Meeting Minutes of the State Department (DOS) and American Immigration Lawyers Association (AILA) in March 2001

Excerpt Regarding E-2 Investor Visa

AILA QUESTION: As to E-2 visa applications, some consulates have indicated to AILA members that under 22 CFR § 41.51(o) that, "an applicant's other sources of income are no longer considered when assessing marginality." This conclusion is contrary to 9 FAM 41.51 Note 10, and does not seem to be a necessary result of '41.51(o). Additionally, such an interpretation would seemingly result in the denial of renewals of long-held E-2 visas, which were obtained on the strength of 9 FAM 41.51 Note 10, and would be contrary to *Lauvik vs. INS*, 910 F.2d 658 (9th Cir. 1990). Is 9 FAM 41.51 Note 10 still valid?

DOS ANSWER: A. The current regulation, 22 CFR 41.51(o), defines marginality as follows: "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." We have drafted new notes to reflect this and other changes in the E regulations, but the new notes have not yet been cleared for publication. To the extent that there is a conflict between the regulations and the notes, the changed regulations supersede the older notes. The decision in Lauvik was based on the older regulation and expressly cited it as authority for its ruling, and therefore this decision has also been superseded by the changed regulation.