ALLIANCE OF BUSINESS IMMIGRATION LAWYERS
(WWW.ABIL.COM)

E VISAS: PROMOTING INTERNATIONAL TRADE AND COMMERCE THROUGH INVESTING AND TRADING - THE BEST OPTION FOR MANY U.S. NONIMMIGRANTS?

Cliff Rosenthal and Bernard P. Wolfsdorf

Bernard P. Wolfsdorf, PLC

Nonimmigrant visa options are becoming increasingly limited. With a massive reduction from 195,000 to 65,000 visas, the H-1B visa cap has severely impacted specialty worker visa availability in the U.S. This problem is exacerbated as the other key temporary worker option, the L-1 intracompany transfer visa, is receiving heightened scrutiny resulting in record denials, particularly for small to medium-sized corporations[1]. With H-1Bs being unavailable for most of the year and Ls being so restrictively adjudicated, the E treaty trader/investor visa is often the only viable nonimmigrant visa option for many foreign nationals. The E-visa option is available to principal investors and managers, as well as essential employees. Principal investors who qualify for E classification are coming to direct and develop the business enterprise, usually for an initial period of 2 years; however, the E visa may be extended indefinitely, often in 5-year increments. Another advantage of the E visa is that the principal applicant's spouse is permitted to obtain so-called "free-market" unrestricted employment authorization[2]. Because the foundation of E lies in bilateral treaties, it appears that this classification may be more resilient to recent attempts to restrict specialized workers from entering the U.S.[3]

Sources of Law

The statutory provision for E nonimmigrant visa classification is found at INA 101(a)(15)(E). Both the Department of State (DOS) and U.S. Citizenship and Immigration Services (USCIS) have published regulations (8 C.F.R. 214.2(e) and 22 C.F.R. 41.51). Although USCIS

---

[1] For instance, officials from the California Service Center recently reported at a Southern California American Immigration Lawyers Association chapter meeting on August 31, 2004, that approximately 30% of all H-1B specialty occupation change of status petitions are denied and about 25% of L-1A petitions are denied.

[2] Pub. L. No. 107-124, 115 Stat. 2402 (Amending INA §214(e)(6). The E visa has 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 3-year period, which can be extended for a further 3 years before the alien "caps out" and reaches the limit on authorized stay. To qualify for the H-1B, the alien must also hold a degree or equivalent in his field of specialty, and the employer must comply with rigorous labor department regulations. The H-1B visa does not permit spouses to apply automatically for work authorization. The L-1 visa can be approved initially for 3 years (unless a new office in which case only 1 year) with a maximum of 7 years of authorized stay for managers/executives and 5 years for specialized knowledge applicants. To qualify, the alien must also have been employed continuously abroad for at least 1 of the past 3 years by a parent, branch, affiliate or subsidiary of the U.S. company preceding application for admission.

[3] 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, which form their foundation. Accordingly, 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 FAM 41.51 N1). We see no such comity with respect to any other visa category in the present, restrictive, adjudicating environment.

regulations are now substantially consistent with DOS positions, USCIS traditionally has deferred to DOS on complex E-visa interpretation issues[4]. Hence, the DOS-published Foreign Affairs Manual (9 FAM 41.51 and notes) is widely considered the most comprehensive official government publication outlining the requirements for E visas.

Requirements for E-1/E-2 Visas

The INA provides for two categories of E visas, namely the E-1 and E-2 classifications. The E-1 is the treaty trader provision, which permits a person to enter the U.S. to conduct substantial trade with a treaty country of which he is a foreign national. 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 U.S. to develop and direct his investment. While the E-1 and E-2 share many requirements, they are nevertheless distinct visa categories, each with their own unique criteria to be met.

Treaty Requirement

The distinctive nature of the E visa is its source in a treaty of friendship, commerce and navigation (FCN) or equivalent[5] between the U.S. and the country of the foreign national. Accordingly, both E-1 and E-2 classifications require the existence of such a treaty as a prerequisite for visa qualification.[6]

In existence for well over 150 years[7], 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 succeed, it is imperative that the investors develop and direct the investment, and hire executives to manage the enterprise. The theory additionally provides that foreign specialists should also be permitted to provide their critical services in essential positions to

---

[4] 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. Please 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. Please note further that this comity between DOS and USCIS has not always existed. For instance, in the leading case of *Matter of Walsh and Pollard* 20 I&N Dec. 60 (BIA 1988), the INS challenged DOS' granting of an E-2 visa, due to its contrary interpretation of the substantiality and essential skills requirements (see below). This resulted in two different proposed regulations published in 1991, which would have potentially created different standards for initial admissions than for extensions and change of status petitions.

[5] 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 FAM41.51 N3). Free trade agreements (e.g. NAFTA) are not treaties under US law. The Free Trade Agreements (FTA) require legislation to implement. Furthermore, a treaty country includes a foreign state (e.g. Australia) that is accorded treaty visa privileges by specific legislation (22 C.F. R. 41.51(f); 8 C.F.R. 214.2(e)(6)).

[6] 9 FAM 41.51 N3; (22 C.F. R. 41.51(f); 8 C.F.R. 214.2(e)(6)

[7] The oldest U.S. treaty currently in existence is with Colombia, which came into force in 1848.

further ensure the investment's commercial success. 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.[8]

Note that not every country has concluded qualifying treaties with the U.S.; while some countries have concluded treaties that provide for E-1 classification (but not E-2 classification) or vice versa[9]. It is also essential to note that each treaty (or equivalent), with one exception, uses general language to trigger the application of the E visa classification.[10]

Nationality

For both E-1 and E-2 visa classifications, the treaty trader/investor must possess the nationality of the treaty country.[11] 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.[12] At least 50% of the corporation's stock must be owned by treaty nationals. Stock owned by U.S. legal permanent

---

[8] 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." 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."

[9] BITS normally provide for E-2 classification only, while Free Trade Agreements usually have both components. For a full list of qualifying treaty countries ordered by E-1/E-2 categories, please consult 9 FAM 41.51, Exhibit 1.

[10] While a comprehensive study of the provisions of each agreement is beyond the scope of this article, it is necessary to highlight one important provision found in the treaty concluded with the United Kingdom. In this regard, the United Kingdom citizens must be domiciled in the United Kingdom in order to be granted a visa there. Please note that the USCIS routinely approves E change of status applications, regardless of domicile. It is also important to note that hiring/firing foreign 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" (*MacNamara*).

[11] 9 FAM 41.51 N2 & N3; 22 C.F. R. 41.51(g); 8 C.F.R. 214.2(e)(7)

[12] 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 N3.2).

residents is excluded in determining the nationality of the enterprise, however. Spouses and dependents need not be nationals of the treaty country to receive derivative status.[13]

If a foreign national has citizenship of treaty two countries, he is required to elect which nationality the enterprise will hold for E-visa purposes by documenting himself accordingly.[14] If a two-party joint venture is equally owned by nationals of two different treaty countries, however, the enterprise holds both nationalities.[15]

Intention to Depart

Both E-1 and E-2 visa categories require the intent of the applicant to depart the U.S. after such status terminates.[16] Nevertheless, he need not intend to be in the U.S. for a specific temporary period, nor is he required to maintain a foreign residence that he does not intend to abandon. In fact, the alien's mere statement of an unequivocal intent to leave following the termination of his E status is usually sufficient to satisfy the intent to depart requirement. Nevertheless, if there are objective indicators evidencing an intent to remain permanently in the United States, consular officers are justified in inquiring into the true intent of the applicant.

The Department of Homeland Security recognizes the doctrine of dual intent for E applications and neither an initial application, change of status, or extension can be denied solely on the basis of an approved or pending immigrant visa petition or labor certification application.[17] Jacquelyn A. Bednarz, then Chief of Nonimmigrant Branch adjudications, succinctly outlined the application of the doctrine of dual intent to E visas, stating:

> Based 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.[18]

Specific E-1 Requirements

---

[13] 22 C.F. R. 41.51(d); 8 C.F.R. 214.2(e)(4)

[14] 9 FAM 41.51 N3.3. If one of these nationalities is American, he may not qualify for E-visa classification nor may his share count towards 50% ownership of the corporation.

[15] *Supra*. This represents a very important strategy consideration, when forming E corporations, as a 50-50 owned company will permit the transfer of employees from more than one country.

[16] 9 FAM 41.51 N15; 8 C.F.R. 214.2(e)(5)

[17] *Supra*

[18] Letter, Bednarz, HQ 214e-C, 245-C (Oct. 1, 1993)

E-1 classification requires substantial trade that is principally between the United States and the treaty country.[19]

The first requirement is the presence of trade[20], which is defined as the existing international exchange of items of trade for consideration between the U.S. and the treaty country. 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. Title to the trade item must pass from one treaty party to the other. 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.[21] Lastly, conditions in the treaty country must be taken into account, which may affect the alien's ability to carry on trade.[22]

Secondly, trade must be substantial[23], 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. Although the monetary value of trade is a relevant factor, it is the volume of transactions, which is the primary focus of the requirement. While no minimum number of transactions is required, the regulations enunciate that numerous transactions are contemplated. A single transaction can never be substantial. Officers are instructed not to summarily exclude smaller businesses based on this requirement, and income sufficient to support the trader and his family derived from numerous international trade is considered a favorable factor in establishing substantiality.

Thirdly, trade must be principally between the United States and the treaty country[24]. To satisfy this requirement, more than 50% of the total volume of trade must be between the two countries.[25]

---

[19] 9 FAM 41.51 N1.1; 22 C.F.R. 41.51(a)(1); 8 C.F.R. 214.2(e)(1)(I).

[20] 9 FAM 41.51 N4; 22 C.F.R. 41.51(h) & (I); 8 C.F.R. 214.2(e)(9)

[21] It has been questioned as to whether this requirement conforms to 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 *supra*.

[22] 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 U.S. to work as an agent, employee or contractor of the government or other Iranian business or organization (Cable, DOS (98-State-128375) (July 8, 1999)).

[23] 9 FAM 41.51 N6; 22 C.F.R. 41.51(j); 8 C.F.R. 214.2(e)(10)

[24] 9 FAM 41.51 N7; 22 C.F.R. 41.51(k); 8 C.F.R. 214.2(e)(11)

[25] Please 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% of its trade is between the U.S. and the treaty country. On

Although no initial investment is required for E-1 classification, 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. 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 U. S. as distinct from a relatively small amount of capital in a marginal enterprise solely for earning a living. Additionally, the investor must be seeking entry to develop and direct the enterprise.[26]

Firstly, there must be a qualifying investment[27], which connotes placing capital assets at risk to earn a financial return. Here, the applicant must show possession and control over the assets, which may be acquired by any legitimate means, including gifts.[28] In addition to monetary funds, the contribution of any other asset may constitute an investment, including amounts spent on equipment, inventory, goods and services; intangible property such as patents[29]; and payments for leases and rent.[30] Inheritance of a business is not considered an investment, however.[31] The concept of at risk requires the invested capital to be subject to partial or total loss, should the investment fail. Therefore, assets acquired by debt do not qualify, unless they are secured by the

---

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 N7.1).

[26] 8 C.F.R. 214.2(e)(2); 22 C.F.R. 41.51(b)(1); 9 FAM 41.51 N1.2

[27] 9 FAM 41.51 N8; 22 C.F.R. 41.51(l); 8 C.F.R. 214.2(e)(12)

[28] In *Nice v Turnage*, 752 F.2d 431 (9th Cir. 1985) it was held that an alien cannot qualify as a treaty investor by investing the funds of a third person. Nevertheless, such an alien could qualify as an E-2 employee, if he independently meets such requirements. Also, see *Matter of Csonka*, Interim Decision #2760 (BIA 1978) which also stated the requirement that an E-2 applicant must invest his own capital.

[29] 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.

[30] This is limited to amounts devoted to each item in a given month (including any deposit). See *Matter of Shaw*, Interim Decision #2525 (BIA July 1976). Market values of leases are usually ignored, unless paid in advance.

[31] But see Letter, Weinig, Deputy Asst. Comm., Adjudications, CO 214e-C (Jan. 17, 1992) who stated that this is permitted. It is submitted that disregarding inherited businesses gives unwarranted attention to form, given that the heir could sell the assets of the business and then immediately reinvest back 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 into the business.

personal assets of the investor.[32] This requirement also connotes that assets be irrevocably committed to the investment. Prospective arrangements or placing uncommitted funds in a bank account are insufficient.[33] 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.[34] 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. As with the E-1 classification, there is no E-2 classification to seek opportunities of investment.[35]

The second requirement is that the investment be in a bone fide enterprise[36], which is defined to be a real, active and operational commercial undertaking for profit. This excludes non-profit organizations, paper corporations and idle speculative investments held only for their appreciation in value. Enterprises holding stocks or land for appreciation are therefore considered passive and are not included.[37]

Thirdly, the investment must be substantial[38]. With no specific minimum investment amount required, substantiality is determined by the "proportionality" test. This requires a proportional relationship between the amount invested by the investor himself and the cost of purchasing or creating the particular business. Generally, the lower the cost of establishing the business, the higher, proportionally, the actual investment by the investor must be to qualify as substantial. DOS suggests that for investments in a small business that cost $100,000 or less to establish,

---

[32] Therefore, funds secured by the assets of the new business are not placed at risk. However, if the treaty investor is a corporation or other business entity, it is submitted that it is sufficient that its own assets are at risk in acquiring the debt.

[33] But placing a reasonable amount of cash in a business bank account to be used for routine business operations may be counted towards the investment. Also, see *Matter of Khan*, Interim Decision #2565 (BIA 1977).

[34] This encapsulates DOS' 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 irrevocable, this does not conform to the commercial reality that investors need more certainty that they will be authorized to manage their investment.

[35] 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 N6.7) .

[36] 9 FAM 41.51 N9; 22 C.F.R. 41.51(m); 8 C.F.R. 214.2(e)(13)

[37] 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 purpose in entering the U.S. 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 (see below) DOS Answers to AILA Questions (10/02/2002) AILA InfoNet Doc. No. 02100340 (Oct. 3, 2002).

[38] 9 FAM 41.51 N10; 22 C.F.R. 41.51(n); 8 C.F.R. 214.2(e)(14)

100% 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. 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.

Fourthly, the investment must not be marginal in the sense that it would only provide enough income to support the applicant and his family. In order to prevent a marginality finding, DOS requires satisfaction of a two-part test. First, look at the alien's income from the investment: if it exceeds what is necessary to support him and his family, the investment is not marginal. If not, one can look at other factors[39], particularly the present and future capacity of the enterprise to make a significant economic contribution, such as expanding employment for U.S. residents. If the applicant seeks to establish a future capacity, it should be realizable within 5 years.

The final requirement is that the investor develops and directs the enterprise[40], which requires him to demonstrate a controlling interest. Generally, ownership of 50% of the enterprise is sufficient, provided all management rights and responsibilities are retained by the investor.[41] Where there is less than 50% ownership, however, the controlling interest may still be established by evidencing managerial control. 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[42]. 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.[43] Secondly, all E employees

---

[39] 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 C.F.R. 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 initial applications. Additionally, there has been a shift of focus from the individual to the enterprise, when assessing marginality. While in the past, marginality could be satisfied by showing additional assets of the investor, this option may not be available any longer.

[40] 9 FAM 41.51 N12; 22 C.F.R. 41.51(m); 8 C.F.R. 214.2(e)(13)

[41] See *U.S. v Matsumaru*, 244 F.3d. 1092 (9th Circ. 2001), which held that "If 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." Also, see *Matter of Kung,* Interim Decision #2762 (BIA 1978) which evaluated the totality of circumstances in determining a restrictive franchise agreement satisfied the control requirement.

[42] 9 FAM 41.51 N14; 22 C.F.R. 41.51(c),(q) & (r); 8 C.F.R. 214.2(e)(17) & (18)

[43] If a corporation is the owner, at least 50% of the ownership must have the nationality of the treaty country (note that stock owned by legal permanent residents is not counted). Similarly, more than 50% of the enterprise must be owned by persons maintaining E status or must be so classifiable, if abroad.

must hold the nationality of the principal treaty trader/investor.[44] Thirdly, only employees in executive/ supervisory or essential skills positions qualify. 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.[45] 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. Ordinary workers are generally excluded from this category[46], unless their essentiality can be proved.[47] 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. Moreover, the petitioner bears the burden of establishing the length of time that the worker will be needed. The passage of time may diminish the essentiality of any position.

Whether the seminal case of *Matter of Walsh and Pollard* 20 I&N Dec. 60 (BIA 1988) permits the so-called "job shop"[48] is hotly debated. Although the issue was never addressed in *Pollard*, DOS is adamant that job shops are not impliedly sanctioned by the decision, because the transaction in question was for a "project-oriented commodity as contrasted to the filling of employment positions."[49] 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 should include the intended length of the project/service, time spent at the non-

---

[44] 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 N3.3).

[45] In applying this regulation, officers typically examine the duties of the employee. In one recent federal case, the following suggestion was made: "The 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" (*Weeks v Samsung Heavy Industries Co., Inc.* 126 F.3d. 926 (7th Cir. 1997).

[46] The reason for this was explained in *Matter of Udagawa*, Interim Decision #2262 (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."

[47] E.g., they are needed for start-up or training purposes or the business is expanding into a new field.

[48] Usually defined as an enterprise that provides workers to other enterprises for employment. *Pollard* involved two employees of IAD, who were sent to the U.S. 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 U.S.

[49] 9 FAM 41.51 N13.1b.

treaty company, length of employment with the E-2 company, source of remuneration, and the substantiality and marginality of the E investment.

Basic Procedures and Principles

The most common way of applying for E classification is consular processing. Unlike H-1 and most L-1 visas, E visas are applied for directly at a U.S. Consulate without the prior approval from the USCIS. Consular officers will always adjudicate E visas *de nova*, regardless of any approved change of status or extension of stay previously filed with the USCIS.[50] In addition to the standard forms and other 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. With regard to the length of visas issued, check the reciprocity schedule at http://travel.state.gov/visa/reciprocityweb/index.htm as E visas can range from 2 to 5 years. In practice, consular officers have been known to limit visa validity length, if the applicant barely meets the E-1/E-2 requirements[51]. With the discontinuance of the Visa Office Re-issuance program, visas may only be reissued by application to a U.S. consular post. While this generally means an applicant must return to his home country, certain Consulates in Mexico are presently accepting such applications as third country nationals (TCN). As long as an applicant continues to qualify as a treaty trader/investor, visas may be reissued indefinitely[52].

On arrival in the U.S., E-visa holders are granted entry for 2 years, regardless of the length of the E visa issued[53]. The easiest way to extend one's stay beyond the 2 years is to depart the U.S. and then reenter, as each entry will result in another 2-year period of authorized E status.[54]

Alternatively, one can apply for an extension of stay for 2 years with either the California or Texas Service Centers[55]. The same rule applies for change of status and change of employer

---

[50] 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 dispositive of the merits of the case for visa issuance. In fact, even with such approval, the applicant may face travel restrictions, if required to obtain a visa stamp from a particularly strict consular post.

[51] Because E visas are primarily adjudicated by DOS, consular officers possess extremely wide discretion in visa issuance. Please note that some posts dislike start-up corporations, while others frown upon investments less than a certain minimum, even though clearly *ultra vires* in terms of the regulations.

[52] Examples of change in circumstances that may prevent visa renewals (or extensions of stay) include abandonment of the qualifying treaty, the investment becoming passive or marginal, change in the percentage ownership by treaty countries, or change in the indicia of control of the business. For employees, renewal may also be prevented by the granting of legal permanent residence to the principal E treaty trader/investor.

[53] 8 C.F.R. 214.2(e)(19). 2-year admission is granted even if the E visa is valid for less than 30 days (Cable, Brooks Asst. Comm., Inspections (Oct. 10, 1989).

[54] 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 stay.

[55] 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 of this strategy is the alien may never be able to travel internationally.

petitions. All extension of stay, change of status and change of employer petitions are filed with Form I-129 and E supplement.

Spouses of E-visa holders can obtain unrestricted work authorization while in E derivative status.[56] Spouses must obtain an employment authorization document (EAD) by filing Form I-765 with the service center that has jurisdiction over their residence or at the appropriate service center, if filed concurrently with an extension of stay or change of status. Although children of E-visa holders may not be granted work authorization, they are not subject to deportation if they do so. They cannot change or adjust status, however, if they have engaged in unauthorized employment. 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.

Conclusion

The E visa is a highly desirable option for nonimmigrants seeking to invest in, or trade with, the U.S. It is also an excellent choice for employers who wish to transfer key managers, executives and essential employees with the treaty country's nationality. The limited H-1B quotas, together with the restrictive and ever-tightening L-1 intracompany transferee adjudications, now make consideration of the E visa option essential in evaluating nonimmigrant visa options. Because 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 U.S. to promote international trade and commerce through investment and trade. Given that E visas are based on the fundamental principle of mutually reciprocal country benefits, it is likely that they will become an even more desirable option, particularly because of increasingly restrictive adjudications in other nonimmigrant visa categories.

_____

Bernard P. Wolfsdorf, PLC: http://www.wolfsdorf.com/default.htm.
To return to the main homepage, click here: http://www.abil.com.

[56] Therefore, an alien who wishes to work in the U.S., but is not him/herself eligible as a treaty national, can still be employed, provided his spouse would independently qualify for E-visa classification. It may sometimes be worth obtaining an E visa so that the spouse can obtain unrestricted employment.