UNCLASSIFIED (U)

9 FAM 402.9

TREATY TRADERS, INVESTORS, AND SPECIALTY OCCUPATIONS - E VISAS

(CT:VISA-998; 01-23-2020)
(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 OVERVIEW OF E VISAS

(CT:VISA-779; 05-13-2019)

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 solely 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), or to work in the enterprise as an executive, supervisor, or essentially skilled employee.

b. On April 18, 2017, the President signed the Executive Order on Buy American Hire American (E.O. 13788), intended to "create higher wages and employment rates for workers in the United States, and to protect their economic interests." The goal of

E.O. 13788 is to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse. You must also 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.

e. For training resources and adjudication tools, please refer to the E Visa Portal.

9 FAM 402.9-3 CLASSIFICATION CODES

(CT:VISA-569; 04-06-2018)

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 (and Essential Employee)
E2	Treaty Investor, Spouse or Child (and Essential Employee)
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-569; 04-06-2018)

a. The treaty trader or investor must, whether an individual or business, possess the nationality of the treaty country. The nationality of a business is determined by the nationality of the individual owners of that business.

b. **Country 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 that the business possesses the nationality of the treaty country. In view of the complex corporate structures in these cases, seek Departmental guidance when necessary by submitting an advisory opinion request to CA/VO/L/A.

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, you must review the ownership of each business structure to determine whether or not the parent organization possesses the requisite 50 percent nationality of the treaty country. 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.

d. **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.

e. **U.S. Lawful Permanent Resident (LPR) Status of Trader or Investor:** A trader or investor with the nationality of a treaty country but who holds U.S. LPR status does not qualify to bring in employees under INA 101(a)(15)(E). Moreover, stock shares owned by U.S. permanent resident aliens cannot be considered in determining the nationality of the business.

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

(CT:VISA-569; 04-06-2018)

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 United States. The alien's expression of an unequivocal intent to depart the United States upon termination of E status is normally sufficient. An applicant who is the beneficiary of an immigrant visa petition will need to satisfy you that his/her intent is to depart the United States at the end of his/her authorized stay, and not stay in the United States to adjust status or otherwise remain in the United States.

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

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

(CT:VISA-779; 05-13-2019)

In adjudicating E-1 visa applications, you must determine whether or not 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) Activities constitute trade within the meaning of INA 101(a)(15)(E) (see 9 FAM 402.9-5(B));

(4) Applicant must be coming to the United States solely to engage in substantial trade (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)).

Please note that all E-1 principal visa applicants must also submit the Form DS-156-E. The DS-156-E must be scanned into the applicant's record. E-1 derivatives do not need to submit Form DS-156-E.

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

(CT:VISA-569; 04-06-2018)

a. **Elements of Trade:** Trade for E-1 purposes has three requirements:

(1) Trade must constitute an exchange;

(2) Trade must be international in scope; and

(3) Trade must involve qualifying activities.

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.

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.

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. Existing trade includes successfully integrated contracts binding upon the parties that call for the immediate exchange of qualifying items of trade.

e. In the rapidly changing business climate with an increasing trend toward service industries, many more service-based business models, 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 that have been found to be legitimate types of E-1 trade. Essentially, any service item commonly traded in international commerce would qualify.

9 FAM 402.9-5(C) Substantial Trade

(CT:VISA-779; 05-13-2019)

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.

c. The word "solely" is often understood as "only" or "not involving anything else;" however, as intended in the usage of the requirement for an E1 visa it is more interchangeable with "principally," "mostly," or "overall." The predominant reason for travel to the United States must be to engage in substantial trade; however, an ancillary or coincidental purpose of travel does not preclude an applicant from being able to establish eligibility for the E1 visa.

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

(CT:VISA-569; 04-06-2018)

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.

b. To measure the requisite trade you should look to the trade conducted by the legal "person" who is the treaty trader. Such a 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 but, rather, is part and parcel of another entity. Thus, to measure trade in the case of a branch, you must look to the trade conducted by the entire entity of which it is a part, usually a foreign-based business (individual, corporation, etc.). In contrast, a subsidiary is a separate legal person/entity.

c. If the trader, whether foreign-based or U.S.-based, meets this 50 percent 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)

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-569; 04-06-2018)

a. In adjudicating E-2 visa applications, you must determine whether or not 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)).

b. E-2 investor applicants and E-2 derivatives do not need to submit a form DS-156-E. All E-2 essential employees and managers are required to submit a DS-156-E, together with the DS-160. The DS-156-E must be scanned into each applicant's record.

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

(CT:VISA-569; 04-06-2018)

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.

b. **Source, Possession, and Control of Funds:** The source of the investment may include capital assets or funds from savings, gifts, inheritance, contest winnings, loans collateralized by the alien's own personal assets (see paragraph c below) or other legitimate sources. The source of the funds need not be outside the United States. The source of the investment must not, however, be the result of illicit activities. You may request whatever documentation is needed to properly assess the source of the funds. The alien must demonstrate possession and control of the invested capital assets and funds.

NOTE: inheritance of a business itself does not constitute an investment.

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. **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. The purchase of a business that is conditioned upon the issuance of the E-2 visa may still qualify as an irrevocable investment. Despite the condition, the purchase would constitute a solid commitment if the assets to be used are held in escrow for release or transfer once the condition is met. The point of the example is that to be in the process of investing the investor must have entered into an agreement and have committed funds.

e. 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.

f. **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.

g. **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.

h. **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 applicant may submit opinions regarding market value from experts in the particular field in question for consideration.

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

(CT:VISA-374; 06-06-2017)

The enterprise must be a real and active commercial or entrepreneurial undertaking, producing some service or commodity. If the investment relates to a new enterprise, then you must be convinced that it will be a real and active commercial or entrepreneurial undertaking that will produce some service or commodity if the visa is issued. 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-569; 04-06-2018)

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.

b. **Interpretations of "Substantial":** No set dollar figure constitutes a minimum amount of investment to be considered "substantial" for E-2 visa purposes. Investment of a substantial amount of capital for E-2 visa purposes constitutes an amount that is:

(1) Substantial in a proportional sense, as determined through the application of the proportionality test outlined below;

(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.

c. **Proportionality Test:** The proportionality test determines whether an investment is substantial by weighing the amount of qualifying funds invested against 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 constituting 100 percent of the total cost would

normally qualify for a business requiring a startup cost of $100,000, for example. At the other extreme, an investment of $10 million in a $100 million business may be considered substantial, based on the sheer magnitude of the investment itself.

(1) See 9 FAM 402.9-6(B) for guidance regarding qualifying funds.

(2) The cost of an established business is generally 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 determined by combining the cost of the assets the investor has already purchased with the cost estimates for the procurement of additional assets needed to run the business. For example, cost may be established through 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 submissions to various governmental authorities.

(4) 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 ongoing 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.

d. **Investor's Commitment:** You may request whatever documentation is needed to properly assess the nature and extent of commitment to a business venture. 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.

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

(CT:VISA-569; 04-06-2018)

A marginal enterprise is an enterprise that does not have the present or future capacity to generate enough income to provide more than 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-569; 04-06-2018)

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.

b. **Controlling Interest:** An equal share of the investment in a joint venture or an equal partnership of two parties, generally gives 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, however, 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.

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.

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.

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)

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.

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-569; 04-06-2018)

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

(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)).

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

(3) Employer, if not residing outside the United States, must be maintaining "E" status in the United States.

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

(CT:VISA-569; 04-06-2018)

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 would 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-569; 04-06-2018)

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.

c. **Specialized Skills:**

(1) Once the business has established the need for a specific skillset, you must determine whether or not the skills are specialized. If so, the visa applicant must satisfy you that he or she possesses these skills. In assessing the specialized nature of the skills sought and whether or not the applicant possesses these skills, consider the following:

(a) The experience and training necessary to achieve such skill(s)

(b) The uniqueness of such skills;

(c) The availability of U.S. workers with such skills;

(d) The salary such special expertise can command;

(e) The degree of proven expertise of the alien in the area of specialization; and

(f) The function of the job to which the alien is destined.

(2) 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.

(3) **Previous Employment With E Visa Firm:** Apart from an ordinarily skilled worker who is relying on his familiarity with the overseas operation to qualify as specialized knowledge, there is no requirement that an "essential" employee have any previous employment with the enterprise in question. 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.

(4) You may request whatever documentation is needed to address the specialized nature of the skillset sought including requesting 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.

d. **Duration of Essentiality:** The applicant bears the burden of establishing at the time of initial application and each subsequent application not only that he or she possess the requisite specialized skills but, also, the length of time that such skills will be needed. 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, and it is reasonable that after a short period of time the enterprise will be able to train American employees the specialized skills needed to successfully operate the enterprise. In assessing the claimed duration of essentiality, consider the time needed to onboard the employee and time to perform the contemplated duties. What is highly specialized and unique today might not be in a few years. 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.

9 FAM 402.9-8 REQUIREMENTS FOR E-3 VISAS

9 FAM 402.9-8(A) Background

(CT:VISA-569; 04-06-2018)

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 an approved Labor Condition Application (LCA) issued by the Department of Labor (DOL);

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

(3) Demonstrate 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.

9 FAM 402.9-8(B) What is Needed to Qualify for a Specialty Occupation Visa

(CT:VISA-390; 06-20-2017)

Principals: A treaty alien in a specialty occupation must meet the general academic and occupational requirements for the position pursuant to INA 214(i)(1). In addition to the nonimmigrant visa (NIV) application, the following documentary evidence must be submitted in connection with an application for an E-3 visa:

(1) A completed Form ETA-9035-E, Labor Condition Application for Nonimmigrant Workers (formerly, Labor Condition Application for H-1B Nonimmigrants), certified by the Department of Labor (DOL).

(2) Evidence of academic or other qualifying credentials as required under INA 214(i)(1) and a job offer letter or other documentation from the employer establishing that upon entry into the United States the applicant will be engaged in qualifying work in a specialty occupation and that the alien will be paid the actual or prevailing wage referred to in INA 212(t)(1). A certified copy of the foreign degree and evidence that it is equivalent to the required U.S. degree could be used to satisfy the "qualifying credentials" requirement. Likewise, a certified copy of a U.S. baccalaureate or higher degree, as required by the specialty occupation, would meet the minimum evidentiary standard.

(3) In the absence of an academic or other qualifying credential(s), evidence of education and experience that is equivalent to the required U.S. degree.

(4) Evidence establishing that the applicant's stay in the United States will be temporary. (See 9 FAM 402.9-4(C) and 9 FAM 402.9-8(G).)

(5) A certified copy of any required license or other official permission to practice the occupation in the state of intended employment if so required or, where licensure is not necessary to commence immediately the intended specialty occupation employment upon admission, evidence that the alien will be obtaining the required license within a reasonable time after admission.

(6) Evidence of payment of the Machine Readable Visa (MRV) fee.

9 FAM 402.9-8(C) Form ETA-9035 Labor Condition Application (LCA) from the Department of Labor (DOL) Required

(CT:VISA-185; 09-26-2016)

a. **Filing Form ETA-9035-E:** For all prospective E-3 hires, employers must submit a Labor Condition Application (LCA) to the Department of Labor (DOL) containing

attestations relating to wages and working conditions.

b. LCAs for E-3 cases must be submitted electronically via the Department's iCERT Portal System. The iCERT Portal System is available at: http://icert.doleta.gov. The only two exceptions for electronic filing are physical disability and lack of internet access preventing the employer from filing electronically. Employers with physical disabilities or lack of internet access preventing them from filing electronic applications may submit a written request for special permission to file their LCAs via U.S. mail. Such requests MUST be made prior to submitting an application by mail and should be addressed to:

Administrator, Office of Foreign Labor Certification
Employment Training Administration
U.S. Department of Labor
Room C-4312
200 Constitution Avenue, NW
Washington, DC 20210

c. The Form ETA-9035 used for requests by mail and Form ETA-9035E used for electronic submissions are the same form. The current ETA-9035/9035E is six to seven pages long. Page 1 (numbered page 1 of 1) includes three attestations for the employer to complete in the electronic filing system. Pages 2-6 (numbered page 1 of 5 through page 5 of 5) contain Sections A through O, and the 7th page is optional for any Addendum to Section G to list additional worksite details.

d. All E-3 LCAs will contain case numbers in the following format: I-203-xxxxx-xxxxxx. All LCAs that were submitted online will display the case number, case status and period of employment on the bottom of each page. Section K on page 4 should contain the signature of the employer. If there is no employer signature, the LCA is not valid for processing and consular staff should 221(g) the case until a signed copy of the LCA has been submitted. In section M of the LCA, the signature block will contain the validity dates of the certification, the Department of Labor’s signature as “Certifying Officer” (not a specific official's name), the determination date, the case number, and the case status as “Certified.” A mailed LCA likely would not have a computer-generated footer at the bottom of the form with the case number, case status, and period of employment. A mailed-in LCA would likely also be completed in a different computer font or contain handwritten information.

e. **Acceptance of Form** ETA-9035 **by Posts:** For mailed-in applications, DOL faxes the LCA back to the employer after approval. Applications approved online are presented on-screen to the employer at the completion of the filing process in the form of a PDF/.pdf document. Consequently the applicant will be presenting either the initial faxed LCA, a printed PDF/.pdf document, or a copy of either of these; there will be no “original” document that will be presented. You must check to make sure the approval date of the LCA is later than September 2, 2005 (the effective date of the Department of State's E-3 regulatory publication).

f. **Verifying Authenticity of the E-3 LCA:** Your acceptance of the LCA certification is discretionary. If you are not satisfied that the LCA being presented is authentic, you should suspend action on the case (INA 221(g)) and verify the LCA with the Department of Labor (DOL).

g. DOL posts html versions of all certified E-3 LCAs on the Labor Certification Registry website. For additional questions concerning the authenticity of a particular LCA, you should send requests to the LCA Help Desk at LCA.Chicago@dol.gov., or by mail to U.S. Department of Labor, Employment and Training Administration, Office of Foreign

Labor Certification, Chicago National Processing Center, 11 West Quincy Court, Chicago, IL 60604-2105.

h. **Petition Filing with DHS Not Required:** An employer of an E-3 treaty alien in a specialty occupation is not required to file a petition with DHS. Instead, a prospective employee will present evidence for classification, including the approved Form ETA-9035-E, directly to you at the time of visa application.

9 FAM 402.9-8(D) Definition of Specialty Occupation

(CT:VISA-185; 09-26-2016)

The E-3 category provides for the issuance of visas solely to E-3 qualifying nationals performing employment within a "specialty occupation." The definition of "specialty occupation" is one that requires:

(1) A theoretical and practical application of a body of specialized knowledge; and

(2) The attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. Note: In determining whether an occupation qualifies as a "specialty occupation," follow the definition contained at INA 214(i)(1) for H-1B nonimmigrants and applicable standards and criteria determined by the Department of Homeland Security (DHS) and legacy Immigration and Naturalization Service (legacy INS). See 9 FAM 402.10-5(E).

9 FAM 402.9-8(E) Determining "Specialty Occupation" Qualification

(CT:VISA-569; 04-06-2018)

Although the term "specialty occupation" is specifically defined at INA 214(i)(1), and further elaborated upon in DHS's regulations (8 CFR 214.2(h)(4)(iii)(A)), consular determinations of what qualifies as a "specialty occupation" will often come down to a judgment call by the adjudicating consular officer. You must determine whether the job itself falls within the definition of "specialty occupation," and also examine the alien's qualifications, including his or her education and experience. You should consider the available offer of employment and the information obtained during the interview, and then on the basis of this information, evaluate whether or not the offer of employment is for a "specialty occupation." Then you must determine whether or not the applicant has the required degree, or equivalency of experience and education, to adequately perform the stipulated job duties.

9 FAM 402.9-8(F) Referring Questionable Cases to CA/VO/L/A and/or the Kentucky Consular Center (KCC)

(CT:VISA-569; 04-06-2018)

a. Seek Departmental guidance by submitting an advisory opinion request to CA/VO/L/A when necessary to determine whether or not E-3 alien's work experience, or proposed employment meets the specialty occupation requirements as described above in 9 FAM 402.9-8(E).

b. If you have concerns about information regarding or provided by the employer (e.g., you doubt that the employer can pay the prevailing wage, or you do not believe the

business is large enough to support additional employees), please email KCC at FPMKCC@state.gov with your concerns, providing as much factual detail as possible. KCC will review the information, investigate, and attempt to provide you with additional research to address those concerns.

9 FAM 402.9-8(G) Intent to Depart Upon Termination of Status

(CT:VISA-569; 04-06-2018)

a. Temporary entry for treaty aliens in specialty occupations is the same standard used for treaty traders/investors.

b. 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 United States. The alien's expression of an unequivocal intent to depart the United States upon termination of E status is normally sufficient. An applicant who is the beneficiary of an immigrant visa petition will need to satisfy you that his/her intent is to depart the United States at the end of his/her authorized stay and not stay in the United States to adjust status or otherwise remain in the United States.

9 FAM 402.9-8(H) E-3 Licensing Requirements

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

a. An E-3 alien must meet academic and occupational requirements, including licensure where appropriate, for admission into the United States in a specialty occupation. If the job requires licensure or other official permission to perform the specialty occupation, the applicant must submit proof of the requisite license or permission before the E-3 visa may be granted. In certain cases, where such a license or other official permission is not immediately required to perform the duties described in the visa application, the alien must show that he or she will obtain such licensure within a reasonable period of time following admission to the United States. However, as illustrated in the example in paragraph b(4) below, in other instances, an alien will be required to present proof of actual licensure or permission to practice prior to visa issuance. In all cases, an alien must show that he or she meets the minimum eligibility requirements to obtain such licensure or sit for such licensure examination (e.g., he or she must have the requisite degree and/or experience). Even when not required to engage in the employment specified in the visa application, a visa applicant may provide proof of licensure to practice in a given profession in the United States together with a job offer letter, or other documentation, in support of an application for an E-3 visa.

b. The following examples are illustrative:

(1) An alien is seeking an E-3 visa in order to work as a law clerk at a U.S.-based law firm. The alien may, if otherwise eligible, be granted an E-3 visa if it can be shown that the position of unlicensed law clerk is a specialty occupation, even if he or she has not been admitted to the bar.

(2) An alien has a job offer from a law firm promising him or her a position as an associate if the alien passes the bar exam. The application indicates that the

position in question meets the definition of a specialty occupation. The alien may apply for an E-3 visa even if he or she will not be immediately employed in the position offered, but will be studying for the bar examination upon admission to the United States. You may issue the visa if you are satisfied that the alien will be taking steps to obtain bar admission within a reasonable period of time following admission to the United States. What constitutes a reasonable period of time will depend on the specific facts presented, such as licensure examination schedules and bar preparation course schedules.

(3) An alien does not have a job offer, but wishes to study for the bar upon admission to the United States with the hope of finding a position at a United States-based law firm. The alien would not be eligible for E-3 classification, since he or she would not be coming to work in a specialty occupation. This person would be required to obtain another type of visa, such as a B-1, in order to study for the bar in this country.

(4) An alien has an offer for employer with a law firm as a litigator, and is to begin working within two weeks of entry into the United States. The applicant must demonstrate that he or she has been admitted to the appropriate bar, or otherwise has obtained permission from the respective jurisdiction or jurisdictions where he or she intends to practice to make court appearances.

9 FAM 402.9-8(I) Numerical Limitation on E-3 Visas

(CT:VISA-185; 09-26-2016)

a. Only E-3 principals who are initially being issued E-3 visas for the first time, or who are otherwise obtaining E-3 status (in the United States) for the first time, are subject to the 10,500 annual numerical limitation provisions of INA 214(g)(11)(B). Consequently, spouses and children of E-3 principals, as well as returning E-3 principals who are being issued new E-3 visas for continuing employment with the original employer, are exempt from the annual numerical limit (see b. and c. immediately below).

b. An E-3 principal who is applying for a new visa following the expiration of the initial E-3 visa, or who is applying for a visa after initially obtaining E-3 status in the United States, is not subject to the annual E-3 numerical limit, provided it is established to your satisfaction that there has been uninterrupted continuity of employment. "Uninterrupted continuity of employment" means that the applicant has worked, and continues to work, for the U.S.-based employer who submitted the original Labor Condition Application (LCA) and offer of employment. To ensure that such applicants are not counted against any subsequent numerical limit, returning E-3 principals will be identified by the visa code "E-3R" (with "R" representing the status of "returning").

c. To ensure that the spouse and children of E-3 principals are not counted against the numerical limit, they will be identified by the visa code "E-3D" (with "D" representing the status of "dependent").

d. At the end of each fiscal year, any unused E-3 numbers are forfeited; such visa numbers do not carry over to the next fiscal year.

e. The Department of State will keep count of the number of E-3 visas issued, and of changes of status to E-3 in the United States as reported by the Department of Homeland Security (DHS). If it appears that the 10,500 annual numerical limits will

be reached in any fiscal year, the Department of State will instruct posts to cease E-3 issuances for that fiscal year.

9 FAM 402.9-8(J) Part-Time Employment by E-3 Applicants

(CT:VISA-569; 04-06-2018)

An E-3 worker may work full or part-time and remain in status based upon the attestations made on the LCA. Section B.4 on the LCA provides the option to request part time employment and DOL approves LCAs for part-time employment. You will need to evaluate potential public charge concerns for any E-3 applicant planning on coming to the United States as a part-time employee.

9 FAM 402.9-8(K) Applicants with Multiple LCAs

(CT:VISA-648; 07-25-2018)

a. If an applicant presents more than one valid LCA, consular officers should evaluate each LCA on its own merits. The applicant will have to qualify for each LCA separately, and each proposed employment situation must overcome public charge concerns on its own. Clearly indicate in the case remarks which LCAs and positions the applicant qualifies for.

b. Multiple annotations: You should annotate the visa with the employer's name, LCA case number and LCA's expiration date for each employer. You may need to use abbreviations in order to make more than one set of annotations fit onto the visa foil. If there is not enough room on the visa foils to add all of the required annotations contact VO/F for additional guidance regarding the possibility of providing a letter for employers.

c. If an applicant presents multiple LCAs for E-3 and E-3R (returning E-3) positions at the same time, and is approved for multiple positions, only one visa should be issued. The visa should be issued for an E-3 position to ensure that the visa is counted towards the annual numerical limit. The visa should be annotated with the employer's name, LCA case number and LCA's expiration date for each E-3 position AND the employer's name, LCA case number and LCA's expiration date for each E-3R position. If there is not enough room on the visa foils to add all of the required annotations contact VO/F for additional guidance.

9 FAM 402.9-8(L) Considerations in Processing E-3 Visas

(CT:VISA-633; 07-13-2018)

a. **Validity of Issued Visa:** The validity of the visa should not exceed the validity period of the LCA. The Department of State and DHS have agreed to a 24-month maximum validity period for E-3 visas.

b. **Initial Authorized Period of Stay for E-3 Applicants:** E-3 applicants are admitted for a two-year period renewable indefinitely, provided the alien is able to demonstrate that he or she does not intend to remain or work permanently in the United States.

c. **Fees:** Other than the normal visa-related Machine Readable Visa (MRV) fees, there is no other fee associated with the issuance of an E-3 visa.

d. **Reports of Cancelled or Revoked E-3 Visas:** In the event an E-3 visa is cancelled or revoked prior to the applicant’s entry into the United States, a report must be sent

to CA/VO/DO/I explaining the circumstances attendant to the non-use of the E-3 number. In cases where the E-3 number has not been used, it will be added back into the remaining pool of unused E-3 visa numbers for that fiscal year.

e. **Annotation of E-3 Visas:** Annotate E-3 visas of the principal applicant with the name of the employer, the ETA case number (found at the bottom of each page of the Form ETA-9035), and the LCA's expiration date. Annotate E-3D visas for derivatives of the principal applicant with the name of the principal applicant, the name of the employer, the ETA case number and the LCA's expiration date.

9 FAM 402.9-8(M) Special Note about E-3 and H-1B Petitions

(CT:VISA-569; 04-06-2018)

When the H-1B numerical cap is reached before the end of the fiscal year, it is likely that there will be numerous Australian H-1B applicants who will have approved Labor Condition Applications (LCA) but whose petitions for H-1B status are returned unapproved by the DHS for lack of an available H-1B visa number. Currently, you are not permitted to accept LCAs approved based upon H-1B-related offers of employment for E-3 applications. Rather, the United States employer must submit a new LCA request to 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-569; 04-06-2018)

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, if 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 classification as the spouse or child of an E 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 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-998; 01-23-2020)

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
Austria	E-1	05/27/1931
Austria	E-2	05/27/1931
Azerbaijan	E-2	08/02/2001
Bahrain	E-2	05/30/2001
Bangladesh	E-2	07/25/1989
Belgium	E-1	10/03/1963
Belgium	E-2	10/03/1963
Bolivia	E-1	11/09/1862
Bolivia[13]	E-2	06/06/2001
Bosnia & Herzegovina[11]	E-1	11/15/1982
Bosnia & Herzegovina[11]	E-2	11/15/1982
Brunei	E-1	07/11/1853
Bulgaria	E-2	06/02/1954
Cameroon	E-2	04/06/1989
Canada	E-1	01/01/1994
Canada	E-2	01/01/1994
Chile	E-1	01/01/2004
Chile	E-2	01/01/2004
China (Taiwan)[1]	E-1	11/30/1948
China (Taiwan)[1]	E-2	11/30/1948
Colombia	E-1	06/10/1948
Colombia	E-2	06/10/1948
Congo (Brazzaville)	E-2	08/13/1994
Congo (Kinshasa)	E-2	07/28/1989
Costa Rica	E-1	05/26/1852

Costa Rica	E-2	05/26/1852
Croatia[11]	E-1	11/15/1982
Croatia[11]	E-2	11/15/1982
Czech Republic[2]	E-2	01/01/1993
Denmark[3]	E-1	07/30/1961
Denmark	E-2	12/10/2008
Ecuador[14]	E-2	05/11/1997
Egypt	E-2	06/27/1992
Estonia	E-1	05/22/1926
Estonia	E-2	02/16/1997
Ethiopia	E-1	10/08/1953
Ethiopia	E-2	10/08/1953
Finland	E-1	08/10/1934
Finland	E-2	12/01/1992
France[4]	E-1	12/21/1960
France[4]	E-2	12/21/1960
Georgia	E-2	08/17/1997
Germany	E-1	07/14/1956
Germany	E-2	07/14/1956
Greece	E-1	10/13/1954
Grenada	E-2	03/03/1989
Honduras	E-1	07/19/1928
Honduras	E-2	07/19/1928
Ireland	E-1	09/14/1950
Ireland	E-2	11/18/1992
Israel[15]	E-1	04/03/1954
Israel[15]	E-2	05/01/2019
Italy	E-1	07/26/1949
Italy	E-2	07/26/1949
Jamaica	E-2	03/07/1997
Japan[5]	E-1	10/30/1953
Japan[5]	E-2	10/30/1953
Jordan	E-1	12/17/2001
Jordan	E-2	12/17/2001
Kazakhstan	E-2	01/12/1994
Korea (South)	E-1	11/07/1957
Korea (South)	E-2	11/07/1957
Kosovo[11]	E-1	11/15/1882
Kosovo[11]	E-2	11/15/1882
Kyrgyzstan	E-2	01/12/1994
Latvia	E-1	07/25/1928
Latvia	E-2	12/26/1996
Liberia	E-1	11/21/1939
Liberia	E-2	11/21/1939
Lithuania	E-2	11/22/2001

Luxembourg	E-1	03/28/1963
Luxembourg	E-2	03/28/1963
Macedonia[11]	E-1	11/15/1982
Macedonia[11]	E-2	11/15/1982
Mexico	E-1	01/01/1994
Mexico	E-2	01/01/1994
Moldova	E-2	11/25/1994
Mongolia	E-2	01/01/1997
Montenegro[11]	E-1	11/15/1882
Montenegro[11]	E-2	11/15/1882
Morocco	E-2	05/29/1991
Netherlands[6]	E-1	12/05/1957
Netherlands[6]	E-2	12/05/1957
New Zealand[16]	*E-1*	*06/10/2019*
New Zealand[16]	*E-2*	*06/10/2019*
Norway[7]	E-1	01/18/1928
Norway[7]	E-2	01/18/1928
Oman	E-1	06/11/1960
Oman	E-2	06/11/1960
Pakistan	E-1	02/12/1961
Pakistan	E-2	02/12/1961
Panama	E-2	05/30/1991
Paraguay	E-1	03/07/1860
Paraguay	E-2	03/07/1860
Philippines	E-1	09/06/1955
Philippines	E-2	09/06/1955
Poland	E-1	08/06/1994
Poland	E-2	08/06/1994
Romania	E-2	01/15/1994
Senegal	E-2	10/25/1990
Serbia[11]	E-1	11/15/1882
Serbia[11]	E-2	11/15/1882
Singapore	E-1	01/01/2004
Singapore	E-2	01/01/2004
Slovak Rep[2]	E-2	01/01/1993
Slovenia[11]	E-1	11/15/1982
Slovenia[11]	E-2	11/15/1982
Spain[8]	E-1	04/14/1903
Spain[8]	E-2	04/14/1903
Sri Lanka	E-2	05/01/1993
Suriname[9]	E-1	02/10/1963
Suriname[9]	E-2	02/10/1963
Sweden	E-1	02/20/1992

Sweden	E-2	02/20/1992
Switzerland	E-1	11/08/1855
Switzerland	E-2	11/08/1855
Thailand	E-1	06/08/1968
Thailand	E-2	06/08/1968
Togo	E-1	02/05/1967
Togo	E-2	02/05/1967
Trinidad & Tobago	E-2	12/26/1996
Tunisia	E-2	02/07/1993
Turkey	E-1	02/15/1933
Turkey	E-2	05/18/1990
Ukraine	E-2	11/16/1996
United Kingdom[10]	E-1	07/03/1815
United Kingdom[10]	E-2	07/03/1815
Yugoslavia[11]	E-1	11/15/1882
Yugoslavia[11]	E-2	11/15/1882

FOOTNOTES

[1]China (Taiwan). Pursuant to Section 6 of the Taiwan Relations Act, Public Law 96-8, 93 Stat, 14, this agreement, which was concluded with the Taiwan authorities prior to January 1, 1979, is administered on a nongovernmental basis by the American Institute in Taiwan, a nonprofit District of Columbia corporation, and constitutes neither recognition of the Taiwan authorities nor the continuation of any official relationship with Taiwan.

[2]Czech Republic and Slovak Republic. The Treaty with the Czech and Slovak Federal Republics entered into force on December 19, 1992; it entered into force for the Czech Republic and Slovak Republic as separate states on January 1, 1993.

[3]Denmark. The Convention of 1826 does not apply to the Faroe Islands of Greenland. The Treaty, which entered into force on July 30, 1961, does not apply to Greenland.

[4]France. The Treaty, which entered into force on December 21, 1960, applies to the departments of Martinique, Guadeloupe, French Guiana, and Reunion.

[5]Japan. The Treaty, which entered into force on October 30, 1953, was made applicable to the Bonin Islands on June 26, 1968, and to the Ryukyu Islands on May 15, 1972.

[6]Netherlands. The Treaty, which entered into force on December 5, 1957, is applicable to Aruba and Netherlands Antilles.

[7]Norway. The Treaty, which entered into force on September 13, 1932, does not apply to Svalbard (Spitzbergen and certain lesser islands).

[8]Spain. The Treaty, which entered into force on April 14, 1903, is applicable to all territories.

[9]Suriname. The Treaty with the Netherlands, which entered into force December 5, 1957, was made applicable to Suriname on February 10, 1963.

[10]United Kingdom. The Convention, which entered into force on July 3, 1815, applies only to British territory in Europe (the British Isles (except the Republic of Ireland), the Channel Islands, and Gibraltar) and to "inhabitants" of such territory. This term, as used in the Convention, means "one who resides actually and permanently in a given place, and has his domicile there." Also, in order to qualify for treaty trader or treaty investor status under this treaty, the alien must be a national of the United Kingdom. Individuals having the nationality of members of the Commonwealth other than the United Kingdom do not qualify for treaty trader or treaty investor status under this treaty.

[11]Yugoslavia. The U.S. view is that the Socialist Federal Republic of Yugoslavia (SFRY) has dissolved and that the successors that formerly made up the SFRY - Bosnia and Herzegovina, Croatia, Kosovo, the Former Yugoslav Republic of Macedonia, Montenegro, Serbia, and Slovenia, continue to be bound by the treaty in force with the SFRY and the time of dissolution.

[12]The E-3 visa is for nationals of the Commonwealth of Australia who wish to enter the United States to perform services in a "specialty occupation." The term "specialty occupation" means an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. The definition is the same as the Immigration and Nationality Act definition of an H-1B specialty occupation.

[13]Bolivia. Bolivian nationals with qualifying investments in place in the United States by June 10, 2012 continue to be entitled to E-2 classification until June 10, 2022. The only nationals of Bolivia (other than those qualifying for derivative status based on a familial relationship to an E-2 principal alien) who may qualify for E-2 visas at this time are those applicants who are coming to the United States to engage in E-2 activity in furtherance of covered investments established or acquired prior to June 10, 2012.

[14]Ecuadorian nationals with qualifying investments in place in the United States by May 18, 2018 continue to be entitled to E-2 classification until May 18, 2028. The only nationals of Ecuador (other than those qualifying for derivative status based on a familial relationship to an E-2 principal alien) who may qualify for E-2 visas at this time are those applicants who are coming to the United States to engage in E-2 activity in furtherance of covered investments established or acquired prior to May 18, 2018.

[15] Israel: Pursuant to a treaty of friendship, commerce, and navigation between the United States and Israel that entered into force on April 3, 1954 entitled nationals of Israel to E-1 status for treaty trader purposes. Nationals of Israel are not entitled to E-2 classification for treaty investor purposes under that treaty. Public Law 112-130 (June 8, 2012), accords nationals of Israel E-2 status for treaty investor purposes if the Government of Israel provides similar nonimmigrant status to nationals of the United States. The Department has confirmed that Israel offers reciprocal treaty investor treatment to U.S. nationals and E-2 visa may be issued to nationals of Israel beginning on May 1, 2019.

[16] New Zealand: Public Law 115-226, enacted on August 1, 2018, accorded nationals of New Zealand to E-1 and E-2 status for treaty trader/treaty investor purposes if the Government of New Zealand provides similar nonimmigrant status to nationals of the United States. The Department has confirmed that New Zealand offers similar

nonimmigrant status to U.S. nationals and E visas may be issued to nationals of New Zealand beginning on June 10, 2019.

9 FAM 402.9-11 SUBMITTING AN APPLICATION FOR AN E-1 OR E-2 VISA

9 FAM 402.9-11(A) Application Forms

(CT:VISA-569; 04-06-2018)

All E-1/E-2 visa applicants must submit completed Form DS-160. All E-1/ E-2 non-derivative visa applicants must also submit the form DS-156-E, except the E-2 principal investor (DS-156-E questions for E-2 investor principals are integrated into their DS-160). The DS-156-E must be scanned into the applicant's record. Derivatives do not need to submit Form DS-156-E.

9 FAM 402.9-11(B) Suggested E-1/E-2 Visa Application Document Checklist - for Applicants

(CT:VISA-569; 04-06-2018)

The following is a list of suggested documentation that may establish an alien's eligibility for an E-1 or E-2 visa. This is meant as a guide only and is not a list of required documentation. Other information and evidence may be submitted by the visa applicant to satisfy the consular officer that the alien meets the criteria described in 9 FAM 402.9-5(A) or 9 FAM 402.9-6(A).

> Please tab and index your supporting documentation and note the corresponding tab number on this form. To facilitate and expedite adjudication of your case, please highlight corroborating figures in annual reports, financial statements, etc.

I. Proof of Nationality of Investor or Applicant

- Tab No.
- Birth Certificate —
- Citizenship certificate —
- Photocopy of passport —
- Evidence of legal status in home country —
- Other nationality documents —

II. Ownership Documents: (either A, B or C)

A. Sole Proprietorship: Tab No.

- Shares/stock certificates —

- Shares register indicating total and outstanding shares issued —
- Minutes of annual shareholders meeting —
- Other Evidence —

B. Partnership: Tab No.

- Partnership or Joint Venture Agreement —
- Shares/stock certificates indicating total shares issued and outstanding shares —
- Other evidence —

C. Corporation: Tab No.

- Shares/stock certificates indicating distribution of ownership, i.e., shares held by each firm and shares held by individual owners corporate matrix —
- If publicly traded on the principal stock exchange of a treaty country, enclose a sample of recently published stock quotations —
- Public announcement of corporate acquisition corporate chart showing head office and other subsidiary/branch locations in the U.S. —

Other evidence of ownership —

III. Trade:

Tab No.

- Purchase orders —
- Warehouse/custom declarations —
- Bills of lading —
- Sales contracts/contracts for services —
- Letters of credit —

- Carrier inventories —
- Trade brochures —
- Insurance papers documenting commodities imported into the U.S. —
- Accounts receivable & accounts payable ledgers —
- Client lists —
- Other documents showing international trade is substantial and that 51% of the trade is between U.S. and the treaty country —

IV. Investment:

	Tab No.
A. For an existing enterprise:	(show purchase price)
• Tax Valuation	—
• Market Appraisal	—
B. For a New Enterprise:	(show estimated start-up cost)
• Trade Association Statistics	—
• Chamber of Commerce Estimates	—
• Market Surveys	—
C. Source of Investment:	Tab No.
• Personal statement of net worth prepared by a certified accountant	—
• Transactions showing payment of sold property or business (proof of property ownership and promissory notes) and rental income (lease agreements)	—

- Voided investment certificates or internal bank vouchers and appropriate bank statement crediting proceeds —
- Debit and credit advices for personal and/or business account withdrawals —
- Audited financial statement —
- Annual report of parent company —
- Net worth statements from certificate professional accountants —

D. Evidence of Investment:

1. Existing Enterprise: Tab No.

- Escrow —
- Escrow account statement in the U.S. —
- Escrow receipt —
- Signed purchase agreement —
- Closing and settlement papers —
- Mortgage documents —
- Loan documents —
- Promissory notes —
- Financial reports —
- Tax returns —
- Security agreements —
- Assumption of lease agreement —
- Business account statement for routine operations —
- Other evidence —

2. New Enterprise: Tab No.

- Inventory listing, shipment invoices of inventory, equipment or business related property —
- Receipts for inventory purchases —
- Canceled checks or official payment receipts for expenditures —
- Canceled check for first month's rent or full annual advance rent payment —
- Lease agreement —
- Purchase orders —
- Improvement expenses —
- Initial business account statements —
- Wire transfer receipts —

V. Marginality:

A. For Existing Business: Tab No.

- U.S. corporate tax returns —
- Latest audited financial statement or non-review statements —
- Annual reports —
- Payroll register —
- W-2 and W-4 tax forms —
- Canceled checks for salaries paid and/or corresponding payroll account —

B. For New Business: Tab No.

- Payroll register, records of salaries paid to employees (if any), employee data, including

names, rates of pay, copies of W-2's —

- Financial projections for next 5 years, supported by a thorough business plan —
- Business income and corporate tax returns (proof of registration, ownership, audited financial and review engagements) —

VI. Real & Operating Commercial Enterprise:

Tab No.

- Occupational license —
- Business license/business permits —
- Sales tax receipt —
- Utility/telephone bills —
- Business transaction records —
- Current/commercial account statements —
- Letters of credit —
- Invoices from suppliers —
- Advertising leaflets —
- Business brochures/promotional literature —
- Newspaper clippings —

VII. Executive/Managerial/Supervisory/Essential Skills:

Tab No.

- Letter from E-2 enterprise providing specific information on the applicant and the reasons for his/her assignment to the U.S. The letter must explain the employee's role in the U.S. company (job title and duties), the applicant's executive or supervisory responsibilities or, if not a supervisor, his/her specialist role, the level of education and knowledge required by the employee's position, his employment experience, progression of promotion or high level training or special qualifications and the —

reasons why a U.S. citizen or legal permanent resident cannot fill the position (if the position is not managerial or supervisory)

- Letter from responsible official at U.S. company or office identifying the need for assigned employee. _

- Organizational chart showing current staffing pattern at U.S. company _

- Evidence of executive, supervisory or specialized knowledge, education, experience, skills or training, such as certificates, diplomas or transcripts. _

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