into the shoes of the primary visa holder?

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IMPORTANT CONSIDERATIONS FOR EXTENSIONS AND RENEWALS

g. Considerations for future extensions / renewals

Depending on an E-Visa client's present E-Visa status in the U.S. (per their I-94 record or USCIS-authorized status), and the presence of an E-Visa in their passport (and its expiry), you and your client need to always be mindful of when and how best to keep their legal stay in the U.S. going.

Between I-94 / USCIS status, Visa validity, Passport validity, minors aging out, etc. there are multiple dates to keep track of. You will need to take great care to keep an eye on those dates, AND also educate the client on keeping an eye on them.

It's not uncommon for either attorney or client to lose sight of something as sneaky as a passport expiring, or a child aging out…. between renewals or extensions.

IF the client has a valid E-Visa in their passport, then EVERY ENTRY INTO the U.S. affords them an automatic 24-month stay, *unless the passport expires sooner*, in which case the I-94 will expire on the date the passport expires.

IF the client takes a trip abroad and enters the U.S. again BEFORE the visa expires, the client is entitled to a full 24-month admission period, provided the passport validity does not cut this short, EVEN IF the actual VISA expires the NEXT DAY.

EXAMPLE 1: Client obtains her first E-Visa at a Consulate for 5 years. 4 days before the visa expires in her passport, she departs the U.S. for a quick trip abroad, and then re-enters the U.S. 1 day before the E-Visa expires. She will receive a new I-94 record for another 24 months, BEYOND the validity of her now-expiring E-Visa in her passport. *(during the extended 24-month period, she can leave the U.S., BUT would need to obtain a NEW E-Visa at the consulate before again re-entering the U.S.)*

IF a client's E-status in the U.S. expires without being re-validated by a trip abroad and a re-entry with the valid E-visa, then the client has 2 choices essentially:

(1) either submit a petition for extension of E-Status to USCIS and seek to obtain a new status for 24 months (assuming the passport allows it),

OR

(2) submit a consular E-Visa application for an E-VISA and re-enter the U.S. (assuming the client does not have a valid one in the passport already or anymore).

Whether to file a petition with USCIS in the U.S., or whether to file a consular application with a consular post overseas, will depend on varying considerations:

- Timing of the application to be filed and the need for action
- Length of processing time (preparation through submission through adjudication)
- Expense of filing + possible Expense of travel
- Considerations of possible delay or denial
- Convenience of "forum shopping" (WHERE to file? TCN-processing, etc.)
- Disruption to daily life and business during the pendency of the filing
- Whether or not dependent family members need to also travel

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WHERE AND HOW TO BEST PROSPECT FOR POSSIBLE E-VISA CLIENTS AND CASES

12. Where and How to Prospect for Good E-Visa Clients

This is a question I've often encountered over the years, especially from new practitioners, looking to grow their practice.

There are many good avenues for prospecting for E-Visa clients! BUT: This requires that you've been able to really get a good grasp on how E-Visas work, what's required and the type of person (i.e. client) that would make a good fit.

In your mind, you need to be able to comfortably go through the basics, and say: "Would THIS person make a good potential E-Visa prospect?"

Here are some good, tried and true places to source viable E-Visa business from:

- Your existing client-base! -- many do not realize that they could be an E-Visa client. This includes anyone presently not on an E-, *who is NOT ALREADY an LPR or USC*, obviously! (they may currently be on any other kind of NIV). This also includes your existing clients who recommend you to others because you've represented them or their loved ones in a stellar fashion. Let *them* be your scouts and lookouts!

- Realtors, CPA's, other (non-immigration pract.) lawyers, and other licensed professionals who frequently deal with foreign clientele, especially if you're in an area where foreign investment and/or foreign business ownership or workforce is high.

- Existing business relationships with other companies and/or networking groups or alliances. (esp. those who promote or foster international relationships),

- Groups or organizations that deal with Small/Mid-size businesses, start-ups, economic development, business chambers of commerce, etc. (incl. business alliances, and multi-cultural/-ethnic chambers, etc. – examples: Hispanic Chamber of Commerce, Indo-American Chamber of Commerce, Latin American Business Alliance, Chinese-American Chamber of Commerce, etc. etc. etc. – you get the idea!)

Again, take a two-pronged approach here. On the one prong, go for the obvious, low-hanging fruit, and work your connections you already have and also smartly invest time and effort on creating NEW connections, and on the other prong, go specifically after those would-be clients by specifically marketing TO THEM.

If you are of an immigrant background yourself, or you feel otherwise deeply connected to a certain population group, ethnicity, etc. then use that connection and market heavily to those segments.

If you are, for example, MEXICAN, or of Mex.-descent, or have a Mexican spouse, etc. or otherwise feel connected to representing Mexican clients, then think of "WHERE AND HOW DO I BEST REACH MEXICANS WHO ARE SUITED FOR E-VISAS?"

Also think about E-Visa prospects in general, the qualities they should possess, these are usually:

- business-minded,
- entrepreneurial,
- managerial-/executive-type people,
- who tend to want to be business owners and self-employed, rather than those who seek a "safe, comfortable" job being someone's employee,
- not necessarily or overly risk-averse,
- have sizeable financial assets available for a new business venture.
- (feel free to add to this list!)

Where and how could you reach these types of individuals? Where do the hang out? Where do they mingle? What do they WATCH, READ, interact with? Trade journals, financial journals or papers? Specific online forums, or specific groups within various social media platforms?

Think outside the box. It may help you to connect with other professionals who otherwise deal with High Net-Worth Individuals ("HNWI") in their work. They will prove a valuable resource in terms of how they themselves reach out to those prospective clients.

ALTERNATIVES FOR CLIENTS WHO ARE NOT E-VISA ELIGIBLE

13. Alternatives for Cases/Clients who are not E- eligible

Depending on your client's specific situation, he/she might not be eligible for an E-Visa, primarily because they do not (or cannot) possess a qualifying nationality, nor is it feasible for them to aspire to first obtain one.

Oftentimes, they might possess (or could possess) a qualifying nationality but are simply not in a present position to satisfy the E-Visa requirements, and are perhaps unlikely to ever do so in the foreseeable future.

> *(Let's neglect for the moment the special case where clients DO or COULD qualify for an NIV, but have special grounds which render them essentially ineligible for a long time, if not permanently)*

For those clients where an E-Visa is not a viable or suitable option, it often helps to go through the mental exercise to see which elements or requirements they cannot meet, and WHY they cannot meet them. Is it something that can be remedied or overcome? It is something that is impossible or unlikely to change? OR is it something that CAN be overcome and simply requires some effort in terms of time, doing, money, etc. and the client's willingness to get it done?

When an E-Visa is not an immediately available avenue, you need to think of other viable avenues the client can take, in an effort to spend time legally in the U.S. some other way, and still accomplish their objectives.

As with the initial E-Visa screening process and the types of questions to ask, you will need to closely examine the client's family history, prior immigration history, educational background, work history and professional experience, their financial standing, and other factors, to see which circumstances are present which might lend themselves to other NIV-categories.

Some common alternatives, -- *keeping in mind a client's state objectives/goals,* -- might include:

- B-1 Visa for business development, setup and start-up (incl. Extension of Status petitions when needed)

- Going on or remaining on F-1 Visa, to complete a structured course of study or degree program (esp. if client has unfinished/ partial degree). – the downside is the tuition cost and very limited of ability to work legally)

- H-1B Visa for degreed professionals / specialty occupation workers, when client has the appropriate education and/or work credentials and a matching job with a U.S. employer. (can also be a part-owner of the U.S. company)
- H-2B Visa for a seasonal worker for a U.S. employer. (no self-employment option here)

- H-3 Trainee Visa to obtain job-relevant / -crucial training in one's profession or industry. (downside: it generally requires a return to home country abroad and the application of one's new skills/experience abroad)

- L-1 Visa for company transfer / specialized knowledge worker. This can be a very good alternative option to an E-Visa, provided the foreign experience abroad and the requisite company relationships exist and can be proven.

- O-1 Visa for extraordinary aliens. This might be good for clients who really do possess out-of-the-ordinary skill sets or abilities in certain fields of endeavor. These are hard to meet, document-heavy, and USCIS loves to litigate the heck out of these with NOIDs or RFEs, even with experienced lawyers. (keep a lookout for artists, athletes, models, tv/film/music career professionals, etc.)

- P-1/P-3 Visas for performers. Keep a lookout for those artists, athletes and musicians among your prospects. These can also be challenging to meet, document-heavy, and USCIS loves to litigate the heck out of these with NOIDs or RFEs, just like O-1.

- R-1 Visas for Clergy / Religious Worker. Keep a lookout for those who are active members of their religious organization, ordained clergy, etc.

- TN Visa for Degreed Professional of NAFTA treaty nation (Canada, Mexico), working in one of the enumerated list of industries / professions. Very similar to H-1B. Not suited for self-employment.

There may always be alternatives not listed here. Only thorough and lengthy conversations with the client will shed sufficient light and give you adequate information, which in turn gives you options, while maybe also eliminating some.

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"PLAN B" WHEN YOUR INITIAL FILING MIGHT NOT WORK

14. Plan B when your initial submission might not work

There will, unfortunately be the occasion where the initial E-Visa submission might not go entirely without a hitch.

When dealing with an E-status petition with USCIS, you might very well end up with an RFE. Most of these, in my experience, are rather benign, usually asking for things already submitted (and not seen or not understood), or containing bona fide requests based on what was submitted. Generally, the E-1 and E-2 status petitions are generally well handled by USCIS and well-documented cases are generally approved.

However, when dealing with a consular post, cases can be held up in processing if the reviewing consular officer feels something is missing or not adequately documented or explained. This usually happens by means of either written correspondence requesting it, generally by email, which is tantamount to an "RFE", or sometimes this can happen at the interview, where the final decision is withheld pursuant to 221(g), until the deficiency in the application is remedied.

It's best to always the most direct, most open line of communication with the adjudicator of your E-Visa case. This is of course much harder with USCIS, as there is no direct link to the officer other than responding to RFEs and NOIDs.

With Consular Posts, -- especially when you handle cases there frequently, -- you can have a semblance of communication with the officers who handle E-Visas there. The more E-Visas a particular consulate handles, the more adept they will be to spotting and resolving issues. Consulates will generally NOT just deny an E-Visa application if it could be remedied with additional information or documentation. That is NOT to say that initial denials do not happen. You (or the client) will generally not know their fate until the conclusion of the interview.

Based on my lengthy experience in handling E-Visas, when a client goes to the consular interview (there are no such interviews with USCIS for E-Visa cases), the reviewing consular officer has already mostly made up his/her mind before the applicant appears.

IF there is a deficiency at the interview, the client can ask that the case be held open, and time be given to send in the missing item(s). Many consulates are amenable to this, but not all.

Some posts will deny the case, also based on 221(g) and allow the applicant to have their file reviewed at an undetermined later time, if and when the applicant can remedy the deficiency, amounting to a later re-opening the case.

Other posts will flat-out deny a case if they truly feel the applicant or the business clearly fail to meet the requirements. In these cases, it's best to discuss the deficiency with the client, the grounds for the denial, and see if those reasons can be remedied, and a second application made.

Oftentimes, a well-done, improved second application will overcome the denial of the first one, because the consulate had to put their cards on the table and reveal the flaw(s) in the application, giving you the opportunity to fix it and improve upon it.

Keep in mind that consular decisions to hold back or deny cases is NOT appealable, or judicially reviewable. The client has no formal appellate rights. It's best to try and get the consulate to meet you "half-way" or to cooperate with you. So your diplomacy skills will be tantamount.

On rare occasion, where it really appears that a consular officer made a genuine mistake or blatant abuse of his/her authority, and made a really bad (i.e. WRONG) call on your application, you might be able to go higher up and contact the Chief of the Consular Bureau of that consular post and plead your plight. Generally, however, the Consulate does not like to review each other's decisions or step on each other's toes.

SIDE NOTE: *(the U.S. State Department's "LEGALNET" email address should ONLY be used in the most EXIGENT and UNIQUE circumstances!!! It's NOT a venting-line for unhappy attorneys who disagree with a consulate's decision)*

Over the years, even I have had my share of difficult cases that might not go through 100% on the very first try. The percentage is small, perhaps around 5% in a good year, 10% in a bad year. Of those 5%-10% of cases that initially

present some level of adjudication difficulty, I can usually wrangle an approval on about 50% of those cases in my second attempt.

Once a client has been to the visa interview, if there are roadblocks to approval, that are NOT Security-related, the reviewing consular officer will usually communicate the reasons for the "issue", and we can usually work on resolving it as soon as possible.

PRACTICE POINTER: For security related delays, or other "administrative processing / review" or matters requiring a possible waiver, be prepared for LOTS of additional time, often many weeks, sometimes several months, of the client being in "adjudication limbo".

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MOVING FROM THE E-VISA TO LPR AND BEYOND

15. Moving from E-Visa to LPR and beyond

Either early on in your initial meetings and strategy sessions, or later on as your clients fulfills their American Dream, discussions will be had about long-term plans and goals, and the client's own visions for where they wish to be in "x" years. Each client is different, and even over time, their initial focus and goals might shift or change completely.

Upon investigation a potential client's own "America Ambitions", some will tell you that:

- they only have a very specific goal and once it's achieved, they will leave again, according to their exit-strategy. (perhaps return to their home-country, perhaps retire elsewhere in a third country, etc.)

- they are only staying in the U.S. long enough to accomplish raising their children and seeing to it that they start their own "American Dream".

- they wish to put down as many roots as possible, and make America their new "forever home", for themselves, as well as any children, etc.

- they are avoiding other external, unfavorable factors or conditions in their home country, and if and when ever those might be remedied, contemplate a possible return home, after a self-imposed "exile".

Stories are very personal and will come in many flavors.

For those clients who really wish to put down long-term, i.e. "permanent" roots, in the United States, you will need to lay out possible strategies to get them from an E-Visa (which could run indefinitely, as long as there remains a qualifying business and element of control and ownership, but requires periodic renewals and extensions), to a viable path to Greencard, and perhaps even U.S. Citizenship (somewhere down the long-line, if the client so desires).

Here are the most common ways this can play out, based on my many hundreds of E-Visa clients, over the years:

- They renew indefinitely, in the hopes of law changes, that something someday will be created by U.S. Congress to create a direct path from E-Visa to LPR. (not currently in legal force, at the time of this writing).

- They renew indefinitely, and are of a nationality (or chargeable nationality) which permits the participation in the annual Diversity Visa Lottery (aka "Greencard Lottery"), as long as it continues to exist.

- Their E-Visa business is vastly successful and over the years has grown to sufficient levels of operation to fully support and application for an EB-5 Employment Creation (aka "Investor") Greencard, satisfying the investment and employment creation requirements (within the provisional 2-yr. conditional grant).

- They started their E-Visa journey either (a) unmarried/single, (b) divorced and remarried, (c) divorced, (d) widowed, (e) or married, and have now had a change of their situation where they are now married to a U.S. Citizen or LPR, through whom they can benefit for Immediate Relative petitioning.

- They started their E-Visa journey in the U.S., while all the time maintaining a profitable, active, and viable foreign enterprise abroad, now allowing them to file an EB-1 Greencard petition as Multinational Manager/Executive. (alternatively, they could also decide to switch from E-Visa to L-1, and then proceed to EB-1 also).

- Many times clients come to the U.S. on E-Visas with children, who ultimately age out at 21, or sometimes migrate over to F-1 or DACA, or H-1B, etc… and ultimately, the children become LPR's and USC's faster than their E-Visa parents, whom they ultimately petition for.

So as you can see, while there currently is no "automatic pathway" from E-Visa to LPR "on the books", -- *hoping this will someday change* -- , with some thinking outside the box, or with some proper planning early on, you can almost always find a way for a client to ultimately get there, even if it's a long and hard road to travel.

SAMPLE DOCUMENTS AND OTHER REFERENCE RESOURCES