E-Treaty Treaty Visas Provide Long Term Immigration Options for Investors and Traders and Promote International Trade and Commerce

By: Cliff Rosenthal and Bernard P. Wolfsdorf © Wolfsdorf Immigration Law Group 2007

Nonimmigrant work visa options are becoming increasingly limited. With the reduction of the H-1B non-master's degree visa quota from 195,000 to 65,000 visas, the H-1B visa has become extremely difficult to obtain and most of those available were snapped up in the first 48 hours of the program. This problem has been exacerbated with the other key temporary worker visa option, the L-1 intra-company transfer visa, receiving heightened scrutiny resulting in record denials, particularly for small/medium-sized corporations[1]. With H-1B visas largely unavailable and L-1 visas so restrictively adjudicated, E visas are often the only viable nonimmigrant visa option for many foreign nationals. The E visa is also one of the only nonimmigrant visa options that permit a foreign national to engage in self-employment. The E visa option is available to principal investors and managers, as well as essential employees.[2] Most E visas are issued for an initial period of five years[3], but they can be renewed indefinitely, often in five-year increments. Another advantage of the E visa is that the principal applicant's spouse is permitted unrestricted employment authorization[4]. Moreover, since the foundation of the E visa lies in bilateral treaties

[1] Officials from the California Service Center reported at a Southern California AILA chapter meeting on August 31, 2004, that approximately 30 percent of all H-1B change-of-status petitions are denied and about 25 percent of L-1A petitions are denied. While we do not have current statistics, it appears that small companies continue to receive lengthy requests for additional information and are often rejected.

[2] Note that the E-3 category that permits applicants to enter the United States to perform a specialty occupation only applies to Australian citizens.

[3] Practice pointer: given that E visas are treaty-based and therefore negotiated, it is always imperative to check visa reciprocity for each country. For instance, Australians can obtain E –1/E-2 visas for four years. Polish citizens can only obtain E visas for one year.

[4] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§ *et seq.*) (INA) §214(e)(6). The E visa has a number of distinct advantages over the H-1B and L-1 visa categories. In addition to being subject to a limited annual quota, the H-1B category, with limited exceptions, provides classification for an initial three-year period, which can be extended for a further three years before the alien reaches his or her the limit on authorized stay. The foreign national must also hold a degree or equivalent in his field of

with potential diplomatic consequences for impeding international trade, it appears that this classification may be more resilient to recent attempts to restrict specialized workers from entering the U.S.[5]

Sources of Law

The statutory provision for the E nonimmigrant visa classification is found at INA 101(a)(15)(E).[6] Both the Department of State (DOS) and the U.S. Citizenship and Immigration Services (USCIS) have published regulations, 8 CFR §214.2(e) and 22 CFR §41.51, pertaining to this classification. USCIS regulations are now substantially consistent with DOS positions, and USCIS has traditionally deferred to DOS on complex E-visa interpretation issues[7]. Hence, the DOS-published *Foreign Affairs Manual* (FAM), 9 FAM 41.51 and notes, is widely

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specialty, the position must require a bachelor's degree as its minimum entry requirement, and the employer must comply with rigorous labor department regulations. The H-1B visa does not permit spouses derivative work authorization. The L-1 visa can be approved initially for three years (but only for one year where there is a new office) with a maximum of seven years of authorized stay for managers/executives and five years for specialized knowledge beneficiaries. To qualify, the alien must also have been employed continuously abroad for at least one of the past three years preceding admission by a parent, branch, affiliate or subsidiary of the U.S. company. There are also strict criteria to determine qualifying corporate relationships, as well as whether applicants are bona fide managers/executives or have the requisite specialized knowledge.

[5] It is perhaps for this reason that consular officers are required to adjudicate E applications within the "spirit" of economic enhancement and facilitation that underpins the economic treaties that form their foundation. Accordingly, the Department of State (DOS) has instructed consular officers to "exercise a great amount of judgment and discretion" in applying regulatory requirements, and should be "flexible, fair, and uniform" in adjudications. 9 U.S. Dep't of State, *Foreign Affairs Manual* (FAM), Note 1 to 22 CFR §41.51. We see no such comity with respect to any other visa category in the present restrictive, adjudicating environment.

[6] 8 USC §1101(a)(15)(E).

[7] E.g*., Kim v District Director*, 586 F.2d 713 (9th Cir. 1978). This deference is probably well founded, given that E visas are based on international treaties, which are traditionally the sphere of DOS. *See* Klasko, "Proposed E-visa Regulations: No Treaty Between the INS and the State Department," 68 *Interpreter Releases* 1417 (Oct. 11, 1991), for further discussion. Note further that the comity between DOS and USCIS has not always existed. For instance, in the seminal case of *Matter of Walsh and Pollard*, 20 I&N Dec. 60 (BIA 1988), legacy INS challenged DOS's granting of an E-2 visa, by virtues of its contrary interpretation of the substantiality and essential skills requirements. This resulted in two different proposed regulations published in 1991, which could potentially have created different standards for consular processing than for extensions and change of status petitions. INS proposed regulations were published in 56 Fed. Reg. 42952-57 (Aug. 301, 1991), while the DOS proposed regulations were published in 56 Fed. Reg. 43565-71 (Sept. 3, 1991).

considered the most comprehensive and authoritative government publication outlining the requirements for E visas.

Requirements for E-1/E-2 Visas

There are three categories of E visas, namely the E-1, E-2 and E-3 classifications.[8] The E-1 is the treaty trader provision, which permits a person to enter the United States to conduct substantial trade with a treaty country of which he or she is a foreign national.[9] The E-2 is the treaty investor provision that allows a person who has invested, or is in the process of investing, a substantial capital amount in a bona fide U.S. enterprise to enter the United States to develop and direct his or investment.[10] While the E-1 and E-2 share many requirements[11], they are nevertheless distinct visa categories, each with their own unique criteria to be established.

Treaty Requirement

The distinctive nature of the E visa is its source in a treaty of friendship, commerce and navigation (FCN) or equivalent[12] between the United States and the country of the foreign

[8] INA §101(a)(15)(E), 8 USC §1101(a)(15)(e).
[9] *Id.*
[10] *Id.*
[11] As the criteria for the E-3 classification is fundamentally distinct from the E-1 and E-2, it will be outlined separately below.
[12] Although it has been many years since new FCN treaties have been concluded, it has been held that Bilateral Investment Treaties (BITS), also known as Treaties Concerning the Reciprocal Encouragement and Protection of Investments, are equivalent to FCN treaties. 9 FAM §41.51, Note 3. Free Trade Agreements (FTA), such as the North American Free Trade Agreement (NAFTA), are not treaties under U.S. law. They require legislation to enable nationals of the signatory countries to qualify for E classification. Furthermore, treaty countries include foreign states (e.g. Australia) that have been accorded treaty visa privileges by specific legislation. 22 CFR §41.51(a)(5) and (b) (5); 8 CFR §214.2(e)(6).

national. Accordingly, both E-1 and E-2 classifications require the existence of such a treaty as a prerequisite for visa qualification.[13]

In existence for well over 150 years[14], FCN treaties have generally been concluded to encourage American investment and trade in foreign countries, as well as facilitate foreign investment and trade in America. This is based on the recognition that in order for any foreign investment to flourish, it is imperative that the investors develop and direct the investment with the aid of its own, carefully selected managers and executives. The theory additionally follows that foreign specialists should also be permitted to provide their critical services in essential positions to ensure the investment's commercial success further. This issue was particularly pertinent in many post World War II treaties that were negotiated in a period where host countries attempted to create jobs for their countrymen by requiring foreign investors to employ a certain percentage of the local labor force.[15]

Not every country has concluded qualifying treaties with the United States. In addition, some countries have concluded treaties that only provide for E-1 classification, but not E-2

[13] 9 FAM §41.51, Note 3; 22 CFR §41.51(a)(5) and (b) (5); 8 CFR §214.2(e)(6).
[14] The oldest U.S. treaty currently in existence is with Colombia, which came into force in 1848.
[15] The legislative history of FCN treaties was examined in *Weeks v Samsung Heavy Industries Co., Inc.* 126 F.3d. 926 (7th Cir. 1997); *MacNamara v Korean Airlines*, 863 F.2d. 1135 (3d Cir. 1988); and *Wickes v Olympic Airways*, 745 F.2d. 363 (6th Cir. 1984). In *MacNamara*, the court stated regarding the treaty with South Korea that "the provision was necessary for the limited purpose of securing to foreign investors the freedom to place its own citizens in key management positions, thus facilitating the operational success in the host country." 863 F.2d at 1144. In *Wickes*, the court stated in relation to the same treaty that the legislative history of post-war treaties suggests that both parties deemed the right to utilize the services of their own nationals in managerial, technical, and confidential capacities to be critical." 745 F.2d at 368.

classification, and vice versa[16]. It is also essential to note that treaties or their equivalents use general language to trigger the application of the E visa classification.[17]

Nationality

For both E-1 and E-2 visa classifications, the treaty trader/investor must possess the nationality of the treaty country.[18] If the applicant is an individual, his nationality is determined by the laws of the foreign state to which he claims nationality. If the applicant is a business, its nationality is traced to the majority nationality of its ultimate owners.[19] At least 50% of the corporation's stock must be owned by treaty nationals.[20] However, stock owned by U.S. legal permanent residents is excluded in determining the nationality of the enterprise. Spouses and dependents need not be nationals of the treaty country to receive derivative status.[21]

If a foreign national has citizenship of two treaty countries, he or she is required to elect which nationality the enterprise will hold for E-visa purposes by documenting himself or herself

[16] BITS normally provide for E-2 classification only, while FTAs usually have both components. For a full list of qualifying treaty countries ordered by E-1/E-2 categories, see 9 FAM §41.51, Exhibit 1.
[17] *But* see treaty concluded with the United Kingdom, which has important specific provisions. In this regard, U.K. citizens must be domiciled in the United Kingdom in order to be granted a visa there. Note though that the USCIS routinely approves E change of status applications, regardless of domicile. It is also important to note that hiring/firing E employees may potentially violate employment discrimination laws pursuant to Title VII. In this regard, federal courts will look at the particular provision of the treaty in question as well as the history and objectives of the particular treaty. See *Weeks v Samsung Heavy Industries Co., Inc.* 126 F.3d. 926 (7th Cir. 1997); *MacNamara v Korean Airlines*, 863 F.2d. 1135 (3d Cir. 1988); and *Wickes v Olympic Airways*, 745 F.2d. 363 (6th Cir. 1984). In these cases, it was held that the U.S. treaties with South Korea and Japan did not violate Title VII, because "discrimination in favor of foreign executives given special status by virtue of a treaty and its implementing regulations is not equivalent to discrimination on the basis of national origin". *Fortino*, 950 F.2d at 392.
[18] 9 FAM §41.51, Note 2 and 3; 22 CFR §41.51(a)(6) and (b)(6); 8 CFR §214.2(e)(7).
[19] Place of incorporation is irrelevant, but where corporate stock is sold exclusively on a stock exchange in the country of incorporation, it is presumed that the country of incorporation is the nationality of the corporation. 9 FAM §44.51 Note 3.2.
[20] 9 FAM §41.51, Note 3.1.
[21] 22 CFR §41.51, Note 17; 22 CFR §41.51(a)(3) and (b)(3); 8 C.F.R. 214.2(e)(4).

accordingly.[22] However, if an applicant is applying for a change of status to E classification, he or she must use the nationality under which he or she was admitted to the United States.[23] If a two party joint venture is equally owned by nationals of two different treaty countries, the enterprise holds both nationalities.[24]

Intention to Depart

Both E-1 and E-2 visa categories require the intent of the applicant to depart the United States after such status terminates.[25] Nevertheless, he or she need not intend to be in the United States for a specific temporary period, nor is he or she required to maintain a foreign residence that he does not intend to abandon.[26]

According to DOS, the foreign national's mere statement of an unequivocal intent to leave following the termination of his or her E status is usually sufficient to satisfy the intent to depart requirement[27]. Nevertheless, if there are objective indicators evidencing intent to remain permanently in the United States, consular officers are justified in inquiring into the true intent of

[22] 9 FAM §41.51 Note 3.3. If one of these nationalities is American, he or she may not qualify for E-visa classification nor may his share count toward 50 percent ownership of the corporation.
[23] *Matter of Ognibene*, 18 I.&N. Dec. 2947 (Reg. Comm'r 1983). This is issue is particularly pertinent, when only one of the applicants nationalities are with a country that has a qualifying treaty. In that case, the applicant will *not* be permitted change status to E-2 and must consular process the visa.
[24] 9 FAM §41.51 Note 3.3. This represents a very important strategy consideration, when forming E corporations, since a 50/50 owned company would permit the transfer of employees from more than one country.
[25] 9 FAM §41.51, Note 15; 8§ CFR §214.2(e)(5).
[26] 9 FAM §41.51, Note 15.
[27] *Id.*

the applicant.[28] Applicants may still establish the intent to depart if they are beneficiaries of approved or pending immigrant visa petitions.[29]

On the other hand, USCIS recognizes the doctrine of dual intent for E applications, and neither an initial application, change of status, nor extension of stay can be denied solely on the basis of an approved or pending immigrant visa petition or labor certification application.[30] Jacquelyn A. Bednarz, then Chief of Nonimmigrant Branch for Adjudications, succinctly outlined the application of the doctrine of dual intent to E visas, stating:

> [b]ased on the absence in the statute of the phrase "having a residence in a foreign country which he has no intent of abandoning," which appears for many other nonimmigrant categories, a treaty alien's desire to see permanent residence at some future date should not deprive him or her of remaining in nonimmigrant status. In practice, the concept of dual intent has been applicable to aliens granted E classification for a long time and has enabled extensions of stay indefinitely.[31]

Specific E-1 Requirements

E-1 classification requires substantial trade that is principally between the United States and the treaty country.[32]

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[28] *Id.*
[29] *Id.*
[30] 8 CFR §214.2(e)(5).
[31] Letter from Jacqueline A. Bednarz, Chief Nonimmigrant Branch Adjudications to Milton Andrews (Oct. 1, 1993).
[32] 9 FAM §41.51, Note 1.1; 22 CFR §41.51(a)(1); 8 CFR 214.2(e)(1)(i).

The first requirement is the presence of trade, which is defined as the existing international exchange of items of trade for consideration between the United States and the treaty country.[33] 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 services.[34] Title to the trade item must pass from one treaty party to the other.[35] In addition, trade must be in existence at the time the applicant applies for the E visa, unless there are successfully negotiated contracts that bind the parties and call for immediate exchange of items of trade.[36] Lastly, conditions in the treaty country must be taken into account, which may affect the alien's ability to carry on trade.[37]

Second, trade must be substantial, which is defined as an amount of trade sufficient to ensure a continuous flow of international trade items between the U.S. and the treaty country.[38] Although the monetary value of trade is a relevant factor, it is the volume of transactions, which is the primary focus of the requirement.[39] While no minimum number of transactions is required, the

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[33] 9 FAM §41.51, Note 4; 22 CFR §41.51(a)(7); 8 CFR §214.2(e)(9).
[34] 9 FAM §41.51, Note 4.5; 22 CFR §41.51(a)(8); 8 CFR §214.2(e)(9).
[35] 9 FAM §41.51, Note 4.2.
[36] 9 FAM §41.51, Note 4.4; 22 CFR §41.51(a)(7); 8 CFR §214.2(e)(9). This nevertheless does not conform to the commercial reality as start-up export/import companies typically require the physical presence of the treaty trader prior to the existence of trade. *See* Klasko, 68 *Interpreter Releases* 1417 (Oct. 11, 1991).
[37] 22 CFR §41.51(a)(1); 8 CFR §214.2(e)(1)(i). For instance, the embargo against Iran prohibits E-1 visas for Iranians despite the existence of a treaty. Nevertheless, E-2 visas are granted, unless the applicant enters the United States to work as an agent, employee or contractor of the government or other Iranian business or organization. "Iran Sanctions and Visa Eligibility," 98 State 128375 (July 8, 1999), *posted on* AILA InfoNet at Doc. No. 99071991 (July 19, 1999).
[38] 9 FAM §41.51, Note 6a; 22 CFR §41.51(a)(9); 8 §CFR 214.2(e)(10).
[39] 9 FAM §41.51, Note 6a.

regulations enunciate that numerous transactions are contemplated.[40] A single transaction can never be substantial.[41] Officers are instructed not to summarily exclude smaller businesses based on this requirement, and income sufficient to support the trader and his or her family derived from numerous international trade is considered a favorable factor in establishing substantiality.[42]

Third, trade must be principally between the United States and the treaty country[43]. To satisfy this requirement, more that 50 percent of the total volume of trade must be between the two countries.[44]

Where an E business enterprise may qualify for both the E-1 and E-2 classifications, it is recommended that an applicant endeavor to qualify under the alternative E-2 classification, if possible, as substantial trade principally conducted with the treaty country is subject to change and discontinuance over time. This may affect the applicant's continued eligibility for E-1 classification in the future.

Specific E-2 Requirements

E-2 classification requires the investor to have invested or to be in the process of investing a substantial amount of capital in a bona fide enterprise in the United States as distinct from a

[40] *Id.*
[41] 8 CFR §214.2(e)(10).
[42] 9 FAM §41.51, Note 6b.
[43] 9 FAM §41.51, Note 7; 22 CFR §41.51(a)(10); 8 CFR §214.2(e)(11).
[44] *Id.* Note that one looks at the trade conducted by the legal entity seeking E-1 eligibility. Therefore, a subsidiary only has to demonstrate that more than 50 percent of its trade is between the United States and the treaty country.

relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living.[45] Additionally, the investor must be seeking entry to develop and direct the enterprise.[46]

First, there must be a qualifying investment, which connotes placing capital assets at risk to earn a financial return.[47] The applicant must show possession and control over the assets, which may be acquired by any legitimate means, including gifts.[48] In addition to monetary funds, the contribution of any asset may constitute an investment, including amounts spent on equipment, inventory, goods and services; intangible property, such as patents[49]; and payments for leases and rent.[50] However, inheritance of a business is not considered an investment.[51] The concept of at risk requires the invested capital to be subject to partial or total loss, should the investment fail.[52] Therefore, assets acquired by debt do not qualify, unless they are secured by the personal

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On the other hand, a branch office, which is not a separate legal entity from its foreign owner, would require the entire international organization to demonstrate the principal trade requirement. 9 FAM §41.51, Note 7.1.

[45] 9 FAM §41.51, Note 1.2; 22 CFR §41.51(b)(i); 8 CFR §214.2(e)(2).

[46] *Id.*

[47] 9 FAM §41.51, Note 8; 22 CFR §41.51(b)(7); 8 CFR §214.2(e)(12).

[48] 9 FAM §41.51, Note 8.1-1. In *Nice v Turnage*, 752 F.2d 431 (9th Cir. 1985), it was held that a foreign national could not qualify as a treaty investor by investing the funds of a third person. Nevertheless, such foreign national could qualify as an E-2 employee, if he or she independently meets such requirements. *See also Matter of Csonka*, 17 I&N Dec. 254 (BIA 1978) (stating that an E-2 applicant must invest his or her own capital).

[49] 9 FAM §41.51, Note 8.2-3. In today's complex society, almost anything may be considered intangible property. For instance, a pending patent or conditional contract may be professionally valued and discounted to take into account its pending/conditional nature. These evaluations are used increasingly in many industries, including the high tech industry, and are considered assets in accordance with their discounted value. Although in theory there appears no reason to regard patents, but not pending patents as assets, it is likely that officers will regard pending patents as too speculative.

[50] 9 FAM §41.51, Note 8.2-1. This is limited to amounts usually devoted to such an item in a given month (including any deposit). For example, the first month's rent may be added to the investment. *See Matter of Shaw*, 17 I&N Dec. 177 (BIA July 1976). Market values of leases are usually ignored, unless paid in advance.

[51] *But see* letter from Lawrence J. Weinig, Deputy Asst. Comm. for Adjudications to Marc M. Yelnick (Jan. 17, 1992) (stating this is permitted). It is submitted that disregarding inherited businesses gives unwarranted attention to form over substance, given that the heir could sell the assets of the business and then immediately reinvest them into the very same business. Similar concerns pertain to a business that applies for E-2 classification after operating for a number of years, where the investor possesses significant retained earnings. In this case, it would also appear that the applicant would have to liquidate the retained earnings and reinvest them back into the business.

[52] 9 FAM §41.51, Note 8.1-2; 22 CFR §41.51(b)(7); 8 CFR §214.2(e)(12).

assets of the investor.[53] This requirement also connotes that assets be irrevocably committed to the investment. Therefore, prospective arrangements or placing uncommitted funds in a bank account are insufficient.[54] Furthermore, the sale of a business conditioned on the investor acquiring an E-2 visa is generally considered revocable, unless funds are placed in escrow or other mechanisms are in place to ensure that solely the denial of the E visa will trigger the sale's cancellation.[55]

Although provision is made for the investor to be "in the process" of investing, the investor must reach the stage, where assets have already been irrevocably committed to the investment and the business is close to the start of actual operations.[56] As with the E-1 classification, there is no E-2 classification to seek opportunities of investment.[57]

The second requirement is that the investment be in a bone fide enterprise, which is defined to be a real, active and operational commercial undertaking for profit.[58] This excludes nonprofit

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[53] *Id.* Therefore, funds secured by the assets of the new business itself are not considered at risk. However, if the treaty investor is itself a corporation or other independent business entity, it is submitted that it is sufficient that its own assets are at risk in acquiring the debt of the E-2 business enterprise.

[54] 9 FAM § 41.51, Note 8.1-3. Placing a reasonable amount of cash in a business bank account to be used for routine business operations may be counted towards the investment. *See also Matter of Khan*, 16 I&N Dec. 138 (BIA 1977).

[55] 9 FAM §41.51, Note 8.1-3; 22 CFR §41.51(b)(7); 8 CFR §214.2(e)(12). This encapsulates DOS's response to the quintessential question facing practitioners: how much capital must an investor place at risk without any guarantee of obtaining E classification? While DOS is adamant that the investment be almost entirely completed, this does not conform to the commercial reality that investors need more certainty that they will be authorized to manage their investment.

[56] *Id.*

[57] However, foreign nationals may qualify for a B-1 visa to seek out business opportunities, as long as they do not perform productive labor or actively participate in the management of the business prior to securing E-2 status. 9 FAM §41.41, Note 6.7.

[58] 9 FAM §41.51, Note 9; 22 CFR §41.51(b)(9); 8 CFR §214.2(e)(13).

organizations, paper corporations and idle speculative investments held only for their appreciation in value.[59] Enterprises holding stocks or land for appreciation are therefore considered passive and are not included.[60]

Third, the investment must be substantial.[61] With no specific minimum investment amount required, substantiality is determined by the "proportionality" test.[62] This requires a proportional relationship between the amount invested by the investor himself or herself and the cost of purchasing or creating the particular business.[63] Generally, the lower the cost of establishing the business, the higher, proportionally, the actual investment by the investor must be to qualify as substantial.[64] DOS suggests that for investments in a small business that cost $100,000 or less to establish, 100 percent of the investment should be invested by the applicant; while an investment in excess of $10 million will qualify based on the sheer magnitude of the investment, regardless of the startup cost of the business.[65] In order to weed out risky investments, the investment must also be of a magnitude sufficient to ensure the applicant's financial commitment to its successful operation, as well as the likelihood that he will successfully develop and direct the enterprise.[66]

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[59] 9 FAM §41.51, Note 9; 22 CFR §41.51(b)(8); 8 CFR §214.2(e)(13).
[60] DOS has confirmed that the management of multiple residential or commercial properties is an active investment. However, if they require little oversight, the investor may not be able to demonstrate that his or purpose in entering the United States is primarily to develop and direct the enterprise. Additionally, if the property is purchased pursuant to a substantial mortgage, an investor may not be able to qualify under the proportionality test. "DOS Answers to AILA Questions (10/02/2002)," *posted on* AILA InfoNet at Doc. No. 02100340 (Oct. 3, 2002).
[61] 9 FAM §41.51, Note 10; 22 CFR §41.51(b)(9); 8 CFR.§214.2(e)(14).
[62] 9 FAM §41.51, Note 10.4.
[63] *Id.*
[64] *Id.*
[65] *Id.* For additional ratios, *see* the U.S. Consulate of Melbourne website at http://melbourne.usconsulate.gov/consular/visatrader.html
[66] 9 FAM §41.51, Note 10.5; 22 CFR §41.51(b)(9); 8 CFR.§214.2(e)(14).

Fourth, the investment must not be marginal in the sense that it would only provide enough income to support the applicant and his family.[67] In order to prevent a marginality finding, DOS requires satisfaction of a two-part test.[68] First, look at the foreign national's income from the investment: if it exceeds what is necessary to support himself or herself, and his or her family, the investment is not marginal. If not, one can look at other factors, particularly the present and future capacity of the enterprise to make a significant economic contribution, such as expanding employment for U.S. residents.[69] If the applicant seeks to establish a future capacity, it should be realizable within five years.[70]

The final requirement is that the investor develops and directs the enterprise, which requires him to demonstrate a controlling interest.[71] Generally, ownership of 50 percent of the enterprise is sufficient, provided all management rights and responsibilities are retained by the investor.[72] However, where there is less than 50 percent ownership, the controlling interest may still be

[67] 9 FAM §41.51, Note 11; 22 CFR §41.51(b)(10); 8 CFR.§214.2(e)(15).
[68] *Id*.
[69] *Id.* While DOS recognizes recourse to "other factors," USCIS regulations make no mention of such a test. In contrast, these regulations categorically require the existence of a significant economic contribution, if the first part of the test is not met. 8 CFR §214.2(e)(15). This difference should be considered when filing for change-of-status and extension petitions, which may be adjudicated on a different standard than for applications that are consular processed. Additionally, there has been a shift of focus from the individual and his or her assets to the enterprise itself and its ability to provide a genuine return on an investment as opposed to providing employment for the foreign national, when assessing marginality.
[70] 9 FAM §41.51, Note 11; 22 CFR §41.51(b)(10); 8 CFR.§214.2(e)(15).
[71] 9 FAM §41.51, Note 12; 22 CFR §41.51(b)(11); 8 CFR §214.2(e)(16).
[72] *Id. See U.S. v Matsumaru*, 244 F.3d. 1092 (9th Circ. 2001), which held that "[I]f an investor has no management control over the enterprise, the investor's constant physical presence in the United States would be unnecessary . . . a majority owner who contractually cedes all managerial control to another loses the ability to "develop and direct" the enterprise." *See also Matter of Kung,* 17 I&N 260 (BIA 1978), which evaluated the totality of circumstances in determining a restrictive franchise agreement satisfied the control requirement.

established by evidencing de facto managerial control.[73] Where there is no majority ownership or de facto control, an investor may qualify as a treaty employee.

Employees of E Treaty Traders/Investors

Identical rules apply to employees whether in the E-1 or E-2 category[74]. The first requirements relate to the employer, which must hold the nationality of the treaty country and must be maintaining E status, or would be so classifiable, if abroad.[75] Second, all E employees must hold the nationality of the principal treaty trader/investor.[76] Third, only employees in executive/ supervisory or essential skills positions qualify.[77] To qualify as an executive/supervisory employee, the position must be principally and primarily executive or supervisory, such that the employee will have ultimate control and responsibility for the enterprise's overall operation or a major component thereof.[78] For employees to qualify under the essential skills category, they must be specialists with special qualifications that are essential to the successful or efficient operation of the enterprise.[79] Ordinary workers are generally excluded from this category, [80]

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[73] 9 FAM §41.51, Note 12-4.
[74] 9 FAM §41.51, Note 14; 22 CFR §41.51(a)(11) and (12) and (b)(12) and (13); 8 CFR §214.2(e)(17) and (18).
[75] *Id.* If a corporation is the owner of the E enterprise, at least 50 percent of the shares must be owned by individuals with the nationality of the treaty country (note that stock owned by legal permanent residents is not counted). Similarly, more than 50 percent of the enterprise must be owned by persons maintaining E status or must be so classifiable, if abroad.
[76] *Id.* However, in a 50/50 joint venture between two parties each possessing a different E treaty nationality, employees from either country may be employed in E status (9 FAM §41.51, Note 3.3).
[77] *Id.*
[78] *Id.* In applying this regulation, officers typically examine the duties of the employee. In one recent federal case, the following critique of this approach was made: "[t]he suggested approach of fragmenting the responsibilities of a "chosen" executive and second-guessing whether they are sufficiently "executive" is inappropriate. The focus must be on the overall responsibility of the "chosen" executive. In a situation of this kind, if a foreign business decides that the responsibilities of the individual replaced are such that they require the attention of a foreign national "executive", this is sufficient," *MacNamara*, 863 F. 2d at 1142.
[79] *Id.*
[80] 9 FAM §41.51, Note 14.3-1. The reason for this was explained in *Matter of Udagawa*, `4 I&N Dec. 579, 581 (BIA 1974), which stated "these job positions can be readily held by American workers without placing in jeopardy a United States investment made by a foreign firm."

unless their essentiality can be proved.[81] While it is unnecessary to prove that U.S. workers are unavailable, this is one of the factors considered in determining essentiality or special qualifications.[82] Moreover, the petitioner bears the burden of establishing the length of time that the worker will be needed.[83] The passage of time may diminish the essentiality of any position.

The issue of whether the so-called "job shop" is permitted under E classification has been hotly debated following the seminal decision in *Matter of Walsh and Pollard*, 20 I&N Dec. 60 (BIA 1988).[84] Although the issue was never directly addressed in *Walsh and Pollard*, DOS is adamant that job shops are not impliedly authorized by the decision, because the particular transaction in this case was for a "project-oriented commodity as contrasted to the filling of employment positions."[85] Based on these dicta, it would appear that officers are required to make a factual inquiry as to whether the E employment is legitimately for the U.S. treaty enterprise or whether it is in essence employment for the non-treaty company. Factors in this determination include the intended length of the project/service, time spent at the non-treaty company, length of employment with the E-2 company, source of remuneration, and the substantiality and marginality of the E investment.

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[81] Factors proving essentiality included the need for start-up or training purposes or the business is expanding into a new field.
[82] 9 FAM §41.51, Note 14.3-2c.
[83] 9 FAM §41.51, Note 14.3-1.
[84]Usually defined as an enterprise that provides workers to other enterprises for employment. *Pollard* involved two employees of IAD, who were sent to the United States pursuant to their employer's contract with GM to provide them with experienced automotive designers to redesign a line of GM cars. The designers reported for work to a GM subsidiary, but were paid by IAD in terms of the contract. There was also testimony that both applicants were offered work with IAD on their return. In order to facilitate contracts between themselves and GM, IAD additionally established a U.S. corporation, which would also assist in managing relocations to the United States. 20 I&N Dec. 60 (BIA 1988).

Basic Procedures and Principles

The most common way of applying for E classification is consular processing.[86] Unlike H-1 and most L-1 visas, E visas are applied for directly at a U.S. consulate without the prior approval of an E-2 application from USCIS. Consular officers will always adjudicate E visas de novo, regardless of any approved change of status or extension of stay previously filed with the USCIS.[87] In addition to the standard forms and other standard visa requirements, applicants must submit the DS-156E along with substantial, supporting documentation. Most consulates require the submission of the supporting documentation for pre-clearance prior to the interview, and processing times for pre-clearance vary from approximately 4 to 12 weeks. At present, there is still no uniform consular practice with regard to obtaining E visas; therefore, practitioners should become familiar with each consulate's individual modus operandi. With regard to the validity period of visas issued, check the reciprocity schedule at http://travel.state.gov/visa/reciprocityweb/index.htm as E visas can range from two to five years. In practice, consular officers have been known to limit visa validity length, if the applicant barely meets the E-1/E-2 requirements.[88] With the discontinuance of the Visa Office reissuance program, visas may only be reissued by application to a U.S. consular post. While this generally means an applicant must return to his or her home country, certain consulates in Mexico and the Caribbean are reported to be accepting such applications as third country nationals (TCN),

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[85] 9 FAM 41.51 N13.1b.
[86] Canadians are required to obtain E visas as an exception to the general rule that Canadians are visa exempt.
[87] Unlike H-1 and L-1 petitions (fraud or patently incorrect USCIS adjudication aside), a prior E change of status or extension of stay approval is not disparities of the merits of the case for visa issuance. In fact, even with such approval, it may be prudent for practitioners to advise clients against international travel, if the foreign national is required to obtain a visa stamp from a particularly strict consular post.
[88] Because E visas are primarily adjudicated by DOS, consular officers possess extremely wide discretion in visa issuance. Note that some posts dislike start-up corporations, while others frown upon investments less than a certain

particularly in a renewal context. As long as an applicant continues to qualify as a treaty trader/investor, visas may be reissued indefinitely[89].

On arrival in the United States, E-visa holders are granted entry for two years, regardless of the length of the E visa issued[90]. The easiest way to extend one's stay beyond the two years is to depart the United States and then reenter, as each entry will result in another two-year period of authorized E status.[91]

Alternatively, one can apply for an extension of stay for two years with either the California or Vermont Service Centers[92]. The same rule applies for change of status and change of employer petitions. All extension of stay, change of status and change of employer petitions are filed with Form I-129 and E supplement.

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minimum value. For instance, many negative reports have come out of the London Consulate that express a concern with individuals establishing businesses to obtain E visas to essentially retire on the coast of Florida.

[89] Examples of change in circumstances that may prevent visa renewals (or extensions of stay) include the investment becoming passive or marginal, as well as a change in the percentage ownership by treaty country nationals. For employees, renewal may also be prevented by the granting of permanent residence to the principal E treaty trader/investor.

[90] 8 CFR §214.2(e)(19). In practice, the two-year admission is granted even if the E visa is valid for less than 30 days at the time of admission.

[91] This option is only valid until the expiry of the E visa upon which the alien will be required to apply for a new visa abroad or extend his or her stay. Note further that trips under 30 days to Canada or Mexico have been held by CBP officers not to be meaningful exits from the United States and therefore do not trigger an additional two years of E classification on return to the United States.

[92] This may be a preferred strategy, where potential visa applicants hold the nationality of countries whose citizens could trigger lengthy background security checks. The obvious disadvantage is that the foreign national may never be able to travel internationally.

Spouses of E-visa holders are authorized to work unrestrictedly.[93] Spouses may obtain an employment authorization document (EAD) by filing Form I-765.[94] Although children of E-visa holders may not be granted work authorization, they are not subject to deportation if they work illegally.[95] However, they cannot change or adjust status, if they have engaged in unauthorized employment.[96] If eligible to adjust status, every E-visa holder (including each dependent) must submit Form I-508 in quadruplicate to waive all privileges and immunities granted to them under the treaty.[97]

E-3 Visas

The E-3 classification, "treaty alien in a specialty occupation", was created pursuant to Public Law 109-13, entitled "The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005". Although the E-3 category shares many procedural similarities with the other E categories, its qualifying criteria bear little resemblance to them and are in fact more closely aligned with the H-1B category. There are 10,500 visas allocated for the E-3 category and they are reserved solely for Australian citizens to be employed in specialty

[93] Therefore, a foreign national who wishes to work in the United States, but is not eligible as a treaty national himself or herself, can still be employed, provided his or her spouse would independently qualify for E-visa classification.
[94] Employment authorization for spouses of E visa holders is incident to their E status. Although there is no requirement to obtain an EAD, it is still recommended as the most cogent form of evidence of employment authorization. The Social Security Administration (SSA) has confirmed that spouses may apply directly for social security numbers without first obtaining an EAD. The SSA has also outlined its preference to issuing social security numbers after obtaining an EAD, given its inability to determine whether the derivative is a spouse that is work-authorized or child that is not work authorized.
[95] 9 FAM §41.51, Note 17.
[96] 8 CFR §245.1(b)(4).
[97] 8 CFR §245.1(c)(3). Leveraging an E-2 into permanent residence can be challenging for principal visa holders, given that most of the immigrant visa categories require an unrelated sponsor and the E-2 paradoxically provides for self-employment. In this scenario, other immigrant categories need to be thoroughly examined, including the EB-5 program, EB-1 category and any family-based options.

occupations as defined under the H-1B regulations.[98] Applicants can apply for a change of status[99] or at any U.S. consulate abroad having jurisdiction over the applicant. Like the other E categories, no petition is filed with USCIS, where consular processing is elected.[100] Applicants must submit an approved labor condition application (LCA), evidence of a bona fide job offer, evidence of a U.S. bachelor's degree or equivalent education and/or experience, and evidence of the specialty occupation.[101] Unlike the other E categories, applicants must express an unequivocal intent to depart the United States following the E-3 status.[102] An applicant is presumed to intend to remain in the United States, unless specific evidence is presented to the contrary.[103] However, an applicant need not establish a residence abroad that he or she will maintain, and he or she may move all his or her household effects to the United States.[104] E-3 visas are granted for an initial two-year period, which may be extended in two-year increments.[105] E-3 spouses and dependents are entitled to derivative status, and spouses are granted unrestricted work authorization as the other E categories.[106]

Conclusion

The E visa is a highly desirable option for nonimmigrants seeking to invest in, or trade with, the United States. It is also an excellent choice for employers who wish to transfer key managers, executives and essential employees with the treaty country's nationality. It is also an attractive

[98] 9 FAM §41.51, Note 16.1b.
[99] It appears that at present that the USCIS Premium Processing service does not apply to E-3s.
[100] 9 FAM §41.51, Note 16.3-4.
[101] 9 FAM §41.51, Note 16.
[102] 9 FAM §41.51, Note 16.6.
[103] *Id.*
[104] *Id.*
[105] 9 FAM §41.51, Note 16.9.
[106] 9 FAM §41.51, Note 17 and 18.

option for Australian citizens wishing to perform in specialty occupations. The limited H-1B quotas, together with the restrictive and ever tightening L-1 intra-company transferee adjudications, now make consideration of the E-visa option essential in evaluating nonimmigrant visa options. Since E visas are based on treaties, which have mutual international enforcement obligations, it is likely that E visas will continue to provide vital opportunities for the United States to promote international trade and commerce through investment and trade.