TREATY INVESTORS

The E-2 visa provides a relatively fast means for persons who are interested in purchasing or establishing business in the United States to obtain an immigration status to be employed in that business in the United States. Unfortunately, it has the drawback of lacking a simple way of converting that status into U.S. permanent residence, and is only available to citizens of countries having the necessary treaty granting reciprocal rights to U.S. citizens seeking to invest abroad.

THE BASIC REQUIREMENTS

The requirements for being a treaty investor in the United States are as follows:

1. Be a citizen of a country with the requisite treaty with the United States. These countries include, but are by no means limited to, the United Kingdom, Canada, Australia, France, Germany, Spain, Mexico, Japan, Korea, The Republic of China (Taiwan), Philippines, and Pakistan.[1]

   Examples of major countries which do not have the requisite treaty are the People's Republic of China, India and Russia.

2. One must be making a "substantial" investment in the United States. 8 U.S.C. § **1101(a)(15)(E)(ii).** The term "substantial investment" is defined in the regulations in a way which is both very technical yet at the same time intentionally ambiguous.[2] First, it is important to emphasize what "substantial" does not mean: substantial does not mean a particular dollar amount. Although the dollar amount of an investment may, in practice, provide a useful hint as to whether the case is likely to be approved, from a strictly legal point of view it is irrelevant. Rather,

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[1] **A complete list can be found at Volume 9 of the Foreign Affairs Manual, section 402.9-10 (9 FAM 402.9-10). The FAM itself can be found online at https://fam.state.gov/.**

[2] See 22 CFR **41.51(b)(9)**. **The USCIS has its own regulations pertaining to treaty investors at 8 CFR 214.2(e), which largely, though not entirely, parallel those of State. However, since as explained below, it is generally preferred to apply for E-2 visas at consulates, I will cite to the DOS regulations.**

substantial is generally defined in the regulations to mean that the investment must pass the "proportionality" test.[3]

"Proportionality Test"-- To be proportional the investment amount must satisfy two requirements:

First, the amount invested must be appropriate to the type of business which the person is investing in. Thus, for example, in a famous case an E-2 visa was approved based upon an investment of $15,000.00, since that was demonstrated to be appropriate for setting up an automotive engineering consulting company in the United States.[4] Further, our office has had investments of as little as $13,000.00 approved when we demonstrated that this was sufficient to establish a physician's office.

Second, the investor must be investing an appropriate percentage of the funds necessary to pursue the business, which will be determined based upon the size of the investment amount. For example, the Department of State in the past has indicated that for an investment amount of $50,000.00 the investor would have to be investing at least 90% of the cash needed to establish the business, for an investment of $100,000.00 he would have to be investing at least 75% of that amount, and for a business costing $500,000.00 he would have to submit at least 60%. However the Foreign Affairs Manual was recently amended to eliminate this strict percentage test.

3. The investment must not be "marginal".[5] An investment is not marginal if either: a: the investment will earn a profit more than enough to provide a "minimal" living for the investor or his family or b: will make a significant economic contribution. "Significant economic contribution" is not directly defined in the regulations but has generally understood to mean that it will create employment for U.S. workers.

However, in recognition of the fact that most businesses require a number of years to reach their full potential, both of these tests are based not upon the investment's *current* performance, but how it is reasonably expected that it *will* be performing five (5) years from now.[6] Therefore even a small investment can pass the marginality test if a

[3] 22 CFR 41.51(b)(9)(i). It must also be "(s)ufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise;" and "(o)f a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise." Id.

[4] **Matter of Walsh and Pollard 20 I&N Dec. 60 (BIA 1988).**

[5] 22 CFR 41.51(b)(10)

[6] Id.

plausible business plan is presented showing that it will either be very profitable or employ a substantial number of U.S. workers five years from now.

4. Finally, the investor must own more than 50% of the stock of the company or otherwise have a controlling interest in it to be able to qualify to be coming to the U.S. to "develop and direct" the investment as required by the regulations.[7]

As indicated, these definitions are at once technical, and yet intentionally vague, especially pertaining to marginality, which is often the key issue in a treaty investor case. The regulations do not provide how much income is "more than enough to provide a minimal living for the investor and his family", nor do they even outright define what significant economic contribution means, much less specify the number of U.S. workers for whom jobs must be created. It is believed that the regulations leave these matters intentionally vague to give U.S. Consular and USCIS officers maximum flexibility in granting or denying treaty investor applications.

PROBLEMS WITH SECURED DEBT

Further, the regulations reflect a startling lack of appreciation of real world business practices. This is vividly illustrated by the treatment of secured debt in the proportionality test. The Department of State and USCIS have defined the proportionality test in such a way that secured debt does not count towards the amount of the investment, but does count towards the cost of the business in determining whether the investment is proportional.[8] Accordingly, it bars from the treaty investor program many, if not most of the sales of small businesses which occur in the United States today. Thus, for example, if a purchaser agrees to buy a business for $200,000, paying $100,000 in cash and providing a promissory note for the balance, secured by the assets of the business, this common transaction will likely fail the proportionality test.

It will fail because the purchaser will only be counted as investing $100,000 of the $200,000 cost of the business. Thus his investment "proportion" is only 50%, even though for an investment in the amount of $100,000 the requisite proportion, under the former DOS guidelines, was supposed to be at least 75%.

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[7] 22 CFR 41.51(b)(11).

[8] **9 FAM 402.9-6(B)(C)(1)**

Strangely enough however, unsecured debt, that is to say a loan for which there is no collateral, does count as part of the investment, as does a loan secured by assets of the investor other than the investment itself. Thus if you have a rich uncle who trusts you enough to lend you a large sum of money without security, you can use that money to purchase a business in the United States and satisfy the proportionality test. Likewise, if you happen to have valuable assets other than the business that you are purchasing, such as a house for example, which your seller is willing to accept as security for a promissory note, then this too can get you around the problem of the proportionality test.[9]

Fortunately, not all U.S. Consulates are strict about enforcing the proportionality test. Some consulates have been known to permit the investor to get away with investing as little as half of the cost of the business. Again, other factors such as the amount invested and the number of jobs created for U.S. workers help in determining how strict these technical rules will be applied in any particular case. Accordingly, knowing the practices in place at the particular consulate at which you are applying for the visa can be as important to a successful visa application as knowledge of the regulations.

THE INVESTMENT MUST BE "AT RISK"

Finally, the money must actually be spent or be otherwise "at risk" to count as an investment. Money simply held in a bank account does not count as an investment except to the extent that it is required for the business's day to day cash flow needs. Nor will the amount one has agreed to pay in a purchase agreement count unless the money has actually changed hands. This creates somewhat of a dilemma for an investor who is purchasing a business on the assumption that he will get an E-2 to manage it. Many investors wisely do not wish to irrevocably purchase a business until they are sure they will get granted E-2 classification. But they aren't eligible for the visa until the money changes hands!

This problem can be resolved by "closing in escrow". The regulations provide that a potential investor may specify in his contract that the purchase price and the business ownership documents (deed, bill of sale, etc) be given to an escrow agent to hold while the investor applies for E-2 classification. The consulate (or the USCIS) will then consider such money actually invested for the purpose of determining the buyer's eligibility to be considered a treaty investor. If the application is approved, and E-2 classification is granted, then the escrow agent will give the money to the seller and the ownership documents to the buyer. If E-2 classification is denied however, then the escrow agent

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[9] **9 FAM 402.9-6(B)(c).**

must return the purchase price to the investor and the documents to the business owner, and the deal will be called off.[10]

WHERE TO APPLY

Once an appropriate investment has been arranged, the next step is to determine where to apply for E-2 classification.

Most treaty investors apply for an E-2 visa at a U.S. Consulate in their home country. While theoretically any consulate may accept an application for a visa from any investor from anywhere in the world, in practice, most consulates would look with great skepticism upon an application filed with them by someone who is not a citizen or resident of the country in which the consulate was located. Thus, for example, a citizen of Korea living in Korea would normally have to apply for an E-2 visa at the U.S. Consulate in Seoul Korea.

However, if one is physically present in the United and maintaining a legal nonimmigrant status say, for example, as a business visitor, then one may apply to the U.S. Citizenship and Immigration Services ("USCIS", formerly "INS") to change one's immigration status in the United State to E-2.[11] There are several advantages in proceeding in this matter. First, one may remain in the U.S. until a decision is made on the application. Second, one does not run the risk of being stuck outside the United States in the event that one appears at a consulate to apply for a visa and it is refused (all U.S. consulates are outside the United States). Third, the Citizenship and Immigration Services is generally known to take a more liberal approach to questions of E-2 eligibility than many of the U.S. Consulates, particularly those in developing countries.

On the negative side, however, is the fact that one's application, if approved, will enable one to remain in the United States and work in the business, but provides severe restrictions upon one's ability to travel internationally. So, for example, if a Korean citizen was granted a change of nonimmigrant status by the USCIS to E-2 he could remain in the U.S. for years, perhaps indefinitely, to manage that business, but would not be able return to the U.S. from a trip to Korea, or any country other than Canada or Mexico, without obtaining a visa from a U.S. Consulate.[12]

Paradoxically, the situation of a Canadian citizen would be even worse. Due to a special provision in the North America Free Trade agreement between Canada and the United States, a

[10] 22 CFR 41.51(b)(7).

[11] See generally 8 CFR 248.

[12] There are special rules for returning to the U.S. from Canada or Mexico without a visa at 22 CFR 41.112(d).

Canadian treaty investor usually cannot return to the United States even from Canada without first obtaining an E-2 visa from a U.S. Consulate.

THE NEXT STEP ISN'T NECESSARILY A GREEN CARD

It is my experience that once they have obtained E-2 classification, most treaty investors are inclined to think that the "next step" is to become a U.S. permanent resident. Certainly, becoming a U.S. permanent resident is something that most treaty investors would want and indeed, for their families' sake at least, eventually need to obtain. While an E-2 investor may keep getting his E-2 status renewed every two years as long as he continues to have the business, nevertheless, there are serious restrictions on being an E-2 nonimmigrant which makes it inconvenient.

First, the treaty investor himself is authorized to be employed only in the business itself, not in any other occupation. Second, although his spouse can obtain authorization to be employed in this business, or any other, his children are NOT authorized to be employed. Third, many colleges will charge his children the very high out of state tuition charged to foreign students even if the child has been living in that state for many years in lawful E-2 dependent status. Finally, worst of all, the children will lose all immigration status when they turn 21 years of age unless they apply to change to some other nonimmigrant status not related to their parents, such as F-1 or H-1B.

Unfortunately, there is no easy and straightforward way for an E-2 treaty investor to become a permanent resident. In particular, the most common way by which people in working status become U.S. permanent residence is barred to a treaty investor. Unlike H-1B workers, for example, a treaty investor's business may not sponsor its owner for labor certification regardless of how severe the shortage is of U.S. workers for persons with the owner's skills or experience. The Department of Labor has stated that it simply will not believe that most businesses would be willing to seriously look for a U.S. worker to replace the business's owner. Likewise, for the same reason, the spouse of a treaty investor will have a great deal of difficulty obtaining labor certification with her spouse's employer as the petitioner, although in some cases this has proven possible.

Perhaps the best chance the family has of becoming permanent residents is, paradoxically, if the non-investor spouse uses his/her employment authorization to find a job outside the investor's business, and that employer sponsors him/her for permanent residency. This may mean that it will make most sense for the spouse with the LEAST qualifications to become the E-2 treaty investor, so that the spouse with greater qualifications can find outside employment and be sponsored for permanent residency.

Also, if the treaty investor has a business outside the U.S. which he will be maintaining even after he acquires a business in the U.S., he may eventually qualify for U.S. permanent residency as a "multinational manager". This is however a complex subject of its own, and somewhat outside the scope of this discussion.

Finally, a person who has made a particularly large investment in the United States, in the range of $500,000.00 to $1,000,000.00, might be able to gain permanent residency through the so-called “Million Dollar Investor” category, if his investment creates at least 10 new jobs for U.S. citizens or permanent residents. The details of this, again, is a subject of its own and outside the scope of this discussion.