E-2 - Treaty Investors

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I. Introduction

The Treaty Investor or E-2 category is a nonimmigrant classification typically limited to an initial authorized stay of one year for eligible participants, but frequently renewable for extended periods. The hallmarks of the E-2 category are a "substantial" qualifying investment in an active US business enterprise, a qualifying role of an individual worker in the enterprise as owner, executive, supervisor or "essential" employee and qualifying nationality of both the sponsoring employer and sponsored employee.

The great majority of cases are consular processed rather than change of status cases. The State Department processes approximately 15,000 visa applications *worldwide* for E-2 principals each year, of which only 10% by DOS report are initial filings. Accordingly, only about 1,500 first time E-2 visa filings occur each year. Of these over 50% traditionally are filed by Japanese nationals destined mostly for New York or California, leaving a balance of approximately 700 new E-2 visa applications each year for non-Japanese or those going to the other 48 states.

II. E-2 Treaty Investor distinguished from EB-5 Permanent Investor Program and from E-1 Treaty Trader Nonimmigrant Category

The E-2 Treaty Investor category should not be confused with the unrelated Permanent Immigrant Investor program, newly created under the Immigration Act of 1990, nor with the related but significantly different E-1

Treaty Trader category. The E-1 category often overlaps with E-2. The principal distinction is the special E-1 requirement of "substantial" ongoing trade between the US and the E-1 home country. The permanent investor program provides a pathway for certain investors who invest in excess of $500,000. US or $1,000,000. US in a new or reorganized US business **and** create at least 10 full-time jobs for US workers for a minimum of 2 years. There are many problems with this new "million dollar" investor category and for most qualified candidates, an experienced immigration lawyer will be able to identify several other more attractive immigration options.

III. Basic Eligibility Requirements for E-2 Status

Although the E-2 Treaty Investor category is essentially a creation of international treaty arrangements of the US, both the Department of State (DOS) and the Immigration and Naturalization Service (INS) regard statutory law as the touchstone of core eligibility for E-2 status.

The Immigration and Nationality Act ("INA"), 8 U.S.C. 1101, et seq., statutorily mandates the application and eligibility requirements for aliens seeking to obtain nonimmigrant visas generally. Section 221 (a) 8 U.S.C. 1201 (a) provides that a consular officer may issue a nonimmigrant visa to an alien who has made proper application.

Section 101 (a) (15) (E), of the INA, 8 U.S.C. 1101 (a) (15) (E), provides the following definition of a nonimmigrant E alien:

"(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him; (i) solely to carry on substantial trade, including trade in services or trade in which he is a national; or (ii) ***solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital.*** (Emphasis added.)

Department of State regulations pertaining to filing a nonimmigrant visa application are published at 22.C.F.R. 41.103. 22 C.F.R. 41.103 (b)(2), provides, "The consular officer may require the submission of additional necessary information or question an alien on any relevant matter whenever the consular officer believes that the information provided in Form OF-156 is inadequate to permit a determination of the alien's eligibility to receive a nonimmigrant visa."

Generally, consular officers everywhere will require *extensive* supplementary documentation as evidence of eligibility before issuing an initial E visa.

Department of State regulations pertaining to nonimmigrant visas under the INA are published at 22 C.F.R. Part 41. The regulations pertaining in particular to treaty trader and the treaty investor nonimmigrant visas are in 22 C.F.R. 41.51. Proposed amended regulations were published in Public Notice 1468, Notice of Proposed Rulemaking dated September 3, 1991. The OMB notice for the final rule was published in the Federal register on June 23, 1994. The Final Rule, is expected to be published soon. Parallel companion revisions of the INS regulations, closely modeled on the DOS rules are also expected to be published soon.

Three additional resources are very important for anyone preparing E-2 applications:

(1) The State Department's periodically updated Notes to Section 41.51 of Volume 9 of the Foreign Affairs Manual. These are commonly referred to as the E-visa "FAM Notes".

(2) The most recent, (as of this writing 5-23-94), version of the DOS Proposed Final Rule amending 22 C.F.R. Part 41.

(3) The BIA decision in the *Matter of Walsh and Pollard* Int. Dec. 3111 (BIA 1988).

IV. Treaties of Friendship, Commerce and Navigation (FCN's), Bilateral Investment Treaties (BIT's), and other Treaty or Statutory Bases of Nonimmigrant Investor Status (NAFTA, IMMACT 90)

E-2 beneficiaries are required to prove that they are nationals of a qualifying E-2 eligible country.

Most E-2 applicants owe their eligibility on this ground to provisions of a commercial Treaty negotiated between their home country and the United States, commonly referred to as a Treaty of Friendship, Commerce and Navigation or (FCN). These treaties span a period of over 175 years from 1815 to the present.

More recently the DOS has added more limited treaties such as Bilateral Investment Treaties (BIT's) and more comprehensive treaties such as the North American Free Trade Agreement (NAFTA) between the US, Canada and Mexico as vehicles for E-2 benefits.

Recently, some countries have also been accorded E-2 eligibility by statute, notably Australia and Sweden pursuant to the Immigration Act of 1990.

Although the applicable language of these treaties and statutory provisions varies somewhat from one country to another, in practice the consulates and INS tend to treat them as equivalent. Currently, nationals of more than 50 countries are eligible for E-2 visa consideration. *(A copy of the current list of eligible countries is attached to this article as Appendix A.)*

V. Issues Frequently Encountered in E-2 cases

A. What is a "substantial" investment?

Perhaps the most commonly-asked question related to E-2 visa eligibility is "how much is a 'substantial' investment?" There is not now, and there will not be in the near future, a bright line test for use as a guide to answering this question. (Assuming that the long-pending - 3 years in gestation - DOS Final Rule is published in its present form.) Amounts considered sufficient by some consular officers for some enterprises in some countries will continue to be rejected as inadequate by other posts evaluating similar investments from other countries. It was ever thus.

While no firm benchmark can be established, the author's own experience has been that in most countries for most applicants unencumbered cash investments in excess of $250,000 are usually considered "substantial" and total investments of less than $50,000 are often problematic. Nevertheless, these are truly case-by-case determinations and "atypical" decisions are typical of E-2 practice. Cases involving less than 51% ownership or control, *or* encumbrances, *or* contingencies, *or* non-cash capital require special care.

One common rule-of-thumb, the "proportionality test" is described by the DOS in its draft Final Rule as follows:

> *Substantial amount of capital* A substantial amount of capital constitutes that amount that is (i) substantial in the proportional sense, i.e., in relationship to the total cost of either purchasing an established enterprise or creating the type of enterprise under consideration; (ii) sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and (iii) of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise. Whether an amount of capital is substantial in the proportionality sense is understood in terms of an inverted sliding scale; i.e., the lower the total cost of the enterprise, the higher, proportionately, the investment must be to meet these criteria.

If in doubt as to the prospects in a particular case, consider consultation with an experienced colleague who has successfully handled initial E-2 projects before filing the case. Alternatively, if additional capital is readily available, you could advise the client of the risks and delay involved in a denied application and submit the application with the amount you think appropriate. Then if the case is denied solely on grounds of insufficient capital, you can just keep adding more capital until the case is approved.

B. "Non-marginality" requirement

The business must not be "marginal." In the words of the DOS draft Final Rule:

> "A marginal enterprise is an enterprise that does not have the present or future capacity to generate more than enough income to provide a minimal living for the treaty investor and his or her family."

Apparently, even very well-capitalized street corner flower sellers or shoe shine stands need not apply.

C. The "active commercial enterprise" requirement

The business must be a real, active operating business enterprise. Purely passive investments do not qualify. (i.e., putting a $100,000 down on a duplex or opening a brokerage account for purchase of a half-million dollar investment portfolio of blue-chip stocks doesn't do it.)

D. The "at risk" requirement

The substantial "invested" capital must be "at risk" in a legal liability sense, i.e., if the business fails the investor stands to lose the invested capital. In the words of the DOS draft rule:

> "Investment means the treaty investor's placing of capital, including funds and other assets, at risk in the commercial sense with the objective of generating a profit. The treaty investor must in possession of and have control over the capital invested or being invested. The capital must be subject to partial or total loss if investment fortunes reverse. Such investment capital must be the investor's unsecured personal business capital or capital secured by personal assets."

E. "Develop and Direct" requirement

The business or individual treaty investor qualifying as an owner must develop and direct the enterprise by controlling the enterprise through ownership of at least 50% of the business **or** by possessing operational control through a managerial position **or** other corporate device **or** by other means.

F. Qualifying Role in Enterprise - Owner, Manager, Executive or Essential Employee

To qualify for an E-2 visa, the applicant must function in a qualifying role in the enterprise. Ordinary skilled and unskilled workers need not apply. Qualifying roles include ownership (if actively involved in the operation of the business as noted above), employment as an executive, supervisor or "specially skilled worker." The draft DOS rule introduces the notion of "special skills" as a successor concept to the previous problematic "essential" skills employee." This may be a distinction without a difference and in the short term past practice is probably the best guide to defining who is an "essential employee."

The language in the draft Final Rule is instructive:

> *Executive or supervisory character* The executive or supervisory element of the employee's position must be a principal and primary function of the position and not an incidental or collateral function. Executive and/or supervisory duties grant the employee ultimate

control and responsibility for the enterprise's overall operation or a major component thereof.

(1) An executive position provides the employee great authority to determine policy of and direction for the enterprise.

(2) A position primarily of supervisory character grants the employee supervisory responsibility for a significant proportion of an enterprise's operations and does not generally involve the direct supervision of low-level employees.

Special qualifications Special qualifications are those skills and/or aptitudes that an employee in a lesser capacity brings to a position or role that are essential to the successful or efficient operation of the enterprise.

(1) The essential nature of the alien's skills to the employing firm is determined by assessing the degree of proven expertise of the alien in the area of operations involved, the uniqueness of the specific skill or aptitude, the length of experience and/or training with the firm, training or other experience necessary to perform effectively the projected duties, and the salary the special qualifications can command. The question of special skills and qualifications must be determined by assessing the circumstances on a case-by-case basis.

(2) A skill that is unique at one point may become commonplace at a later date. Skills required to start up an enterprise may no longer be essential after initial operations are complete and are running smoothly. Some skills are essential only in the short-term for the training of locally-hired employees. Long-term essentiality might, however, be established in connection with continuous activities in such areas as product improvement, quality control, or the provision of a service not generally available in the United States. Whether the special qualifications are essential will be assessed at the time of each visa application on a case-by-case basis.

G. Consular Processing vs. Change of Status

E status can be obtained through change of status or entry after consular processing. Most E-visa applications are initially filed at consular posts for the reason that most E applicants travel a lot. If an E status is obtained from the INS, the applicant has to in effect "reapply" for the E at the consulate on the next trip out of the US. A prior INS determination of E eligibility is not in any sense binding upon the consular post. *Note: Many consulates take their E visa adjudicative independence very seriously.*

If applying for the E-2 category as a change of status, Form I-129 is filed with supporting documentation at the appropriate INS Service Center.

H. Variations in Practices and Standards among Consular Posts

Wide variations in practice and adjudicative standards exist among consular posts in E visa matters. The divergences from post to post in the handling of third country nationals, level of documentation required and threshold amounts for what is considered "substantial" investment are legendary.

I. Problems of E-2 Dependent's Employment Authorization

Finally, a continuing unresolved problem for E-2 beneficiaries is the absence of employment authorization for E-2 dependents, who are also classified as E-2's. Unlike the E-2 principals, however, E-2 dependents do not even have permission to work for the E-2 sponsor. Although INS practice has been to not seek to enforce the departure of E-2 dependents who engage in unauthorized employment, the INS has stated that the usual consequences of ineligibility for adjustment of status will apply. Also, the employer of an E-2 dependent is not exempt from Employer Sanctions enforcement.

VI. Conclusion

For some entrepreneurial or business clients and certain of their key employees the E-2 category may be a good option. This is especially true for those clients who may be ineligible for Permanent Residence or the H or L categories, or who prefer not to use those categories for tax considerations or for other reasons.

However, in most cases an initial E application will be far more complex than an H-1 or L-1 for the same applicant. Therefore, E cases like other complex business immigration cases should be carefully screened for appropriateness before filing and if filed, carefully and thoroughly documented.

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9 FAM 402.9-10 TREATIES AND LAWS CONTAINING TRADER AND INVESTOR PROVISIONS IN EFFECT BETWEEN THE UNITED STATES AND OTHER COUNTRIES

(CT:VISA-185; 09-26-2016)

COUNTRY	CLASSIFICATION	ENTERED INTO FORCE
Albania	E-2	01/04/1998
Argentina	E-1	12/20/1854
Argentina	E-2	12/20/1854
Armenia	E-2	03/29/1996
Australia	E-1	12/16/1991
Australia	E-2	12/27/1991
Australia[12]	E-3	09/02/2005
Austria	E-1	05/27/1931
Austria	E-2	05/27/1931
Azerbaijan	E-2	08/02/2001
Bahrain	E-2	05/30/2001
Bangladesh	E-2	07/25/1989
Belgium	E-1	10/03/1963
Belgium	E-2	10/03/1963
Bolivia	E-1	11/09/1862
Bolivia[13]	E-2	06/06/2001
Bosnia & Herzegovina[11]	E-1	11/15/1982
Bosnia & Herzegovina[11]	E-2	11/15/1982
Brunei	E-1	07/11/1853
Bulgaria	E-2	06/02/1954
Cameroon	E-2	04/06/1989
Canada	E-1	01/01/1994
Canada	E-2	01/01/1994
Chile	E-1	01/01/2004
Chile	E-2	01/01/2004
China (Taiwan)[1]	E-1	11/30/1948
China (Taiwan)[1]	E-2	11/30/1948
Colombia	E-1	06/10/1948
Colombia	E-2	06/10/1948
Congo (Brazzaville)	E-2	08/13/1994
Congo (Kinshasa)	E-2	07/28/1989
Costa Rica	E-1	05/26/1852
Costa Rica	E-2	05/26/1852
Croatia[11]	E-1	11/15/1982
Croatia[11]	E-2	11/15/1982
Czech Republic[2]	E-2	01/01/1993

Denmark[3]	E-1	07/30/1961
Denmark	E-2	12/10/2008
Ecuador	E-2	05/11/1997
Egypt	E-2	06/27/1992
Estonia	E-1	05/22/1926
Estonia	E-2	02/16/1997
Ethiopia	E-1	10/08/1953
Ethiopia	E-2	10/08/1953
Finland	E-1	08/10/1934
Finland	E-2	12/01/1992
France[4]	E-1	12/21/1960
France[4]	E-2	12/21/1960
Georgia	E-2	08/17/1997
Germany	E-1	07/14/1956
Germany	E-2	07/14/1956
Greece	E-1	10/13/1954
Grenada	E-2	03/03/1989
Honduras	E-1	07/19/1928
Honduras	E-2	07/19/1928
Iran	E-1	06/16/1957
Iran	E-2	06/16/1957
Ireland	E-1	09/14/1950
Ireland	E-2	11/18/1992
Israel	E-1	04/03/1954
Italy	E-1	07/26/1949
Italy	E-2	07/26/1949
Jamaica	E-2	03/07/1997
Japan[5]	E-1	10/30/1953
Japan[5]	E-2	10/30/1953
Jordan	E-1	12/17/2001
Jordan	E-2	12/17/2001
Kazakhstan	E-2	01/12/1994
Korea (South)	E-1	11/07/1957
Korea (South)	E-2	11/07/1957
Kosovo[11]	E-1	11/15/1882
Kosovo[11]	E-2	11/15/1882
Kyrgyzstan	E-2	01/12/1994
Latvia	E-1	07/25/1928
Latvia	E-2	12/26/1996
Liberia	E-1	11/21/1939
Liberia	E-2	11/21/1939
Lithuania	E-2	11/22/2001
Luxembourg	E-1	03/28/1963

Luxembourg	E-2	03/28/1963
Macedonia[11]	E-1	11/15/1982
Macedonia[11]	E-2	11/15/1982
Mexico	E-1	01/01/1994
Mexico	E-2	01/01/1994
Moldova	E-2	11/25/1994
Mongolia	E-2	01/01/1997
Montenegro[11]	E-1	11/15/1882
Montenegro[11]	E-2	11/15/1882
Morocco	E-2	05/29/1991
Netherlands[6]	E-1	12/05/1957
Netherlands[6]	E-2	12/05/1957
Norway[7]	E-1	01/18/1928
Norway[7]	E-2	01/18/1928
Oman	E-1	06/11/1960
Oman	E-2	06/11/1960
Pakistan	E-1	02/12/1961
Pakistan	E-2	02/12/1961
Panama	E-2	05/30/1991
Paraguay	E-1	03/07/1860
Paraguay	E-2	03/07/1860
Philippines	E-1	09/06/1955
Philippines	E-2	09/06/1955
Poland	E-1	08/06/1994
Poland	E-2	08/06/1994
Romania	E-2	01/15/1994
Senegal	E-2	10/25/1990
Serbia[11]	E-1	11/15/1882
Serbia[11]	E-2	11/15/1882
Singapore	E-1	01/01/2004
Singapore	E-2	01/01/2004
Slovak Rep[2]	E-2	01/01/1993
Slovenia[11]	E-1	11/15/1982
Slovenia[11]	E-2	11/15/1982
Spain[8]	E-1	04/14/1903
Spain[8]	E-2	04/14/1903
Sri Lanka	E-2	05/01/1993
Suriname[9]	E-1	02/10/1963
Suriname[9]	E-2	02/10/1963
Sweden	E-1	02/20/1992
Sweden	E-2	02/20/1992
Switzerland	E-1	11/08/1855
Switzerland	E-2	11/08/1855

Thailand	E-1	06/08/1968
Thailand	E-2	06/08/1968
Togo	E-1	02/05/1967
Togo	E-2	02/05/1967
Trinidad & Tobago	E-2	12/26/1996
Tunisia	E-2	02/07/1993
Turkey	E-1	02/15/1933
Turkey	E-2	05/18/1990
Ukraine	E-2	11/16/1996
United Kingdom[10]	E-1	07/03/1815
United Kingdom[10]	E-2	07/03/1815
Yugoslavia[11]	E-1	11/15/1882
Yugoslavia[11]	E-2	11/15/1882

FOOTNOTES

[1]China (Taiwan). Pursuant to Section 6 of the Taiwan Relations Act, Public Law 96-8, 93 Stat, 14, this agreement, which was concluded with the Taiwan authorities prior to January 1, 1979, is administered on a nongovernmental basis by the American Institute in Taiwan, a nonprofit District of Columbia corporation, and constitutes neither recognition of the Taiwan authorities nor the continuation of any official relationship with Taiwan.

[2]Czech Republic and Slovak Republic. The Treaty with the Czech and Slovak Federal Republics entered into force on December 19, 1992; it entered into force for the Czech Republic and Slovak Republic as separate states on January 1, 1993.

[3]Denmark. The Convention of 1826 does not apply to the Faroe Islands of Greenland. The Treaty, which entered into force on July 30, 1961, does not apply to Greenland.

[4]France. The Treaty, which entered into force on December 21, 1960, applies to the departments of Martinique, Guadeloupe, French Guiana, and Reunion.

[5]Japan. The Treaty, which entered into force on October 30, 1953, was made applicable to the Bonin Islands on June 26, 1968, and to the Ryukyu Islands on May 15, 1972.

[6]Netherlands. The Treaty, which entered into force on December 5, 1957, is applicable to Aruba and Netherlands Antilles.

[7]Norway. The Treaty, which entered into force on September 13, 1932, does not apply to Svalbard (Spitzbergen and certain lesser islands).

[8]Spain. The Treaty, which entered into force on April 14, 1903, is applicable to all territories.

[9]Suriname. The Treaty with the Netherlands, which entered into force December 5, 1957, was made applicable to Suriname on February 10, 1963.

[10]United Kingdom. The Convention, which entered into force on July 3, 1815, applies only to British territory in Europe (the British Isles (except the Republic of Ireland), the Channel Islands, and Gibraltar) and to "inhabitants" of such territory. This term, as used in the Convention, means "one who resides actually and permanently in a given place, and has his domicile there." Also, in order to qualify for treaty trader or treaty investor status under this treaty, the alien must be a national of the United Kingdom. Individuals having the nationality of members

of the Commonwealth other than the United Kingdom do not qualify for treaty trader or treaty investor status under this treaty.

[11]Yugoslavia. The U.S. view is that the Socialist Federal Republic of Yugoslavia (SFRY) has dissolved and that the successors that formerly made up the SFRY - Bosnia and Herzegovina, Croatia, Kosovo, the Former Yugoslav Republic of Macedonia, Montenegro, Serbia, and Slovenia, continue to be bound by the treaty in force with the SFRY and the time of dissolution.

[12]The E-3 visa is for nationals of the Commonwealth of Australia who wish to enter the United States to perform services in a "specialty occupation." The term "specialty occupation" means an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. The definition is the same as the Immigration and Nationality Act definition of an H-1B specialty occupation.

13Bolivia. Bolivian nationals with qualifying investments in place in the United States by June 10, 2012 continue to be entitled to E-2 classification until June 10, 2022. The only nationals of Bolivia (other than those qualifying for derivative status based on a familial relationship to an E-2 principal alien) who may qualify for E-2 visas at this time are those applicants who are coming to the United States to engage in E-2 activity in furtherance of covered investments established or acquired prior to June 10, 2012.