

No E-1 Trader and E-2 Investor Visas in Lieu of H-1B Professional Worker Visa

August 28, 1996

Dear (Attorney):

This responds to your letter of July 21, 1995 to Louis D. Crocetti Jr. and Lawrence Weing. I apologize for the delay in responding and hope this has not incurred any inconvenience.

Your letter involves two companies: Company A is a United States-based company engaged in the design and development of a new product not yet accepted in the United States. Company B is a company based in Great Britain, characterized as “a job shop/employment agency” maintaining a staff of engineers.

From your letter, I understand that Company B has contracted to provide Company A with engineers who will be controlled and directed by Company A’s managers and supervisors, but who will be paid by Company B. Company B will deposit money into the accounts of these engineers in Great Britain. At the same time, Company B has invested over \$20,000 in a subsidiary B, in the United States, in order to provide other United States companies with engineers under a similar arrangement.

You ask whether these engineers may qualify as essential employees under the decision in *Matter of Walsh and Pollard*, 20 I&N Dec. 60 (BIA 1988). The Foreign Affairs Manual (FAM) at 9 FAM 41.51, Note 12.1, distinguishes the fact pattern in *Walsh and Pollard* from the job shop you describe, stating unequivocally that that case may not be used “to facilitate the creation of job shops under the E-2 visa classification.” In *Walsh and Pollard*, the United States company contracted for an engineering design for a model, making that case distinguishable from a job-shop scenario in which the contract is to fill employment positions. Rather than coming to fill employee vacancies of a United States business, the employees who came to the United States subsidiary in *Walsh and Pollard* came to perform services and responsibilities on site pursuant to a very specific design project.

Moreover, the “job shop” scenario you describe is ill-fitted to the E classification. First, essential E-2 employees derive their treaty national status directly from either the principal E investor for whom they work, or the enterprise for which they work (which is qualified by the nationality of its ownership). The engineers in your letter intend to work for Company A which is a United States-based company. From the information you have provided, however, Company A is not an investment enterprise or able to establish the requisite nationality of ownership necessary to qualify these employees for treaty eligibility. The fact that they are paid by Company B will neither change the fact that Company A remains the employer nor suffice for purposes of establishing the requisite treaty eligibility. See *Matter of Pozzoli*, 14 I&N Dec. 569 (Reg. Comment 1974). As the employer in fact, Company A would be responsible for verifying employment eligibility.

Second, there may be an issue of whether these employees possess skills essential to the employing investment enterprise and not otherwise readily available in the United States, as well as the length of time the skills will remain essential.

In addition, the definition of “independent contractor” at 8 CFR 274a.1(j) has no bearing on the E treaty trader and investor visa classification. However, even if they were independent contractors, Section 274A(a)(4) of the Immigration and Nationality Act makes it clear that Company A or Subsidiary B may not contract with Company B if there is knowledge that the aliens involved in the employment contract are unauthorized to work in the United States.

Finally, there are no provisions for the classification “E-1/E-2 in lieu of H-1(b).” As you are undoubtedly aware, the H-1(b) classification has a numerical limitation and is subject to a labor condition application. The E classification facilitates commercially driven, bona fide trade and investment in this country pursuant to United States treaties and agreements and was not intended to be used to circumvent the requirements of H-1(b).

I hope this information is useful.

Sincerely,

Katherine A. Lorr
Acting Chief, Business and Trade Branch
Benefit Division