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Visa Spotlight: U.S. Treaty Investor Visas for Entrepreneurs

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Introduction

The *Immigration and Nationality Act* ("INA") provides several options for foreign entrepreneurs who wish to establish businesses in the United States and obtain U.S. work permits to manage those businesses. The most popular U.S. work permit for entrepreneurs is the E-2 treaty investor category.

INA §101(a)(15)(E)(i) defines an E-2 treaty investor as an alien entitled to enter the United States pursuant to a treaty of commerce and navigation, between the United States and the foreign state of which she is a national, solely to develop and direct the operations of an enterprise in which she has invested (or is actively in the process of investing) a substantial amount of capital. The eligibility requirements of the E-2 treaty investor category are described in greater detail below.

Existence of Treaty

E-2 eligibility is derived from treaties that are intended to enhance and facilitate economic and commercial interaction between the United States and the treaty country. Therefore, a treaty of Freedom, Commerce and Navigation ("FCN") must normally exist between the United States and the country of the applicant's nationality. However, bilateral investment treaties have been held to be equivalent to an FCN treaty. A treaty country is also deemed to include a foreign state that is accorded treaty visa privileges by specific legislation, as is the case with the *North American Free Trade Agreement* ("NAFTA").

Canadian citizens are clearly eligible for E-2 treaty investor status, pursuant to the NAFTA. Although Canadian permanent residents are not automatically eligible for E-2 treaty investor status, they may still qualify if they possess the nationality of another eligible treaty country.

The list of countries that are eligible for E-2 treaty investor status is available on the Web.[1] The list also includes countries that are entitled to E-1 treaty trader status, a related category intended for entrepreneurs who engage in substantial trade between the United States and the treaty country. However, the E-1 treaty trader category is outside the scope of this article.

Required Nationality

In the case of an individual treaty investor, the applicant must simply possess the nationality of an eligible treaty country. This is clearly established where the applicant holds a passport issued by one of the eligible treaty countries.

[1] http://travel.state.gov/visa/fees/fees_3726.html.

The nationality of a business is determined by the nationality of the individual owners of that business. Therefore, a business that is at least 50% owned by nationals of an eligible treaty country will be eligible for E-2 treaty investor status.

Investment Requirements

The concept of investment connotes the placing of funds or other capital assets at risk, in the commercial sense, in the hope of generating a return. If the funds are not subject to partial or total loss if business fortunes reverse, then it is not an investment.

In other words, indebtedness secured by the assets of the treaty enterprise is not considered an eligible investment. However, unsecured loans or loans secured solely by the treaty investor's personal assets may be considered eligible investments.

Investment capital must also be irrevocably committed to the treaty enterprise. A treaty investor must be close to the start of actual business operations, not simply at the stage of signing contracts (which may be broken) or scouting for suitable locations and property. A mere intention to invest, or possession of uncommitted funds in a bank account, or even prospective investment arrangements entailing no present commitment, will not suffice.

Bona Fide Enterprise

The treaty enterprise in which the applicant invests must be a real and active commercial or entrepreneurial undertaking, producing some service or commodity. A shell company, passive investment, or uncommitted funds do not qualify as they do not require the intent to direct or develop a commercial enterprise.

Investment Must Be Substantial

The position of the U.S. Department of State continues to be that there is no set minimum dollar amount that will be considered "substantial" for the purposes of E-2 treaty investor eligibility. The phrase "substantial amount of capital" is defined at §41.51(b)(9) to Title 22 of the Code of Federal Regulations ("22 CFR") as an amount that is:

a) Substantial in relation to the total cost of either purchasing an established enterprise or creating the type of enterprise under construction;

b) Sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and

c) Of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise.

The above definition essentially describes what is known as the "proportionality test." According to the *Foreign Affairs Manual* ("FAM"), the guide used by United States consular posts, the proportionality test involves a comparison between two figures:

a) The amount of qualifying funds invested; and

b) The cost of an established business or, if a newly-created business, the cost of establishing such a business.

The cost of an established business is normally its purchase price, which is considered its fair market value. The cost of a newly-created business is the actual cost needed to establish such a business to the point of being operational.

Where the total cost of the treaty business is low, the applicant's investment capital should represent a higher percentage of that cost. However, where the total cost of a treaty business is high, the applicant's investment capital may represent a lower percentage of that cost. For example, an applicant may be required to invest 100% of the total capital in a business costing $100,000, but may only be required

to invest 60% of the total capital in a business costing $500,000.

In practice, the quantum of the investment is still unofficially considered by consular posts when adjudicating E-2 treaty investor applications. Although minimum investment levels will vary from one consular post to another, U.S. consulates in Canada generally prefer to see investments of at least $100,000USD or more.

Not a Marginal Enterprise

A treaty investor may not invest in a marginal enterprise. A marginal enterprise is defined as an enterprise that does not have the present or future capacity to generate more than enough income to provide a minimal living for the treaty investor and her family.

An enterprise that does not have the capacity to generate such income but has a present or future capacity to make a significant economic contribution is not considered a marginal enterprise. However, this projected future capacity should generally be realizable within five years from the date the alien commences normal business activity of the enterprise.

In other words, the treaty investor should be prepared to demonstrate that the treaty enterprise is either generating more income than is required to support the investor and her family, or that it will do so within the first five years. This will clearly occur when the treaty enterprise is generating sufficient income to financially support the treaty investor (and her family), even after deducting the cost of employing several U.S. workers.

Ability to Develop and Direct the Enterprise

A treaty investor must be seeking entry solely to develop and direct the treaty business. The ability to develop and direct is normally established by demonstrating ownership of at least 50% of the treaty business (if the owner retains full rights of control over that portion of the business and has not assigned them to another).

Intention to Depart

Pursuant to 22 CFR §41.51(b)(1)(iii), a treaty investor must intend to depart from the United States upon termination of her status, including any extensions. However, she does not have to establish an intention to remain in the United States for a specific temporary period of time or the existence of a residence in a foreign country.

The treaty investor's expression of an unequivocal intent to return when her E-2 status ends is normally sufficient, in the absence of specific evidence to the contrary. However, a prior overstay or violation of status while in the United States will strongly infer that the applicant does not intend to depart from the United States and it may be very difficult to overcome such an inference.

Dependent Spouse and Minor Children

The dependent spouse and minor child of a treaty investor are entitled to the same classification as the principal applicant. The nationality of the dependent spouse and child is immaterial to their eligibility as E-2 dependents.

E-2 dependents may remain in the United States for the duration of treaty investor's stay. Dependent spouses, but not dependent children, may also seek open work permits to engage in employment while in the United States.

Visas Required for Canadians

Visas are entry documents only. Where a nonimmigrant is exempt from the need to obtain a visa prior to seeking admission to the United States, she may simply apply for admission at the port of entry. If successful, she will be admitted in that classification. For example, a Canadian citizen seeking admission as a B-1 business visitor may simply apply at the port of entry and be admitted in B-1 business

visitor status, without having to obtain a B-1 visa from a United States consulate.

While Canadian citizens are visa-exempt under most nonimmigrant categories, §212.1(l) to Title 8 of the Code of Federal Regulations ("8 CFR") specifically states that any alien seeking admission as an E-2 treaty investor under the provisions of the NAFTA must be in possession of a nonimmigrant visa issued by an United States consular officer, classifying the alien under that section.

In other words, Canadian citizens are required to file a formal application for a visa with a United States consular post in Canada, if they wish to apply under the E-2 treaty investor category. Although this is a common requirement for most nationalities, it is considered somewhat unusual for Canadian citizens.

Duration of Stay and Extensions

E-2 visas can be valid for a period of up to five years at a time. However, the maximum visa duration permitted will depend upon the nationality of the alien. These maximum periods may be determined by referring to the U.S. Department of State's Visa Reciprocity Tables, which are available on the Web.[2]

For example, the maximum duration of a treaty trader or investor visa for Canadian citizens is sixty months, or five years. However, it is important to remember that a consular officer may choose to grant an E-2 visa for a shorter period of time.

Despite the fact that E-2 visas may be valid for up to five years, pursuant to 8 CFR §214.2(e)(1), treaty investors may not be admitted for an initial period of more than two years and may not be granted extensions of stay in increments of more than two years. Therefore, a treaty investor with a five-year visa will initially be admitted in E-2 status for only two years.

Of course, the treaty investor may apply for an extension of stay within the United States prior to the expiration of this two-year period, or leave the country and seek readmission using the still-valid visa. In either case, the treaty investor will be allowed to remain in or enter the United States for an additional period of two years.

Theoretically, there is no limit on the number of years that an E-2 treaty investor can remain in the United States. Provided that she continues to satisfy the eligibility requirements, a treaty investor may maintain E-2 status almost indefinitely.

Conclusion

Despite the relative complexity of such filings, the E-2 treaty investor classification remains one of the most useful options for foreign entrepreneurs who wish to establish or purchase a business in the United States. ■

[2] http://travel.state.gov/visa/fees/fees_3272.html.