Analysis of Comments to E Visa Regulations

State Dept. E Visa Regulation

Date: September 12, 1997 [Page 48149-48155]

Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended; Business and Media Visas; Treaty Trader and Treaty Investors

AGENCY: Bureau of Consular Affairs, State Department.

ACTION: Final rule.

SUMMARY: This rule amends the nonimmigrant visa regulations, by adding a definition of the term ``substantial'' to section 41.51 in order to implement the provisions of section 204(c) of Pub. L. 101-649. This rule adds a new section 101(a)(45) to the Immigration and Nationality Act (INA) for purposes of defining this term as used in section 101(a)(15)(E) of the INA. Furthermore, this rule incorporates into regulation the underlying principles of the treaty trader/treaty investor visa classification which have been published in the form of interpretive note material in Volume 9 of the State Department's Foreign Affairs Manual.

EFFECTIVE DATE: November 12, 1997.

FOR FURTHER INFORMATION CONTACT: Stephen K. Fischel, Director, Legislation, Regulations and Advisory Assistance, 202-663-1184.

SUPPLEMENTARY INFORMATION: Public Notice 1468 at 56 FR 43565, September 3, 1991, proposed adding regulations to title 22, part 41, Code of the Federal Regulations. The proposed regulations were required to implement the provisions of section 204(c) of the Immigration Act of 1990, Pub. L. 104- 649 which requires the Secretary of State to promulgate a regulatory definition of the term ``substantial'' after consultation with the appropriate agencies of the United States Government. The proposal was discussed in detail in Notice 1468, as were the Department's reasons for the regulations. The Department received 14 timely comments in responds to the Notice of Proposed Rulemaking.

Analysis of Comments

General Comment

The Department's proposed rule and the Immigration and Naturalization Service's proposed rule on the treaty visa classification were published within a few days of each other. Although the rules were intended to be identical in substance, each agency selected

different language to articulate its rules. This difference in language led readers to reach the unintended conclusion that the rules were substantively different if not at odds with each other in a few critical ways.

Many commenters expressed their concern about the apparent differences in two ways. First, commenters requested that the agencies work together to publish rules that were clearly identical in substance. The agencies certainly recognize the need for one set of principles to administer the law and have worked together to achieve that goal. Furthermore, commenters suggested that, since the Department of State has the greatest amount of experience in administering treaty trader/investors visa rules, and since INS has been deferring to the Department of State's regulations and interpretations, the INS should continue to defer to the Department and to apply the Department's regulations. Such deference, it was suggested, could involve the specific reference, in the Immigration and Naturalization Service (Service) regulations, to the Department of State's regulations, or the publication of the Department's entire treaty visa

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regulations in Title 8 of Code of Federal Regulations.

The two agencies agree in principle with these objectives. Although the Department and the Service are each publishing their own regulations, they are intended to be substantively the same. To further uniform application of these rules, the Service will be expressly authorized by the INS Operations Instructions to consult with the Advisory Opinions Division of the Visa Office of the Department of State on treaty visa issues.

The Advisory Opinions Division renders opinions on legal issues relating to visa law on behalf of the Visa Office to United States consular officers serving at United States embassies and consulates abroad. Opinions rendered by this division on questions of law, as opposed to the application of the law to the facts of a particular case, are generally binding on consular officers. (See 22 CFR 41.121(d)). A significant distinction is made between this current departmental practice and the projected consultation process with the Service. Guidance offered at the request of the Service will be purely advisory in nature and will not be binding on the Service in any way. The Service will continue to posses exclusive authority and responsibility for the adjudication of treaty visa cases submitted to them in accordance with applicable law and procedure.

This consultation process will merely constitute a means of sharing the Department's knowledge gained from the experience of adjudicating treaty visa cases for many years. The INS will possess the option of drawing upon such expertise, but will be under no obligation to consult with the Visa Office. The exercise of this option is left to the discretion of that agency.

One commenter had expressed the hope that not only the Service and the Department would promulgate the same regulations but that consular officers abroad would

automatically accept a Service's change of status determination in an ``E'' visa case rather than subject the alien to readjudication of the visa application.

Consular officers posses exclusive authority to issue and refuse visas (INA 104). Not only must they determine an alien's eligibility under INA 212(a) but, in the case of all nonimmigrant visa classifications, they must assess whether the alien has met all the requirements of that particular nonimmigrant visa classification. Even in petition-based nonimmigrant visa classifications the consular officer retains the authority, and the responsibility, to review the petition to make sure the alien is appropriately and properly classified; this is not just because mistakes may happen, but because the consular officer may have access to information not available to the INS officer. If the review results in a finding that the officer knows or reasonably believes that the alien is not entitled to the given classification, the petition is returned pursuant to regulation to the appropriate office of the Immigration and Naturalization Service for appropriate action.

As treaty visa cases involve no INS approved petitions, the consular officer has the responsibility to adjudicate all aspects of the visa application. Under this regulation and these administrative procedures, the consular officer will continue to have that responsibility. It is anticipated, however, that in view of the newly adopted procedures more uniform application of these visa regulations will be achieved, thus reducing the possibility of disparate results.

Several commenters expressed disappointment that the Department proposed regulations on treaty visas without even mentioning the Board of Immigration Appeals decision in the Matters of Walsh and Pollard, Int. Dec. #3111 (BIA 1988). Since this case was not cited in the preamble to the proposed rule, some commenters inferred that the Department did not agree with the holding of the decision.

The Department finds this decision to be useful on at least two points. First, the Board followed the Department's interpretation that substantial investment is determined by application of the proportionality test, not by application of a set minimum dollar figure. Secondly, the Board agreed that the concept of ``develop and direct'' applies to the ``principal'' treaty investor, not to each employee of the treaty investor.

This decision unquestionably contributes significantly to the body of administrative case law on treaty visas, but it does have a shortcoming. The decision has been read to imply that the treaty investor visa classification is appropriate for the creation of certain ``job shop'' arrangements. The principles upon which the decision is founded to do support that inference. These regulations, likewise, do not endorse that inference.

As clear recognition of the significance of this case, special treatment is accorded this decision in the interpretive note material in the Foreign Affairs Manual. It should be noted, however, that the ``job shop'' inference is also accorded appropriate discussion.

Employee of Treaty Trader or Treaty Investor

The Department received one comment on the long-standing regulation at section 41.51(c), which requires the employer to hold treaty visa status or, if not in the United States, to be so classifiable. The commenter prefers removing the requirement that the employer hold treaty visa status and instead allowing the employer to be lawfully classified under any other nonimmigrant status. The purpose of this commenter's suggestion is to allow employees to qualify for treaty visas regardless of the nonimmigrant classification of the employer.

Although the Department recognizes the practicality of such a suggestion, we believe that the current regulation is to proper interpretation of the law. The statutory section addresses the conditions whereby the ``principal'' treaty traders and treaty investors may qualify for an E visa. No mention is made of employees. Employee status is the logical creation of regulation. Persons in that status derive that status directly and exclusively from ``principal'' treaty traders or treaty investors. Without a qualifying relationship to a principal which has been accorded treaty trader or treaty investor status, the alien cannot likewise be accorded treaty visa status. This derivative relationship is analogous to other relationships more explicitly defined in the Act such as the relationship of spouse and children to a principal accorded lawful immigration status under the INA. One can not derive status from a person who does not possess such status.

Nationality

One commenter expressed the hope that an easier method could be found to ``register'' large enterprises to qualify for ``E'' visa status. This issue is similar to that raised by two other commenters who expressed strenuous dissatisfaction with the proposed rules for determining the nationality of an incorporated entity. The problem arises in cases involving corporations that sell stocks on exchanges in more than one country.

The standard of practicability was adopted in recognition of this problem. This standard contemplates the applicant submitting the best evidence available and the consular officer reaching a reasonable decision considering the particular circumstances in each case. This is not intended to be an onerous paper production exercise.

The statute speaks of granting special treatment for ``nationals'' of treaty

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partners. Nationality of enterprises based on ownership captures the essence of the statue and the bilateral relationship. Although registration of businesses in a jurisdiction to engage in business activities in that jurisdiction has been accorded recognition for national treatment in other contexts by other laws and some courts, mere registration has not been and is not accepted as the proper standard for determining nationality under INA 101(a)(15)(E).

This issue was addressed in Matter of N---S---, 7 I&N Dec. 426 (1957). Recognizing the Congress' review of this longstanding rule during the formulation of the Immigration and

Nationality Act during the early 1950's, the decision states at Dec. 428 that, ``there being no substantial change in language between the present statute and regulations as compared with the preceding statute and regulations on the same subject, the rulings and principles previously enunciated and which are presumed to have been known to the Congress must be deemed to be presently applicable.'' For similar reasons, we believe that the regulations as proposed are consistent with Congressional intent.

Trade

Three commenters suggested that the Department incorporate the concept of ``business commitments'' in its definition of existing international trade. The proposed rule reiterated the statutorily mandated principle that the trade for treaty trader purposes must be in existence in order to qualify for such status. The Department agrees, however, that the concept of ``business commitments'' as described in Matter of Seto, 11 I&N Dec. 290 (1965), should be included within the definition of trade. Drawing from a Supreme Court decision and a Court of Appeals decision, this decision holds that ``existing trade includes successfully negotiated contracts which call'' for the exchange of goods within the meaning of INA 101(a)(15)(E)(i). But on the other hand, the decision states that transactions which are in the state of negotiation do not by themselves constitute trade for this purpose.

The Department not only agrees with this principle, but it has been incorporated into the regulation. Additionally, the appropriate guidance will be provided in the Foreign Affairs Manual. Substantial trade

An identical comment was submitted in two letters concerning the definition of trade. The specific language of the proposed rule expressly prohibits a single transaction from qualifying as substantial trade. The underlying principle of substantial trade is that a continuing flow or exchange of trade items exist. The commenters expressed fear that this definitional language would be interpreted to exclude the circumstance of a single large transaction exchanged annually or periodically over extended periods of time.

The language of the regulation incorporated the essence of the language which has been used in the interpretive notes in the FAM. The wording was specifically selected to avoid the establishment of any specific time limitations. The thrust of the definition is to disqualify a ``one shot'' deal but to consider all other continuing exchanges of value. Determinations have been and will continue to be made upon case by case analysis. It appears that the meaning of this definition is exactly the meaning sought by the commenters. To further clarify the regulations, the Department has amended the language accordingly.

A commenter expressed disappointment that the Department did not incorporate into the regulations a certain note in the FAM describing substantial trade. That note states that for smaller businesses income derived from international trade which is sufficient to support the treaty trader and his or her family should be considered to be a favorable

factor when assessing the substantiality of trade in a particular case. The Department adheres to this concept. The regulation has been amended to include this concept.

Treaty investment

Investment capital

Risk

Several commenters agreed with our statement in the preamble of the proposed regulation that the rule regarding risk did not square with business reality. A couple of commenters did offer the suggestion of amending the rule by use of the following language: ``loans secured exclusively by the assets of the investment enterprise itself, without ultimate recourse to the treaty investor, may not be counted toward the actual amount of capital investment".

The purpose of the risk provision is to place the risk of the investment totally and exclusively on the shoulders of the treaty investor. As this suggested language would dilute the element of risk by including the possibility of using the business as collateral, the Department will retain the language as proposed. In addressing the issue of ``irrevocable commitment", several commenters suggested that language be added to the regulations that would formally recognize the use of mechanisms such as escrow to protect the treaty investor if a visa were not issued in a certain case. Such mechanisms have long been recognized as proper safeguards by the Department. The Department's opinion has been published broadly, including in the Interrogatories in Matters of Walsh and Pollard which have been disseminated widely not only in the private sector but also within the Foreign Service as instructional material. The regulations have been amended to accommodate this request.

Substantial capital

One commenter expressed dislike for the proportionality test but failed to offer any suggestions for an alternative test. The commenter questioned why the proportionality test was selected in light of the Congressional mandate to define ``substantial" investment, why a minimum investment amount was even considered in light of the Matters of Walsh and Pollard, Int. Dec. #3111 (BIA 1988), why no economic studies were undertaken in this exercise, and why the Immigration and Naturalization Service proposed a different formula when the Secretary of State was given authority to promulgate the regulatory definition.

The supplemental information portion of the proposed rule explained the entire exercise undertaken to reach a definition, as required by the statute. Comprehensive letters were prepared explaining the purpose and requirements of the treaty visa classification and soliciting comments and suggestions from each agency. The agencies, Department of Commerce, Labor, the Treasury, and the Small Business Administration, the U.S. Trade Representative, and, of course, the Immigration and Naturalization Service, each

responded. All but one felt competent to provide constructive input into the analysis. The agencies overwhelmingly favored continued use of the proportionality test. The general conclusion was that this test appears to have worked successfully in the past and that no superior test could be devised which would capture the essence of this requirement.

The fact that Congress required that the definition be codified in regulatory form does not necessarily suggest, as stated by this commenter, that Congress was dissatisfied with the current test. Legislative history of this provision and predecessor versions in earlier bills

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suggest that Congress sought primarily the establishment of a test to be applied uniformly by both agencies. Secondarily, the Congress accorded the Secretary of State the responsibility of preparing such regulations in light of the extensive experience in adjudicating treaty visa applications as well as the obvious jurisdictional tie to the treaty function.

The Congress did require the Secretary of State to consult ``with appropriate agencies of Government''. This requirement was carried out as described above and in the preamble of the proposed regulation. A great cross section of agencies was selected as indeed no independent economic study was either required by Congress or undertaken by the Department of State. It was anticipated that the agencies that monitor the pulse of the economy would provide relevant input into the formulation of the test. None of these agencies nor any of the others perceived the necessity to undertake an economic study. Based upon such responses from interested agencies, the Department was satisfied that sufficient avenues had been explored.

The establishment of a minimum amount of investment had to be considered during this review, as the Department bore the responsibility of considering all viable alternatives. A set minimum dollar figure is always the first test offered as an alternative to the proportionality test. While such a test has certain administrative advantages, the agencies overwhelmingly rejected it in favor of the proportionality test.

Lastly, the commenter suggested that INS' proposed regulations differed from the Department's on this issue of substantial investment. That issue has been rendered moot by the Service's decision to promulgate regulations consistent with the Department's regulations.

Three other commenters discussed the proportionality test. Two commenters expressed concern over the application of the ``inverted sliding scale'' thinking that it differs from the proportionality test now in use. The term ``inverted sliding scale'' is merely a descriptive characterization of the proportionality test. No substantive change is intended by the use of this term. The test is intended to apply as it has in the past.

Concern was expressed over the use of presumptions and that there were only three such benchmarks. It was feared that these percentages would be used in those designated

ranges as bright line tests and not as guidelines as intended. In view of the lower cost needed to establish certain types of businesses, the commenters felt a need for a designation for a $100,000 investment or even lower. Several commenters felt that the third benchmark of 30% was too high for exceptionally large investment figures. It was opined that the sheer magnitude of such investments should be considered to be substantial regardless of the percentage.

In an attempt to avoid the use of the presumptive percentages as bright line tests, the three presumptive benchmarks have been removed. The regulation merely defines the test, whereas in the FAM note material examples will be provided. Any examples given are not intended to be binding but are intended to demonstrate to adjudicating officers and the public the general range of the proportionality test. The fear that the percentages used in such examples will be applied by adjudicators as bright line tests cannot be totally abated; however, through instructional material in the FAM, advisory opinions, and other relevant material, the adjudicating officers will be instructed to use these figures as flexible guidelines on a case by case basis.

The commenter also suggested that some of the descriptive language used in the FAM note material and/or language used in the supplemental information of the proposed rule should be incorporated into regulation. Although some of this descriptive language has been incorporated into regulation, the general definitional language has been somewhat rewritten to more prominently feature the underlying ingredients of ``substantial amount of capital".

The language describing the application of the proportionality test has been altered for clarity. Although the preamble of the proposed regulation stated that the figure representing the actual cost of establishing a business must be used in arriving at the investment percentage, the proposed rule has been interpreted to permit the use of a figure of an amount of investment needed to establish a business of that nature, regardless of what the enterprise in question might cost. The regulation is amended to more accurately reflect the explanation in the preamble.

Marginality

The comments save one were generally favorable of the Department's treatment of marginality. The single negative comment essentially stated that the proposed language would bar viable enterprises from qualifying for treaty visa status thus shutting off the infusion of foreign investment. The commentary wrongly imparted this intent to the Department.

The Department has no desire to bar viable enterprises, but as the supplemental information provided with the proposed rule clearly lays out, the Department does have as one of its objectives to weed out those enterprises that are indeed nonviable. Recognizing that no rule is perfect, the Department attempted to craft the regulation to achieve its objective. Unfortunately, that commenter offered no alternative to the proposal.

The other comments, however, suggested that the rule be clarified so that the capacity to generate income be cast not only in the present tense but also in the future. Although the proposed rule was intended to address this very concern, more specific language has been added. By including the language of ``present and future'' to the capacity to generate income and to the capacity to make an economic contribution, the question now arises as to when in the future must such capacity be realized. Is it realistic to allow an treaty investor to realize this capacity 20 years in the future? We think not. A reasonable standard should be established.

When establishing entitlement to treaty investor classification the alien bears the burden of satisfying the consular officer that the enterprise is a viable commercial entity with the requisite income generating capacity. To demonstrate that capacity, a business plan of some sort is often presented. This plan projects the amount of income contemplated considering the expenses of establishing and/or using the enterprise and factoring in the marketability of the service or commodity to be provided or sold. The Department accepts the reality that many start-up businesses will not generate any profits initially. It is, also, the Department's understanding that a five year term is considered a standard period of time to gauge profitability of such a business. The Department finds it reasonable that from the date the principal treaty investor commences operation of normal business activities that the business is projected to be generating the requisite income or making the requisite economic contribution within a five year period. For further clarity, economic contribution replaces economic impact to signify that a positive economic impact is contemplated.

Develop and direct

One of the four comments received on this issue referred to the typographical error in the September 3, 1991 printing

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of the proposed rule. The word ``marginal'' was intended to read as ``managerial'' and has been corrected.

A favorable comment was received which applauded the ability to meet the develop and direct requirement not just by ownership but by managerial or other corporate or structural means.

Another comment focused on the fact that the Department's proposed regulations required that the treaty investor be in a position to develop and direct rather than ``solely'' develop and direct the enterprise in which the alien had invested. The distinction made by the commenter lies in the possibility of being in a position to control without exercising such control.

The language used by the Department derives from Matter of Lee, 15 I&N Dec. 187 at 189 (1975). This decision cites the statutory language and then provides its interpretation.

``Section 101(a)(15(E)(ii) of the Act requires the treaty investor to be coming solely to develop and direct the operations of the enterprise in which substantial investment has been or is in the process of being made. In order for a treaty investor to develop and direct the operations of an enterprise, it must be shown he has a controlling interest; otherwise other individuals who do have the controlling interest are in a position to dictate how the enterprises is to be developed and directed."

The observation made by the commenter was presented in the form of a question. The query focuses on whether the statutory language requires an alien personally to develop and direct an enterprise or whether the alien must be in a position to develop and direct an enterprise. In the latter case, the alien may not personally develop or direct the enterprise but may afford a third party the opportunity to do so. Although the Department has consistently interpreted the proposed regulation to mean that the treaty investor must demonstrate that his or her purpose of entry is to develop and direct the enterprise, the language has been amended to comport more directly with the statute and to remove any hint of ambiguity.

The last commenter made two suggestions. The first was to have the Department accord ``E'' visa status to large companies involved in joint ventures. In the opinion of the commenter no company ``controls'' the sizable joint venture, the develop and direct requirement should, therefore, be waived. As the develop and direct requirement is statutory and the law contains no authority for it to be waived, the Department cannot accede to this suggestion. (This does not mean, however, that this develop and direct requirement cannot be met by other means, such as through the concept of ``negative control''.)

The same result attaches to the second suggestion. The commenter proposed that treaty investors with investments of a minimum of $10,000,000 be exempt from the develop and direct requirement if the treaty investor otherwise met the ``E'' visa requirements. Although the Department understands the motivation behind this suggestion as well, the statute does not provide the authority to waive the requirement. Employee: Executive or Supervisor

The Department received several comments on this proposed regulatory provision. As all the comments were favorable and no changes were recommended, the regulation stands as proposed. Essential employee

The proposed language drew quite a few comments addressing different aspects of the proposal. The first comment took issue with the concept that the employer must demonstrate that replacement by a U.S. worker is not feasible or that the employer is making reasonable and good faith efforts to train U.S. workers. The commenter questioned the advisability and the legality of trying to modify our treaty obligations by administrative regulations. In light of the change we are making to this regulation the comment is rendered moot. On the other hand, the statute, regulations, and the treaty contain nothing that would prohibit the imposition of such regulatory requirements.

Three commenters objected to the requirement in proposed Sec. 41.51(r)(2) that the alien must in each case affirmatively establish that the alien's eventual replacement by a U.S. worker is not feasible or that the employer is making reasonable and good faith efforts to recruit and/or train U.S. workers to perform the responsibilities of the alien's prospective position. Two commenters made reference to the interpretive note material in the FAM at 22 CFR 41.51 N4-3 and found these notes to be instructive. They suggested that perhaps this requirement should be imposed only on those aliens claiming to posses essential skills who will engage in activities which may involve manual duties as explained in Sec. 41.51 N.4-3(b). This requirement should not be imposed across the board. These comments continued by recommending that the regulatory language be altered to expressly provide that aliens with special skills that have not become commonplace might remain in the United States indefinitely, and any training/recruitment/feasibility requirement should be expressly limited to the exceptions listed in the FAM notes.

The Department accepts and recognizes these suggestions as valid and having merit. The intent of the proposed regulation was to put the applicant and the applicant's employer on notice that indeed not all positions that require specialized skills might be considered ``essential'' on a continuing basis. It was thought that, through the usual application process of assessing ``essentiality'', this requirement of feasibility/training would be met. Certainly, aliens with skills unique to them or at least not commonplace in the United States would by the very nature of the activity establish ipso facto that such skills would be essential on a continuing basis and that training, etc. would not be feasible. The Department agrees that the proposed language appears more burdensome than intended.

Consequently, the Department has changed section 41.51(r)(2) to better capture the essence of the concept that the establishment of ``essentiality'' is an ongoing process. A key to this adjudication exercise is the determination of whether the specialized skills are commonplace in the United States. Certainly, some such skills will be found not to be commonplace on a continuing basis and other skills will be found to become commonplace at some point in time. When that point in time is reached, the alien may not qualify as an essential employee. The employer will than have to fill the position by other means.

In order to reflect more clearly this principle, the regulation has been amended to remove all references to affirmative responsibilities requiring a feasibility assessment or training requirements. The guidance in the FM note material cited above has been incorporated into the regulation. The operation of this regulation will follow the stated objective which comports with the two commenters' suggestions.

A commenter objected to the use of the term ``unique'' skills as a means to determine essential skills. The commenter stated that this was too high a standard to impose on aliens to qualify as an essential employee. Furthermore, while it is no longer used for L-1 adjudication, it should not be used in this context.

The characterization of a skill as ``unique'' has a long association with the E visa classification. This is descriptive of a skill which clearly is

one-of-a-kind and is, thus, not commonplace. It does not and never has been intended to constitute a minimum standard for meeting the requirement of essential skills. To the contrary, skills of unique character would so greatly exceed any minimum standard of ``essentiality'' that persons blessed with unique skills coming to fill positions requiring such unique skills would in the overwhelming number of cases be considered to be ``essential''. As ``unique'' continues to be a useful descriptive term in the adjudication process, the regulations and interpretive guidance in the FAM will continue to use it.

Final Rule

This final rule of Sec. 41.51 would: provide a general definition of treaty trader (paragraph (a)); provide a definition of treaty investor (paragraph (b)); define an alien employee (paragraph (c)); extend treaty classification to the spouse and children of the principal alien (paragraph (d)); and authorize ``E'' status to certain foreign information media (paragraph (e)). The remaining paragraphs constitute definitional provisions.

This rule is not expected to have a significant impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The information collection contained in this rule has been submitted to the Office of Management and Budget in compliance with provisions of the Paperwork Reduction Act of 1980. This rule has been reviewed as required by E.O. 12778 and certified to be in compliance therewith, and reviewed in light of E.O. 12866 and found to be consistent therewith.

List of Subjects in 22 CFR Part 41

Aliens, Treaty Trader or Investor.

In view of the legislative mandate of Pub. L. 101-649, Part 41 to Title 22 would be amended as follows:

PART 41--[AMENDED]

1. The authority citation for Part 41 is revised to read:

Authority: INA 104, 66 Stat. 174, 8 U.S.C. 1104; sec. 109(b)(1), 91 Stat. 847; sec. 204, 104 Stat. 5019, 8 U.S.C. 1101 note.

2. Part 41, Subpart F--Business and Media Visas, is amended by revising section 41.51 to read as follows:

Sec. 41.51 Treaty trader or treaty investor.

(a) Treaty trader. An alien is classifiable as a nonimmigrant treaty trader (E-1) if the consular officer is satisfied that the alien qualifies under the provisions of INA 101(a)(15)(E)(i) and that the alien:

(1) Will be in the United States solely to carry on trade of a substantial nature, which is international in scope, either on the alien's behalf or as an employee of a foreign person or organization engaged in trade, principally between the United States and the foreign state of which the alien is a national, (consideration being given to any conditions in the country of which the alien is a national which may affect the alien's ability to carry on such substantial trade); and

(2) Intends to depart from the United States upon the termination of E-1 status.

(b) Treaty investor. An alien is classifiable as a nonimmigrant treaty investor (E-2) if the consular officer is satisfied that the alien qualifies under the provisions of INA 101(a)(15)(E)(ii) and that the alien:

(1) Has invested or is actively in the process of investing a substantial amount of capital in bona fide enterprise in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living; and

(2) Is seeking entry solely to develop and direct the enterprise; and

(3) Intends to depart from the United States upon the termination of E-2 status.

(c) Employee of treaty trader or treaty investor. An alien employee of a treaty trader may be classified E-1 and an alien employee of a treaty investor may be classified E-2 if the employee is in or is coming to the United States to engage in duties of an executive or supervisory character, or, if employed in a lesser capacity, the employee has special qualifications that make the services to be rendered essential to the efficient operation of the enterprise. The employer must be:

(1) A person having the nationality of the treaty country, who is maintaining the status of treaty trader or treaty investor if in the United States or if not in the United States would be classifiable as a treaty trader or treaty investor; or

(2) An organization at least 50% owned by persons having the nationality of the treaty country who are maintaining nonimmigrant treaty trader or treaty investor status if residing in the United States or if not residing in the United States who would be classifiable as treaty traders or treaty investors.

(d) Spouse and children of treaty trader or treaty investor. The spouse and children of a treaty trader or treaty investor accompanying or following to join the principal alien are entitled to the same classification as the principal alien. The nationality of a spouse or child of a treaty trader or treaty investor is not material to the classification of the spouse or child under the provisions of INA 101(a)(15)(E).

(e) Representative of foreign information media. Representatives of foreign information media shall first be considered for possible classification as nonimmigrants under the provisions of INA 101(a)(15)(I), before consideration is given to their possible classification as nonimmigrants under the provisions of INA 101(a)(15)(E) and of this section.

(f) Treaty country. A treaty country is for purposes of this section a foreign state with which a qualifying Treaty of Friendship, Commerce, and Navigation or its equivalent exists with the United States. A treaty country includes a foreign state that is accorded treaty visa privileges under INA 101(a)(15)(E) by specific legislation (other than the INA).

(g) Nationality of the treaty country. The nationality of an individual treaty trader or treaty investor is determined by the authorities of the foreign state of which the alien claims nationality. In the case of an organization, ownership must be traced as best as is practicable to the individuals who ultimately own the organization.

(h) Trade. The term ``trade'' as used in this section means the existing international exchange of items of trade for consideration between the United States and the treaty country. Existing trade includes successfully negotiated contracts binding upon the parties which call for the immediate exchange of items of trade. This exchange must be traceable and identifiable. Title to the trade item must pass from one treaty party to the other.

(i) Item of trade. Items which qualify for trade within these provisions include but are not limited to goods, services, technology, monies, international banking, insurance, transportation, tourism, communications, and some news gathering activities.

(j) Substantial trade. Substantial trade for the purposes of this section entails the quantum of trade sufficient to ensure a continuous flow of trade items between the United States and the treaty country. This continuous flow contemplates numerous exchanges over time rather than a single transaction, regardless of the monetary value. Although the monetary value of the trade item being exchanged is a relevant consideration, greater weight is given to more numerous exchanges of larger value. In the case of smaller businesses, an income derived from the value of numerous transactions which is

sufficient to support the treaty trader and his or her family constitutes a favorable factor in assessing the existence of substantial trade.

(k) Principal trade. Trade shall be considered to be principal trade between the United States and the treaty country when over 50% of the volume of international trade of the treaty trader is conducted between the United States and the treaty country of the treaty trader's nationality.

(l) Investment. Investment means the treaty investor's placing of capital, including funds and other assets, at risk in the commercial sense with the objective of generating a profit. The treaty investor must be in possession of and have control over the capital invested or being invested. The capital must be subject to partial or total loss if investment fortunes reverse. Such investment capital must be the investor's unsecured personal business capital or capital secured by personal assets. Capital in the process of being invested or that has been invested must be irrevocably committed to the enterprise. The alien has the burden of establishing such irrevocable commitment given to the particular circumstances of each case. The alien may use any legal mechanism available, such as by placing invested funds in escrow pending visa issuance, that would not only irrevocably commit funds to the enterprise but that might also extend some personal liability protection to the treaty investor.

(m) Bona fide enterprise. The enterprise must be a real and active commercial or entrepreneurial undertaking, producing some service or commodity for profit and must meet applicable legal requirements for doing business in the particular jurisdiction in the United States.

(n) Substantial amount of capital. A substantial amount of capital constitutes that amount that is:

(1)(i) Substantial in the proportional sense, i.e., in relationship to the total cost of either purchasing an established enterprise or creating the type of enterprise under consideration;

(ii) Sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and

(iii) Of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise.

(2) Whether an amount of capital is substantial in the proportionality sense is understood in terms of an inverted sliding scale; i.e., the lower the total cost of the enterprise, the higher, proportionately, the investment must be to meet these criteria.

(o) Marginal enterprise. 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.

(p) Solely to develop and direct. The business or individual treaty investor does or will develop and direct the enterprise by controlling the enterprise through ownership of at least 50% of the business, by possessing operational control through a managerial position or other corporate device, or by other means.

(q) Executive or supervisory character. The executive or supervisory element of the employee's position must be a principal and primary function of the position and not an incidental or collateral function. Executive and/or supervisory duties grant the employee ultimate control and responsibility for the enterprise's overall operation or a major component thereof.

(1) An executive position provides the employee great authority to determine policy of and direction for the enterprise.

(2) A position primarily of supervisory character grants the employee supervisory responsibility for a significant proportion of an enterprise's operations and does not generally involve the direct supervision of low-level employees.

(r) Special qualifications. Special qualifications are those skills and/or aptitudes that an employee in a lesser capacity brings to a position or role that are essential to the successful or efficient operation of the enterprise.

(1) The essential nature of the alien's skills to the employing firm is determined by assessing the degree of proven expertise of the alien in the area of operations involved, the uniqueness of the specific skill or aptitude, the length of experience and/or training with the firm, the period of training or other experience necessary to perform effectively the projected duties, and the salary the special qualifications can command. The question of special skills and qualifications must be determined by assessing the circumstances on a case-by-case basis.

(2) Whether the special qualifications are essential will be assessed in light of all circumstances at the time of each visa application on a case-by-case basis. A skill that is unique at one point may become commonplace at a later date. Skills required to start up an enterprise may no longer be essential after initial operations are complete and are running smoothly. Some skills are essential only in the short-term for the training of locally-hired employees. Long- term essentiality might, however, be established in connection with continuous activities in such areas as product improvement, quality control, or the provision of a service not generally available in the United States.

(s) Labor disputes. Citizens of Canada or Mexico shall not be entitled to classification under this section if the Attorney General and the Secretary of Labor have certified that:

(1) There is in progress a strike or lockout in the course of a labor dispute in the occupational classification at the place or intended place of employment; and

(2) The alien has failed to establish that the aliens entry will not affect adversely the settlement of the strike or lockout or the employment of any person who is involved in the strike or lockout.

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