

Investing in the United States: Basis for An E-2 Visa

By Atty. German Castillo

The United States presents many opportunities for investing. Many of these investment opportunities lie in active operations that produce services or commodities. Should a foreign national make a substantial invest in such active operations he/she may very well have the opportunity to enter or remain in the United States.

In its most simple essence, the E-2 Visa provides an investor, who has taken the risk of investing a substantial amount of capital into an active operation, the opportunity to develop and direct that operation/enterprise from within the United States. It will be the purpose of this short article to explain some of the requirements, summarize the E-2 benefits, and present some alternatives were E-2 is not applicable to the foreign national.

The Requirements: The first requirement, for an E-2 visa application, is that the Applicant and the enterprise must be nationals of the same treaty country. The E-2 visa arises from the foreign national's country having a "bilateral investment treaty" or "treaty of commerce and navigation" between that country and the United States. As of the date of publication, countries having the requisite treaties include, Albania, Armenia, Australia, Azerbaijan, Bahrain, Bangladesh, Belgium, Bosnia & Herzegovina, Bulgaria, Canada,

Colombia, Congo (Brazzaville), Congo (Kinshasa), Costa Rica, Croatia, Czech Republic, Egypt, Estonia, Ethiopia, France, Germany, Iran, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Korea, Kyrgyzstan, Liberia, Lithuania, Luxembourg, Mexico, Morocco, Norway, Oman, Pakistan, Panama, Paraguay, Philippines, Romania, Senegal, Serbia & Montenegro, Slovak Republic, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Taiwan, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Ukraine, and the United Kingdom.

The second major requirement, for an E-2 visa application, is that the investment must be substantial. The US Immigration Service tends to focus on absolute substantiality without establishing a numerical limit—although in practice, investments greater than \$65,000 have been considered substantial. On the other hand, the Department of State applies a proportionality test to determine whether an investment is substantial. This is done by comparing the amount actually invested, with the cost (value) of the business—i.e., what amount it takes to buy the business or to establish it from scratch, as may be the case. If the amount invested is the same as the cost (value), the investment is 100% of the required funds, which would always be deemed "substantial," although 100% is never required.

The third major requirement, for an E-2 visa application, is that the funds or

other investment assets must be placed "at risk." In other words, the investor must have irrevocably committed the funds to the investment. The funds, at that point, would be subject to partial or total loss should the investment fortunes take a turn for the worse. For example, funds that still are within the investor's own accounts, and committed only by an investment contract, would not be classified as a risk—the reasoning being that a contract remains subject to breach.

The fourth major requirement, for an E-2 visa application, is that the investment must be more than "marginal." By such requirement, it is meant that the investment has the capacity to generate more than just enough profit for the investor and his/her family to earn a living, or it must have a significant impact on the local economy—most commonly by providing or generating jobs in the U.S.

There are several other requirements that are almost intuitive, but are worth stating briefly. For one, the investment must be a real and active commercial or entrepreneurial undertaking, producing some service or commodity, as opposed to a passive mere speculative investment—e.g., buying undeveloped land or stocks merely to resell at a profit or investing in a not-for-profit organization.

For another, the funds or other investment assets must belong to the investor, whether obtained by such means as gift, savings, or inheritance. Although com-

monly misunderstood, the investment funds do not need not come from outside the United States, but must be received legitimately.

Finally, the investor who is coming to develop and direct his/her investment must in fact have "control" of the investment operations/enterprise. Typically, such control arises from having at least 51% ownership of the enterprise. The Benefits: Having established the required elements for E-2 status, an investor will also be able to obtain E-2 dependent status for his/her family. The spouse of the E-2 investor may apply for work authorization. Unlike other categories, E-2 status can continue to be extended indefinitely as long as the investor affirms that he/she will leave the United States when the E-2 purpose is over. That same affirmation of intent to return, means the E-2 holder does not need to maintain a foreign residence during their E-2 stay in the U.S.

There are other possibilities for obtaining E-2 status based on being an "employee" instead of an "investor." Likewise, irrespective of nationality, there are other immigration options for those wishing to invest at least \$500,000 or who want to make an intra-company executive or managerial transfer.

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