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TREATIES OF 'FRIENDSHIP, COMMERCE AND TRADE AND INVESTMENT THROUGH NONIMMIGRANT VISAS

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Since the Dutch settled in New York in the 1600s and began myriad bustling shipping and trade endeavors, the United States has held allure to foreigners seeking to invest in new ventures. The immigration laws in the U.S. continue to reflect that vision, perhaps most notably in the E-1 Treaty Trader and E-2 Treaty Investor visas.

For countries with trade treaty status with the United States, the E Treaty visas offer great latitude to individuals and companies looking to invest in U.S. businesses and bring workers from their countries along with them. In general, the qualifying factors are that:

1. The nationality of the company or individual applying for the E-Visa must be of a treaty country (treaty countries for E-1s and E-2s differ slightly; see tables listed on page 11);
2. The company or individual must be seeking to either do trade within the U.S. with foreign countries, or to invest in a U.S. company; and

3. The individual workers coming to the U.S. from the treaty country to work for the U.S. company or to trade with the U.S. must qualify as either managerial or executive, or as essential employees.

The United States has, over the course of its history, signed treaties with nearly every country in the world. In particular, it has signed treaties of 'Friendship, Commerce and Navigation', the purpose of which has been to promote trade and investment between the U.S. and other countries, as a means of improving and encouraging international relations. More recently, the U.S. has signed agreements known as **Bilateral Investment Treaties**, most often with former communist states, which are also designed to improve international relations, in addition to promoting investment.

As a result of the creation of the E-1 and E-2 treaty visa categories, nationals—either individuals or companies—of countries who have signed such trade treaties with the U.S. can obtain visas to work in the U.S. in order to develop and direct

their investment in the U.S., or carry on international trade with the U.S.

The advantages of these visas are that, so long as the investment or trade remains ongoing and viable, the E-Visa can be renewed indefinitely, after an initial grant of five years. In addition, the E-Visa allows the individual employee or the trader/investor to freely live in the U.S. or elsewhere; there is no residence requirement for the E-Visa holder, either in the U.S. or in the national's treaty country. Furthermore, the family members of the employee may come to the U.S. and live and study; unlike many nonimmigrant visas, the spouse and

BERLIN AND NAVIGATION' PROMOTE IMMIGRANT E-VISAS CAIRO BAGDAD MADRID ATHENS DUBLIN HONG KONG CITY TAIPEI MOSCOW SYDNEY SANTO SPIRITO AIREES

the children (16 and over) may also apply for work authorization.

The possible disadvantages of the E-Visas are that they will not cover foreign employees who are not nationals of the same treaty country as the company or investor. In addition, the E-Visas are nonimmigrant visas, and as a result, do not provide a direct path towards permanent residency in the U.S.

An E-Visa may be applied for directly at a consulate, or may be applied for with the U.S. Citizenship and Immigration Services (USCIS), if a qualified candidate is seeking to change his or her status from another visa. However, it is important to note that should the individual who has changed his or her status while in the U.S. leave the U.S.

and seek reentry, U.S. consulates and consular sections of U.S. embassies universally require that a completely new E-2 visa application be submitted to the consulate. As a matter of policy, an individual cannot simply make an appointment with the embassy or consulate and ask for a visa stamp in his or her passport based upon the approval notice for a change of status from the USCIS.

Both the E-1 and the E-2 require very specific documentation. Though each consulate varies with regards to the specific types of documents and the order of the documents to be submitted, the following is a general overview of what is required for the two types of treaty visas.

E-1 Treaty Trader Visa

Nationals of qualifying treaty countries who undertake a significant amount of international trade with the United States may qualify for this type of visa. The volume of trade between the U.S. and the treaty trader company must be sufficient to justify the need to have the trader or his or her employee(s)

manage the trade operations in the U.S. Furthermore, the trade volume must constitute the majority of the trader's international trade—in other words, at least 50% of the trader's exports and imports must be either to or from the U.S. Although there is no set minimum level of trade considered sufficient, the higher the volume of trade, the more likely an individual or company is to qualify as a Treaty Trader.

In order to qualify, the trade in which the treaty trader engages between the U.S. and an authorized E-1 visa treaty country must be based on an existing relationship involving the international exchange of items. That existing relationship, and the trade that occurs as a result, must amount to more than 50% of the E-Visa treaty trader's business. For example, a company from Trinidad manufactures and exports goods to a U.S. facility for sale and distribution in the United States. So long as that activity comprises at least 50% of the Trinidadian company's business, the remainder of its business can be within Trinidad, or with any other country.

There are two basic categories available under the E-1 Visa classification, the treaty trader working individually on his or her own behalf; or the E-1 visa employee. In either case, the individual must qualify, as set out in the third section of this article, as either a manager or executive, or as an essential employee. For the E-1 applicant to qualify, he or she must be coming to the U.S. solely to carry on trade of a substantial nature, including trade in services or trade in technology.

For E-1 visa purposes, the definition of "trade" is expansive, but it must include the following three criteria:

1. There must be an actual exchange of goods or services between the foreign country and the United States. The exchange must be documented and identifiable.
2. The trade must be international in scope and occur between the foreign country and the United States. It is vital to remember that doing business in the U.S. without consecrating any activity or trade with the foreign country will not suffice for an E-1 visa.
3. The trade between the two countries must involve the commercial exchange of goods or services. While what constitutes the exchange of goods is fairly obvious, the trade of services can include such activities as accounting, engineering, international banking, insurance, tourism, communications, newsgathering, consulting, advertising and design.

Finally, in order to qualify for an E-1 Visa, the treaty trader must show that he is actively engaging in substantial trade. To qualify as substantial, the trade must be continuous, and thus a single transaction will not qualify. For small businesses, the income from the international transactions must be enough to support the treaty trader and his or her family.

E-2 Treaty Investor Visa

For a successful E-2 visa, in addition to the basic treaty visa requirements, the applicant must provide documentation showing that the individual or company meets each of the following requirements.

First, a qualifying investment must be active: the business enterprise must represent a real operating enterprise productive of some service or commodity. Speculative or idle investment will not qualify, nor are uncommitted funds in a bank account or similar security considered an investment. Moreover, this investment must be irrevocable, or "at risk". The investor is required to make a commitment of funds that represents an actual, active investment. It is acceptable to use an escrow account to protect the investor in the event the visa is denied, however, the investor must present other evidence showing the investment will be active. In addition, the investor cannot just invest the capital and not take part in the actual managing or directing of the U.S. company. The investor must manage the business and must exercise controlling interest in the business.

"So long as the investment or trade remains ongoing and viable, the E-Visa can be renewed indefinitely"

Second, the qualifying investment must be substantial, taking into consideration only those financial transactions in which the investor's own resources are placed at risk. There is no minimum dollar amount necessary in order for the investment to be considered substantial. However, in order for an investment to be considered substantial under the INA and subsequent regulations, it must meet one of two tests:

1. It has to be proportional to the total value of the particular enterprise in question (a test usually applied to investment in existing businesses); or
2. It has to be an amount normally considered necessary to establish a viable enterprise of the type

contemplated (a test normally applied to new businesses).

Third, the investment cannot be marginal in nature, and thus must not be created only to support the investor and his or her family. **In most cases the investment should create job opportunities for U.S. workers.** Investment will be considered marginal if it does not have the present or future capacity to generate more than minimal living for the investor and his or her family. Factors to determine whether investment is marginal include whether the investment will expand job opportunities; whether it will generate other sources of income; and whether it will generate income substantially above that would be considered a living.

Finally, for E-2 visas, the person for whom treaty investor status is sought must fill a key role with the company, either as the investor who will develop and direct the investment or as a qualified employee necessary for the development of the investment.

E1 and E2 Employees

Two types of employee qualify for E visas: executives and managers; and

essential employees.

Executives and Managers should be going to another country to develop and direct the trade or investment of the principal investor/trader in the United States. The company should show that the position is principally and primarily executive or supervisory, and also that the position provides

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the individual with the ultimate control and responsibility for the enterprise, or some major section of it. Furthermore, such personnel should be able to demonstrate their executive or managerial background, though there is no requirement that they have worked for the principal trader or investor for at least one year. Generally a resumé and supporting letter from the principal suffices to show that the person qualifies.

Specialist or Essential Skilled Workers are a little more complicated to prove than the executive or manager. To obtain an E-Visa for an essential employee, the application must show all of the following:

- there are no U.S. workers available for the position;
- the employment of the treaty national is necessary for the running of the principal trader or investor's business in the U.S.; and
- U.S. workers will be trained to replace the treaty national (details of the proposed training must be given).

In determining whether a person is an essential employee, the government will look at the following factors:

1. Employee's degree or proven expertise in area of operations;
2. Uniqueness of the specific skills;
3. Function of the job to which the applicant is committed; and
4. Salary.

While not uncomplicated visa application processes, the E-1 and E-2 regulations are nevertheless fairly straightforward in what is required in order to qualify. Once qualified, the E-1 or E-2 visa holder has a great deal of flexibility in how to carrying on his business, and where to settle and live. Furthermore, individual U.S. consulates and consular posts at U.S. embassies readily provide detailed terms and rules for complying with the treaty trader/investor requirements.

The following are the countries whose nationals qualify for the E-1 and E-2 Treaty Status. Please note that it is always important to check with the U.S. Department of State before pursuing an E-Visa to ensure that the status of a country has not changed.

E-1 Visa Countries

The following countries have treaties with the United States that allow qualifying nationals to apply for Treaty Trader status:

Argentina	China (ROC)	France	Italy	Netherlands	Sweden
Australia	Colombia	Germany	Japan	Norway	Switzerland
Austria	Costa Rica	Greece	Korea	Oman	Thailand
Belgium	Denmark	Honduras	Latvia	Pakistan	Togo
Bolivia	Estonia	Iran	Liberia	Philippines	Turkey
Brunei	Ethiopia	Ireland	Luxembourg	Spain	U.K.
Canada	Finland	Israel	Mexico	Suriname	Yugoslavia

E-2 Visa Countries

E-2 visas may only be applied for by people or companies from the following countries:

Argentina	China (ROC)	Georgia	Kyrgyzstan	Pakistan	Switzerland
Armenia	Colombia	Germany	Latvia	Panama	Thailand
Australia	Congo	Grenada	Liberia	Philippines	Togo
Austria	Costa Rica	Honduras	Luxembourg	Poland	Trinidad and Tobago
Bangladesh	The Czech Republic	Iran	Mexico	Romania	Tunisia
Belarus	Ecuador	Ireland	Morocco	Senegal	Turkey
Belgium	Egypt	Italy	Moldova	The Slovak Republic	The Ukraine
Bosnia-Herzegovina	Estonia	Jamaica	Mongolia	Spain	United Kingdom
Bulgaria	Ethiopia	Japan	Netherlands	Sri Lanka	Uzbekistan
Cameroon	Finland	Kazakhstan	Norway	Suriname	Yugoslavia
Canada	France	Korea	Oman	Sweden	

Unratified but signed treaties exist with: Albania, Azerbaijan, Haiti, Jordan, Nicaragua, and Russia.

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