

An Immigration Guide For Business Investors

Do I Really Need to Invest \$1 Million Dollars?

By

Jeffrey A. Devore*

* **JEFFREY A. DEVORE** is an attorney practicing immigration and nationality law with the law firm of Devore & Devore, P.A., which has offices in West Palm Beach (Palm Beach Gardens) and Fort Lauderdale (Plantation), Florida. He received his Bachelor of Science degree in Computer Science from Bowling Green State University and his Juris Doctor degree from The Thomas M. Cooley Law School. He was admitted to The Florida Bar on May 4, 1990.

Mr. Devore is Board Certified in Immigration and Nationality law by The Florida Bar and specializes in assisting foreign nationals who want to live and work in the United States and companies that wish to employ them. He is AV Rated by Martindale-Hubbell, indicating very high to preeminent legal ability and very high ethical standards as established by confidential opinions from members of the Bar. He has been recognized as an expert in immigration law by the Florida Courts, has litigated several cases against the Departments of State, Justice and Homeland Security in Federal Court and has written and lectured extensively on United States immigration and naturalization matters.

Recognized in 2003 by the *South Florida Business Journal* as one of the Best of the Bar and in 2004 as one of *Florida Trend's* Legal Elite, Mr. Devore is a former recipient of the Immigration Law Award presented by the Legal Aid Society of Palm Beach County in recognition of outstanding *Pro Bono* service to the community. In 2007 Mr. Devore was named a Florida Super Lawyer in the field of Immigration and Nationality Law. He is a frequent speaker on immigration matters at internationally known continuing legal education (CLE) seminars as well as for employers, civic groups and other organizations.

Mr. Devore is a member of The Florida Bar, the Palm Beach County Bar Association, the American Bar Association, and the American Immigration Lawyers Association (AILA) and is a past President of AILA's South Florida Chapter (2004-2005). He is a former member and past chair (2001-2002) of The Florida Bar's Immigration and Nationality Law Certification Committee and serves as Vice President of the Legal Aid Society of Palm Beach County. Mr. Devore can be contacted by telephone at (561) 478-5353 or via e-mail at jdevore@visabank.com.

INTRODUCTION

Does a foreign national really need to invest \$1 million dollars to get a green card? It's an option available to those who can afford the financial commitment and are willing to deal with a lot of bureaucratic wrangling. The million dollar investment can even be reduced to \$500,000 in certain instances. However, most people don't have significant assets lying around and for them, there are usually better options. Some of those other options are discuss in the pages that follow.

The purpose of this article is to provide an overview of visa options available to an investor. It is not all inclusive and there may be other and/or better options available to a foreign national. The article is comprised of four sections: 1) Treaty Traders; 2) Treaty Investors; 3) Treaty Employees; and 4) EB-5 Immigrant Investor Visas. The first three sections discuss the requirements for obtaining E-1 and E-2 nonimmigrant visas and for bringing in foreign workers for the enterprise. The fourth section discusses the requirements for obtaining lawful permanent residence in the United States (i.e. the "Green Card") based upon a substantial investment.

While written by an attorney, this article is not, and should not be, construed as legal advice for any particular purpose. The author unequivocally recommends that anyone attempting to take advantage of the matters discussed herein meet with a qualified immigration attorney to discuss the specifics of his or her case prior to taking any action in furtherance thereof.

TREATY VISAS IN GENERAL

Section 101(a)(15)(E) of the Immigration and Nationality Act provides that a nonimmigrant treaty visa may be issued in accordance with the provisions of a treaty of Friendship, Commerce and Navigation (FCN) between the United States and a foreign state of which the applicant is a national (i.e. citizen). The classification is further broken down into two categories: E-1 (treaty trader) and E-2 (treaty investor).¹ A list of the countries with qualifying treaties can be found in Appendix A at the end of this article.

An alien may be accorded E-1 status if he or she seeks admission solely to carry on substantial trade, including trade in services and technology, between the United States and the foreign country of which he or she is a national. A foreign national may qualify for E-2 status as a treaty investor “to develop and direct the operations of an enterprise in which he or she has invested, or of an enterprise he or she is actively in the process of investing a substantial amount of capital.” An employee of a treaty trader or investor may also be accorded “E” status if he or she holds the same nationality as the foreign national employer and is seeking admission to engage in duties that require special qualifications essential to the efficient operation of the enterprise. Treaty visa holders are not required to maintain a foreign residence they have no intention of abandoning. It is only necessary for the foreign national to demonstrate that he or she intends to depart the U.S. upon conclusion of “E” visa status.

The Department of Homeland Security (DHS) and the Department of State (DOS) each have their own regulations pertaining to “E” Visa status. United States Citizenship and Immigration Services (USCIS) is the DHS component responsible for adjudication of immigration related benefits within the United States.² The Department of State processes visa applications for those foreign nationals outside the United States at its various embassies and consulates throughout the world.³

USCIS regulations for treaty visas can be found at 8 C.F.R. § 214.2(e) and Department of State regulations at 22 C.F.R. § 41.51. Both rules were published simultaneously and are intended to provide consistent adjudication of “E” nonimmigrant visa petitions by USCIS and E nonimmigrant visa applications by the Department of State. Consular officers will

¹ In recent years, the Department of State has negotiated Bilateral Investment Treaties (BIT’s) with foreign states which provide for treaty investor (E-2) status, but not treaty trader (E-1) status and Free Trade Agreements (e.g. NAFTA) which provide for both. The Department of State maintains a list of qualifying countries online at <http://travel.state.gov/visa/reciprocity/index.htm>.

² United States Citizenship and Immigration Services is one of the successor agencies to the former Immigration and Naturalization Service which was abolished by the Homeland Security Act of 2002 which created the Department of Homeland Security.

³ A list of American Embassies and Consulates worldwide and links to their websites can be found at http://travel.state.gov/travel/tips/embassies/embassies_1214.html

also rely heavily on the Foreign Affairs Manual (FAM) which contains detailed guidance and notes helpful in adjudicating visa applications.

It should be noted, however, that unlike many other nonimmigrant visa categories (e.g. H, L, O) no nonimmigrant visa petition must be approved by USCIS before a foreign national may apply for an “E” visa at a United States Embassy or Consulate. A foreign national who is granted a change of status by USCIS to “E” status and then departs the U.S. must apply for an “E” visa at an American Embassy or Consulate. The Department of State takes the position that it is not bound by a previous decision of USCIS to accord “E” Visa status and therefore gives little, if any weight, to a previously approved USCIS petition.

The regulations provide for a two year period of initial admission and an unlimited number of two year extensions for “E” nonimmigrant classification. If an alien departs the United States and enters the U.S. using an “E” visa, he or she is entitled to readmission for a period of two years, notwithstanding the fact that the visa may expire prior to the end of the two year period, unless the alien’s passport expires less than six months from the date of admission. The only restriction on readmission is the validity of the “E” visa itself.⁴ The departure date is provided to the alien on DHS form I-94.⁵

When faced with an expiring I-94 and a facially valid “E” visa, one should consider the practicality of filing for an extension of stay with USCIS, or departing and reentering the United States, thereby obtaining a new I-94 card authorizing an additional two year period of admission. It is important to note, however, that an alien traveling to a contiguous territory for less than 30 days will not necessarily be issued a new I-94, and that Canadian citizens must always present a facially valid “E” visa when applying for admission as a treaty alien.⁶

⁴ This assumes, of course, that the alien is not inadmissible to the United States based upon some other provision of the law (e.g. criminal activity).

⁵ Commonly referred to as an I-94 card.

⁶ For most nonimmigrant visas, Canadian citizens may apply at the border for entry without having to make a formal visa application at an Embassy or Consulate. However, NAFTA requires that Canadian citizens apply for an “E” visa at a U.S. Embassy or Consulate. They may not apply at a border post.

TREATY TRADER (E-1) STATUS

An E-1 visa is based upon trade, not investment. Thus, no minimum capital investment is required in order to obtain an E-1 visa. However, the following requirements must be met:

- 1) The requisite treaty exists;
- 2) The individual and/or business possess the nationality of the treat country;
- 3) The activities must constitute trade as contemplated under Section 101(a)(15) of the Act:
 - Trade must constitute an exchange;
 - Trade must be international in scope; and
 - Trade must involve qualifying activities.
- 4) The trade must be substantial;
- 5) The trade must be primarily between the United States and the treaty country; and
- 6) The applicant intends to depart the United States when E-2 status terminates.

Trade

For trade to exist there must be an actual exchange of qualifying commodities such as goods, services or monies. An exchange of goods or consideration for services must flow between the two treaty countries and must be traceable or identifiable. Title to the trade item must pass from one treaty party to the other.⁷ The purpose of these treaties is to develop international trade between the two countries. Thus, while some domestic trade is acceptable, at least 50% of the trade conducted must be international in scope between the United States and the treaty country.

Unlike a treaty investor who can qualify for E-2 status when he or she is actively in the process of investing, a foreign national cannot qualify for E-1 status for the purpose of searching for trading relationships. ***Trade between the United States and the treaty country must already be in progress at the time of application.*** Existing trade includes

⁷ The fact that proceeds from services performed in the U.S. may be placed in a bank account in a treaty country does not necessarily indicate that meaningful exchange has occurred if the proceeds do not support any business activity in the treaty country.

successfully integrated contracts binding upon the parties which call for the immediate exchange of qualifying items of trade.

Trade for E-1 purposes involves the commercial exchange of goods or services in the international market place. USCIS defines the term “goods” as “tangible commodities or merchandise having extrinsic value.” Further, the term “services” is defined as “legitimate economic activities which provide other than tangible goods.” In the rapidly changing business climate with an increasing trend toward a service based economy, many services might benefit from E-1 visa classification. The term “trade” has been interpreted to include international banking, insurance, transportation, tourism, communications, data processing, advertising, accounting, management consulting, technology, and some news gathering activities. These activities do not constitute an all inclusive list but are merely examples of the types of services found to fall within the E-1 meaning of trade. Essentially, any service item commonly traded in international commerce would qualify.

Substantiality

The word “substantial” is intended to describe the flow of the goods or services which are being exchanged between the treaty countries. Trade must be a continuous flow which involves numerous transactions over time. USCIS and Consular officers have been instructed to focus primarily on the volume of trade conducted, but they consider the monetary value of the transactions as well. Although the number of transactions and the value of each transaction will vary, greater weight is generally accorded to cases involving numerous transactions of larger value.

A small business should not be excluded from E-1 status if it is capable of demonstrating a pattern of transactions of value. Thus, proof of numerous transactions, although each may be relatively small in value, might establish the requisite continuing course of international trade. Income derived from the international trade which is sufficient to support the treaty trader and family should be considered as a favorable factor when assessing the substantiality of trade in a particular case.

Substantial trade in goods may be demonstrated by evidence from many sources including, but not limited to, bills of lading, customs receipts, letters of credit, insurance papers documenting commodities imported, purchase orders, carrier inventories, trade brochures, sales contracts, and other traditional business documentation. Substantial trade in services may be demonstrated by presenting a summary or audit of international accounts and transactions and, if necessary for verification, contracts demonstrating the nature of the trade/service activity, the value/cost of such, and the time of performance of these activities as well as other conditions of the transaction. Documents can also be presented which verify that payment has been made pursuant to such a contract and that performance of the services has been made in part or total.

TREATY INVESTOR (E-2) STATUS

Unlike treaty trader status, the E-2 visa is based upon investment, not trade. An investor may undertake any lawful active commercial or entrepreneurial business enterprise which produces some service or commodity for the purpose of making a profit. Non-profit and passive investments do not qualify for treaty investor status. The investment cannot be in 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.

Invested or Actively in the Process of Investing

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. If the funds are not subject to partial or total loss in the event that business fortunes reverse, then it is not an “investment” in the sense intended by the Immigration and Nationality Act. The investor must establish that he or she has either made a substantial investment or is actively in the process of making a substantial investment in the subject enterprise. Where a new enterprise is being formed, the applicant must demonstrate that the funds have been committed and are at risk. Further, the funds must be irrevocably committed to the business.

Indebtedness may be counted as part of the foreign national’s total investment provided that it meets certain criteria. ***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 foreign national 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 (e.g. a personal guarantee on a loan secured by business assets). ***Loans secured solely by the foreign national’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 summary, 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 foreign national’s personal dwelling used as collateral, or some similar personal liability. A reasonable amount of cash, held in a business bank account or similar fund to be used for routine business operations, may be counted as investment funds.

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.⁸ 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 upon the condition being met. The point of the example is that to be in the process of investing the investor must have, and in this case would 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 of signing contracts or scouting for suitable locations and property. Mere intent to invest, or possession of uncommitted funds in a bank account, or even prospective investment arrangements entailing no present commitment, is insufficient.

Develop and Direct

In all treaty investor cases, it must be shown that nationals of a treaty country own at least 50 percent of an enterprise. An equal share of the investment in a joint venture or an equal partnership of two parties, generally does give controlling interest, if the joint venture and partner each retain full management rights and responsibilities. This concept is referred to as “Negative Control” and results in both parties possessing equal responsibilities, each having the capacity of making decisions that are binding on the other.

It must also be shown that a national (or nationals) of the treaty country, through ownership or by other means, develop and direct the activities of 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.

Substantial Investment

There is no set dollar figure which constitutes a minimum investment amount which satisfies the substantiality test. A substantial amount of capital for E-2 visa purposes constitutes an amount that is:

⁸ Business reality is that while a seller may be willing to close in escrow, they will do so only if a final result can be obtained in a reasonable amount of time. In these days of increasing USCIS and Department of State delays and seemingly daily procedural changes imposed by both the Department of Homeland Security and Department of State, escrow closings may become a thing of the past unless the seller is induced with significant additional consideration.

- 1) Substantial in a proportional sense, i.e., 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.

The substantiality requirement is met by satisfying the “proportionality test.” This test is the comparison between two figures: the amount of qualifying funds invested and the fair market value of the established business or, if a new business is being created, the cost of establishing such a business. For example, the total investment needed to start a restaurant is usually less than that needed to start a manufacturing plant.

The vast majority of cases involve less than 100% cash (or cash equivalent) investments which can best be understood as a sort of inverted sliding scale. The lower the cost of the business, the higher percentage of investment is required, whereas, a highly expensive business would require a lower percentage of qualifying investment. The Department of State previously provided examples⁹ to demonstrate the concept of the proportionality test, but specifically stated that they are not to be viewed as bright-line requirements:

- A newly-created business, e.g., a consulting firm, might only need a \$50,000 investment to be set up and become fully operational. As this cost figure is relatively low, a higher percentage of investment is anticipated. An investment approaching 90–100% would easily meet the test;
- A business costing \$100,000 might require an investment of 75–100% to meet the test;
- A small business costing \$500,000 would demand generally upwards of a 60% investment, with a \$375,000 investment clearly meeting the test;
- In the case of a million dollar business, a lesser percentage might be needed, but 50–60% investment would qualify;
- A business requiring \$10 million to purchase or establish would require a much lower percentage. A \$3 million investment might suffice in view of the sheer magnitude of the dollar amount invested; and

⁹ These examples were removed from the Department of State’s Foreign Affairs Manual (FAM) on October 10, 2001 during an amendment process. It is unclear as to why they were removed, though some consular officers used them as bright line tests when they were not intended as such. They are still useful, however, in evaluating the proportionality of an investment.

- An investment of \$10 million in a \$100 million business would qualify based on the sheer magnitude of the investment itself.

It is important to note that businesses in the formative years or during a period of change of ownership are often unprofitable. 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 weed out risky undertakings and to ensure that the investor is unquestionably committed to the success of the business. Consular officers have been directed to use judgment that takes into account the totality of the factors involved, and not undertake simple arithmetic exercises in assessing proportionality.

Marginality

Even if an investment is substantial, it cannot be marginal or an application for E-2 status will fail. 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 his family. The projected income should generally be recognizable within five years from the date the foreign national commences the business activity of the enterprise.

The Department of State has provided guidelines on how to determine whether an investment is marginal:

- 1) First, look to the alien's income from the investment. If the income derived from the business exceeds what is necessary to support the foreign national and his or her family, then the test is satisfied;
- 2) If the first test is not met, and it becomes necessary to consider other factors, one can look to the economic impact of the business. The business must have the capacity, present or future, to make a significant economic contribution. The projected future capacity should generally be realizable within five years from the date the alien commences normal business. It is recommended that applicant's submit a reliable business plan to verify the capacity to realize a profit within a maximum of five years.

TREATY EMPLOYEES

In order to qualify to bring an employee into the United States under an E-1 or E-2 visa, the prospective employer in the United States must be maintaining “E” status and meet the following criteria:

- The employer must meet the nationality requirement, i.e., if an individual, the nationality of the treaty country or, if a corporation or other business organization, at least 50% of the ownership must have the nationality of the treaty country;¹⁰
- The employer and the employee must have the same nationality; and
- The employer, if not residing abroad, must be maintaining “E” status in the United States.

Essential Skills Employees

Employees must be coming to the U.S. to engage in duties of an executive or supervisory character, or, if employed in a lesser capacity, the employee must have special qualifications that make the services to be rendered essential to the efficient operation of the enterprise. There is no prior employment requirement for the prospective employee. In evaluating the executive and/or supervisory elements, the following factors are considered:

The title of the position to which the applicant is destined, its place in the firm's organizational structure, the duties of the position, the degree to which the applicant will have ultimate control and responsibility for the firm's overall operations or a major component thereof, the number and skill levels of the employees the applicant will supervise, the level of pay, and whether the applicant possesses qualifying executive or supervisory experience; and

Whether the executive or supervisory element of the position is a principal and primary function and not an incidental or collateral function.

The weight to be accorded a given factor may vary from case to case. For example, the position title of “vice president” or “manager” might be of use in assessing the supervisory nature of a position if the applicant were coming to a major operation having

¹⁰ A permanent resident alien (“Green Card” holder) does not qualify to bring in employees under the treaty visa provisions. Moreover, shares of a corporation or other business organization owned by permanent resident aliens cannot be considered in determining majority ownership by nationals of the treaty country to qualify the company for bringing in alien treaty employees.

numerous employees. However, if the applicant were coming to a small two-person office such a title, in and of itself, would be of little significance.

Employees who are considered essential to the efficient operation of the enterprise must possess specialized skills. The burden of proof to establish that the applicant has special qualifications essential to the effectiveness of the firm's United States operations is on the company and the applicant. The determination of whether an employee is an "essential employee" in this context requires the exercise of judgment. It cannot be decided by the mechanical application of a bright-line test as by its very nature, essentiality must be assessed on the particular facts of each case.

The applicant bears the burden of establishing at the time of application not only the need for the skills that he or she offers but, also, the length of time that such skills will be required. In general, E classification is intended for specialists and not for ordinary skilled workers. There are, however, exceptions to this generalization. Some skills may be essential for as long as the business is operating. Others, however, may be necessary for a shorter time, such as in start-up cases.

For long term need, the employer may show a need for the skill(s) on an on-going basis when the employee(s) will be engaged in functions such as continuous development of product improvement, quality control, or provision of a service otherwise unavailable. An employer may need the employee's skills for only a relatively short (e.g., one or two years) period of time when the purpose of employment relates to start-up operations (of either the business or a new activity by the business) or to training and supervision of technicians employed in manufacturing, maintenance and repair functions.

Once the business has established the need for the specialized skills, the experience and training necessary to achieve such skills must be analyzed to recognize the special qualities of the skills in question. The question of duration of need will cause variances among the kinds of skills involved. Further, the visa applicant must prove that he or she possesses these skills, by demonstrating the requisite training and/or experience. In assessing the specialized skills and their essentiality, Consular officers have been directed to consider such factors as the:

- 1) Degree of proven expertise of the alien in the area of specialization;
- 2) The uniqueness of the specific skills;
- 3) The function of the job to which the alien is destined; and
- 4) The salary such special expertise can command. In assessing the claimed duration of essentiality, the consular officer should look to the period of training needed to perform the contemplated duties and, in some cases, the length of experience and training with the firm.

Availability of U.S. workers is also considered in assessing the degree of specialization the applicant possesses and the essentiality of the skilled worker to the successful operation of the business. This consideration is not a labor certification test, but a measure of the degree of specialization of the skills in question and the need for such.

EB-5 IMMIGRANT INVESTORS

Section 203(b)(5) of the Immigration and Nationality Act provides that immigrant visas shall be made available to aliens seeking to enter the United States for the purpose of engaging in a new or reorganized for profit commercial enterprise which will benefit the U.S. economy and create at least 10 full-time jobs. The basic amount required to invest is \$1 million, but the amount may be reduced to \$500,000 if the investment is made in a "targeted employment" area.¹¹ Unlike the E-1 and E-2 visas, no qualifying treaty is required.

There are two basic requirements to establish a new commercial enterprise. First, the enterprise must be "new", *i.e.*, formed after November 29, 1990. Second, it must be a "commercial" enterprise. Any for-profit entity formed for the ongoing conduct of lawful business may serve as a commercial enterprise. This includes sole proprietorships, partnerships (whether limited or general), holding companies, joint ventures, corporations, business trusts, or other entities publicly or privately owned. This definition would even include a holding company and its wholly-owned subsidiaries if each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. However, the term "new commercial enterprise" does not include noncommercial activity, such as owning and operating a personal residence. The essential elements of a successful EB-5 petition are detailed below.

Creating an Original Business

Previously, an EB-5 petitioner must have a hand in the "establishment" of the enterprise and must be present at the enterprise's inception. This posed particular problems for people investing in partnerships. The partnership will usually be created and then the general partner will seek individuals to invest as limited partners. Under the legacy INS' interpretation, such investors cannot qualify for EB-5 classification because they were not partners when the original partnership was created. However, in 2002, Congress eliminated the "establishment" requirement for EB-5 investors, instead only requiring that investors show that they have "invested" in a commercial enterprise.

Buying an Existing Business

By reorganizing or restructuring an existing business, an investor may create a "new commercial enterprise" and therefore qualify for a visa. USCIS has held that simply changing the legal form of the enterprise does not satisfy this requirement. Regardless of the forms used to create a new enterprise, the focus of the law is on the creation of at least 10 new employment opportunities. Investments creating a new enterprise but failing to create 10 new jobs will also fail to qualify for the investor/employment-creation visa.

¹¹ A "targeted employment" area is defined as an area which, at the time of investment, is a rural area or an area which has experienced a rate of unemployment that is at least 150 percent of the national average.

Expanding an Existing Business

An investor can also create a new enterprise by expanding an existing business. Only an expansion resulting in an increase of at least 40 percent in the net worth of the business or in the number of employees of the business will satisfy the visa requirements. This could require the investor to create more than 10 new jobs to qualify for a visa. The larger the business that the investor expands, the more onerous his or her burden to qualify for a visa under this standard. However, an investor need not show that his or her investment alone caused the 40 percent increase.

Pooling Arrangements

The regulations specifically allow immigrant investors to pool their investments with others seeking EB-5 status. Each investor is required to invest the applicable statutory amount. All of the new jobs created by the new commercial enterprise will be allocated among those within the pool seeking permanent investor visas. USCIS has injected a restriction on pooling investments by requiring the petitioner to show that *every* investor in the partnership identify the source of their funds and prove that they were derived by lawful means. This evidentiary hurdle can make it very difficult for members in a partnership to qualify for EB-5 status.

“Engaging” in a New Commercial Enterprise

The statute requires an EB-5 applicant to enter the United States to engage in a new commercial enterprise. To qualify, an alien investor must maintain more than a passive role in the new enterprise upon which the petition is based. The regulations require an EB-5 immigrant to be involved in the management of the new commercial enterprise. The petitioner must either be involved in the day-to-day managerial control of the commercial enterprise or manage it through policy formulation. Applicable regulations state that if the petitioner is a corporate officer or board member, or, in the case of a limited partnership, is a limited partner under the provisions of the Uniform Limited Partnership Act (ULPA), he or she satisfies the requirement of engaging in the management of the new commercial enterprise. USCIS however, has found that merely calling the investor a limited partner pursuant to the ULPA in a partnership agreement does not automatically mean that the person is involved in the management of the new commercial enterprise.

“Investing” or “Actively in the Process of Investing” “Capital”

The Immigration and Nationality Act requires an EB-5 petitioner to have invested or be in the process of investing. The term "invest" means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital and will not constitute an investment.

The regulations define "capital" as cash and cash equivalents, equipment, inventory, and other tangible property. Capital does not include loans by the petitioner or other parties. Indebtedness secured by assets owned by the alien entrepreneur may be considered capital, provided the investor is personally and primarily liable for the debts and the assets of the enterprise upon which the petition is based are not used to secure any of the indebtedness. This requirement is essentially identical to the treaty investor (E-2) capital infusion requirement.

Indebtedness typically consists of a promissory note signed by the petitioner that specifies a payment schedule to the new commercial enterprise. Absent fraud, a signed promissory note that is secured by the petitioner's personal assets constitutes a contribution of capital by the petitioner. The issuer of the promissory note, *i.e.*, the alien investor, is considered to be "at risk" if the petitioner is clearly obligated to make all the required payments on the note and there are no "escape" clauses. The investor cannot receive any bond, note, or other debt arrangement from the enterprise for the capital contributed to it. This includes any stock redeemable at the holder's request. All capital is valued at fair market value in U.S. dollars at the time they are given.

Benefiting the U.S. Economy

The statute requires that investments "benefit the U.S. economy" to qualify the investor for an EB-5 visa or status. The statute provides no guidance on which investments benefit the economy. This silence means USCIS adjudicators are left to their subjective interpretations of the investment and its relative benefits when reviewing the petition. Arguably, the petitioner has benefited the economy by merely meeting the employment and investment requirements of the visa classification. However, because the statute specifically identifies the "benefit" element as distinct from other components of the visa, it appears that the applicant must independently show that the enterprise, in the conduct of its business, will benefit the U.S. economy. Therefore, a consulting firm exclusively serving customers abroad with no return benefit to the U.S. economy (other than employing the requisite number of workers), might not support an EB-5 petition. In contrast, showing that the new enterprise provides goods or services to U.S. markets should satisfy this requirement.

Federal regulation of foreign investment is extensive. Some regulations restrict foreign investments in aviation, banking, shipping, communications, land use, energy resources, and government contracting. Additionally, Congress has imposed several disclosure and data requirements on foreign investments. An investment may not be deemed beneficial to the U.S. economy if it runs afoul of any statutory limitation on foreign investment.

Creating or Saving Jobs

To qualify for EB-5 status, an investment normally must create full-time employment for at least 10 U.S. citizens, lawful permanent residents or other immigrants lawfully authorized to be employed in the United States. The investor, his or her spouse and

children do not count toward the 10 employee minimum. Nonimmigrants are also excluded from the count.

The regulations define an "employee" for EB-5 purposes as an individual who (1) provides services or labor for the new commercial enterprise and (2) receives wages or other remuneration directly from the new commercial enterprise. This definition excludes independent contractors.

The Types of Jobs

The jobs created must be full-time. This means employment of a qualified employee in a position that requires a minimum of 35 working hours per week. Job-sharing arrangements, where two or more qualifying employees share a full-time position, will also serve as full-time employment if the hourly requirement per week is met. Job-sharing does not include combinations of part-time positions even if when combined, such positions meet the hourly requirement per week.

When the Jobs Must Exist

The law is unclear about when new jobs must exist. The statutory language is prospective and therefore does not require jobs to exist at the time of initial investment or before the petition is filed. USCIS does not require retention of employees until a reasonable time after conditional visa issuance. In fact, a petitioner may support a petition with a comprehensive business plan demonstrating a need for at least 10 employees within the next two years. The business plan need only indicate the approximate dates during the following two years when the employees will be hired. The temporary vacancy of a position during the two-year conditional period does not disqualify an investor, as long as good-faith attempts to re-staff the position are made.

Where the Jobs Must be Located

When enacting the EB-5 program, Congress took an affirmative step toward creating jobs in the geographic areas that needed them most. The statute sets aside 3,000 of the approximately 10,000 EB-5 visas available annually for alien entrepreneurs who invest in "targeted employment areas." The statute defines a "targeted employment area" as a rural area or an area that has experienced high unemployment of at least 150 percent of the national average. An area not within a metropolitan statistical area or the outer boundary of any city or town having a population of 20,000 or more is considered a rural area.

Troubled Businesses

Special rules govern investments in "troubled" businesses. A troubled business is one that has been in existence for at least two years, has incurred a net loss for accounting purposes during the 12 or 24 month period before the petition was filed, and the loss for such period is at least equal to 20 percent of the business's net worth before the loss. To establish investment in a troubled business, the petitioner must show that the number of

existing employees will be maintained at no less than the pre-investment level for at least two years. Thus, this provision includes a significant incentive in that it does not require the creation of 10 new jobs. Instead, it requires only that the business maintain the number of existing employees during the conditional status period. As a caveat, if the troubled business does not remain afloat for two years after the investment, the alien investor might lose his or her conditional resident status.

Regional Centers

In 2002, Congress created a pilot program to provide for investment in a “regional center”.¹² This program is currently set to expire on March 6, 2009, though Congress is expected to extend the program. In this program, a promoter makes a proposal to United States Citizenship and Immigration Services. If USCIS finds it will benefit a regional economy and shows potential for providing significant indirect employment, the project will be designated a Regional Center. With USCIS approval, the promoter forms a limited partnership or corporation. Investors may apply for green cards upon making the investment.

Investors in a Regional Center do not have to have day-to-day management responsibility and do not have to prove the business employs 10 people. Instead, they may rely on industry job multiplier statistics. An approved regional center designation means that USCIS is satisfied with the job creation potential.

This provision makes it possible for a foreign national to invest in a commercial enterprise which lends money to other businesses and to count the jobs created by those businesses for the purpose of satisfying the EB-5 job creation requirements. As a result of the limited management responsibilities and flexible job creation requirements, regional centers have become increasingly popular. However, as the regional center is essentially a third party investment vehicle, an investor should be careful to complete his due diligence prior to investing in order to ensure that the investment not only satisfies his immigration objectives, but that he is also comfortable with the risk to his investment capital.

¹² A “regional center” is defined as any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment.

CONCLUSION

Many foreign nationals often believe that they need a “Green Card” to live and work in the United States. As depicted herein, such is not the case. It is important to note that lawful permanent residents of the United States are, like U.S. Citizens, taxed on their world wide income. For the financially successful, this can result in a significant tax consequence. While international tax treaties can reduce or in some circumstances eliminate U.S. tax on foreign income, such a person should consult with immigration and tax counsel to evaluate his particular circumstances.

There are many avenues available to work in the U.S., many of which are not detailed in this article. The key is to find the right one to allow the foreign national to obtain his or her objective in a reasonable period of time.

Appendix A

Treaty Countries

Country of Citizenship	Treaty Trader (E-1)	Treaty Investor (E-2)
Albania	No	Yes
Argentina	Yes	Yes
Armenia	No	Yes
Australia	Yes	Yes
Austria	No	Yes
Azerbaijan	No	Yes
Bahrain	No	Yes
Bangladesh	No	Yes
Belgium	Yes	Yes
Bolivia	Yes	Yes
Bosnia & Herzegovina	Yes	Yes
Brunei	Yes	No
Bulgaria	No	Yes
Cameroon	No	Yes
Canada	Yes	Yes
Chile	Yes	Yes
China (Taiwan) ¹	Yes	Yes
Colombia	Yes	Yes
Congo (Brazzaville)	No	Yes
Congo (Kinshasa)	No	Yes
Costa Rica	Yes	Yes
Croatia	Yes	Yes
Czech Republic ²	No	Yes

Country of Citizenship	Treaty Trader (E-1)	Treaty Investor (E-2)
Denmark ³	Yes	No
Ecuador	No	Yes
Egypt	No	Yes
Estonia	Yes	Yes
Ethiopia	Yes	Yes
Finland	Yes	Yes
France ⁴	Yes	Yes
Georgia	No	Yes
Germany	Yes	Yes
Greece	Yes	No
Grenada	No	Yes
Honduras	Yes	Yes
Iran	Yes	Yes
Ireland	Yes	Yes
Israel	Yes	No
Italy	Yes	Yes
Jamaica	No	Yes
Japan ⁵	Yes	Yes
Jordan	Yes	Yes
Kazakhstan	No	Yes
Korea (South)	Yes	Yes
Kyrgyzstan	No	Yes
Latvia	Yes	Yes
Liberia	Yes	Yes
Lithuania	No	Yes
Luxembourg	Yes	Yes
Macedonia	Yes	Yes
Mexico	Yes	Yes
Moldova	No	Yes
Mongolia	No	Yes
Morocco	No	Yes

Country of Citizenship	Treaty Trader (E-1)	Treaty Investor (E-2)
Netherlands ⁶	Yes	Yes
Norway ⁷	Yes	Yes
Oman	Yes	Yes
Pakistan	Yes	Yes
Paraguay	Yes	Yes
Philippines	Yes	Yes
Poland	No	Yes
Romania	No	Yes
Senegal	No	Yes
Singapore	Yes	Yes
Slovak Republic ²	No	Yes
Slovenia ¹¹	Yes	Yes
Spain ⁸	Yes	Yes
Sri Lanka	No	Yes
Suriname ⁹	Yes	Yes
Sweden	Yes	Yes
Switzerland	Yes	Yes
Thailand	Yes	Yes
Togo	Yes	Yes
Trinidad & Tobago	No	Yes
Tunisia	No	Yes
Turkey	Yes	Yes
Ukraine	No	Yes
United Kingdom ¹⁰	Yes	Yes
Yugoslavia ¹¹	Yes	Yes

¹ Pursuant to Section 6 of the Taiwan Relations Act, (TRA) Public Law 96-8, 93 Stat, 14, and Executive Order 12143, 44 F.R. 37191, this agreement which was concluded with the Taiwan authorities prior to January 01, 1979, is administered on a nongovernmental basis by the American Institute in Taiwan, a nonprofit District of Columbia corporation, and constitutes neither recognition of the Taiwan authorities nor the continuation of any official relationship with Taiwan.

² The Treaty with the Czech and Slovak Federal Republic entered into force on December 19, 1992; entered into force for the Czech Republic and Slovak Republic as separate states on January 01, 1993.

³ The Treaty which entered into force on July 30, 1961, does not apply to Greenland.

⁴ The Treaty which entered into force on December 21, 1960, applies to the departments of Martinique, Guadeloupe, French Guiana and Reunion.

⁵ The Treaty which entered into force on October 30, 1953, was made applicable to the Bonin Islands on June 26, 1968, and to the Ryukyu Islands on May 15, 1972.

⁶ The Treaty which entered into force on December 05, 1957, is applicable to Aruba and Netherlands Antilles.

⁷ The Treaty which entered into force on September 13, 1932, does not apply to Svalbard (Spitzbergen and certain lesser islands).

⁸ The Treaty which entered into force on April 14, 1903, is applicable to all territories.

⁹ The Treaty with the Netherlands which entered into force December 05, 1957, was made applicable to Suriname on February 10, 1963.

¹⁰ The Convention which entered into force on July 03, 1815, applies only to British territory in Europe (the British Isles (except the Republic of Ireland), the Channel Islands and Gibraltar) and to "inhabitants" of such territory. This term, as used in the Convention, means "one who resides actually and permanently in a given place, and has his domicile there." Also, in order to qualify for treaty trader or treaty investor status under this treaty, the alien must be a national of the United Kingdom. Individuals having the nationality of members of the Commonwealth other than the United Kingdom do not qualify for treaty trader or treaty investor status under this treaty.

¹¹ The U.S. view is that the Socialist Federal Republic of Yugoslavia (SFRY) has dissolved and that the successors that formerly made up the SFRY - Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Slovenia, and the Federal Republic of Yugoslavia continue to be bound by the treaty in force with the SFRY and the time of dissolution.