

E-1 & E-2 VISA GUIDE: Acquiring Treaty Trader and Treaty Investor Status

Introduction

Generally speaking, E visas are non-immigrant work visas which allow nationals of eligible countries with which the U.S. maintains a qualifying treaty of commerce to come to the U.S. either: (i) in the case of an E-1 visa holder, to carry on substantial trade principally between the U.S. and the foreign state of which he or she is a national; or (ii) in the case of an E-2 visa holder, to develop and direct the operations of an enterprise in which he or she has invested, or of an enterprise in which he or she is actively in the process of investing, a substantial amount of capital. The E visa category is designed to facilitate commercial interaction and growth between the U.S. and eligible treaty countries.

L-1 Visa Basic Requirements

To qualify for a Treaty Trader (E-1) or Treaty Investor (E-2) visa, the following requirements must be met:

- The visa applicant must be a national of a country that has a treaty of commerce and navigation, or similar treaty, with the U.S.
- The visa sponsor—either the foreign parent company or the

foreign national owner of the company—and the visa applicant share the nationality with the treaty country.

Generally speaking, if 51% of the company is owned by nationals of the treaty country, who are not also permanent residents of the U.S., the company will qualify for E classification.

- The individual is either the principal trader who is coming to the U.S. to engage in substantial trade, or the applicant is employed in a supervisory or executive capacity, or possesses highly specialized skills essential to the efficient operation of the company. Ordinary skilled or unskilled workers do not qualify.
- There is "*substantial trade*" between the U.S. and the treaty country (to qualify for an E-1 visa) or a "*substantial investment*" (to qualify for an E-2 visa).

Trade can involve the exchange, purchase or sale of goods or services and the transfer of technology. Trade includes not only the import and export of goods, but also services such as accounting, engineering, advertising, banking, communications, consulting, and computer software.

E-1 Treaty Trader Countries

Treaty Trader (E-1) visas are only available to nationals of certain countries with which the U.S. maintains a treaty of commerce and navigation.

A partial list of E-1 Treaty Trader countries is shown here.

Argentina	France	Netherlands
Australia	Germany	Norway
Austria	Greece	Oman
Belgium	Honduras	Pakistan
Bolivia	Iran	Paraguay
Brunei	Ireland	Philippines
Canada	Israel	Poland
Chile	Italy	Serbia
China-Twn.	Japan	Singapore
Colombia	Jordan	Slovenia
Costa Rica	Korea (S.)	Spain
Croatia	Latvia	Sweden
Denmark	Liberia	Switzerland
Estonia	Luxembourg	Thailand
Ethiopia	Macedonia	Turkey
Finland	Mexico	U.K.

E-2 Treaty Investor Countries

Treaty Investor (E-2) visas are also only available to nationals of countries with which the U.S. which maintains a treaty of commerce and navigation.

A partial list of E-2 Treaty Investor countries is shown here.

Argentina	Estonia	Norway
Australia	Ethiopia	Oman
Austria	Finland	Pakistan
Azerbaijan	France	Panama
Bahrain	Georgia	Paraguay
Belgium	Germany	Philippines
Bolivia	Honduras	Poland
Canada	Iran	Serbia
Chile	Ireland	Singapore
China-Twn.	Italy	Spain
Colombia	Japan	Sweden
Costa Rica	Jordan	Switzerland
Croatia	Korea (S.)	Thailand
Denmark	Luxembourg	Turkey
Ecuador	Mexico	Ukraine
Egypt	Morocco	U.K.

Several countries enjoy both E-1 and E-2 treaty status.

Other countries—like Ecuador, Morocco and Ukraine—are only eligible for E-2 Treaty status. Likewise, a few countries—such as Brunei, Denmark, Greece and Israel—are only eligible for E-1 but not E-2 treaty status. (Israel is expected to receive E-2 Treaty status sometime in 2015.)

Finally, some nations simply have not negotiated a treaty that lays a legal foundation for E visa privileges. These

include Hungary, India, Kuwait, New Zealand, and Portugal.

A complete list of E-1 and E-2 Treaty countries can be accessed at the United States' Department of State Website [here](#).

What is Substantial Trade?

As noted earlier, to qualify for E-1 Treaty Trader status, the trade must be *substantial*. For trade to be considered substantial it must involve a continuous flow of trade and consist of numerous transactions over time. While there is no set guideline for determining how much trade is enough to be considered substantial, consular officers will consider several key factors, including:

- the volume of trade;
- the number of trade transactions;
- the monetary value of the transactions; and
- the continued nature of the trade.

Also, to be substantial, the trade must be principally between the U.S. and the treaty country; that is, at least 50% of the international trade involved must be between the U.S. and the country of the applicant's nationality.

This last requirement may be of particular concern to those ventures with significantly fluctuating trade flows. A change in such a company's global trading patterns could result in the disqualification of the company from E-1 visa classification if the amount of trade between the treaty country and the U.S. falls below 50%.

What is a Substantial Investment?

As with substantial trade, there is no minimum amount that must be invested to be considered substantial for E-2 Treaty Investor visa purposes. In general, however, in order for an investment to be considered substantial, it must meet either the *Proportionality Test* or the *Viability Test*.

A. Proportionality Test for Substantial Investment

Under the *Proportionality Test*, the investment is compared to the total fair market value or purchase price of the enterprise. Whether an amount of capital is substantial under this test is understood in terms of an inverted sliding scale; that is, the lower the total cost of the enterprise, the higher, proportionately, the investment must be. Generally, an investment of more than fifty percent (50%) of the value of the enterprise will be considered substantial. However, in certain

circumstances, the monetary amount of the investment may be large enough by itself to be considered substantial.

Under the *Proportionality Test*, a small business with less than a \$100,000 valuation will likely require the full \$100,000 investment for the investment to be considered substantial. The same \$100,000 would likely not suffice as substantial, however, for a business with a \$1,000,000 valuation. In that case, a \$500,000 investment—or 50% of company's value—would likely be required.

B. Viability Test for Substantial Investment

Alternatively, under the *Viability Test*, the amount invested will be considered substantial if it is an amount normally considered necessary to establish a viable enterprise of the type in question. This test is usually applied to new businesses and may require a showing of what would be a reasonable amount of capital necessary to establish the type of business in question.

While there is no minimum amount of cash required for an investment to be considered substantial, generally at least \$100,000 USD is required, provided that amount is otherwise proportional to the cost of acquisition.

What Are Qualifying Investments?

Investments must also pass a number of other tests, including the *Marginality Test*, *Income Capacity Test*, and *Active Investment Test*, to qualify for an E-2 investor visa.

A. Marginality Test

Under the *Marginality Test*, the investment must not be considered marginal; that is, the investment will have to be more than solely for the purpose of earning a living for the investor. This requires that the applicant establish that the commercial enterprise will create jobs for U.S. workers. Generally speaking, at least two (2) new jobs are required for E-2 visa applications.

B. Income Capacity Test

Under the *Income Capacity Test*, the investment must be shown to have the present or future capacity to generate more than enough income to provide minimal living for the investor and his or her family, or to make a significant economic contribution. Generally, the projected future income-generating capacity should be realizable within five (5) years from the date the E-2 visa investor commences business of the enterprise.

C. Active Investment Test

Under the *Active Investment Test*, the investment in the U.S. must be “active”—that is, the business

enterprise underlying the investment must be a real, operating commercial enterprise in the U.S. providing some service or good. Passive investments such as in stock or real estate—such as a vacation home—do not qualify. Rather, the investment must involve funds and assets for which the investor is personally *at risk*. Loans secured by the assets of the enterprise are not acceptable. At risk funds in the E-2 visa context would include any personal funds that are subject to partial or total loss if investment fortunes reverse.

What Employees Are Eligible for E-1 Visas?

Ordinarily, the treaty trader is an individual. However, employees of qualified treaty trader firms may also obtain treaty trader status. To be eligible the employee must also share the nationality of the principal treaty employer, and must engage in executive or supervisory duties or provide services that are essential to the operation of the enterprise.

A. Executive or Supervisory Employees

Executive and supervisory employees have ultimate control and responsibility for a significant proportion of the business's overall operation. An executive employee possesses authority to determine the policy of and direction for the business. A supervisory position allows the employee supervisory responsibility for a significant

proportion of an enterprise's operations.

In determining whether an individual is an executive or supervisory employee, consular officers will consider the following factors:

- the employee's title;
- where the proposed position falls within the U.S. company's organizational hierarchy;
- the degree to which the employee will have ultimate control and responsibility for the company's overall operations or a major component thereof;
- the number and level of any subordinates;
- the employee's pay level;
- the employee's executive or supervisory experience; and
- whether the position principally requires management skills or key supervisory responsibility for a large portion of the company's operations.

B. Essential Skills Employees

For E visa purposes, essential skills employees bring skills which are essential to the successful or efficient operation of the enterprise. The employee does not need to have any

previous employment with the business, but in order to obtain this classification, factors such as the employee's proven expertise in the area of operations involved, the length of his or her experience or training with the business, the uniqueness of his or her specific skills, the nature of his or her job functions, and the salary commanded are taken into consideration.

Benefits of the E Visa

Both the E-1 and E-2 visa classifications have several advantages over other nonimmigrant visas.

Unlike other nonimmigrant visas, the E visa can be renewed indefinitely as long as the qualifying organization maintains its E visa status.

Further, there is no fixed investment threshold. Unlike the USD \$1million threshold for the permanent resident investor visa (the EB-5 Visa), there is no fixed dollar amount for the E-1 or E-2 visas.

Also, unlike other visas with annual caps (such as the H-1B visa, for example), there are no limits to the number of E visas that the USCIS can issue per year.

Another benefit to the E visa is that no "Labor Certification" is required. (Normally, foreign nationals seeking to work in the U.S. must first compete with U.S. workers and show that no such worker is ready, willing, and able to do the job through which the

foreign national is seeking to obtain a visa. An individual in E status, however, can skip this process.)

Further, unlike for L-1 and H-1B visa applicants, no preliminary petition procedure is involved in obtaining an E visa. As a result, E visa applicants generally avoid several weeks and even months of processing time.

Additionally, the spouse and unmarried minor children (that is children under 21) of an E visa holder may accompany him or her to the U.S. The nationality of the accompanying spouse or children is immaterial to their derivative E status.

Finally, the E-1 or E-2 visa holder's spouse is entitled to work, and their dependent children may engage in part-time or full-time study.

These benefits are summarized below:

- E visas can be renewed indefinitely;
- No fixed investment threshold;
- No limits to number of E visas that can be issued per year;
- No "Labor Certification";
- No preliminary petitions;
- Visas are available for E visa holder's spouse and unmarried minor children; and
- Spouse may work; minor children allowed part-time or full-time study.

Other Immigration Options

Nationals of non-treaty countries or those who do not meet the “trade” or “investment” requirements of treaty trader or investor visas should be aware that there are other business-related visas which might be appropriate for their purposes and for which they might qualify, including the B-1 temporary business visitor visa, H-1B specialty occupation worker visa, L-1 intra-company transferee visa, and EB-5 alien entrepreneur immigrant investor visa.

In this regard, you are invited to view our related business immigration articles on our website. We welcome the opportunity to assist you in your business expansion to the U.S.

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