entities are engaged in commercial trade or services.

- Combined U.S. annual sales of $25 million, U.S. workforce of 1,000 *or* received approval of at least 10 L petitions in last 12 months.
- Nonprofit organizations cannot file blanket petitions. 9 FAMe 402.12-8(B)(b).
- Employee must work abroad for parent, affiliate or subsidiary for 12 months. INA §214(c)(2)(A). AFM at 32.4 Note.
- Anti-Job Shop Provision of INA §214(c)(2)(F) applies. *See in this section* ¶ 8.d (p.1102), *supra*; AFM at 32.5.

(2) Procedure

- Obtain approval of blanket from the service center. All extensions, change of status must be filed with service centers. 8 CFR §214.2(*l*)(7)(i).
- Petition initially approved for 3 years; must then apply for extension. 8 CFR §214.2(*l*)(7)(i)(A).
- Fill out Form I-129S, attach I-171C demonstrating "blanket approval," and submit to consular officer to obtain visa (unless visa exempt). Must establish beneficiary's managerial, executive, or specialized knowledge professional qualifications. 8 CFR §214.2(*l*)(5)(ii). **PAGE 1107** Blanket L may not be used for specialized knowledge positions that are not professional. 8 CFR §214.2(*l*)(5)(ii)(D).
- A new Certificate of Eligibility (I-129S) *is* required where beneficiary is reassigned to an organization listed in the approved petition *and* will be performing different job duties. 8 CFR §214.2(*l*)(5)(ii)(G). A new certificate is not needed for transfers to any organization listed on a blanket petition if the job duties are virtually the same. 9 FAMe 402.12-8(I)
- Consular officer can issue visa for three years from the date of adjudication and can annotate visa with name of actual employer which should be listed in PIMS. 9 FAMe 402.12-8(F)(a)
- Applicant who could qualify for a blanket L may apply instead file for an individual L and a petitioner may not seek L classification under both procedures unless a consular officer denies the blanket L. 9 FAMe 402.12-8(H)

11.q. L-1 for CNMI

AFM 36.8; Memo, Neufeld, HQ 70/10.10 Effect of the CNRA Under Section 101(a)(15)(L) and 203(b)(1)(C) (Nov. 23, 2009), *reprinted in* 87 No. 37 *Interpreter Releases* 1930-32 (Sept. 27, 2010).

As of Nov. 28, 2009, a person working in the CNMI will not be considered to be working abroad any longer. The L classification requires that the transferee has been employed abroad for one year prior to transfer. USCIS has established special rules permitting the continuation of L-1 status.

M. *Treaty Traders/Investors (E-1 / E-2 Visas)*

INA §101(a)(15)(E), 8 USC §1101(a)(15)(E); 8 CFR §214.2(e); 22 CFR §41.51; 62 FR 48138 at 48146–55 (Sept. 12, 1997); Immigration Acts of 1924; July 6, 1932; and 1952

Traditionally, most E-1/E-2 treaty rights arose out of Treaties of Friendship, Commerce and Navigation (FCNs), which governed both trade and investment. More recently, the U.S. has signed treaties directed solely to investment called Bilateral Investment Treaties (BIT) and to Free Trade Agreements (NAFTA/Fast Track), which contain both E-1 and E-2 components. BITs allow for E-2 status only; however, they are more expansive than the traditional FCNs because they apply to foreign nationals who establish, administer or advise an enterprise and not simply develop or direct it. 66 No. 2 *Interpreter Releases* 32, 59 (Jan. 9, 1989). They also contain other provisions governing tax and dispute resolution. *See e.g., Chevron Corp v. Ecuador,* 795 F.3d 200 (D.C. Cir. 2015) [upholding Chevron's judgment in arbitration against Ecuador by virtue of the BIT]. For a list of E-1/E-2

countries, *see* 9 FAMe 402.9-10 and **Appendix L** (p.2045).

1. ***Definition***

1.a. Person is entering U.S. (for indefinite time).

1.b. Based upon treaty of friendship, commerce and navigation, BIT, or other arrangements (NAFTA—Canada and Mexico) between U.S. and country of applicant's nationality. Some countries have only E-1 treaties or E-2 treaties; some have both. 9 FAMe 402.9-10; *see* **Appendix L** (p.2045) for list.

1.c. Person is entering

- Solely to carry on substantial trade which is international in scope principally between U.S. and the foreign state of which he or she is a national (E-1 treaty trader); or
- Solely to develop and direct the operations of an enterprise in which the alien has invested, or is actively in the process of investing, a substantial amount of capital in a bona fide enterprise (E-2 treaty investor); or
- As a key employee from treaty country of either E-1 or E-2, including executives and supervisors, 9 FAMe 402.9-7(B) or persons whose services are "essential to the efficient operation of the enterprise." 22 CFR §§41.51(a)(2), (b)(2); 8 CFR §214.2(e)(3); 9 FAMe 402.9-7(C) or
- **PAGE 1108** As a principal employer who is: (a) a person with nationality of treaty country whether in or outside U.S.; or (b) an enterprise or organization that is 50% or more owned by treaty nationals, 9 FAMe 402.9-7(A); or
- A dependent of one of the above referenced persons, 9 FAMe 402.9-9.

2. ***General considerations***

2.a. Need not show coming to U.S. for a specific period of time, so long as there is an ultimate intention to depart the U.S. and not permanently remain. 8 CFR §214.2(e)(1)(ii), (2)(iii), (5); *Lauvik v. INS*, 910 F.2d 658, 660–61 (9th Cir. 1990) [reversing denial of E-2 extension where DD failed to distinguish between applicant's desire not to depart from his intent to do so].The E can sell his or her residence and move all household effects to U.S. and may be the beneficiary of an IV. 9 FAMe 402.9-4(C);

2.b. May not be denied solely on basis of an approved LC or IV petition. However, DOS requires the E to establish that he or she will not seek AOS in the U.S. 8 CFR §214.2(e)(5); 9 FAMe 402.9-4(C) [referencing 9 FAMe 402.12-14]

2.c. Each treaty may contain specific provisions that create subtle but important differences in the treatment of treaty nationals. For example, the treaty with the UK requires a UK citizen to be domiciled in the UK to obtain the benefits of the treaty. This is not true for any other E treaty with any other country.

2.d. INS and DOS regulations are identical in most important respects. 62 FR 48138–55 (Sept. 12, 1997). INS traditionally followed DOS regulations and FAM. O.I. §214.2(e); *Kim v. District Director*, 586 F.2d 713, 716 (9th Cir. 1978); *Matter of Walsh & Pollard*, 20 I&N Dec. 60 (BIA 1988); *Matter of Csonka*, 17 I&N Dec. 254 (RC 1978); *Matter of Tamura*, 10 I&N Dec. 717 (RC 1964), *overruled on other grounds in Matter of Udagawa,* 14 I&N Dec. 578 (BIA 1974).

2.e. *Business Plan*—For both an E-1 and E-2 any submission should include a detailed business plan. The requirements of a comprehensive business plan are outlined in *Matter of Ho,* 22 I&N Dec. 206, 213 (AC Examinations 1998) [EB-5 context but applicable to E visas].

3. ***Nationality of E***

8 CFR §214.2(e)(7), 62 FR 48138 at 48140 (Sept. 12, 1997); 22 CFR §41.51(a)(6); 9 FAMe 402.9-4(B).

A person entering the U.S. on an E visa must be a national of a treaty country and, if he or she is an employee of a company, both the person and company must be from the *same* treaty country.

3.a. *Determining Nationality*—The country of incorporation is "irrelevant to the nationality requirement for E visa purposes." 9 FAMe 402.9-4(B)(b). If it is a business structure that maintains corporate stock, at least 50% of stock must be owned by nationals of treaty country. Permits joint ventures. 9 FAMe 402.9-4(B)(c); 51 FR 6911–7001 (Feb. 27, 1986). The joint venture may be between nationals of two different treaty countries, in which case employees of either nationality may obtain an E visa. 9 FAMe 402.9-4(B)(c), (d). Nationality may now also be determined by operational control. 9 FAMe 402.9-4(B)(c) ["Pursuant to 22 CFR 41.51(b)(11), if the applicant is the investor who is coming solely to develop and direct the enterprise, then the applicant must show that he or she controls or will control the enterprise. Normally such control is shown through at least 50 percent ownership by the applicant, but it can also be shown by possession of operational control (through a managerial position or other corporate device) or by other means"]. Where foreign corporation is owner of the U.S. entity, the nationality of the foreign corporation is determined by its owners, not by its place of incorporation or the location of the company's business. 9 FAMe 402.9-B(b); *Matter of* ___, EAC 90-123-50664 (AAU May 14, 1993). However, for a publicly traded company, the firm's nationality is presumed to be that of the country in which the firm's stock is physically listed and traded on the stock exchange if that stock is sold exclusively on that exchange. In the case of private equity/hedge funds, there will normally be significant single investors or large scale institutional investors that can provide evidence of nationality. It can be more difficult to establish nationality where the corporation is widely held. In those cases the applicant must satisfy the consular officer with the best evidence available. 9 FAMe 402.9-4(B)(b) **PAGE 1109**

(1) *Lawful Permanent Residents May Not Be Counted*—LPRs from the treaty country who own stock in the U.S. company cannot have their stock counted when determining the nationality of the company. E or non-E nationals of the treaty country who are not LPRs, can count their stock when determining nationality. 9 FAMe 402.9-7(A) ["A permanent resident alien does not qualify to bring in employees under INA 101(a)(15)(E). Moreover, shares of a corporation or other business organization owned by permanent resident aliens cannot be considered in determining majority ownership by nationals of the treaty country to qualify the company for bringing in alien employees."].

(2) *Dual Nationality/Change of Status*— The nationality claimed by a dual national at the time of his entry into the U.S. must be regarded for purposes of INA §214 as his or her sole nationality during the duration of her stay. Thus a dual national of Venezuela and Italy cannot change to an E status in the U.S. if he entered on his Venezuelan passport. *Matter of Ognibene,* 18 I&N Dec. 425 (BIA 1983) [person who entered as Canadian prior to NAFTA could not change status to an E-2 based upon his Italian passport]. Similarly, a person who is a U.S. citizen but a dual national (*e.g.*, with Italy) cannot assert her foreign nationality to obtain E status for employees where she has asserted her U.S. citizenship as her predominant nationality. *Matter of Damioli,* 17 I&N Dec. 303 (BIA 1980) [where nature of business required U.S. ownership]. 22 CFR §40.2(a).

(3) *Employees and Nationality*—In order to employ persons from the treaty country, at least 50% of the corporation must be owned by persons having the nationality of the treaty country who are maintaining E status if residing in the U.S. or, if not residing in the U.S., who would be classifiable as E nonimmigrants. 9 FAMe 402.9-7(A); 22 CFR §41.51(a)(2). *Cf. Incalza v. Fendi N. Am., Inc.,* 479 F.3d 1005 (9th Cir. 2007) [where Italian national was fired after company changed to French ownership, employee's award of damages was upheld because company could have requested H-1B status or given him unpaid leave until he resolved his immigration status]. When a company is equally owned and controlled by nationals of 2 different treaty countries, employees of either nationality may obtain E visas to work. 9 FAMe 402.9-4(B)(c).

4. ***Time of Admission—***Two-year admission and E/S in 2-year increments. 8 CFR §214.2(e)(19)–(20).

Admission may be up to 2 years even if the visa is valid for less than 30 days at the time of entry. Cable, Brooks, Asst. Comm., Inspections (Oct. 10, 1989), *reprinted in* 8 *AILA Monthly Mailing* 761 (Dec. 1989); 22 CFR §41.112(a). But a person may not be admitted in E classification for a period of time extending more than 6 months beyond the expiration of his or her passport. 8 CFR §214.2(e)(19)(iii).

5. ***E-1 Visas*** [INA §101(a)(15)(E)(i), 8 USC §1101(a)(15)(E)(i), 9 FAMe 402.9-5]

5.a. Criteria for E-1, 9 FAMe 402.9-5(A) requires a determination that: (i) a treaty exists; (ii) the individual or business possesses the nationality of the treaty country; (iii) the activities the E-1 will engage in constitute trade within the meaning of the INA §101(a)(15)(E); (iv) the trade is substantial; (v) the trade is principally between the U.S. and the treaty country; (vi) if an employee the applicant is destined to an executive/supervisory position or possesses skills essential to the firms operations in the U.S.; and (vii) the applicant intends to the depart the U.S. when the E-1 status terminates.

5.b. Trade

(1) *Trade Defined*—Under 8 CFR §214.2(e)(9), 22 CFR §41.51(a)(7) and (8), 9 FAMe 402.9-5(B), 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 counted as trade for the purposes of E-1 eligibility. According to DOS, 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." The USCIS definition also includes "data processing, advertising, accounting, design and engineering, and management consulting." 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." 62 FR 48138 at 48141 (Sept. 12, 1997) **PAGE 1110** ; 9 FAMe 402.9-5(B)(f). *E.g.*, union official sent to U.S. for organizing, eligible for E. Includes export or import; if equipment purchase involves transfer of component parts for assembly in U.S., it is trade. Trade must be an exchange, international in scope, and must involve qualifying activities. 9 FAMe 402.9-5(B)(a)

(a) Trade Entails Exchange—Must be an actual, meaningful, exchange of qualifying commodities such as goods, money or services. The goods must flow between the two countries and must be traceable and identifiable and title of the goods must pass from one treaty party to the other. 9 FAMe 402.9-5(B)(b)

(b) Trade Must Be International—Development of the domestic market without international exchange does not constitute trade. 9 FAMe 402.9-5(B)(c)

(c) Trade Must Be In Existence—Trade must already be in progress, such as existing contracts, and a visa cannot be obtained for the purpose "of searching for a trading relationship." 9 FAMe 402.9-5(B)(d)

(d) Trade In A Service—If it is trade in a service, the provision of the service by the enterprise must be the purpose of that business and the service must "itself be a saleable commodity which the enterprise sells to the clients." Types of services include international banking, tourism, communications, and newsgathering activities. 9 FAMe 402.9-5(B)(f).

(2) *"Principal" trade* [8 CFR §214.2(e)(11), 9 FAMe 402.9-5(D)]

(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, 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.

(f) E-1 employee, however, need not be employed in the trade with the treaty country. 9 FAMe 402.9-5(D)(c).

(3) *"Substantial"* [8 CFR §214.2(e)(10), 22 CFR §41.51(a)(9), 9 FAMe 402.9-5(C)]

(a) "An amount of trade sufficient to ensure 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. Look to a "continuous flow" involving "numerous transactions over time." 9 FAMe 402.9-5(C)(a)

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

(d) *Volume* of exchange is the primary focus but monetary value is also a consideration and "greater weight should be accorded to cases involving more numerous transactions of larger value." 9 FAMe 402.9-5(C)(a). No minimum requirement for either.

(e) *Small Businesses*—Income derived from the value of numerous transactions which is sufficient to support the trader and her family is a favorable factor in assessing existence of substantial trade. "Income derived from the international trade that is sufficient to support the treaty trader and family should be considered favorably when assessing the substantiality of trade." 9 FAMe 402.9-5(C)(b).

(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, and sales contracts. 62 FR 48138 at 48141 (Sept. 12, 1997). **PAGE 1111**

5.c. *Employee's Work*—Employee can be a new hire and need not have worked for the company previously as long as he is treaty national. 9 FAMe 402.9-7(C)(*l*). For a discussion of the nature of the employees' position with the company, *see in this section* ¶ 7 (p.1114), *infra*.

5.d. *Special Problems Relating to Embargoes*—Where the U.S. places an economic embargo or sanctions on a country, the country's E-1 privileges are often rendered inoperable. For example, U.S. sanctions against Yugoslavia in the 1990s resulted in the suspension of E-1 visas. 12 *AILA Monthly Mailing* 140–43 (Feb. 1993). Also, an embargo against Iran prohibits most, *but not all,* Iranian E-1s. Executive Orders 12957 (Mar. 15, 1995), 12959 (May 6, 1995), and 13059 (Aug. 19, 1997), 60 FR 14615 & 24757, 62 FR 44531; 31 CFR pt. 560. *Exporting* agricultural commodities, food, medicine, medical devices, informational material or aircraft parts of U.S. aircraft from the U.S. to Iran are permissible under the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, PL 111-195, 124 Stat. 1312 (July 1, 2010) and therefore an Iranian citizen presumably is not barred from E-1 status for exporting from the U.S. such commodities. Presidential Executive Order 13608 (May 1, 2012) bars both immigrant and nonimmigrant entry into the U.S. to anyone who violates the Iranian or Syrian trade embargo. 77 FR 26409-11 (May 3, 2012). Syrian E-2s are not barred and may be generally licensed under OFAC regulations. 79 FR 25414 (May 2, 2014).

6. ***E-2 Visas*** [INA §101(a)(15)(E)(ii), 8 USC §1101(a)(15)(E)(ii); 22 CFR §41.51, 9 FAMe 402.9-6]

6.a. Criteria for E-2s requires a determination whether the: (1) treaty exists; (2) individual/entity possess the nationality of the treaty country; (3) applicant has invested or is actively investing; (4) enterprise is operating commercial enterprise; (5) investment is substantial; (6) investment is not marginal; (7) applicant

will "develop and direct" the business; (8) applicant, if employee is an executive/supervisor or an essential employee; and (9) applicant tends to depart the U.S. in the future. 9 FAMe 402.9-6(A)

6.b. *Nationality of Investment Enterprise*—Same as E-I; 50% is sufficient (joint venture). 22 CFR §41.51(b)(6), 9 FAMe 402.9-4(B).

6.c. *Investment*—Has invested or is actively in the process of investing. 22 CFR §41.51(b)(1).

(1) Funds in employer's possession/control

(a) *Funds must be "at risk"*—9 FAMe 402.9-6(B)(c) (*e.g.,* must be unsecured loan or collateral for loan must be from personal assets). The capital must be subjected to partial or total loss if investment fortunes reverse. It must be "the investor's unsecured personal business capital or capital secured by personal assets." 8 CFR §214.2(e)(12); 22 CFR §41.51(b)(7). Mortgage debt or commercial loan secured by enterprise assets is not sufficient. 9 FAMe 402.9-6(B)(c)(1); 62 FR 41138 at 48142 (Sept. 12, 1997). A second mortgage on a home, unsecured or unencumbered loans or assets and loans on the person's personal signature are acceptable. 62 FR 41138 at 48142 (Sept. 12, 1997); 9 FAMe 402.9-6(B)(d) [personal funds, other unencumbered assets, a mortgage with the personal dwelling used as collateral]. Inheriting a business is not an investment, 9 FAMe 402.9-6(B)(b), although applicant may use inherited funds for an investment. *Id. See also* Letter, Weinig, Deputy Asst. Comm., Adjudications, CO 214e-C (Jan. 17, 1992), *reprinted in* 69 No. 13 *Interpreter Releases* 438 (Apr. 6, 1992). *But see Nice v. Turnage*, 752 F.2d 431 (9th Cir. 1985) [cannot simply invest a third party's (*e.g.,* parent/in-law) money]. The statute does not require that the source of the funds be outside the U.S. *Id.* 9 FAMe 402.9-6(B)(b).

(b) *Prospective Plans Insufficient—Matter of Chung*, 15 I&N Dec. 681 (RC 1976). Uncommitted funds in a bank account insufficient. 9 FAMe 402.9-6(B)(f); *Matter of Heitland*, 14 I&N Dec. 563 (BIA 1974). Applicant must have an irrevocable commitment to invest, such as a purchase or sale of a business with the funds held in escrow conditioned solely on the grant of the visa. 9 FAMe 402.9-6(B)(e). The applicant must be "close to the start of actual business operations, not simply in the stage of signing contracts (which may be broken) or scouting for suitable locations and property." 9 FAMe 402.9-6(B)(f). Prospective investment arrangements entailing no present commitment, will not suffice. *Id.* Applicant has burden of showing irrevocable **PAGE 1112** commitment of funds to the enterprise. 8 CFR §214.2(e)(12); 22 CFR §41.51(b)(7); 9 FAMe 402.9-6(B)(f). For example, in determining the value of the investment the "investor should have already purchased at least some of the necessary assets and thus be able to provide cost figures for additional assets needed to run the business. [A]n indication of the nature and extent of commitment to a business venture may be provided by invoices or contracts for substantial purchases of equipment and inventory; appraisals of the market value; accounting audits; and records required by various governmental authorities." 9 FAMe 402.9-6(D)(c)(3)

(c) *Escrowed Funds*—Placing funds in escrow to purchase business pending approval of E with legal mechanism that irrevocably commits funds but also protects investor if application is denied is permissible. 8 CFR §214.2(e)(12); 22 CFR §41.51(b)(7); 9 FAMe 402.9-6(B)(e).

(2) Funds cannot be obtained directly or indirectly through criminal activity. 8 CFR §214.2(e)(12). Criminal activity does *not* include activity which would be lawful under U.S. law. Thus, the violation of foreign laws restricting the exit of capital from the country would not be considered using funds that came from a criminal activity. 62 FR 48138 at 48142. (Sept. 12, 1997). Providing proof of legal source of funds is best practice.

(3) Valuation of Investment [9 FAMe 402.9-6(B)(g)-(i)]

(a) Rent paid on equipment or property is investment, but limited to funds devoted to item in any

month (unless rent paid in advance). *Matter of Shaw*, 15 I&N Dec. 794 (BIA 1976). Purchase of equipment/inventory counted. *Matter of Khan*, 16 I&N Dec. 138 (BIA 1977). 9 FAMe 402.9-6(B)(g)

(b) Transfer of goods and machinery so long as it is demonstrated they will be or are being put to use in the enterprise. 9 FAMe 402.9-6(B)(h). Fair market value should be established.

(c) Intangible or intellectual property may also be considered a capital investment. The fair market value should be determined and if not possible, the applicant may substitute the value of the current publishing or manufacturing contracts. If none exist, DOS will accept expert opinions on value. 9 FAMe 402.9-6(B)(i)

6.d. Commercial Enterprise

- Passive investment not allowed (*e.g.,* stocks, undeveloped land). 9 FAMe 402.9-6(C).
- Entrepreneurial. Land development as opposed to land investment. *Matter of Heitland*, *supra*.
- Nonprofit institutions (schools, associations) are *not* commercial enterprises. 62 FR 48138 at 48142 (Sept. 12, 1997); 22 CFR §41.51(b)(8); 9 FAMe 402.9-6(C).

6.e. Substantiality of Investment [INA §101(a)(45), 8 USC §1101(a)(45); 9 FAMe 402.9-6(D)]

(1) DOS uses relative/proportionality test: (i) the amount of qualifying funds invested weighed against the total cost of purchasing or creating the enterprise; (ii) the amount normally considered sufficient to ensure the investor's financial commitment to the successful operation of the enterprise; and (iii) a magnitude of investment to support the likelihood that the investor will successfully develop and direct the enterprise. 8 CFR §214.2(e)(14); 9 FAMe 402.9-6(D)(b); 22 CFR §41.51(b)(9).

(2) *Proportionality Test*—Must assess the percentage of the investment in relation to the cost of the business. If the investor invested 100% of the needed funds the investment is *per se* substantial. The lower the cost of the business the higher the percentage is required. Thus, investment of 100% in a small business of $100,00 or less would "automatically qualify." Similarly a $10 million dollar investment in a $100 million business would likely qualify given the magnitude of the investment. The lower the cost of the enterprise, the higher, proportionally, the investment must be to be considered substantial. 8 CFR §214.2(e)(14)(iii); 9 FAMe 402.9-6(D)(f) [suggesting that if total investment is $100,000 or less, E-2 investor should provide 100% of the investment]. The legacy INS's 50%+ rule has been abandoned. 62 FR 48138 at 48142 (Sept. 12, 1997). **PAGE 1113**

(3) Amount of Investment Determined By Nature of Business—DOS recognizes that the value (cost) of the business is dependent upon the nature of the enterprise and the cost of the business *per se* is not independently relevant or determinative of qualification for E-2 status, as long as all other requirements are met. 9 FAMe 402.9-6(D)(e) [recognizing that the cost to purchase an on-going commercial enterprise or to establish a service business, such as a consulting firm, may "be relatively low"]. DOS will look at the "amount necessary to establish a viable enterprise." *Matter of Walsh & Pollard*, 20 I&N Dec. 60 (BIA 1988) [British company set up U.S. subsidiary to fulfill its contractual obligations with GM. Investment was less than $50,000]. Airgram, DOS (Apr. 3, 1989), *reprinted in* 66 No. 13 *Interpreter Releases* 381, 387–92 (Apr. 3, 1989).

6.f. Cannot Be Marginal [9 FAMe 402.9-6(E); 8 CFR §214.2(e)(15); 22 CFR §41.51(b)(10)]

(1) Enterprise marginal if it does not have the present or *future* capacity to generate more than minimal living for investor and family. Projected future capacity should be realizable within 5 years, so applicant should provide a *5-year business plan*. 22 CFR §41.51(b)(10); 8 CFR §214.2(e)(15); 9 FAMe 402.9-6(E)

(2) Investment cannot be solely to earn a living for the investor and his family. *Lauvik v. INS*, 910 F.2d

658, 661–62 (9th Cir. 1990); *Kim v. District Director*, 586 F.2d 713 (9th Cir. 1978). Investor's employment as skilled or unskilled labor in business is unrelated to the marginality issue. 62 FR 48138 at 48143 (Sept. 12, 1997).

(3) Factors [Memo, Weinig, Assoc. Comm., Adjudications, CO 214e-C (June 14, 1985)]:

- Investment will expand job opportunities;
- Generate other sources of income;
- Investment will generate income substantially above what would be considered a living;
- Investor will not work simply as a skilled or unskilled worker.

(4) Where INS did not consider record evidence of other income, court reversed finding that investment was marginal. *Chung v. INS*, 662 F.Supp. 474 (W.D. Wash. 1987). *Matter of Kung,* 17 I&N Dec. 260 (Comm. 1978).Whether other income is still a factor in marginality is questionable with current wording of the regulations. 8 CFR §214.2(e)(15); 22 CFR §41.51(b)(10); 9 FAMe 402.9-6(E).

6.g. Develop and Direct [9 FAMe 402.9-6(F)]

(1) Must manage business and not compete directly in the market as skilled laborer. *Lauvik v. INS*, 910 F.2d 658, 661–62 (9th Cir. 1990) [reversing denial where applicant performed "some menial tasks"]. "Hands-on" management incidental to developing business is allowed. 62 FR 48138 at 48144 (Sept. 12, 1997).

(2) Has controlling interest in business. *Matter of Lee*, 15 I&N Dec. 187 (RC 1975). Control may be by negative veto and therefore 50% ownership may be sufficient to establish the "develop and direct" criteria so long as the E is not contractually precluded from taking action. 9 FAMe 402.9-6(F)(a), (b) [recognizing negative control but only in the context where there are two and no greater than two partners]. Control may be established by: (a) 50% ownership; (b) operational control through managerial position; or (c) other means. 8 CFR §214.2(e)(16), 22 CFR §41.51(b)(11). What constitutes control may vary depending on factors such as the structure of the enterprise. 9 FAMe 402.9-6(F)(f).

(3) Develop and direct only applies to principal investor, not employees. 62 FR 48138 at 48150; *Matter of Walsh & Pollard*, 20 I&N Dec. 60 (BIA 1988). 9 FAMe 402.9-6(F)(c); Visa Office response to Interrogatory 17, *digested in* 66 *Interpreter Releases* 369 (Apr. 3, 1989).

(4) In small corporation, stock ownership is generally indicia of control. However, majority ownership of stock is not enough where majority owner cedes managerial control over the enterprise. *U.S. v. Matsumaru,* 244 F.3d 1092, 1100–01 (9th Cir. 2001).

(5) In large corporation look to corporate/stock structure and corporate practice. 9 FAMe 402.9-6(F). Negative control of joint-venture qualifies. *Id.* **PAGE 1114**

7. ***Employees—***Employees of E-1/E-2 must have same nationality as treaty employer, 9 FAMe 402.9-7(A) *and* must be either:

7.a. Executives and Supervisors

8 CFR §214.2(e)(17); 9 FAMe 402.9-7(B); 22 CFR §§41.51(a)(11) and (b)(12)

(1) Position must be principally and primarily, as opposed to incidentally or collaterally, executive or supervisory.

(2) Duties must provide the employee ultimate control and responsibility for the enterprise's overall operation or a major component of it.

(a) DHS/DOS shall consider: (i) whether the executive position provides great authority to determine policy and direction; (ii) whether the supervisory position provides supervision for a significant portion of the operation and does not generally involve supervision over low-level employees; (iii) whether the applicant possesses executive/supervisory skills and experience; (iv) whether salary and title are commensurate with executive/supervisory position; (v) the relationship of the position to the organizational structure; (vi) the responsibility of the applicant for making discretionary decisions, setting policies, directing and managing business operations, and/or supervising other professional and supervisory personnel; and (vii) if the position requires performance of routine staff work or if it is only of an incidental nature.

7.b. Nonsupervisory Person with Special Qualifications Who Is An Essential Employee

8 CFR §214.2(e)(18); 9 FAMe 402.9-7(C); 22 CFR §§41.51(a)(12) and (b)(13); *See also Matter of Walsh & Pollard*, *supra*.

(1) In determining if employee is essential, the factors to consider are:

- The short or long term need for employee, *e.g.*, long term for product development; short term to train others
- The employee's degree or proven expertise in area of operations;
- The uniqueness of the specific skills;
- The function of the job to which the applicant is destined;
- The salary such special expertise can command; and
- The availability of U.S. workers.

9 FAMe 402.9-7(C)(f). *Matter of Nago*, 16 I&N Dec. 446, 447 (BIA 1978); *Matter of Udagawa*, 14 I&N Dec. 578, 582 (BIA 1974); 8 CFR §214.2(e)(18)(ii).

(2) Knowledge of a foreign language, culture, or country conditions, or previous employment do not by themselves meet the special qualifications requirement. Need to analyze essentiality in relationship to the enterprise. 8 CFR §214.2(e)(18)(i).

(3) Employee's skills do not have to be "unique" or "one of a kind," but rather, "indispensable to the success of the enterprise." 62 FR 48138 at 48144 (Sept. 12, 1997); 9 FAMe 402.9-7(C)(k) [in some cases, ordinarily skilled workers can qualify, and this almost always involves workers needed for start-up or training purposes].

(4) Whether essential skills are needed or available will vary during the life of an enterprise. Skills that may be needed to start an enterprise may not be necessary after the business is running smoothly. 8 CFR §214.2(e)(18)(ii); 22 CFR §§41.51(a)(12) and (b)(13); 9 FAMe 402.9-7(C)(a)-(d).

7.c. No Requirement of Previous Employment—No requirement for essential employee to have previous employment with the enterprise. 9 FAMe 402.9-7(C)(*l*).

7.d. For E-1/E-2 employee to qualify, the employer must hold treaty status if in U.S. *or be so classifiable* if not in the U.S. The employer may not be an LPR. 9 FAMe 402.9-7(A)(1); 62 FR 48138 at 48150 (Sept. 12, 1997); 22 CFR §§41.51(a)(2) and (b)(2). **PAGE 1115**

8. ***Procedures*** [8 CFR §214.2(e)(19)–(21)]

8.a. Filed on Form I-129 if seeking C/S in U.S. If filing at consular post, most posts use the DS-156E supplemental form in addition to the DS-160 visa application. Must provide supporting evidence of the investment or trade. The burden of proof is on the applicant. *Matter of Khan*, 16 I&N Dec. 138 (BIA 1977);

Matter of Shaw, 15 I&N Dec. 794 (BIA 1976). Approval of "E" status by USCIS is *not* determinative of subsequent visa application at the U.S. consulate which is required to make an independent determination of admissibility.

8.b. *Visa Reciprocity*—DOS reciprocity schedules determine the length of time the visa will be granted. Maximum is usually 5 years but Es are continuously renewable depending upon compliance.

8.c. Admission up to 2 years. 8 CFR §214.2(e)(19)(i). If E does not leave the U.S. during that time, must file I-129 to extend status before I-94 expires. 8 CFR §214.2(e)(20). The two year period may be truncated if the passport is not valid for the requested two year admission, but applicant can at least get up to 6 months beyond passport validity period. 8 CFR §214.2(e)(19)(iii).

8.d. Special qualification/essential employees responsible for start-up operations generally only given 2 years absent special circumstances. 8 CFR §214.2(e)(20)(ii).

8.e. Substantive and nonsubstantive changes in employer, 8 CFR §214.2(e)(8)(iii) and (iv).

(1) A substantive change requires filing a new I-129 with employer supplement. A change is substantive if there has been a fundamental change in the employer's basic characteristics such as a merger, acquisition, or sale where the applicant is employed.

(2) *Nonsubstantive change*—No I-129 necessary if there is no substantive or fundamental change in the E's employment that would affect eligibility, or if corporate changes occur which do not affect the previously approved employment relationship. 8 CFR §214.2(e)(8)(iv). Nonsubstantive changes include change in name of treaty company, where one treaty national owner is replaced by another, or in some mergers and acquisitions where there is no effect on the E's employment or relationship to the approved treaty activity. 62 FR 48138 at 48141 (Sept. 12, 1997).

(3) If employer is unsure about the effect of change, may seek USCIS advice by filing a completed I-129 with fee. 8 CFR §214.2(e)(8)(v).

(4) If there is a substantive change, a new *visa* may also be required.

8.f. *Employment by Subsidiary* [8 CFR §214.2(e)(8)(ii)]—May perform work for parent or subsidiary of employer enterprise without it being deemed substantive change of E status if: (a) subsidiary independently qualifies as a treaty organization at the time the E treaty status was determined; (b) the work requires an executive, supervisor or essential skill person; *and* (c) work is consistent with E status.

8.g. *Multiple Employees/Multiple Employers*—A person is not precluded from hiring multiple employees in E-2 status, 9 FAMe 402.9-6(G), but employment cannot be inconsistent with terms and conditions of E. 8 CFR §214.2(e)(8). Nor may it rely on a "job shop" to fulfill its employee needs. 9 FAMe 402.9-6(G)(d)-(f). If properly authorized nothing precludes an E-2 employee from holding an E-2 as an investor and working for another qualifying employer as an E-2. Letter, Lorr, Acting Chief, Business and Trade Branch, Benefits Division, INS, HQ 70/6.2.5-6 (1996), *reprinted in* 73 No. 37 *Interpreter Releases* 1290, 1308–10 (Sept. 30, 1996). An unauthorized change of employment to a new employer is a failure to maintain status. 8 CFR §214.2(e)(8)(vii).

8.h. *E-1/E-2 in Lieu of H-1B*—Notwithstanding *Matter of Walsh & Pollard*, the Service will not grant E-2 (essential employee) status to persons who are paid by job-shop to work at another company (that is U.S. owned). Letter, Lorr, Acting Chief, Benefits Division, INS, HQ 70/6.2.5-6 (Aug. 28, 1996), *reprinted in* 73 No. 37 *Interpreter Releases* 1290, 1311–14 (Sept. 30, 1996). *See* 9 FAMe 402.9-6(G)(d)-(f). **PAGE 1116**

8.i. E-1 generally must demonstrate that trade is already in existence at the time of the application. *Matter of Seto*, 11 I&N Dec. 290 (RC 1965). An exception is a showing of binding contracts calling for immediate trade. 9 FAMe 402.9-5(B)(d). An E-2 may have a startup business.

8.j. No E visas for Mexico/Canada if there is a labor dispute. 8 CFR §214.2(e)(22); 22 CFR §41.51(a)(13). A similar restriction also applies to nationals of Chile and Singapore, although DOS and USCIS regulations have not yet been amended to reflect this fact. INA §214(j)(2).

9. ***Families of E Visa Holders***

9.a. Spouse and children accompanying or following to join principal E. Nationality not important. 8 CFR §214.2(e)(4); 22 CFR §§41.51(a)(3) and (b)(3); 9 FAMe 402.9-9(a). Admitted for period of validity of principal's status. 8 CFR §214.2(e)(19)(ii).

9.b. Employment Authorization

(1) E-2 spouse can obtain EAD. INA §214(e)(6); 9 FAMe 402.9-9(d); Cable, DOS, 02-State-17328 (Jan. 29, 2002), AILA Doc. No. 02013032. File I-765 at the appropriate service center and provide: (a) proof of principal's current status including the petition approval notice if available; and (b) copies of I-94s of principal and spouse. EAD will be granted for period of admission and/or status not to exceed 2 years. Memo, Yates, Deputy Ex. Assoc. Comm., Field Operations, HQ 70/6.2.5, 6.2.12 (Feb. 22, 2002), AILA Doc. No. 02022832.

(2) Children are not employment authorized but can attend school without changing status. Inspector's Field Manual §§15.4(e), 15.5(d). Dependent children or sons and daughters of Taipei Economic and Cultural Representative Office (TECRO) employees may obtain EAD. 8 CFR §274a.12(c)(2).

10. ***Special Commonwealth of the Northern Mariana Islands (CNMI) E-2 Provision***

8 CFR §214.2(3)(23), 73 FR 79264-78 (Dec. 20, 2010)

Title VII of the Consolidated Natural Resources Act of 2008, PL 110-229, 122 Stat. 754, 853 (May 8, 2008) established a special E-2 classification for the CNMI until Jan. 18, 2013. 8 CFR §214.2(e)(23)(i). The CNMI E-2 is for persons who were admitted to CNMI as long-term investors before Nov. 28, 2009, continuously maintained residence in CNMI under the long-term investor status, are otherwise admissible, and maintain the investment. Persons in the CNMI may apply for an E-2 at a consulate outside of the CNMI. *See* USCIS, *Q&A: Filing Instructions for the E-2 CNMI Investor Classification*, AILA Doc. No. 10012866. USCIS has proposed regulations at 74 FR 46938 (Sept. 14, 2009). Includes retiree investors who invested in a residence under certain conditions, but these investors are not employment authorized. 8 CFR §§214.2(e)(23)(iii)(C), (xi)(B); 8 CFR §274a.12(b)(22). The applicant must file the petition beginning Jan. 18, 2011 but before Jan. 18, 2013 and extensions are available until Dec. 31, 2019. Update, USCIS, USCIS Issues Final Rule for CNMI-Only Investor Program (Dec. 17, 2010), AILA Doc. No. 10121734.

11. ***Employment Discrimination and Wrongful Termination—***Under traditional E treaties relating to friendship, commerce and navigation, hiring only foreign nationals for employment may be contrary to Title VII. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982); *Weeks v. Samsung Heavy Indus. Co., Inc.*, 126 F.3d 926 (7th Cir. 1997); *Wallace v. SMC Pneumatics Inc.*, 103 F.3d 1394 (7th Cir. 1997); *Papaila v. Uniden America Corp.*, 51 F.3d 54 (5th Cir. 1995); *McNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988); *Spiess v. C. Itoh & Co.*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982); *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984). In addition, an E employee may have a cause of action for wrongful termination. *Incalza v. Fendi N. Am., Inc.,* 479 F.3d 1005 (9th Cir. 2007) [upholding damages award where E-1 Italian was fired after company changed from Italian to French ownership because company could have requested H-1B or given him unpaid leave to resolve immigration status]. The FCN treaty may also not preempt state employment claims. *Ventress v. Japan Airlines,* 486 F.3d 1111, 1114–18 (9th Cir. 2007) [Japan-U.S. FCN does not preempt California whistleblower claim]. But a parent company retains the right to send employees to the U.S. based upon citizenship, and the treaty in that situation may prohibit a claim for national origin or race discrimination in regard to those employees. *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991); *Bennett v. Total Minatome Corp.,* 138 F.3d 1053, 1058–59 (5th Cir. 1998);

Schanfield v. Sojitz Corp. of Am., 663 F.Supp.2d 305, 330–33 (S.D.N.Y. 2009) **PAGE 1117** [dismissing race and national origin claims because the "treaty permits it" where plaintiff claimed he was prevented from ascending to higher management due to rotational employees coming from Japanese parent].

12. ***E Treaties and Expropriation—***E treaty may not provide a basis for a private cause of action for expropriation of a U.S. national's property. *McKesson Corp v. Islamic Republic of Iran,* 539 F.3d 485 (D.C. Cir. 2008) [Treaty of Amity with Iran, although self-executing, did not create private cause of action by U.S. corporation whose property was expropriated by Iran].

N. *E-3 Visas (Australian Special Occupation)*

INA §101(a)(15)(E)(iii), 8 USC §1101(a)(15)(E)(iii); PL 109-13, 119 Stat. 231, Div. B, Tit. V, §501(May 11, 2005); 22 CFR §41.51(c); AFM at 34.6; 9 FAMe 402.9-8

1. ***Generally***—E-3 category allows persons to enter the U.S. "solely to perform services in a specialty occupation in the United States if the alien is a national of the Commonwealth of Australia" and files a labor attestation under INA §212(t). Limited to 10,500 per fiscal year. Although the E-3 has characteristics similar to H-1Bs and H-1B1s, it is a separate visa with separate benefits and requirements. E-3 spouses may work and E-3 applicants are not required to pay the special fees required of H-1Bs. Aytes, Acting Assoc. Dir., Domestic Operations, USCIS, "Processing Guidelines for E-3 Australian Specialty Occupation Workers and Employment Authorization for E-3 Dependent Spouses," *published in* 83 No. 3 *Interpreter Releases* 121, 123–24, 140–45 (Jan. 17, 2006). However, like H-1Bs and H-1B1s, E-3s are required to provide an LCA.

2. ***Requirements***—To qualify for an E-3 visa, the applicant must [22 CFR §41.51(c)(1); 9 FAMe 402.9-8(c); AFM 34.6(a)]:

   2.a. Be a national of Australia;

   2.b. Demonstrate that he satisfies the "specialty occupation" requirements under INA §214(i)(1) and DHS regulations;

      (1) Submit a certified copy of a license or permission to practice if required, or evidence that he will meet the licensure requirements, if not required to immediately practice. AFM at 34.6(a)(2); 9 FAMe 402.9-8(H).

      (2) Does not include fashion models of distinguished merit and ability.

   2.c. Present an LCA in accordance with INA §212(t)(1). The E-3 LCA is the same as that for H-1B and H-1B1 applicants. 20 CFR §655.730; 73 FR 19944–50 (Apr. 11, 2008). *See in this part* ¶ C.2.i (p.1005), *supra*.

   2.d. Present academic or other credentials demonstrating he qualifies for the position under INA §214(i)(1); AFM 34.6(a)(4) [must show possession of U.S. bachelor's or higher degree (or its foreign equivalent].

   2.e. Present a job offer letter or other documentation from the employer establishing that he will be engaged in a specialty occupation and that he will be paid the higher of the actual or prevailing wage pursuant to INA §212(t)(1);

   2.f. Have a visa number available under INA §214(g)(11)(B); and

   2.g. Intend to depart the U.S. upon termination of E-3 status. 9 FAMe 402.9-8(G) [needs intent to depart but does not need to proceed to U.S. for a specific temporary period of time; may sell his or her residence and move all household effects and may be a beneficiary of an IV]

3. ***Application Process*** [AFM 34.6(b)]—Apply at consulate for E-3 visa, 9 FAMe 402.9-8(C)(i), or apply for C/S or E/S on I-129 petition at the VSC with the information required for eligibility, described above (¶ 2, *supra*).