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ESTABLISHING A BUSINESS IN THE UNITED STATES AS AN E-2 TREATY INVESTOR
A Brief Overview

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Overview

In an effort to facilitate foreign investment and trade, the United States has entered into reciprocal agreements, called treaties, with certain countries, allowing individual investors and traders bearing the nationality of these countries, as well as foreign companies and their employees, owned by a majority of treaty nationals, to enter the United States to live and work pursuant to the terms of the treaty. The treaty terms vary depending on whether the person, partnership or company is a trader or investor. In the alphabet soup of visas, the U.S. classifies traders under a category of visa called 'E-1', and investors under a category called 'E-2'.

Eligibility

At a glance, E-2 eligibility is based on:

- A qualifying treaty of Friendship, Commerce and Navigation (Sweden is a party to such a treaty);
- Individuals and/or businesses who possess the nationality of the treaty country;
- An applicant who has *irrevocably invested* or is actively in the process of *irrevocably investing* in a U.S. for-profit business;
- The U.S. business is a real and operating commercial enterprise;
- The investment is substantial, as defined by a test of proportionality, not by a set dollar amount;

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- The investment is more than a marginal one solely for earning a living;
- The intent of the treaty investor is to solely develop and direct the operations of the U.S. business;
- The applicant, if an employee, is destined to an executive/supervisory position or possesses skills essential to the firm's operations in the United States.

Individual Investors

One way to think of the E-2 visa is as an entrepreneurial visa. The term investor can be misleading to some individuals, who wrongly assume that it only applies to aloof millionaires enhancing their investment portfolios across the pond. Instead, the foundations and scope of the E-2 visa are much more grounded, allowing entrepreneurs to build and grow small profitable businesses in the United States, reaching an American audience. At its core, the E-2 classification allows for entrepreneurial individuals who possess the nationality of a treaty country to invest in a:

- Start-up for-profit business in the United States, such as a corporation or limited liability company; or
- Purchase a majority share or membership in an existing *profitable* business in the United States.

Whether starting-up a for-profit business or purchasing an existing one, entrepreneurs often worry that their investment may not be substantial and speculate on what amount of money will allow them to direct and develop their enterprise in the United States. It is important to understand two things here:

1. Unlike the EB-5 classification, there is no bright line or dollar amount for the E-2 classification. Substantial is instead considered in the context of the industry. The amount invested in the business must be proportionate to the value of the business; and
2. The investment is not limited to cash. Goods, equipment, and intellectual property can be invested.

The investment, whether cash or assets, must be legitimately under the investor's control, irrevocably committed to the business, and as such at risk in a commercial sense. Uncommitted funds in a bank account are not considered an active investment. One can use loans secured against personal assets as an investment source, but not loans secured against the assets of the investment enterprise.

Companies / Employers

Foreign companies, e.g. those not incorporated or organized in the United States, owned by a majority of treaty nationals, can apply for E-2 treaty investor registration with a U.S. Consulate, if among other things, the foreign company:

- Has a branch or subsidiary in the United States, in which a substantial investment has been made over a period of time; or
- Plans to establish (either start-up or acquire) a branch or subsidiary in the United States and makes a substantial investment in that U.S. enterprise.

Advantages

The advantages of a company applying to register a business as E-2 qualified are numerous:

- The U.S. company may hire foreign employees, who have the same nationality as the treaty company's parent, who are destined to fulfill executive, supervisory, or essential roles within the U.S. company;
- Treaty employees who meet the criteria are not subject to the burdensome process, time and costs associated with H-1B visas, such as visa caps and maximum time stay;
- U.S. Government filing fees for an E2 visa are a fraction of the cost compared to petition-based visas, such as the L-1A, L-1B, or H-1B, as well as EB-5;
- E-2 Treaty Investor visas are typically (based on reciprocity) issued for 2 years for Swedish citizens, and although nonimmigrant in nature, they can be renewed indefinitely, so long as the company maintains its E-2 eligibility. This is in stark contrast to the L-1A, L-1B and H-1B visas, which all have a limited lifetime use, and are issued for shorter period of time;
- Companies are not forced to transition employees to permanent residents, which could allow employees to take up employment at U.S. competitors with ease.

The advantages of E-2 status must, of course, be considered and weighed in the context of your company, and its long and short-term objectives. For example, the L-1A intracompany transferee classification is often favored by foreign businesses who are not owned by a majority of treaty nationals, or who wish to establish or send employees of any nationality to a branch or subsidiary in the United States, without having to make a substantial investment.

E2 Dependents

The spouse and dependent children (those under 21 and unmarried) of an E-2 visa holder (investor or an E-2 employee) are permitted to travel on dependent E-2 visas, and can be of any nationality. Moreover, E-2 spousal dependents are eligible to apply for unrestricted work authorization in the United States at any company. Children are also eligible to study at U.S. institutions.

E-2 Treaties in the Age of Trump

On April 18, 2017, the President signed the Executive Order on Buy American Hire American (E.O. 13788), intended to "create higher wages and employment rates for workers in the United States, and to protect their economic interests." The goal of E.O. 13788 is to protect the interests of United States workers. This Executive Order has been codified into the U.S. Department of State's Foreign Affairs Manual (FAM) for consular officers to consider when adjudicating E-2 cases. The FAM does, however, remind consular officers that the basis of this classification lies in treaties which were entered into, at least in part, to enhance or facilitate economic and commercial interaction between the United States and the treaty country, and they should adjudicate cases with this spirit in mind.