Creating Jobs and Strengthening the U.S. Economy Through the E Visa

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As a result of the increased scrutiny of L-1 (Intra-Company Transferee) visas at USCIS, immigration attorneys and clients are looking at alternative visas to allow foreign skilled and talented entrepreneurs to come to the U.S. One of those visa options is the nonimmigrant E visa, which provides foreign nationals the opportunity to live, work, study and potentially gain legal permanent residency in the United States. There are three types of nonimmigrant E visas available: E-1 (for Treaty Trader); E-2 (for Investors); and E-3 (for certain Specialty Occupation Professionals from Australia). This article will focus on the E-2 visa, which is the most commonly used.

Advantages of the E-2 Visa

The E-2 visa is particularly useful for business owners, managers and essential skilled employees who need to remain in the U.S. for extended periods of time in furtherance of the investment. The E status has the potential of indefinite renewals as long as the business is real, operating and generating enough income to support more than the investor and his/her family. The E classification is one of the best alternatives for a foreign national to remain working in the U.S. when he/she has exhausted the allowed time in an H and/or L status. The E status can also be used by non-degree workers and for self-petitioning. Additionally, the spouse of the E investor can apply to obtain work authorization.

Challenges of the E-2 Visa Application

Managing the client's expectations throughout the process of interpreting the discretionary threshold requirements to determine whether the E-2 visa is the right visa for the foreign national and his/her family can be challenging. The increased scrutiny and inconsistencies of adjudications by consular posts around the world, coupled with the irrevocable expenses incurred by the client, can cause much stress to the applicant and his/her family.

Persons Eligible

The Immigration and Nationality Act[1] ("INA") provides nonimmigrant E-2 classification for a national of a country with which the United States maintains an appropriate treaty of commerce and navigation and who is coming to the U.S. to develop and direct the operations of an enterprise in which the national or the petitioning company has invested, or is actively in the process of investing, a substantial amount of capital.

The First Step in E-2 Visa Planning

In order for a foreign investor or company to apply for an E-2 visa, the U.S. must have the requisite treaty with the applicant's country of citizenship. Without the existence of the applicable treaty, no E-2 visa application is possible. For example, the U.S. does not have treaties that support an E-2 visa with any of the BRIC countries.

A list of the treaty countries that support E visa applications can be found in the Foreign Affairs Manual ("FAM")[2] and at the Department of State website.[3] Treaties were first negotiated with Costa Rica (1852), Argentina (1854), Switzerland (1855) and Yugoslavia (1882). After World War II, a flurry of negotiation ensued between the U.S. and other nations to promote trade, and a significant number of the treaties currently supporting E visa applications came into existence. The countries most recently added to the list were Chile and Singapore in 2004.

To qualify, the individual investor or employee and the E business must have the nationality of the same treaty country.[4] The person's nationality is determined by the authorities of the country of which the person claims nationality. The business' nationality is determined by the nationality of the majority owners of the business. When the treaty business is at least 50% owned by nationals of the same treaty country, the nationality requirement is satisfied.

Problems can arise when the business is less than 50% owned by nationals of the treaty country. In those situations, a careful analysis of the nationalities involved must be undertaken, and the attorney should consider creating a trust and/or restructuring the business to satisfy the nationality requirement.

A business applying for E status may have only one qualifying nationality. If the owner is a dual national (other than a U.S. citizen), he/she must chose which nationality to use, taking into consideration that the E employees of the company must possess the nationality of the qualifying country and hold themselves as nationals of that country. Nationals of a treaty country who are also U.S. citizens or U.S. legal permanent residents are not considered nationals of the treaty country and cannot be counted toward determining the 50% ownership for purposes of E-2 eligibility.

Additional Requirements

An E-2 Visa applicant must also show that:

- He/she has invested or is actively in the process of investing funds that are at risk or subject to loss if the business fails.[5] Loans secured with assets of the investment are not allowed. Uncommitted funds in a bank account or similar security are not considered an investment. It is permissible to place some of the investment funds committed to the enterprise in an escrow account pending visa adjudication.
- The enterprise is real and operational.[6] Speculative or idle investments do not qualify.
- The investment is substantial and proportional to the cost of the enterprise. The percentage of the amount invested in a low-cost enterprise is expected to be higher than the percentage of amount invested in a high-cost enterprise.[7]
- The investment is not marginal.[8] It must generate sufficient present or future income to provide a minimal living for more than the investor and his/her family.
- The investor is coming to the U.S. to develop and direct the enterprise.[9]
- If the applicant is not the principal investor, he/she must be employed in a supervisory, executive or highly specialized capacity. Ordinary skilled and unskilled workers do not qualify.
- The applicant intends to depart the U.S. when the E status terminates.

The Foreign Affairs Manual ("FAM") notations for an E visa are very helpful. Lawyers should be sure to consult 9 FAM 41.51 and its notes on the E visa requirements when preparing the application.

Irrevocably Committed Funds

The treaty investor must show evidence that the funds invested are at risk and show how the funds were obtained. To show source of investment, the investor can present, among other things: a personal statement of net worth prepared by a CPA; transactions showing payment of sold property or business (including proof of property ownership); bank statements crediting proceeds; lines of credits backed by personal property (not the investment business); and audited financial statements. The source of the funds must be funds in which personal assets are involved. A loan cannot be secured against the business assets at issue but can be secured against other personal assets of the investor.

One of the most stressful requirements for the E visa applicant is that the investment capital must be subject to partial or total loss if the investment is not successful. Presenting evidence that a portion of the required funds are being held in escrow pending visa approval can prove that the capital is irrevocably committed to the enterprise.

At the time of the application, the investor must already be operating the business, or be nearing the start of operations, not simply in the stage of signing contracts. The requirement that the business be real and operating makes it difficult for a start-up business to qualify for an E. In the case of a start-up, the foreign national may want to consider hiring a manager or assistant to operate the business while the E visa is being processed. Documents demonstrating that the business is real and operating include an occupational license; a business license/permit; utility/telephone bills; business transaction records; advertising/business brochures; and bank statements, among other things.

Threshold for Substantial Investment

Neither the regulations nor FAM provide a bright-line minimum investment that qualifies as substantial. The applicant must show an investment sufficient to indicate the investor's financial commitment to the enterprise and to support the successful development of the business.

The determination of whether the investment is substantial is based on the "proportionality test." The test is a comparison between the amount of funds invested and the cost of the business (i.e., its purchase price at fair market value). Unverified and unaudited financial statements are typically insufficient to establish the nature and status of an enterprise. In the case of a new business, the funds invested can include the purchase price and the amount spent—such as the cost of equipment, government documentation and licenses, insurance and rent—on goods and assets necessary to run the business. The value of goods transferred to the U.S. may also be considered, as long as the goods will be used for the benefit of the business. In general, the lower the cost of the enterprise, the higher, proportionately, the investment must be to meet the substantiality threshold.

The FAM provides an example of how the proportionality test works. For example, an investment of 100 % or a higher percentage of the cost of the business ordinarily would automatically qualify for a small business that costs $100,000 or less. At the other extreme, an investment of $10 million in a business that costs $100 million would likely qualify, based on the sheer magnitude of the investment itself.[10] In practice, clients who purchase a business for $65,000 to $75,000 and invest 110% to 120% of the cost of the business—including additional assets needed to start the business—can generally qualify for an E visa.

Proof

Under the current economic climate, failure to offer sufficient proof that the business can create and support jobs for U.S. workers is one of the most common causes of E visa denials.[11] A marginal enterprise is one that does not have the present or future capacity to generate more than enough income to provide a minimal living for the investor and his/her family. In order to show that an *existing* business is not marginal, the investor can present: U.S. corporate income tax returns; audited financial statements; annual reports; payroll registers; W-2 and W-4 tax forms; or cancelled checks for salaries paid and/or corresponding payroll accounts. If the foreign investor is purchasing an existing business that has posted a net operating

loss for many years, he/she will have great difficulty overcoming marginality.

In order to show that a *new* business is not marginal, the investor should submit a reliable and well-developed business plan outlining how the business will grow and support U.S. jobs over a five-year period. Financial projections should be backed up by resources and information supporting how the projections were developed.

An investor cannot show independent sources of income to support his/her family to demonstrate that the business is not marginal. Although not as persuasive as creating direct jobs for U.S. workers, the applicant should indicate that the business will also create and support indirect job expansion by providing commerce for other local businesses such as printers, couriers, banks, utility companies, etc.

Length of Stay

An E visa is typically issued for five years; however, the I-94, providing the length of stay allowed in the U.S., is given for two years at a time. In practice, a foreign national can depart the U.S. before the end of the five-year visa expiration and obtain a new I-94 providing an additional two years of authorized stay, which has the effect making the initial visa good for seven years. Extensions of stay may be applied for indefinitely, as long as the enterprise is viable and the applicant continues to meet the visa qualifications.

Spouse and Children

A spouse, as well as unmarried children under the age of twenty-one, regardless of nationality, are allowed to enter the U.S. with the principal E visa holder and obtain E visa status. A significant benefit of the E visa is that the spouse of the principal E visa holder is able to seek employment authorization from the Department of Homeland Security; dependent children are not allowed to apply for work authorization but can attend school and travel. The spouse cannot begin working until he/she receives the employment authorization document ("EAD"). It typically takes ninety days for the EAD to be processed.

Where to Apply

Whether to apply for E status in the U.S. or at the consular post is an important strategic determination that must be made after a full analysis of the facts of the case and the requirements of the applicable consular post. Although a foreign national in the U.S. can apply for a change of status to E status, in many cases it is best if the foreign national applies for an E visa at the consulate abroad because the general consensus is that the Department of State has primary jurisdiction for E visa issuance, and E classification approval by USCIS is not binding on the consular post. Unlike many other nonimmigrant visas, E petition approval by USCIS is not required in order to apply for a new E visa at a consular post. Visa applicants who obtain E visa classification in the U.S. will need to submit a new E visa application to the consulate for de novo adjudication.

Factors to consider in deciding whether to apply in the U.S. or abroad include: consular processing will typically take longer than USCIS using premium process adjudication; consular posts have very specific formatting and presentation requirements that might be difficult to fulfill during the initial filing; and traveling needs. The applicant might be best served by applying at the consular post if he/she needs to travel abroad soon and/or frequently.

Consular Processing Tips

When preparing the consulate application, it is critical to check the consulate's website on a regular basis. Each consulate has specific requirements and filing procedures and formats that must be followed and that change on a regular basis without notice. There are more than seventy-five U.S. embassies and consulates around the world, each with its own particular requirements. Websites for each embassy, consular post, and diplomatic mission can be accessed at http://usembassy.state.gov. It is also very helpful to consult with an attorney who is familiar with the processing requirements of the post, or consult with embassy personnel, and to provide an email address on the DS-156E application to facilitate communication with the consulate visa unit.

For example, to process an E visa in Vancouver, the applicant schedules an interview six weeks out and then submits the E package to the consulate shortly after scheduling the interview. The package is received, logged and reviewed. If the consular officer requires additional information, he/she will request it prior to the interview.

To process in London, which is one of the toughest consulates for E visa issuance, the applicant submits the specific documents for the E-2 visa. The documents must be provided in a hard binder with appropriate tabs. The application is reviewed for completeness by a member of the E Visa Unit and if information is missing, the case is returned to the applicant or legal representative for correction. Once the application is deemed complete, the case is placed in a queue for processing based on the date of receipt, which is the date the case was found to be documentarily complete.

Denial or Request for Additional Evidence

Consular officers indicate that a disorganized and incomplete presentation is one of the main reasons for receiving a denial or a request for additional evidence. Officers note that the majority of these cases are submitted by foreign nationals who, in order to save money, do not hire an immigration attorney. In the end, this could jeopardize their chances of obtaining a visa. Other reasons for a denial or a request for additional evidence include:

- failure of the applicant to be prepared for the interview;
- failure to overcome the marginality threshold;
- failure to complete the DS-160 application accurately;
- failure to upload the required photo and/or failure to bring an additional photo to the interview; and
- failure to submit supporting documents, such as marriage and birth certificates, for dependents.

If the Application is Denied

The best way to avoid a denial is to submit the best possible petition/application with objective supporting evidence. In the case of a consular application for an E visa, you should prepare the client for the interview by going over the forms, the job title and requirements, the requirements of the visa classification and the intent to depart, and any other weakness in the application and/or applicant's history. Instruct the client to obtain the name of the interviewing officer and to pay attention to the interview questions and answers. If the visa is denied, the applicant should, immediately after the interview, write the questions and his/her answers; obtain a written denial, ideally with an explanation of the basis for the denial; and obtain the name of the interviewing officer's supervisor.

If you have a strong case and believe there has been an adjudication error or misunderstanding, you should prepare a rebuttal brief with supporting evidence and submit it to the interviewing officer for reconsideration as soon as possible. If you cannot obtain a positive adjudication from the first-line officer, consider sending a request for supervisory review to the Chief of the Nonimmigrant Visa Unit and/or the Visa Section Chief. Unfortunately, there is no right to appeal consular decisions, and at times the best approach is to let some time lapse and resubmit the application with much stronger evidence.

Legal Permanent Resident Status

The E-2 visa is classified as a nonimmigrant visa whereby the investor must have intent to return to his/her home country once the business obligations have concluded. Not surprisingly, after living and working in the U.S. and spending significant time, money and effort on successful businesses, many foreign nationals want to stay here. There is, however, no clear path from E status to legal permanent residency.

Recently, with the development of more favorable EB-5 (Immigrant Investor Program) rules, E visa holders whose businesses can show financial investments in the range of $500,000 to $1 million and the creation of at least ten new jobs for U.S. workers can consider applying for EB-5 status which could lead to permanent residency. Like the E-2 visa, the qualifying investment for the EB-5 status must benefit the U.S. economy through the provision of goods and services to U.S. markets, and the applicant must be involved in the operation of the investment enterprise.

Other options include:

- *Employment-based sponsorship*: U.S. businesses sponsor the foreign national or his/her spouse for a legal permanent residency.
- *Family-based sponsorship:* the E visa holder marries a U.S. citizen or lawful permanent resident or has other immediate relatives (parent, sibling, or child) who can provide sponsorship.

Intent to Depart the U.S. Upon Termination of Status

An E visa holder should proceed with caution when applying for legal permanent residency and should consult with an immigration attorney as it could jeopardize his/her E visa renewal based on the presumption of immigrant intent and lack of intent to depart.

The Immigration and Nationality Act, regulations and USCIS recognize a quasi "dual intent" for E visa holders. The Department of State also recognizes a limited "dual intent" but much more narrowly.

E visa holders must show, primarily via a written statement, an unequivocal intent to depart the U.S. upon termination of their status and are not required to maintain a residence or significant ties abroad.[12] USCIS should not deny an extension of stay or change of status to E classification solely on the basis of an approved permanent labor certification or filed or approved immigrant petition.

After filing for adjustment of status, the nonimmigrant intent becomes harder to justify. There is, however, a USCIS memorandum that supports the approval of an extension of E status after an adjustment of status has been filed for the investor. If the investor needs to travel abroad, however, he/she should travel on advanced parole rather than the E visa. Moreover, the E visa renewal at a consular post is unlikely to be approved.

Conclusion

Despite its challenges, we are fortunate to have the E visa as an option for foreign nationals who want to come to the U.S. to live and work, helping to create jobs and strengthen our economy. I am hopeful that in the future our immigration laws will also include a more direct path for foreign entrepreneurs to obtain permanent residency in the U.S. so that they can continue to contribute to our country.■


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Endnotes:

1 INA sec. 101(a)(15)(E).
2 9 FAM 41.51, Exhibit 1.
3 http://travel.state.gov/visa.
4 9 FAM 41.51 N2, N3.1, N.3.3; 22 C.F.R. sec. 41.51.
5 9 FAM 41.51 N8.
6 9 FAM 41.51 N9.
7 9 FAM 41.51 N10.
8 9 FAM 41.51 N11.
9 9 FAM 41.31 N12.
10 9 FAM 41.51 N10.4.
11 22 C.F.R. § 41.51(b)(1)(i)); 9 FAM 41.51 N11.
12 22 C.F.R. § 41.51; 9 FAM 41.51 N15.