

## **MINIMUM REQUIREMENTS: E-1 & E-2 VISAS**

The following requirements are applicable to both E-1 and E-2 categories:

1. A treaty must exist between the United States and the foreign country under whose treaty the E status is sought;
2. Majority ownership or control of the investing or trading company must be held by nationals of the foreign country under whose treaty the E status is sought;
3. Foreign country citizenship of the country under whose treaty the status is sought must be held by each employee or principal of the company who is seeking the E status pursuant to the treaty.

### **REQUIREMENT ONE: A TREATY OF COMMERCE AND NAVIGATION OR BILATERAL INVESTMENT TREATY MUST BE IN EXISTENCE BETWEEN THE U.S. AND THE FOREIGN COUNTRY**

The E nonimmigrant category is available only if a treaty of commerce and navigation or a bilateral investment treaty providing for nonimmigrant entries is in existence between the U.S. and the foreign country. The following countries have trade and investment treaties with the United States and their nationals are eligible for both E-1 and E-2 status:

Argentina, Australia, Austria, Belgium, Bosnia, Canada, Colombia, Costa Rica, Croatia, Ethiopia, Finland, France, Germany, Honduras, Iran (with restrictions), Ireland, Italy, **Japan**, **Korea**, Latvia, Liberia, Luxembourg, Macedonia, Mexico, Netherlands, Norway, Oman, Pakistan, **Philippines**, Slovenia, Spain, Suriname, Sweden, Switzerland, **Thailand**, **Taiwan**, Togo, Turkey, United Kingdom

The following countries have trade treaties with the United States which allow for conferral of E-1 (treaty-trader status) to the nationals of said countries:

Bolivia, Brunei, Denmark, Estonia, Greece, Israel

The following countries have investment treaties with the United States which allow for conferral of E-2 (treaty-investor status) to the nationals of said country:

Albania, Armenia, Bangladesh, Bulgaria, Cameroon, Congo, Czech Republic, Ecuador, Egypt, Estonia, Grenada, Georgia, Jamaica, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, Morocco, Zaire, Panama, Poland, Romania, Senegal, Slovakia, Sri Lanka, Trinidad & Tobago, Tunisia, Ukraine

### **REQUIREMENT TWO: MAJORITY OWNERSHIP OF TRADE OR INVESTMENT COMPANY MUST BE HELD BY TREATY COUNTRY NATIONALS**

Majority ownership or control of the investing or trading company must be held by treaty-country nationals (the company or individual engaging in trade or commerce must have the same nationality as the treaty country). The nationality of the company engaging in trade or investment is the nationality of those persons who own at least 50% of the stock of the corporation; the nationality of

the persons owning the corporate stock is their country of citizenship. Note, however, that foreign nationals (who are nationals of the treaty country) who are also U.S. permanent residents cannot be counted towards determining at least 50% ownership.

**REQUIREMENT THREE: FOREIGN COUNTRY CITIZENSHIP OF THE COUNTRY UNDER WHOSE TREATY THE STATUS IS SOUGHT MUST BE HELD BY EACH EMPLOYEE OR PRINCIPAL OF THE COMPANY WHO IS SEEKING E STATUS PURSUANT TO THE TREATY**

Treaty country citizenship must be held by each employee or principal of the treaty enterprise who seeks E status pursuant to the treaty. The rule is that the principal investor or trader and the employees of the treaty enterprise must have the same nationality as the treaty enterprise. Note, however, that while the primary treaty alien and employee treaty alien must be nationals of the treaty country through which the company/enterprise qualifies, the spouses and/or children of the alien(s) can be any nationality. As long as the qualifying alien is eligible for E status, his or her spouse and children will be granted status under the same treaty.

**ADDITIONAL REQUIREMENTS FOR E-1**

In addition to three requirements listed above, which apply for both E-1 and E-2 status holders, the following requirements apply to the E-1 (treaty-trader) status:

1. **Trade:** The trading company has to be engaged in trade. Thus, you will be required to demonstrate the existence of such trade through evidence of the exchange, purchase, or sale of goods or services;
2. **Substantial (not “Marginal”):** You will need to demonstrate that the trade is substantial to the INS based on the volume of trade, the number of transactions, and the existence of a continued course of trade. Significantly, a small dollar amount can still demonstrate substantial trade when the aforementioned criteria (volume of trade, number of transactions, and continued pattern of trade) have been met. Likewise, an extremely large dollar value may very well represent substantial trade, even where all of the aforementioned criteria do not, at first glance, appear to be met. Note: Due to the requirement that the trading company demonstrate a continued pattern of trade, it is clear that trade must have already started prior to the application for treaty trader status;
3. **Principally with the U.S.:** You need to show that the business activity of the U.S. office consists primarily of trade between the U.S. and the treaty country. This means that more than 50% of the total volume of international trade of the U.S. enterprise has to consist of trade between the treaty country and the U.S. This requirement is deemed an ongoing requirement. Thus, at all times during an alien’s E-1 stay, the trade needs to be principally between the U.S. and the treaty country. However, understandably, there may be occasions where it is necessary that the total volume of trade between the U.S. and the treaty country falls below the 50% threshold. It should be noted that such occasions must be temporary and infrequent, since long-term violations of this rule would result in a loss of status for the E-1 holder;
4. **Appropriate Duties:** The employee or principal must serve the company in a specified capacity: either in a supervisory or managerial capacity or in a capacity involving essential skills. What this means is that the employee must be performing executive or supervisory duties or, alternatively, must be serving in a minor capacity as a specialist who possesses

skills that are essential to the successful operation of the enterprise. Notably, the treaty enterprise should not expect to staff its United States operations completely with treaty country nationals. Obviously, the closer to the uppermost levels of management the position is, the more likely that the person filling the position will qualify for treaty trader status. At lower levels, however, only positions requiring specialized, technical knowledge of the company's product (knowledge that is not readily available among U.S. workers) may be filled with aliens in E-1 status. It may be expected that, in this latter situation, the company trains U.S. workers who will eventually fill the technical positions. Therefore, technical visas generally won't be renewed indefinitely.

### ADDITIONAL REQUIREMENTS FOR E-2

In addition to the three general rules, listed above, which apply to both E-1 and E-2 holders, the following special requirements apply to E-2 holders:

1. **Active Investment (not "Passive"):** The investor is required to make a commitment of funds that represents an actual, active investment. Moreover, this investment must be irrevocable;
2. **Substantial (not "Marginal") Investment:** The investment must be substantial, taking into consideration only those financial transactions in which the investor's own resources are placed at risk. There is no minimum dollar amount necessary in order for the investment to be considered substantial. However, in order for an investment to be considered substantial by the INS, it must meet one of two tests: (1) It has to be proportional to the total value of the particular enterprise in question (a test usually applied to investment in existing businesses); or (2) It has to be an amount normally considered necessary to establish a viable enterprise of the type contemplated (a test normally applied to new businesses). Also, under INS guidelines, the larger the total value of the enterprise or the cost to start up the enterprise, the smaller the percentage of the total investment the investor must put up to meet the substantiality requirement. Of course, a million dollar investment by a large foreign company will probably be viewed as being substantial regardless of its proportion to the total value of the enterprise.
3. **Creation of jobs:** The investment cannot be marginal in nature, that is, one which will only support the investor and his or her family; in most cases it must create job opportunities for U.S. workers (citizens or permanent residents);
4. **Essential Role in Enterprise:** The person for whom treaty investor status is sought must fill a key role with the company, either as the investor who will develop and direct the investment or as a qualified employee necessary for the development of the investment.

### SUMMARY

The E visa is one of the most flexible and beneficial visas available to foreign nationals who wish to operate businesses in the U.S. with depending on the sponsorship of an employer or individual. Among the many benefits are potentially unlimited duration in the U.S. and the opportunity to bring one's immediate family to the U.S. to live and work (spouse). But, the above requirements are only the minimum criteria for establishing E visa eligibility. The prospective E visa applicant (i.e. foreign entrepreneur / small businessperson) has the burden of establishing to the INS and/or the

U.S. Consulate that ALL the requirements are satisfied before an E visa will be granted. Many of the requirements and criteria are not objective and are; in fact, open to subjective interpretation and determination by the government. For these reasons, it is critical that great detail and care be given to establish and present the required evidence in the most persuasive and convincing manner possible. To accomplish this goal, the professional expertise and guidance of qualified, experienced legal (and business) professionals is indispensable and highly recommended.

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