9 FAM 402.9

TREATY TRADERS, INVESTORS, AND SPECIALTY OCCUPATIONS - E VISAS

(CT:VISA-131; 05-16-2016)
(Office of Origin: CA/VO/L/R)

9 FAM 402.9-1 STATUTORY AND REGULATORY AUTHORITIES

9 FAM 402.9-1(A) Immigration and Nationality Act

(CT:VISA-1; 11-18-2015)

INA 101(a)(15)(E) (8 U.S.C. 1101(a)(15)(E)); INA 101(a)(45) (8 U.S.C. 1101(a)(45)); INA 214(e)(6) (8 U.S.C. 1184(e)(6)); INA 214(g)(11) (8 U.S.C. 1184(g)(11)); INA 214(i)(1) (8 U.S.C. 1184(i)(1)); INA 214(j)(2) (8 U.S.C. 1184(j)).

9 FAM 402.9-1(B) Code of Federal Regulations

(CT:VISA-1; 11-18-2015)

22 CFR 41.51.

9 FAM 402.9-1(C) Public Law

(CT:VISA-1; 11-18-2015)

Public Law 107-124.

9 FAM 402.9-2 E VISAS - OVERVIEW

(CT:VISA-1; 11-18-2015)

a. Treaty Trader (E-1) and Treaty Investor (E-2) visas are for citizens of countries with which the United States maintains treaties of commerce and navigation. The applicant must be coming to the United States to engage in substantial trade, including trade in services or technology, in qualifying activities, principally between the United States and the treaty country (E-1), or to develop and direct the operations of an enterprise in which the applicant has invested a substantial amount of capital (E-2).

(Previous Location: 9 FAM 41.51.N1 CT:VISA-1586; 10-14-2010)

b. As the E visa is becoming ever more popular, you must remember that the basis of this classification lies in treaties which were entered into, at least in part, to enhance or facilitate economic and commercial interaction between the United States and the

treaty country. It is with this spirit in mind that cases under INA 101(a)(15)(E) should be adjudicated.

c. Although this classification mandates compliance with a lengthy list of requirements, many of these standards are subject to the exercise of a great amount of judgment and discretion. Consular officers should seek to be flexible, fair, and uniform in adjudicating E visa applications.

d. As in the case of any visa application, the burden of proof to establish status rests with the alien. If the alien's qualification for E-1 or E-2 classification is uncertain, you may request whatever documentation is needed to overcome that uncertainty.

9 FAM 402.9-3 CLASSIFICATION CODES

(CT:VISA-1; 11-18-2015)

22 CFR 41.12 identifies the following visa classification symbols for treaty trader, treaty investors or specialty occupation aliens accordance with INA 101(a)(15)(E):

E1	Treaty Trader, Spouse or Child
E2	Treaty Investor, Spouse or Child
E3	Australian Treaty Alien coming to the United States Solely to Perform Services in a Specialty Occupation
E3D	Spouse or Child of E3
E3R	Returning E3

9 FAM 402.9-4 GENERAL REQUIREMENTS FOR E-1 AND E-2 VISAS

9 FAM 402.9-4(A) Qualifying Treaty or Equivalent

(CT:VISA-105; 04-06-2016)

The Immigration and Nationality Act section 101(a)(15)(E) requires the existence of a qualifying treaty of commerce and navigation between the United States and a foreign State in order for E visa classification to be accorded to nationals of that foreign State. Such qualifying treaties may include treaties of Friendship, Commerce and Navigation and Bilateral Investment Treaties. Countries whose nationals may be accorded nonimmigrant classification under INA 101(a)(15)(E) pursuant to a qualifying treaty, or pursuant to legislation enacted to extend that same privilege, are listed in 9 FAM 402.9-10.

9 FAM 402.9-4(B) Nationality

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N2 CT:VISA-322; 10-10-2001)

a. The treaty trader or 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 alien claims nationality. The nationality of a business is determined by the nationality of the individual owners of that business.

(Previous Location: 9 FAM 41.51 N3.2 CT:VISA-1586; 10-14-2010)

b. **Place of Incorporation:** The country of incorporation is irrelevant to the nationality requirement for E visa purposes. In cases where a corporation is sold exclusively on a stock exchange in the country of incorporation, however, one can presume that the nationality of the corporation is that of the location of the exchange. The applicant should still provide the best evidence available to support such a presumption. In the case of a multinational corporation whose stock is exchanged in more than one country, then the applicant must satisfy you, by the best evidence available, that the business meets the nationality requirement. In view of the complex corporate structures in these cases, you should avail yourself of Departmental assistance by submitting an advisory opinion request to CA/VO/L/A when necessary.

(Previous Location: 9 FAM 41.51 N3.1 CT:VISA-2317; 08-20-2015)

c. **Fifty Percent Rule**: Pursuant to 22 CFR 41.51(b)(2)(ii), nationals of the treaty country must own at least 50 percent of the business in question when the investor is an organization and the applicant is an employee. In corporate structures one looks to the nationality of the owners of the stock. If a business in turn owns another business, then nationality of ownership must be traced to the point of reaching the 50 percent rule with respect to the parent organization. In most cases, this should pose no real problem but, in modern business structures and layered relationships, you will have to rely heavily on the evidence presented to adjudicate whether the business entity in question possesses the requisite nationality. Pursuant to 22 CFR 41.51(b)(11), if the applicant is the investor who is coming solely to develop and direct the enterprise, then the applicant must show that he or she controls or will control the enterprise. Normally such control is shown through at least 50 percent ownership by the applicant, but it can also be shown by possession of operational control (through a managerial position or other corporate device) or by other means. Note, however, that merely occupying a managerial position is not sufficient to meet this requirement if the applicant does not and will not control the enterprise.

(Previous Location: 9 FAM 41.51 N3.3 CT:VISA-322; 10-10-2001)

c. **Dual Nationality of Trader or Investor:** Except in the case in which an enterprise is owned and controlled equally (50/50) by nationals of two treaty countries, a business for which E visa status is sought may have only one qualifying nationality. In the case of dual national owner(s), a choice must be made by the owner(s) as to which nationality shall be used. The owner and all E visa employees of the company must possess the nationality of the single E visa qualifying country, and hold themselves as nationals of that country for all E visa purposes involving that company, regardless of whether they also possess the nationality of another E visa country. When a company is equally owned and controlled by nationals of two different treaty countries, employees of either nationality may obtain E visas to work for that company.

9 FAM 402.9-4(C) Intent to Depart Upon Termination of Status

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N15 CT:VISA-1451; 07-20-2010)

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. As discussed in 9 FAM 402.12-14, an applicant might be a beneficiary of an immigrant visa petition filed on his or her behalf. However, the alien might satisfy you that his and/or her intent is to depart the United States upon termination of status, and not stay in the United States to adjust status or otherwise remain in the United States regardless of legality of status.

9 FAM 402.9-5 REQUIREMENTS FOR E-1 TREATY TRADER VISAS

9 FAM 402.9-5(A) Evaluating E-1 Visa Applications

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N1.1 CT:VISA-1586; 10-14-2010)

In evaluating E-1 applications, you must determine whether the:

(1) Requisite treaty exists (see 9 FAM 402.9-4(A) and 402.9-10);

(2) Individual and/or business possesses the nationality of the treaty country (see 9 FAM 402.9-4(B));

(3) Activities constitute trade within the meaning of INA 101(a)(15)(E) (see 9 FAM 402.9-5(B));

(4) Trade is substantial (see 9 FAM 402.9-5(C));

(5) Trade is principally between the United States and the treaty country (see 9 FAM 402.9-5(D));

(6) Applicant, if an employee, is destined to an executive/supervisory position or possesses skills essential to the firm's operations in the United States (see 9 FAM 402.9-7(B) and (C)); and

(7) Applicant intends to depart the United States when the E-1 status terminates (see 9 FAM 402.9-4(C)).

9 FAM 402.9-5(B) Trade for E-1 Purposes

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N4.1 CT:VISA-78; 05-07-1993)

a. **Elements of Trade:** Trade for E-1 purposes consists of three ingredients, each of which must be present in all E-1 cases. The three requirements are:

(1) Trade must constitute an exchange;

(2) Trade must be international in scope; and

(3) Trade must involve qualifying activities.

(Previous Location: 9 FAM 41.51 N4.2 CT:VISA-1586; 10-14-2010)

b. **Trade Entails Exchange:** There must be an actual exchange, in a meaningful sense, of qualifying commodities such as goods, moneys, or services to create transactions considered trade within the meaning of INA 101(a)(15)(E)(i). An exchange of a good or service for consideration must flow between the two treaty countries and must be traceable or identifiable. However, the fact that proceeds from services performed in the United States 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. Title to the trade item must pass from one treaty party to the other.

(Previous Location: 9 FAM 41.51 N4.3 CT:VISA-78; 05-07-1993)

c. **Trade Must be International:** The purpose of these treaties is to develop international commercial trade between the two countries. Development of the domestic market without international exchange does not constitute trade in the E-1 visa context. Thus, engaging in purely domestic trade is not contemplated under this classification. The traceable exchange in goods or services must be between the United States and the other treaty country.

(Previous Location: 9 FAM 41.51 N4.4 CT:VISA-78; 05-07-1993)

d. **Trade Must be in Existence:** An alien cannot qualify for E-1 classification for the purpose of searching for a trading relationship. Trade between the treaty country and the United States must already be in progress on behalf of the individual or firm to entitle an alien to treaty trader classification. Existing trade includes successfully integrated contracts binding upon the parties that call for the immediate exchange of qualifying items of trade.

(Previous Location: 9 FAM 41.51 N4.5 CT:VISA-322; 10-10-2001)

e. In the rapidly changing business climate with an increasing trend toward service industries, many more services, whether listed below or not, might benefit from E-1 visa classification.

f. To constitute trade in a service for E-1 purposes, the provision of that service by an enterprise must be the purpose of that business and, most importantly, must itself be the saleable commodity which the enterprise sells to clients. The term "trade" as used in this statute has been interpreted to include international banking, insurance, transportation, tourism, communications, and newsgathering activities. (Aliens engaged in newsgathering activities, however, should usually be classified under INA 101(a)(15)(I).) 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.

9 FAM 402.9-5(C) Substantial Trade

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N6 CT:VISA-1586; 10-14-2010)

a. The word "substantial" is intended to describe the flow of the goods or services that are being exchanged between the treaty countries. The trade must be a continuous flow that should involve numerous transactions over time. You should focus primarily on the volume of trade conducted but you may also consider the monetary value of the transactions as well. Although the number of transactions and the value of each

transaction will vary, greater weight should be accorded to cases involving more numerous transactions of larger value.

b. The smaller businessman should not be excluded if 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 that is sufficient to support the treaty trader and family should be considered favorably when assessing the substantiality of trade in a particular case.

9 FAM 402.9-5(D) Trade Must Be Principally Between United States and Country of Alien's Nationality

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N7 CT:VISA-78; 05-07-1993)

a. The general rule requires that over 50 percent of the total volume of the international trade conducted by the treaty trader regardless of location must be between the United States and the treaty country of the alien's nationality. The remainder of the trade in which the alien is engaged may be international trade with other countries or domestic trade. The application of this rule requires a clear understanding of the distinctions in business entities described below.

(Previous Location: 9 FAM 41.51 N7.1 CT:VISA-1586; 10-14-2010)

b. To measure the requisite trade one should look to the trade conducted by the legal "person" who is the treaty trader. Such trader might be an individual, a partnership, a joint venture, a corporation (whether a parent or subsidiary corporation), etc. It is important to note that a branch is not considered to be a separate legal person or trader but part and parcel of another entity. In contrast, a subsidiary is a separate legal person/entity. Thus, to measure trade in the case of a branch, you must look to the trade conducted by the entity of which it is a part, usually a foreign-based business (individual, corporation, etc.).

(Previous Location: 9 FAM 41.51 N7.2 CT:VISA-322; 10-10-2001)

c. If the trader, whether foreign-based or U.S.-based, meets this 50 percentile requirement, the duties of an employee need not be similarly apportioned to qualify for an E-1 visa. For an example, if a U.S. subsidiary of a foreign firm is engaged principally in trade between the United States and the treaty country, it is not material that the E-1 employee is also engaged in third-country or intra-U.S. trade or that the parent firm's headquarters abroad is engaged primarily in trade with other countries. As noted above, this would not be true in the case of a branch of a foreign firm.

9 FAM 402.9-5(E) E-1 Classification for Taipei Economic and Cultural Representative Office (TECRO) Employees

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N5 CT:VISA-1328; 09-30-2009)

See 9 FAM 402.3-5(I). Also, see the Visa Reciprocity and Country Documents Finder, Taiwan.

9 FAM 402.9-6 REQUIREMENTS FOR E-2 TREATY INVESTOR VISAS

9 FAM 402.9-6(A) Evaluating E-2 Treaty Investor Applications

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N1.2 CT:VISA-1451; 07-20-2010)

In evaluating E-2 applications, you must determine whether the:

(1) Requisite treaty exists (see 9 FAM 402.9-4(A) and 402.9-10);

(2) Individual and/or business possess the nationality of the treaty country (see 9 FAM 402.9-4(B));

(3) Applicant has invested or is actively in the process of investing (see 9 FAM 402.9-6(B));

(4) Enterprise is a real and operating commercial enterprise (see 9 FAM 402.9-6(D));

(5) Applicant's investment is substantial (see 9 FAM 402.9-6(E));

(6) Investment is more than a marginal one solely for earning a living (see 9 FAM 402.9-6(F));

(7) Applicant is in a position to "develop and direct" the enterprise (see 9 FAM 402.9-6(G));

(8) Applicant, if an employee, is destined to an executive/supervisory position or possesses skills essential to the firm's operations in the United States (see 9 FAM 402.9-6(B) and (C)); and

(9) Applicant intends to depart the United States when the E-2 status terminates (see 9 FAM 402.9-4(C)).

9 FAM 402.9-6(B) E-2 Applicant Must Have Invested or Be in Process of Investing

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N8.1 CT:VISA-1451; 07-20-2010)

a. **Concept of "Investment" and "In Process of Investing":** You must assess the nature of the investment transaction to determine whether a particular financial arrangement may be considered an "investment" within the meaning of INA 101(a)(15)(E)(ii). The core factors relevant to your analysis of whether the applicant actually has invested, or is in the process of investing in an enterprise are discussed below.

(Previous Location: 9 FAM 41.51 N8.1-1 CT:VISA-322; 10-10-2001)

b. **Possession and Control of Funds:** The alien 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.

(Previous Location: 9 FAM 41.51 N8.1-2 CT:VISA-1586; 10-14-2010)

c. **Investment Connotes Risk:** 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 must not, therefore, be extended to non-profit organizations.) (See 9 FAM 402.9-6(D).) 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.

d. **Personal Assets Only:** 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. 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. (See paragraph e. below for contrast with uncommitted funds.)

(Previous Location: 9 FAM 41.51 N8.1-3 CT:VISA-1586; 10-14-2010)

e. **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 that 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.

f. 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 (which may be broken) 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, will not suffice.

(Previous Location: 9 FAM 41.51 N8.2-1 CT:VISA-322; 10-10-2001)

g. **Payments for Leases or Rents as Investments:** Payments in the form of leases or rents for property or equipment may be calculated toward the investment in an amount limited to the funds devoted to that item in any one month. However, the market value of the leased equipment is not representative of the investment and

neither is the annual rental cost (unless it has been paid in advance) as these rents are generally paid from the current earnings of the business.

(Previous Location: 9 FAM 41.51 N8.2-2 CT:VISA-1586; 10-14-2010)

h. **Value of Goods or Equipment as Investment:** 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. However, the alien must demonstrate that the goods or machinery will be or are currently 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.

(Previous Location: 9 FAM 41.51 N8.2-3 CT:VISA-322; 10-10-2001)

i. **Intangible Property:** Rights to intangible or intellectual property may also be considered capital assets to the extent to which their value can reasonably be determined. Where no market value is available for a copyright or patent, the value of current publishing or manufacturing contracts generated by the asset may be used. If none exist, the opinions of experts in the particular field in question may be submitted for consideration and acceptance.

9 FAM 402.9-6(C) Commercial Enterprise Must Be Real and Active

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N9 CT:VISA-404; 04-29-2002)

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.

9 FAM 402.9-6(D) Investment Must Be Substantial

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N10.1 CT:VISA-1586; 10-14-2010)

a. **General:** 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 weed out risky undertakings and ensure that the investor is unquestionably committed to the success of the business. Consequently, you must view the proportionate amount of funds invested, as evidenced by the proportionality test, in light of the nature of the business and the projected success of the business.

(Previous Location: 9 FAM 41.51 N10.2 CT:VISA-1586; 10-14-2010)

b. **Interpretations of "Substantial":** Investment of 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) below: 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.

c. This requirement is met by satisfying the "proportionality test" (below). The test is a comparison between two figures: (1) the amount of qualifying funds invested, and (2) 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 as explained in 9 FAM 402.9-6(B) above.

(2) Generally, the cost of an established business is 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.

d. If you question these figures, you may seek additional evidence to help establish what would be a reasonable amount. Such evidence may include letters from chambers of commerce or statistics from trade associations. Unverified and unaudited financial statements based exclusively on information supplied by an applicant normally are insufficient to establish the nature and status of an enterprise.

(Previous Location: 9 FAM 41.51 N10.3 TL:VISA-322; 10-10-2001)

e. **Value of Business Determined by Nature of Business:** The value (cost) of the business is clearly dependent on the nature of the enterprise. Any manufacturing business, such as an automobile manufacturer, might easily cost many millions of dollars to either purchase or establish and operate the business. At the extreme opposite pole, the cost to purchase an on-going commercial enterprise or to establish a service business, such as a consulting firm, may be relatively low. As long as all the other requirements for E-2 status are met (see 9 FAM 402.9-6), the cost of the business per se is not independently relevant or determinative of qualification for E-2 status.

(Previous Location: 9 FAM 41.51 N10.4 CT:VISA-1586; 10-14-2010)

f. **Proportionality Test**: The amount invested in the enterprise must be compared to the cost (value) of the business by assessing the percentage of the investment in relation to the cost of the business. If the two figures are the same, then the investor has invested 100 percent of the needed funds in the business; such an investment is substantial. The vast majority of cases involve lesser percentages. 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. Thus, investments of 100 percent or a higher percentage would normally automatically qualify for a small business of $100,000 or less. 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.

(Previous Location: 9 FAM 41.51 N10.5 CT:VISA-322; 10-10-2001)

g. **Investor's Commitment:** An element of judgment to be factored into the requirement of substantial investment concerns an assessment of the extent of the investor's commitment to the successful operation of the project in view of the amount invested.

9 FAM 402.9-6(E) Enterprise Must Be More Than Marginal

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N11 CT:VISA-1328; 09-30-2009)

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.

9 FAM 402.9-6(F) Applicant is in a Position to Develop and Direct the Enterprise

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N12.1 CT:VISA-322; 10-10-2001)

a. In all treaty investor cases, it must be shown that nationals of a treaty country own at least 50 percent of an enterprise. It must also be shown, in accordance with INA 101(a)(15)(E)(ii), that a national (or nationals) of the treaty country, through ownership or by other means, develops and directs the activities of the enterprise. The type of enterprise being sought will determine how this requirement is applied.

(Previous Location: 9 FAM 41.51 N12 CT:VISA-1868; 09-06-2012)

b. **Controlling Interest**: 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 arrangement is often called "Negative Control." With each of the two parties possessing equal responsibilities, they each have the capacity of making decisions that are binding on the other party. The Department of State has determined that an equal partnership with more than two partners would not give any of the parties control based on ownership, as the element of control would be too remote even under the negative control theory.

(Previous Location: 9 FAM 41.51 N12.2 CT:VISA-322; 10-10-2001)

c. **Owner to Demonstrate Development and Direction of 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 for its employee to enter the United States 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.

(Previous Location: 9 FAM 41.51 N12.3 CT:VISA-322; 10-10-2001)

d. **Visa Holder to be Employee of U.S. Enterprise:** In instances in which treaty country ownership may be too diffuse to permit one individual or company to demonstrate the ability to direct and develop the U.S. enterprise, the owners of treaty country nationality must:

(1) Show that together they own 50 percent of the U.S. enterprise; and

(2) Demonstrate, that at least collectively, they have the ability to develop and direct the U.S. enterprise.

e. In these cases an owner may not receive an 'E' visa as the "investor," nor may an employee be considered to be an employee of an owner for 'E' visa purposes. Rather, all 'E' visa recipients must be shown to be an employee of the U.S. enterprise coming to the United States to fulfill the duties of an executive, supervisor, or essentially skilled employee.

(Previous Location: 9 FAM 41.51 N12.4 CT:VISA-1451; 07-20-2010)

f. **Control by Management:** As indicated, a joint venture or an equal partnership involving two parties, could constitute control for E-2 purposes. However, modern business practices constantly introduce new business structures. Thus, it is difficult to list all the qualifying structures. If an investor (individual or business) has control of the business through managerial control, the requirement is met. The owner will have to satisfy you that the investor is developing and directing the business.

9 FAM 402.9-6(G) The Walsh/Pollard Case

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N13 CL:VISA-404; 04-29-2002)

a. This precedent decision by the Board of Immigration Appeals warrants separate discussion because it emphasizes established rules and has led to some confusion and misinterpretation.

b. The thrust of the fact pattern involved the contractual arrangement between a foreign entity and a U.S. business to provide services.

(1) The foreign company promised to provide certain engineering design services which the U.S. business did not have the capacity to perform.

(2) The design services were specific project-oriented services.

(3) The employees of the foreign company furnished under the contract were demonstrably highly qualified to provide the needed service.

(4) Pursuant to the contract, the foreign business created a subsidiary in the U.S. to ensure fulfillment of the contract and to service their employees. This subsidiary constituted their E-2 investment.

(5) The employees who came to the U.S. entity to perform these services on site came to fulfill certain responsibilities pursuant to that very specific design project. They did not come to the United States to fill employee vacancies of the U.S. business. It is, therefore, irrelevant that the design activities could have been performed either at the facility of the foreign entity abroad or in the United States at the job site of the U.S. business.

c. This decision followed the Department of State's guidelines on E-2 visa classification. The prominent elements are:

(1) When applying the substantiality test, one must focus on the nature of the business. Thus, as in this case, sometimes an investment of only a small amount of money might meet the requirement.

(2) The test of "develop and direct" applies only to the investor(s), not to the individual employees.

(3) The test of "essential skills" as set forth in 9 FAM 402.9-7(C) won clear acceptance.

(Previous Location: 9 FAM 41.51 N13.1 CT:VISA-1451; 07-20-2010)

d. **Job Shop:** The greatest area of confusion surrounding Walsh/Pollard initially concerned the issue of the "job shop." A job shop usually involves the providing of workers needed by an employer to perform pre-designated duties. The employer often has position descriptions prepared for such workers. The positions to be filled by the workers are often positions which the employer cannot fill for a variety of reasons, such as unavailability of that type of worker, cost of locally hired workers, etc. For example, a manufacturer needs 100 tool and die workers to meet its production schedule. If they have only 50 on the rolls, they might engage a job shopper to fill the other positions.

e. The fact pattern of this decision is not that of a job shop, nor does it in any way facilitate the creation of job shops under the E-2 visa classification. It is a pattern in direct contrast to a job shop, in which a business creating a new model required design-engineering services that the business neither had the capacity to perform nor had any positions to fill in that regard. It is expectable, in such circumstances, that the business might contract with another to provide the needed design for the model. The "contracted design" is a project-oriented commodity as contrasted to the filling of employment positions. The fact that the designing entity might prepare the design anywhere, even on the sites of contracting business, does not alter the nature of the transaction.

f. Since the distinction might be clouded in some circumstances, you should exercise care in adjudicating such cases and not hesitate to submit any questionable cases for an advisory opinion.

9 FAM 402.9-7 EMPLOYEE ENTITLED TO E-1 OR E-2 VISA

9 FAM 402.9-7(A) Employer Qualifications

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N14.1 CT:VISA-1328; 09-30-2009)

In order to qualify to bring an employee into the United States under INA 101(a)(15)(E) several criteria must be met. The:

(1) Prospective 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 percent of the ownership must have the nationality of the treaty country (see 9 FAM 402.9-4(B)). NOTE: A permanent resident alien does not qualify to bring in employees under INA 101(a)(15)(E). 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 employees under INA 101(a)(15)(E);

(2) Employer and the employee must have the same nationality; and,

(3) Employer, if not a resident abroad, must be maintaining "E" status in the United States.

9 FAM 402.9-7(B) Executive and Supervisory Employee Responsibility

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N14.2 CT:VISA-1451; 07-20-2010)

In evaluating the executive and/or supervisory element, you should consider the following factors:

(1) 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;

(2) Whether the executive or supervisory element of the position is a principal and primary function and not an incidental or collateral function. For example, if the position principally requires management skills or entails key supervisory responsibility for a large portion of a firm's operations and only incidentally involves routine substantive staff work, an E classification would generally be appropriate. Conversely, if the position chiefly involves routine work and secondarily entails supervision of low-level employees, the position could not be termed executive or supervisory; and

(3) The weight to be accorded a given factor, which 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 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.

9 FAM 402.9-7(C) Essential Employees

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N14.3 CT:VISA-1550; 09-28-2010)

a. The regulations provide E visa classification for employees who have special qualifications that make the service to be rendered essential to the efficient operation of the enterprise. The employee must, therefore, possess specialized skills and, similarly, such skills must be needed by the enterprise. 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.

b. 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. By its very nature, essentiality must be assessed on the particular facts in each case.

(Previous Location: 9 FAM 41.51 N14.3-1 CT:VISA-1451; 07-20-2010)

c. **Duration of Essentiality:** 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 needed. 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.

d. Although there is a broad spectrum between the extremes set forth below, you may draw some perspective on this issue from these examples:

(1) 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 (as in Walsh & Pollard).

(2) Short-term need - The employer may need the skills for only a relatively short (e.g., one or two years) period of time when the purpose of the employee(s) relate(s) 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.

(Previous Location: 9 FAM 41.51 N14.3-2 CT:VISA-1451 07-20-2010)

e. **General Factors to Be Considered:** Once the business has established the need for specialized skills, the experience and training necessary to achieve such skill(s) 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. The visa applicant must prove that he or she possesses these skills, by demonstrating the requisite training and/or experience.

f. In assessing the specialized skills and their essentiality, you must consider such factors as the:

(1) The 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, you must 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.

g. The availability of U.S. workers provides another factor in assessing the degree of specialization the applicant possesses and the essentiality of this 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. For example, a TV technician coming to train U.S. workers in new TV technology not generally available in the U.S. market probably would qualify for an E visa.

h. If the essential skills question cannot be resolved on the basis of initial documentation, you might ask the firm to provide statements from such sources as chambers of commerce, labor organizations, industry trade sources, or state employment services as to the unavailability of U.S. workers in the skill areas concerned.

i. Using the criteria above, you can then make a judgment as to whether the employee is essential for the efficient operation of enterprise for an indefinite period or for a shorter period. It might be determined that some skills are essential for as long as the business is operating. There may be little problem in assessing the need for the employee in the United States in the short term, such as start-up cases. Long-term employment presents a different issue, in that what is highly specialized and unique today might not be in a few years. It is anticipated that such changes would more likely occur in industries of rapid development, such as any computer-related industry. Although this may not be fully determinable at the time of initial application, you must monitor this at the time of any application for reissuance. The alien at that time will bear the burden of establishing that his or her specialized skills are still needed and that the applicant still possesses such skills.

(Previous Location: 9 FAM 41.51 N14.3-3 CT:VISA-1451 07-20-2010)

j. **Concept of Training:** "Essential" employees possess skills which differentiate them from ordinarily skilled laborers. If an alien establishes that he or she has special qualifications and is essential for the efficient operation of the treaty enterprise for the long term, the training of United States workers (for) (as) replacement workers is not required.

k. In some cases, ordinarily skilled workers can qualify as essential employees, and this almost always involves workers needed for start-up or training purposes. A new business or an established business expanding into a new field in the United States might need employees who are ordinarily skilled workers for a short period of time. Such employees derive their essentiality from their familiarity with the overseas operations rather than the nature of their skills. The specialization of skills lies in the knowledge of the peculiarities of the operation of the employer's enterprise rather than in the rote skill held by the applicant. To avoid problems with subsequent applications, you might find, at the time of the original application, that it is best to set a time frame within which the business must replace such foreign workers with locally hired employees. Some of the factors used in the preceding analysis would be drawn upon again to reach such an agreement.

(Previous Location: 9 FAM 41.51 N14.3-4 CT:VISA-78; 05-07-1993)

l. **Previous Employment With E Visa Firm:** There is no requirement that an "essential" employee have any previous employment with the enterprise in question. The only time when such previous employment is a factor is when the needed skills can only be obtained by that employment. The focus of essentiality is on the business needs for the essential skills and of the alien's possession of such. Firms may need skills to operate their business, even though they don't have employees with such skills currently on their employment rolls.

9 FAM 402.9-8 REQUIREMENTS FOR E-3 VISAS

9 FAM 402.9-8(A) Background

(CT:VISA-1; 11-18-2015)
(Previous Location: 9 FAM 41.51 N16.1 CT:VISA-1586; 10-14-2010)

a. The E-3 visa classification ("treaty alien in a specialty occupation") was the result of Public Law 109-13, entitled "The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005" (May 11, 2005). The new law added paragraph (iii) to INA 101(a)(15)(E), establishing a visa classification for Australians in specialty occupations.

b. The law allows for the temporary entry of Australian professionals to perform services in a "specialty occupation" for a United States employer. The temporary entry of nonimmigrants in specialty occupations is provided for at Section 501 of Public Law 109-13. The law establishes a new category of temporary entry for nonimmigrant professionals, the E-3 category. Unlike the current E-1 and E-2 visas, the E-3 visa is not limited to employment that is directly related to international trade and investment. Subject to the requirements discussed herein, E-3 visa holders are eligible to work for any employer in the United States. Dependent spouses and children accompanying or following to join are also eligible for temporary entry.

c. To qualify for an E-3 visa, an Australian must:

(1) Present to you an approved Labor Condition Application (LCA) issued by the Department of Labor (DOL);

(2) Demonstrate to you that the prospective employment meets the standard of being "specialty occupation employment" (see 9 FAM 402.9-8(E) below);

(3) Show you that the necessary academic qualifications for the job have been met (see 9 FAM 402.9-8(H));

(4) Convince you that the proposed stay in the United States will be temporary (see 9 FAM 402.9-4(C); and

(5) Provide evidence of a license or other official permission to practice in the specialty occupation if required as a condition for the employment sought (see 9 FAM 402.9-8(H)). In certain cases, where such license or other official permission is not required immediately, an alien must demonstrate that he or she will obtain such licensure or permission within a reasonable period of time following admission to the United States.

d. A maximum of 10,500 E-3 visas can be issued annually.

DOL and receive a separate E-3-based LCA approval for any employee possessing a previously approved H-1B-based LCA.

9 FAM 402.9-9 SPOUSE AND CHILDREN OF E VISA ALIENS

(CT:VISA-105; 04-06-2016)

a. **Entitled to Derivative Status:** The spouse and children of an E visa alien accompanying or following to join the principal alien are entitled to derivative status in the same classification as the principal alien. The nationality of the spouse and children of an E visa applicant is not material. The spouse and children of an E visa alien receive the same visa validity and number of entries, and are required to pay the same reciprocity fee, as applicable, as the principal alien, as listed in the reciprocity schedule for the principal alien's country of nationality.

b. **Spouses and Children:** To establish qualification for E-3 classification as the spouse or child of an E-3 alien, you may accept whatever reasonable evidence is persuasive to establish the required qualifying relationship. The presentation of a certified copy of a marriage or birth certificate is not mandatory if you are otherwise satisfied that the necessary relationship actually exists.

c. **Spouse and Children of E-3 Aliens Not Subject to Numerical Limitation:** The spouse and children of E-3 principals are classifiable as E-3's, using the visa code E-3D. They are not counted against the 10,500 annual numerical limitation described at INA 214(g)(11)(B).

d. **Employment by Spouse of E Visa Aliens:** INA 214(e)(6) permits the spouse (but not other dependents) of a principal E nonimmigrant to engage in employment in the United States. The spouse of a qualified E nonimmigrant may, upon admission to the United States, apply with the DHS for an employment authorization document, which an employer could use to verify the spouse's employment eligibility. Such spousal employment may be in a position other than a specialty occupation.

9 FAM 402.9-10 TREATIES AND LAWS CONTAINING TRADER AND INVESTOR PROVISIONS IN EFFECT BETWEEN THE UNITED STATES AND OTHER COUNTRIES

(CT:VISA-94; 03-17-2016)

COUNTRY	CLASSIFICATION	ENTERED INTO FORCE
Albania	E-2	01/04/1998
Argentina	E-1	12/20/1854
Argentina	E-2	12/20/1854
Armenia	E-2	03/29/1996
Australia	E-1	12/16/1991
Australia	E-2	12/27/1991
Australia[12]	E-3	09/02/2005