

Excerpt from AILA liaison meeting with U.S. Department of State, Visa Office (VO) on October 24, 2007 regarding proof of E-2 enterprise's employees:

E-2 Investor Visas

In connection with a small business E visa application where the business has been in operation in the US, consulates have requested evidence of all employees' lawful status in the US, specifically US passports or Resident Alien Cards. First, we question whether this is an appropriate request in the E visa context. Second, while employers must complete I-9s and verify authorization for employment, an employer is prohibiting from demanding specific evidence to verify employment. 8 C.F.R. section 274a.2(b)(1)(v) and INA274B(6) provides:

A person's or other entity's request, for purposes of satisfying the requirements of section 274A(b), for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1).

A U.S. citizen or permanent resident worker may have chosen to provide a driver's license and social security card rather than a passport or I-551, and we are concerned that requesting more documents in the context of an E visa case, in addition to the inconvenience relating to a tangential issue, requires employers to violate I-9 regulations. Further, employers are not required to make or keep copies of the documents seen when the I-9 was completed. Please advise consulates about the limitations on employers' possession of employees' documents and instruct them not to require E visa applicants to produce documents other than copies of completed I-9 forms themselves and any copies the employer routinely collects in the I-9 process of those documents the workers have chosen to provide in completing Forms I-9, which may not be passports and permanent resident cards.

Answer from VO: Whether an E firm is employing qualified workers can be relevant to visa adjudication. One of the ways to overcome marginality is to demonstrate that the business is creating jobs for US workers. This

requirement, however, would only be satisfied by creating jobs for qualified US workers. An investment that only created employment for unqualified workers would not be satisfying the marginality requirements. However, normally the consular officer should only look to I-9 filings as evidence for this.

We are also aware that the Administration has committed to simplifying the I-9 process and making the E-Verify system more robust and will provide further guidance to consular officers in the field to ensure that they request appropriate evidence.