

E-2 Treaty Investors

The E-2 Visa is applicable to the nationals from countries** which have entered into a Friendship, Commerce and Navigation and Bilateral Investment Treaties with the United States in accordance with INA Section 101 (a) (15)(E). The investor must come to the United States to invest in a new or existing commercial enterprise and must be accompanied by evidence that will discuss the following requirements for issuance of an E-2 visa:

1. **Does a requisite treaty of commerce and navigation exist between the applicant's nationality and the USA?**

The Immigration and Nationality Act in section 101(a)(15)(E) requires the existence of a qualifying treaty of commerce and navigation between the United States and another State in order for the E visa classification to be accorded to nationals of that State. Such qualifying treaties may include treaties of Friendship, Commerce and Navigation and Bilateral Investment Treaties. Below please find a list of countries** with which the United States have entered into a Friendship, Commerce and Navigation and Bilateral Investment Treaties for E-2 purposes.

2. **Does the applicant and/or business possess the nationality of the treaty country?**

The treaty investor must, whether an individual or business, possess the nationality of the treaty country. The nationality of the individual is determined by the authorities of the country of which the Applicant claims nationality. The nationality of a business is determined by the nationality of the individual owners of that business. The United States entity must be owned at least 50% by individuals with the same nationality as the Applicant. Nationals of foreign countries who are permanent residents of the United States or are US citizens do not count as nationals of the foreign country.

3. **Has the applicant invested, or is the applicant actively in the process of investing the requisite capital?**

The funds invested must be "at risk" which means being already invested in the commercial enterprise or being placed in an "escrow account" ready to be invested upon approval of the E-2 visa petition. 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 financial return. (E-2 investor status shall not, therefore, be extended to non-profit organizations.) If the funds are not subject to partial or total loss if business

fortunes reverse, then it is not an “investment” in the sense intended by INA 101(a)(15)(E)(ii). If the funds’ availability arises from indebtedness, these criteria must be followed:

(1) Indebtedness such as mortgage debt or commercial loans secured by the assets of the enterprise cannot count toward the investment, as there is no requisite element of risk. For example, if the business in which the alien is investing is used as collateral, funds from the resulting loan or mortgage are not at risk, even if some personal assets are also used as collateral.

(2) *Only indebtedness collateralized* by the alien’s own personal assets, such as a second mortgage on a home or unsecured loans, such as a loan on the alien’s personal signature may be included, since the alien risks the funds in the event of business failure.

In short, at risk funds in the E-2 context include only funds in which personal assets are involved, such as personal funds, other unencumbered assets, a mortgage with the alien’s personal dwelling used as collateral, or some similar personal liability.

The Funds Must be Irrevocably Committed

To be “in the process of investing” for E-2 purposes, the funds or assets to be invested must be committed to the investment, and the commitment must be real and irrevocable. As an example, a purchase or sale of a business which qualifies for E-2 status in every respect may be conditioned upon the issuance of the visa. Despite the condition, this would constitute a solid commitment if the assets to be used for the purchase are held in escrow for release or transfer only on the condition being met. The point of the example is that to be in the process of investing the investor must have reached an irrevocable point to qualify.

Moreover, for the alien to be “in the process of investing”, the alien must be close to the start of actual business operations, not simply in the stage U.S.

Mere intent to invest, or possession of uncommitted funds in a bank account, or even prospective investment arrangements entailing no present a real commitment for E-2 purposes.

The amount spent for purchase of equipment and for inventory on hand may be calculated in the investment total. The value of goods or equipment transferred to the United States (such as factory machinery shipped to the United States to start or enlarge a plant) may be considered an investment. The alien, however, must demonstrate that the goods or machinery will be put, or are being put, to use in an ongoing commercial enterprise. The applicant must establish that the purchased goods or equipment are for *investment and* not personal purposes

4. **Is the company in the United States a real and operating commercial enterprise?**

The enterprise must be a real and active commercial or entrepreneurial undertaking, producing some service or commodity. It cannot be a paper organization or an idle speculative investment held for potential appreciation in value, such as undeveloped land or stocks held by an investor without the intent to direct the enterprise. The investment must be a commercial enterprise, thus it must be for profit, eliminating non-profit organizations from consideration.

5. **Is the investment in question "substantial"?**

The purpose of the requirement is to ensure to a reasonable extent that the business invested in is not speculative but is, or soon will be, a successful enterprise. The rules regarding the amount of funds committed to the commercial enterprise and the character of the funds, primarily personal or loans based on personal collateral, are intended to ensure that the investor is unquestionably committed to the success of the business. The proportionate amount of funds invested, is recognized by the proportionality test, in light of the nature of the business and the projected success of the business.

A substantial amount of capital for E-2 visa purposes constitutes *an* amount that is:

- (1) Substantial in a proportional sense, (the application of the proportionality test): i.e., *substantial* in relationship to the total cost of either purchasing an established enterprise, or creating the type of enterprise under consideration;
- (2) Sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and
- (3) Of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise. No set dollar figure constitutes a minimum amount of investment to be considered "substantial" for E-2 visa purposes.

This requirement is met by satisfying the "proportionality test". The test is a comparison between two figures. The amount of qualifying funds invested, and the cost of an established business or, if a newly created business, the cost of establishing such a business.

- (1) The amount of the funds or assets actually invested must be from qualifying funds and assets.
- (2) The cost of an established business is, generally, its purchase price, which is normally considered to be the fair market value.
- (3) The cost of a newly created business is the actual cost needed to establish such a business to the point of being operational. The actual cost can usually be computed as the investor should have already purchased at least some of the necessary assets and, thus, be able to provide cost figures for additional assets needed to run the

business. For example, an indication of the nature and extent of commitment to a business venture may be provided by invoices or contracts for substantial purchases of equipment and inventory; appraisals of the market value of land, buildings, equipment, and machinery; accounting audits; and records required by various governmental authorities.

The proportionality test can best be understood as a sort of inverted sliding scale. The lower the cost of the business the higher a percentage of investment is required. *On the other hand*, a highly expensive business would require a lower percentage of qualifying investment. There are no bright line percentages that exist in order for an investment to be considered substantial. Yet, as stated above, the lower the cost of the business the higher the percentage of qualifying investment is anticipated. Thus, investments of 100 percent or a higher percentage would normally automatically qualify for a small business of \$100,000.00. At the other extreme, an investment of \$10 million in a \$100 million business would likely qualify, based on the sheer magnitude of the investment itself.

6. **Is the investment in question more than "marginal", and not structured solely to earn a living for the applicant and his family?**

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

7. **Will the applicant fill a position calling on him to "develop and direct" the enterprise?**

In instances in which a sole proprietor or an individual who is a majority owner wishes to enter the United States as an "investor," or send an employee to the United States as his and/or her personal employee, or as an employee of the U.S. enterprise, the owner must demonstrate that he or she personally develops and directs the enterprise. Likewise, if a foreign corporation owns at least 50 percent of a U.S. enterprise, and wishes its employee to enter the U.S. as an employee of the parent corporation, or as an employee of the U.S. business, the foreign corporation must demonstrate it develops and directs the U.S. enterprise.

8. **What is the origin or source of the funds used to capitalize the U.S. company?**

The Applicant must demonstrate possession and control of the capital assets, including funds invested. If the investor has received the funds by legitimate means, e.g., savings, gift, inheritance, contest, etc. and has control and possession over the funds, the proper employment of the funds may constitute an E-2 investment. (It should be noted, however, that inheritance of a business does not constitute an investment.) Furthermore, the statute does not require that the source of the funds be outside the United States.

9. **Does the applicant intent to depart upon conclusion of his E-2 visa status?**

An applicant for an E visa need not establish intent to proceed to the United States for a specific temporary period of time. Nor does an applicant for an E visa need to have a residence in a foreign country which the applicant does not intend to abandon. The alien may sell his or her residence and move all household effects to the U.S. The alien's expression of an unequivocal intent to return when the E status ends is normally sufficient, in the absence of specific indications of evidence that the alien's intent is to the contrary. If there are such objective indications, inquiry is justified to assess the applicant's true intent.

One of the benefits of this type of Visa is that there is no limit length of stay in the United States, but the applicant must express his intention of leaving the country once the business is finished. The wife and children (single and under 21 years of age) of the applicant also qualify for this type of Visa, and the wife or husband of the E principal may obtain authorization to work anywhere he/she chooses.

General Qualifications of the Employee of a Treaty Investor

To qualify for E-2 classification, the employee of a treaty investor must:

- Be the same nationality of the principal alien employer (who must have the nationality of the treaty country)
- Meet the definition of "employee" under the relevant law
- Either be engaging in duties of an executive or *supervisory character*, or if employed in a lesser capacity, have special qualifications.

If the principal alien employer is not an individual, it must be an enterprise or organization at least 50% owned by persons in the United States who have the nationality of the treaty country. These owners must be maintaining nonimmigrant treaty investor status. If the owners are not in the United States, they must be, if they were to seek admission to this country, classifiable as nonimmigrant treaty investor.

Duties which are of an *executive or supervisory character* are those which primarily provide the employee ultimate control and responsibility for the organization's overall operation, or a major component of it

Special qualifications are skills which make the employee's services essential to the efficient operation of the business. There are several qualities or circumstances which could, depending on the facts, meet this requirement. These include, but are not limited to:

- The degree of proven expertise in the employee's area of operations
- Whether others possess the employee's specific skills
- The salary that the special qualifications can command
- Whether the skills and qualifications are readily available in the United States

Knowledge of a foreign language and culture does not, by itself, meet this requirement. Note that in some cases a skill that is essential at one point in time may become commonplace, and therefore no longer qualifying, at a later date.

Who May File for Change of Status to E-2 Classification

If the treaty investor is currently in the United States in a lawful nonimmigrant status, he or she may file to request a change of status to E-2 classification.

How to Obtain E-2 Classification if Outside the United States

An investor must apply directly at a US consulate abroad in order to file for an E-2 visa if physically outside the United States or if in the United States in a status that does not allow for a change of status like a visa Waiver. Each US Consulate possess different procedures in terms of E-2 visa issuance. Even though a US consulate may issue an E-2 visa for up to 5 year, upon returning to the United States, the Port of Entry officer will issue admission for periods of up to two year periods. There is no maximum limit to the number of extensions an E-2 nonimmigrant may be granted. All E-2 nonimmigrants, however, must maintain an intention to depart the United States when their status expires or is terminated.

An E-2 nonimmigrant who travels abroad may generally be granted an automatic two-year period of readmission when returning to the United States.

Terms and Conditions of E-2 Status

A treaty investor or employee may only work in the activity for which he or she was approved at the time the classification was granted. An E-2 employee, however, may also work for the treaty organization's parent company or one of its subsidiaries as long as the:

- Relationship between the organizations is established
- Subsidiary employment requires executive, supervisory, or essential skills
- Terms and conditions of employment have not otherwise changed.

Family of E-2 Treaty Investors and Employees

Treaty investors and employees may be accompanied or followed by spouses and unmarried children who are under 21 years of age. Their nationalities need not be the same as the treaty investor or employee. These family members may seek E-2 nonimmigrant classification as dependents and, if approved, generally will be granted the same period of stay as the employee. If the family members are already in the United States and are seeking change of status to or extension of stay in an E-2 dependent classification, they may. Spouses of E-2 workers may apply for work authorization and there is no specific restriction as to where the E-2 spouse may work.