RESIDENCE IN THE UNITED STATES THROUGH INVESTMENT: REALITY OR CHIMERA?†

*Leslie K. L. Thiele**

Scott T. Decker

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INTRODUCTION

The U.S. immigration system has long contained provisions which permit long-term or permanent status in the United States through investment by a foreign investor. For many years, until 1990, a foreigner theoretically could seek immigrant status as an investor in a "nonpreference" category. Under the system of allocating visas in force at that time, nonpreference visas would be available if any immigrant visas remained after demand in all of the preference categories had been satisfied. Not surprisingly, because of perennial high demand for immigrant visas, the nonpreference avenue to permanent resident status became unavailable in September 1978[1] and never reemerged as a realistic alternative for immigration into the United States.

In 1990, the U.S. immigration laws were drastically revised in the Immigration Act of 1990 (IMMACT 1990).[2] The existing preference categories were reorganized, new categories were created, and old categories were deleted, demoted, or revised. As part of this revision, the useless nonpreference visas disappeared. At the same time, two new alternatives based on investment were created for immigration to or long-term residence in the United States.[3] The nonpreference investor category reemerged as part of the new employment-based fifth preference category of visas intended for job creation.[4] Abbreviated "EB-5," this preference category received an allocation of approximately 10,000 visas per year,[5] making immigrant status via investment more than a theoretical possibility for the first time in over a decade.

The new EB-5 immigrant visa took its place alongside an existing nonimmigrant investment-based category, the E-2 Treaty Investor visa.[6] The "E" category was created in the

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[1] *See* Richard D. Steel, STEEL ON IMMIGRATION LAW 287 (1985).

[2] *See* Pub. L. No. 101-649, 104 Stat. 4978.

[3] *See* Immigration & Nationality Act (INA) § 203(b)(5)(A)(ii)–(B)(i), 8 U.S.C. § 1153(b)(5)(A)(ii)–(B)(i) (2006).

[4] Immigration Act of 1990, sec. 121, § 203(b)(5), 104 Stat. at 4989–90 (codified as amended at INA § 203(b)(5), 8 U.S.C. § 1153(b)(5)).

[5] *Id.* sec. 121, § 203(b)(5)(A), 104 Stat. at 4989.

[6] The U.S. immigration system distinguishes between two basic categories of visas: nonimmigrant or temporary visas, and immigrant or permanent visas. A nonimmigrant visa allows an individual to come to the United States for a defined purpose for a defined period of time, which can range from a few days to years. U.S. Department of State, Temporary Visitors to the U.S., http://travel.state.gov/visa/temp/temp_1305.html (last visited Jan. 8, 2010). An immigrant visa allows an individual to live and work in the United States permanently and to eventually apply for citizenship if additional qualifications

Immigration & Nationality Act of 1952 (INA),[7] but was rarely used because of lack of regulatory guidance. Provisions for adjudication of E visas only entered the Department of State's (DOS) Foreign Affairs Manual (FAM) in 1993.[8] On November 12, 1997, expanded parallel regulatory provisions by the DOS and the legacy Immigration and Naturalization Service (INS) became effective after seven years of negotiation and debate.[9] Together, this new regulatory framework expanded the E visa category's utility as a vehicle for long-term residence in the United States.

These two visa categories—one immigrant, one nonimmigrant—were intended to create new opportunities for foreigners seeking to reside in the United States independent of any family or employment relationship. Entrepreneurs could, in theory, bring new capital to the U.S. economy, and in turn receive the right to remain in the United States on the E visa as long as the investment continued, or to remain permanently through compliance with the investment and job-creation requirements for an EB-5 immigrant visa.

Persons experienced in the ways of the U.S. immigration system understand, however, that "while Congress gives, USCIS takes away."[10] Implementation of expansive Congressional legislation by the immigration authorities through regulation (by agencies such as the Department of Homeland Security (DHS), the Department of Justice, and the DOS) often negates or narrows the broad categories and generous standards created by statute. Has the implementation of these two investment-based categories lived up to the hopes for which they were created? Are the E visa and EB-5 programs able to create jobs and infuse capital into the U.S. economy or has administrative or consular rigidity changed these possibilities into a mere chimera of long-term residence in the United States?

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are met. U.S. Department of State, What is a Visa?, http://travel.state.gov/visa/questions/questions_4429.html (last visited Jan. 8, 2010). Immigrant visas are often referred to as "green cards" from the color of the card issued to legal permanent residents in the 1950s, although the cards have been other colors since that time.

[7] Pub. L. No. 82-414, § 203(a)(1), 66 Stat. 163, 178.

[8] 9 U.S. Dep't of State, Foreign Affairs Manual (FAM) § 41.51 n.14.3-2 (2009), *available at* http://www.state.gov/documents/organization/87220.pdf.

[9] Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, 62 Fed. Reg. 48,149, 48,154–55 (Sept. 12, 1997) (to be codified at 22 C.F.R. pt. 41).

[10] USCIS is an acronym for the United States Citizenship and Immigration Services.

I. TEMPORARY RESIDENCE THROUGH INVESTMENT: THE E-2 TREATY INVESTOR VISA

A. Overview

The INA, as enacted in 1952, provided for a class of nonimmigrant visas based on the existence of treaty relationships between the United States and other countries. "Treaty Investor" visas, referred to as E-2 visas, are available to persons (individuals or entities) of qualifying nationalities who are coming to develop and direct enterprises in the United States in which they are investing a substantial amount of capital.[11] These visas offer the possibility of extended stays in the United States as long as the qualifying investments continue.[12] These visas also offer some possibility of conversion to permanent resident status in limited circumstances.[13]

Under the INA and the implementing regulations of the DOS and the DHS,[14] four groups may enter the United States as E-2 Treaty Investors: (1) individual foreign nationals making a qualifying direct investment in the United States; (2) business or corporate entities controlled by foreign nationals making a qualifying direct investment (often referred to as "treaty enterprises"); (3) management or supervisory employees of a treaty enterprise; and (4) other employees with special skills who are essential to the foundation or initial operations of the treaty enterprise.[15] The focus of this article will be on the opportunities which these first two groups of E-2 Treaty Investor visas offer to foreign investors making a direct investment in the United States either individually or through a business entity.

The E visa is one of the rare nonimmigrant visa categories that

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[11] INA § 101(a)(15)(E)(ii), 8 U.S.C. § 1101(a)(15)(E)(ii) (2006).

[12] 8 C.F.R. § 214.2(e)(20)(i)(A) (2009).

[13] *See, e.g.*, § 214.2(e)(5).

[14] INS, part of the Department of Justice, was in charge of immigration and citizenship services as well as enforcement, until March 1, 2003, when these functions were transferred to the newly-created DHS. Press Release, U.S. Dep't of Homeland Sec., Department of Homeland Security Facts for March 1, 2003 (Mar. 2, 2003), http://www.dhs.gov/xnews/releases/press_release_0100.shtm. Within the DHS, the INS's responsibility for processing applications for immigration benefits and naturalization applications was assumed by the new USCIS and enforcement functions were transferred to the Bureau of Immigration & Customs Enforcement and the Bureau of Customs and Border Protection. *Id.* The Department of State has continued to manage consular functions and the overseas visa process. *See* U.S. Department of State, About Us, http://www.travel.state.gov/about /about_304.html (last visited Jan. 8, 2010).

[15] 8 C.F.R. § 214.2(e)(1)–(7).

does not depend upon a job offer from a sponsoring U.S. employer or on a related supporting relationship.[16] Due to the nationality and treaty requirements,[17] E status is not as widely available as common nonimmigrant work visas such as the H-1B "specialty occupation" visa[18] or the L "intra-company transferee."[19] However, the E visa is the only category which permits residence in the United States based on self-employment without a high mandated investment amount.[20] Within its limitations, the E visa category is an extremely useful tool for long-term investment in the United States.

B. The Regulatory Environment: Department of State and United States Citizenship and Immigration Services

Unlike other nonimmigrant visas, the USCIS shares responsibility for the issuance of E visas with the DOS. An applicant for E status therefore must choose between two different application procedures. Applicants may (1) apply for E visas directly at a U.S. consulate without filing any other petitions or applications with the USCIS[21] or (2) apply for E status by filing an application with the USCIS in the United States to change from an existing nonimmigrant status to the appropriate E visa category.[22]

The choice of an application avenue is a complicated one. Visas issued at U.S. consulates are stamped in the treaty investor's passport and are valid for entries for a period of up to five years, with a maximum duration of stay of two years with each entry.[23] E visa status granted through application to USCIS is valid for a two-year period of stay in the United States only, which presents

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[16] *See* INA § 203(b)(5), 8 U.S.C. § 1153(b)(5).

[17] *See* INA § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E).

[18] INA § 101(a)(15)(H)(i), 8 U.S.C. § 1101(a)(15)(H)(i).

[19] INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

[20] *See* INA § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E). *But see* INA § 203(b)(5)(C)(i), 8 U.S.C. § 1153(b)(5)(C)(i) (requiring a minimum capital investment of $1 million).

[21] U.S. Department of State, Treaty Traders and Trade Investors, http://travel.state.gov/visa/temp/types/types_1273.html (last visited Jan. 8, 2010).

[22] *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., I-765, APPLICATION FOR EMPLOYMENT AUTHORIZATION (2009), *available at* http://www.uscis.gov/files/form/I-765.pdf.

[23] 8 C.F.R. § 214.2(e)(19) (2009); Leslie K. L. Thiele, *Investment and Trade: E Visas*, *in* BUSINESS IMMIGRATION LAW: STRATEGIES FOR EMPLOYING FOREIGN NATIONALS 6-41 (Rodney A. Malpert & Amanda Peterson eds., 2000).

complications when the individual travels overseas.[24] At that time, a visa stamp for reentry must be obtained, which, in the case of some consulates, means a whole new E application.

The choice of application procedure is a complicated one, involving analysis of travel plans, planned duration of stay, and the language of the supporting documentation. That particular issue will not be addressed here. Rather, it is the regulatory environment created by this dual parallel system that is of concern to treaty investors.

The DOS and the USCIS have each issued regulations detailing their respective E visa application processes.[25] The regulations substantially overlap. The USCIS regulations cover a number of topics not addressed by the DOS because the USCIS is also responsible for the admission of foreign nationals to the United States and oversight of their status while they are in the United States.[26] Consular officers are not bound by the USCIS regulations, but they may look to them for guidance in the absence of other authority.[27] Similarly, USCIS officers are not bound by the DOS regulations, but they may look to the DOS regulations, DOS practice, and the DOS FAM for guidance.[28]

C. Requirements for E-2 Treaty Investor Status

1. The Existence of a Qualifying Treaty

The individual or treaty enterprise seeking E status must be a national of a foreign country with which the United States has a

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[24] § 214.2(e)(19).

[25] § 214.2(e) (providing the operative regulations for the USCIS); 22 C.F.R. § 41.51 (2009) (providing the parallel regulations for the DOS).

[26] *See* U.S. Citizenship & Immigration Services, About Us, http://www.uscis.gov/aboutus (last visited Jan. 8, 2010).

[27] For many years there were no detailed operative regulations in place for the issuance of E visas by the legacy INS and the DOS. Applicants looked to questionable DOS and INS regulations, the statute, and consular practice. Proposed comprehensive DOS and INS regulations were published in 1991 and languished while the INS and the DOS tried to resolve various contested issues. Six years later, the DOS and the INS published their final regulations in the Federal Register, effective as of November 12, 1997. Nonimmigrant Clauses; Treaty Aliens; E Classifications, 62 Fed. Reg. 48,138 (Sept. 12, 1997) (to be codified at 8 C.F.R. pt. 214).

[28] *See generally* 9 FAM § 41.51 (2008), *available at* http://www.state.gov/documents/organization/87220.pdf. Before the DOS published its new regulations, substantial guidance on preparing E applications was found in the DOS FAM. Although most sections of the relevant FAM provisions predate the regulations, the FAM continues to offer helpful guidance on E application issues to both applicants and consular officers.

treaty of "[f]riendship, [c]ommerce and [n]avigation" (FCN), a comparable bilateral investment treaty (BIT), or other multilateral trade arrangement, such as the North American Free Trade Agreement (NAFTA).[29]

a. Qualifying Treaties and Equivalent Relationships

Prior to 1948, the United States solidified trade relations with other countries by negotiation of broadly-drafted FCN treaties.[30] These were intended to accomplish trade liberalization goals that could not be met by the then-existing international infrastructure. The General Agreement on Tariffs and Trade came into existence in 1948, and brought increased multilateral trade liberalization, leading to decreased use of FCN treaties to accomplish these national objectives.[31] Since 1981, the United States has increasingly negotiated BITs with foreign countries to encourage and protect U.S. investments abroad.[32] At the same time, the United States has granted similar rights to its treaty partners investing in the United States.

A BIT contains fairly standard language permitting nationals of the signatory country to enter the other country to make investments involving "a 'substantial amount of capital or other resources.'"[33] These provisions make "nationals of a BIT country eligible for E treaty investor status under U.S. law."[34] BITs also contain other reciprocal guarantees protecting foreign nationals entering the United States in E treaty status, such as guarantees of "national treatment" for foreign investors and the right to hire key personnel of the treaty country's nationality.[35]

The United States also enters into multilateral trade agreements that create eligibility for E status. The best example is NAFTA, which grants treaty trader or treaty investor status for Canadians and Mexicans.[36]

In one case, a treaty country was accorded treaty visa

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[29] *Id.* § 41.51 n.3 (2008).

[30] *See U.S. Signs Bilateral Investment Treaties With Two More Countries, Bringing Treaty Total to 40*, 74 INTERPRETER RELEASES 1217, 1218–19 (1997).

[31] *Id.* at 1218.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 1218–19.

[35] *Id.* at 1218.

[36] *See* North American Free Trade Implementation Act, Pub. L. No. 103-182, § 341, 107 Stat. 2057, 2116 (1993) (signed by President Clinton on Dec. 8, 1993; applied INA § 101(a)(15)(E) to Canadian and Mexican citizens, effective Jan. 1, 1994).

privileges by U.S. legislation. In 1955, the United States and Philippine governments implemented a 1954 statute that made Philippine nationals eligible for E classification, even though there is no commercial treaty in effect between the countries.[37]

For an E visa, the INA requires that there exist an FCN between the treaty country and the United States.[38] The DOS regulations provide that a "treaty country" is a foreign state for which a qualifying FCN treaty "*or its equivalent* exists with the [United States]."[39] The DOS provision allows a wider range of trade arrangements to be the basis for treaty investor status than do the INA requirements, such as the BITs or NAFTA. The USCIS has respected this broader interpretation.

b. Limitations on Treaties

An apparently qualifying treaty does not always provide a foundation for both treaty trader *and* treaty investor status. FCN treaties normally permit both treaty trader and treaty investor visas, but BITs are almost always restricted to investment, with no provision for treaty trader status. Other treaties permit only treaty trader status; nationals of Bolivia, Brunei, Denmark, Greece, and Israel may be granted treaty trader status, but not treaty investor status.[40]

2. An Investor of a Qualifying Nationality

The person (individual or entity) seeking E-2 treaty investor status must hold the nationality of a country with which the United States has a qualifying treaty or equivalent arrangement (a "treaty country").[41] "Nationality" is determined by the laws of the country granting that nationality.[42]

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[37] Entry Rights Agreement, U.S.-Phil., Sept. 6, 1955, 6 U.S.T. 3030.

[38] INA § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E) (2006).

[39] 22 C.F.R. § 41.51(b)(5) (2009) (emphasis added).

[40] *See* U.S. Department of State, Treaty Countries, http://www.travel.state.gov/visa/frvi/reciprocity/reciprocity_3726.html (last visited Jan. 8, 2010) (providing a list of qualifying treaties in force and whether they provide for treaty trader status (E-1), treaty investor status (E-2), or both (E-1/E-2)).

[41] INA § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E).

[42] 8 C.F.R. § 214.2(e)(7) (2009).

a. Nationality of Natural Persons

The nationality of an E treaty applicant who is a natural person is usually the same as the person's county of citizenship or, in some cases, the country of his or her birth.

The INA provides that a treaty alien may enter the United States pursuant to a treaty between the United States and "the foreign state of which he is a national."[43] The USCIS regulations specify that nationality is determined by "the foreign state of which the [treaty] alien is a national."[44] The DOS regulations and the FAM fortunately avoid the USCIS's circular definition by providing that nationality is determined by the foreign state where the treaty "alien claims nationality."[45] Whether an intending E applicant is a national of France, and eligible to make a qualifying treaty investment under the U.S.-France FCN, for example, would be determined solely by French laws of nationality and citizenship.

The increasing mobility of the world's inhabitants has led to an increase in the number of individuals who hold multiple citizenships. For example, if a foreign national holds two citizenships, each of which is eligible for E status, the intending treaty alien may apply under either nationality. If a foreign national holds one qualifying nationality and one non-qualifying nationality, the individual may apply claiming the nationality of the reciprocal treaty country. In that case, the foreign national must be documented and admitted into the United States as a national of the treaty country where the treaty benefits accrue.[46]

Suppose an individual born in Cameroon but who has acquired Canadian citizenship wishes to enter the United States on an E visa based on NAFTA as the qualifying treaty. In that case, the individual would have to enter the United States on a Canadian passport and claim Canadian, not Cameroonian, nationality throughout the application process. On the other hand, an individual who holds both French and Canadian citizenship could choose to apply for E status either under NAFTA or the U.S.-France FCN, whichever was most convenient. Determining factors could include the applicant's place of residence, language of the application paperwork, and local consular processing times.

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[43] INA § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E).

[44] 8 C.F.R. § 214.2(e)(7).

[45] 22 C.F.R. § 41.51(b)(6) (2009); 9 FAM § 41.51 n.2 (2001), *available at* http://www.state.gov/documents/organization/87220.pdf.

[46] 9 FAM § 41.51 n.3.3 (2001).

If using the U.S.-France FCN, the individual would have to apply as a French national under the French treaty relationship, and enter the United States using a French passport.

Applicants holding U.S. citizenship, even as dual citizens, are not eligible for E status. E status is a nonimmigrant status and an applicant who holds U.S. citizenship cannot qualify as a bona fide "nonimmigrant."[47]

b. Nationality of Business Organizations

The nationality of a business organization depends on the nationality of the *individuals* who ultimately control it. The country of incorporation or establishment of the business organization is irrelevant to this determination; a U.S. corporation can qualify as a treaty enterprise if nationals of a treaty country own the requisite percentages of the corporation's stock.[48]

In order to be a treaty enterprise, a business organization must be ultimately at least fifty percent owned—either directly or indirectly through other corporations—by individuals who are nationals of the treaty country.[49] These individuals must either hold E status or, if they are outside the United States, be eligible for E status.[50] Thus, if a business entity is owned by another business or is part of a corporate group, at least fifty percent of the ultimate parent organization must be owned by treaty country nationals.[51] Determining ownership for corporations which are publicly traded on a stock exchange presents special challenges. The rules for such calculations start with the position that if a corporation's shares are traded exclusively on a single stock exchange, then the nationality of the corporation is that of the stock exchange where the corporation is registered.[52]

In the case of a large or multinational corporation with its shares traded on several exchanges, the DOS has established a standard of practicability; the burden is on the applicant to establish the nationality of the corporation by "the best evidence

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[47] *See id.*; *see also In re* Damioli, 17 I. & N. Dec. 303, 303–04 (B.I.A. 1980).

[48] 9 FAM § 41.51 n.3.2 (2002).

[49] *Id.* at n.3.1 (2009).

[50] 8 C.F.R. § 214.2(e)(3)(i)-(ii) (2009); 22 C.F.R. § 41.51(b)(2)(ii) (2009); *see infra*, note 54 (ownership by U.S. legal permanent residents with the qualifying nationality are not counted towards the requisite treaty ownership).

[51] 9 FAM § 41.51 n.3.2 (2001).

[52] *Id.*; Nonimmigrant Classes; Treaty Aliens; E Classification, 62 Fed. Reg. 48,138, 48,140 (Sept. 12, 1997) (to be codified at 8 C.F.R. pt. 214).

available," considering all relevant circumstances.[53] Partial shareholder lists might be available from the corporate transfer agents, partial address lists of shareholders might be available from the last shareholders' meeting, or there might be several large institutional shareholders from one country that could establish a significant percentage of ownership in that country.

In calculating the ownership of a potential treaty enterprise, U.S. permanent residents are not counted toward the foreign ownership requirements, even though they may be citizens or nationals of the treaty country in question.[54] An individual holding U.S. permanent resident status is an *immigrant* and not eligible for a *nonimmigrant* visa status.[55] United States permanent residents also cannot meet the regulatory requirements that they maintain treaty status or "would be classifiable" as treaty aliens if they are outside the United States.[56] Persons holding dual citizenship (the United States and a foreign country) are similarly disregarded in such a calculation.

c. Nationality Requirements and Employees of Treaty Aliens or Treaty Organizations

An investor establishing a treaty enterprise in the United States may hire employees of the same nationality on a preferential basis. These may be management or supervisory employees of a treaty enterprise or other employees with special skills who are essential to the foundation or initial operations of the treaty enterprise.[57] An individual employee of a treaty alien or of a treaty enterprise must hold the same nationality as the primary treaty trader or investor.[58]

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[53] Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended; Business and Media Visas; Treaty Trader and Treaty Investors, 62 Fed. Reg. 48,149, 48,150 (Sept. 12, 1997) (to be codified at 22 C.F.R. pt. 41). Possibly in self-defense, the DOS regulations request that this not degenerate into an "onerous paper production exercise." *Id.*

[54] *See* 9 FAM § 41.51 n.3.3 (2001); *see also State Dept. Discusses E Visa Status*, 71 INTERPRETER RELEASES 1361, 1361 (1994).

[55] INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2009).

[56] *See* 8 C.F.R. § 214.2(e)(3)(ii) (2009) ("The principal [treaty trader or treaty investor] employer must be: . . . [a]n . . . organization at least 50 percent owned by persons in the United States having the nationality of the treaty country and maintaining nonimmigrant treaty trader or treaty investor status" if residing in the United States or if not residing in the United States who "would be classifiable as treaty traders or treaty investors.").

[57] § 214.2(e)(3).

[58] *Id.* ("The employee must have the same nationality as the principal alien employer."). The FAM contains the same requirement. 9 FAM § 41.51 n.2

This "same nationality" requirement becomes critical in two cases. The first is if the treaty investor is considering selling the treaty enterprise which he or she has founded. The business may have grown and become successful due to the labors of key E employees. If such an E business enterprise is acquired by nationals from another country, then the investing business' E status is lost. The employees will lose their entitlement to E status at the same time. Careful advance planning is required to move key employees to another visa status in advance of the transfer of ownership of the business. This, of course, assumes that another visa status is available—which may or may not be the case. The continuing work authorization of key employees can become a critical part of the acquisition.

In the second case, the treaty employee can lose E status if an individual employer or majority shareholder loses E status. If the treaty alien who is the direct employer becomes a legal permanent resident of the United States, the treaty alien no longer holds E status and can no longer employ other qualifying nationals in that status.[59] If the treaty investor is the majority owner of a business organization employing E treaty nationals, and becomes a legal permanent resident, then the business organization loses its E status. Again, careful advance planning is required to avoid losing key employees during such transitions.

d. Nationality of Dependents

The spouse and other dependents of treaty aliens are not required to hold treaty country nationality to enter the United States as treaty dependents.[60] For example, if a French citizen qualifies for E-2 Treaty Investor status, her Algerian husband will also receive E-2 status as her dependent.

(2001). The DOS regulations are less explicit but require that the E-l and E-2 foreign nationals qualify under INA § 10l(a)(15)(E)(i) or (ii), which requires such nationality. Nonimmigrant Classes; Treaty Aliens; E Classification, 62 Fed. Reg. 48,138, 48,146 (Sept. 12, 1997) (to be codified at 8 C.F.R. pt. 214).

[59] *See* 8 C.F.R. § 214.2(e)(3)(i); *see also* Nonimmigrant Classes; Treaty Aliens; E Classification, 62 Fed. Reg. at 48,139 ("[A]n employee cannot be classified under section 101(a)(15)(E) of the Act if the employer is lawfully classified under another nonimmigrant status at the time E nonimmigrant visa classification is requested. For this reason . . . a permanent resident may not be the employer of a treaty alien, and the treaty alien status of an employee terminates when the E nonimmigrant visa employer becomes a permanent resident.").

[60] 8 C.F.R. § 214.2(e)(4); 22 C.F.R. § 41.51(c)(2) (2009).

3. A Qualifying Investment

An individual seeking treaty investor status—either directly or through a business enterprise—must be entering the United States solely to develop and direct the operations of a bona fide enterprise in which the intending treaty alien has invested, or is actively in the process of investing, a substantial amount of capital.

That short, dense sentence contains four core requirements for E treaty investor status, each of which must be addressed in an application for E status:

(1) the investor must be investing or in the process of investing capital;
(2) the amount of capital must be substantial;
(3) the enterprise must be bona fide. In a corollary to this requirement, the regulations prohibit marginal investments; the investment must do more than merely support the treaty investor and his or her family;[61] and
(4) the investor must be coming to develop and direct the enterprise being founded.

a. The Definition of "Invested" or "Process of Investing" Capital

The investor either must have already invested capital in a bona fide enterprise in the United States or be involved currently and actively in making that investment.[62] "Investment" means placing capital, "including funds and other assets . . . at risk in the commercial sense with the objective of generating a profit."[63]

i. Source of the Invested Capital

The USCIS requires that the foreign national—directly or through a business enterprise—has invested or is in the process of investing capital.[64] The intending investor must be able to demonstrate the source of this capital for two reasons. First, the regulations prohibit investments where the funds or assets were obtained, directly or indirectly, through criminal activity.[65]

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[61] 8 C.F.R. § 214.2(e)(15).
[62] INA § 101(a)(15)(E)(ii), 8 U.S.C. § 1101(a)(15)(E)(ii) (2006).
[63] 8 C.F.R. § 214.2(e)(12); 22 C.F.R. § 41.51(b)(7).
[64] INA § 101(a)(15)(E)(ii), 8 U.S.C. § 1101(a)(5)(E)(ii) (providing specifically that the investor must be entering the United States "solely to develop and direct the operations of an enterprise in *which he* has invested, or of an enterprise in *which he* is actively in the process of investing" (emphasis added)).
[65] 8 C.F.R. § 214.2(e)(12).

Second, the investor personally must be the source of the funds and be at risk for their loss.[66] To ensure the integrity of the E visa program, foreign nationals may not claim E visa status merely by acting as a front for investments made by third parties.[67]

It is usually sufficient for the E-2 investor to demonstrate that the funds used in an E investment were in the possession and control of the investor prior to the investment, combined with an explanation of the source of the capital. If the amount of capital appears to be disproportionate based on the E applicant's prior earnings or activities, the consular or immigration officers may examine more closely the claimed source of the investor's funds. The source (such as a gift, a loan against an expected inheritance, an inheritance from a relative or other person, or the proceeds of the sale of a previously owned business) might require documentation for the examining authority.

ii. Capital at Risk of Loss

The critical question for many investors is whether they are placing capital "at risk" as defined by the regulations.[68] Capital must be at risk of partial or total loss if the investment is not profitable.[69] For this reason, investments based on purely executory contracts that can be rescinded without risk or financial consequences to the investor do not constitute an "investment."

The USCIS and DOS have consistently taken the position that capital secured by the assets of the enterprise, such as economic development loans or mortgages with no other security, is not "capital at risk."[70] Such capital is discounted in determining the required "substantial investment."[71] However, in its focus on not permitting borrowed capital to be part of the "substantial investment" equation, the government has refused to consider as

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[66] *Id.*

[67] Nice v. Turnage, 752 F.2d 431, 432 (9th Cir. 1985) (noting that a foreign national's application to change to E status was denied when he could not show the source of his investment—a check for $25,000 drawn on a foreign bank account signed by the foreign national's wife under a power of attorney from an undisclosed principal).

[68] *See* 8 C.F.R. § 214.2(e)(12); 22 C.F.R. § 41.51(b)(7).

[69] *Id.*

[70] Nonimmigrant Classes; Treaty Aliens; E Classification, 62 Fed. Reg. 48,138, 48,142 (Sept. 12, 1997) (to be codified at 8 C.F.R. pt. 214).

[71] *Id.*

"capital at risk" many routine methods of contributing capital to a growing business. The DOS does not even recognize as "capital at risk" the common recourse loan, i.e., a loan secured by assets of the treaty enterprise, where, in case of default, the mortgagors have ultimate recourse to the individual treaty investors or owners.[72]

The positions of the DOS and USCIS on this issue have prevented E visa investors from using routine and common tax-advantaged structures for financing a new business. If an investor contributes appreciated land and buildings to an enterprise in the United States and transfers ownership of those real property assets to the enterprise, they become property of the enterprise and are "capital at risk" for the contributing investor. Those assets could now be used to secure loans to the corporation. However, because those assets belong to the enterprise and not to the investor, the loans obtained through the use of those assets would *not* be considered "capital at risk." This would be true even if the investor would lose the contributed assets if the business fails.

An E investor must therefore be creative in structuring an investment to ensure that capital for the enterprise is "at risk" under the USCIS and DOS standards. The treaty investor should consult with legal counsel and tax advisors to develop a means of financing the treaty enterprise that best leverages the treaty investor's assets. It may be advantageous to divide the investment into two businesses—a financing vehicle and the actual investment enterprise. Or the investor may retain title to significant business assets and pledge them as collateral for loans to himself while leasing the assets (subject to the loan) to the treaty enterprise. The ultimate choice of financing structure depends on the needs of the business.

iii. Capital "Irrevocably Committed"

The treaty investor must establish that the capital that was

[72] The comments to the proposed 1997 regulations noted that the DOS position on risk was inconsistent with business realities, and proposed allowing business assets to be included in "substantial capital" so long as ultimate recourse on the loans was to the treaty investor. *Id.* In the Preamble to the new regulations, the DOS rejected this proposal, saying that this language would dilute the element of risk by permitting the business to be used as collateral. *Id.* ("The purpose of the risk provision is to place the risk of the investment exclusively on the shoulders of the investor."). The DOS clearly failed in that mission.

invested or is in the process of being invested is "irrevocably committed" to the enterprise.[73] Executory contracts or other business arrangements that permit capital to be released without financial penalty to the investor do not constitute capital which is irrevocably committed.

This requirement creates a problem for many treaty investors, who are understandably hesitant to commit funds irrevocably to enterprises in the United States before the investors have any assurance that their E visas will, indeed, be granted. Investors face the very real possibility of investing money in a U.S. enterprise without subsequently being granted the visa which would enable them to come to the United States to supervise that investment.

The immigration regulations have addressed this issue in part by specifically authorizing the use of escrow accounts or similar mechanisms that permit commitment of funds while protecting the investor.[74] The entire transaction should be completed in escrow so that the funds will flow into the investment enterprise as soon as the visa is issued. Such escrow agreements must clearly provide that the only basis for revocation of the committed funds would be the failure of the E treaty investor to obtain the necessary visa.

This structure works well for some enterprises, e.g., for the purchase of an existing business or a franchise, where the investment and the work begin when the closing takes place. This structure does not work for the situation where a business is being started by the investor, possibly as a subsidiary of an overseas enterprise. Without the use of the investor's funds to organize and begin the business, there is no bona fide business as required by the E regulations.[75]

A further complication is that, despite the regulatory recognition of closing into escrow, consulates frequently require evidence of business operations and expenditure of funds before the E visa will be granted.

iv. Control over the Capital Invested

The E "treaty investor must be in possession of and have

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[73] 8 C.F.R. § 214.2(e)(12); 22 C.F.R. § 41.51(b)(7).

[74] 8 C.F.R. § 214.2(e)(12); 22 C.F.R. § 41.51(b)(7).

[75] *See* 8 C.F.R. § 214.2(e)(13); Nonimmigrant Classes; Treaty Aliens; E Classification, 62 Fed. Reg. at 48,142.

control over the capital invested or being invested."[76] The investor does not need to have all of the committed capital in his or her possession or under his or her control at the moment of the application, but the investor must be "actively in the process of investing" the capital.[77]

In some investments, an applicant may be relying on future infusions of capital, in addition to the initial capital investment. In those situations, it is necessary to show that the applicant's future control over those funds is not contingent or otherwise questionable. Examples of acceptable proof include promissory notes from other investors, sales contracts for the assets being sold in the foreign country to generate capital, or other evidence that the funds will be available to the treaty investor at some future time.

b. Investment of a "Substantial" Amount of Capital

In addition to the requirements having to do with the source and availability of the treaty investor's capital, the regulations further require that the capital invested in the treaty enterprise be "substantial."[78] The USCIS and DOS regulations have assiduously avoided any sort of formal or fixed definition of what is "substantial" for purposes of a treaty investment.[79] Rather, the regulations and the FAM have attempted to establish guideposts and formulas for assessing an investment without drawing

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[76] 8 C.F.R. § 214.2(e)(12); 22 C.F.R. § 41.51(b)(7).

[77] 8 C.F.R. § 214.2(e)(2)(i).

[78] *Id.*

[79] In IMMACT 1990, the Congress defined substantial as—in essence—whatever the Secretary of State says it is:

> (c) SUBSTANTIAL DEFINED—Section 101(a), as amended by section 123 of this Act, is further amended by adding at the end the following new paragraph:
>
> > '(45) The term 'substantial' means, for purposes of paragraph (15)(E) with reference to trade or capital, such an amount of trade or capital as is established by the Secretary of State, after consultation with appropriate agencies of Government.'

Pub. L. No. 101-649, § 204(c), 104 Stat. 4978, 5019. However, the Secretary of State has refused to set any specific figure. In promulgating the September 1997 regulations, the DOS and then-INS consulted extensively with other government agencies, which overwhelmingly preferred continuation of a proportionality test for a "substantial" investment, rather than a bright-line dollar figure. The DOS even removed suggested benchmarks from the sliding scale proposed in the regulations because it felt that these benchmarks would become fixed requirements rather than merely guideposts. Nonimmigrant Classes; Treaty Aliens; E Classification, 62 Fed. Reg. at 48,142.

bright-line distinctions between sufficient and insufficient capital.[80]

The regulations recognize that different amounts of capital are required for different investments. Clearly, it takes far less capital to establish a computer software development company than to establish a manufacturing plant. A software development company requires a lease, a few chairs and desks, some computers, and enough money to pay the bills until the development contracts begin to pay off in a few weeks or months. The manufacturing enterprise requires substantial infusions of capital for inventory, equipment, and hard assets, as well as working capital until the business becomes profitable, possibly years later.[81]

The regulations establish a three-part test for determining "substantiality" in the context of a particular investment, which is usually referred to as the "proportionality test."[82] The first and most important element of this test is that the amount of capital invested must be substantial in proportion to the total cost of purchasing an established enterprise, or of creating a new enterprise.[83] The FAM reads, "[t]he cost of an established business is, generally, its purchase price, which is normally considered to be the fair market value."[84] Also, "[t]he cost of a newly created business is the actual cost needed to establish such a business to the point of being operational."[85] The amount invested should then be compared to the cost of the business being established, "assessing the percentage of the investment in relation to the cost of the business."[86] "If the two figures are the same, then the investor has invested 100 *percent* of the needed

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[80] Nonimmigrant Classes; Treaty Aliens; E Classification, 62 Fed. Reg. at 48,142–43; 9 FAM § 41.51 n.10.2 (2009), *available at* http://www.state.gov/documents/organization/87220.pdf.

[81] *See* 9 FAM § 41.51 n.10.3 (2001) (discussing the value of the business being established, and concluding, "[a]s long as all the other requirements for E-2 status are met, the cost of the business per se is not independently relevant or determinative of qualification for E-2 status").

[82] 8 C.F.R. § 214.2(e)(14) (2009); 22 C.F.R. § 41.51(b)(9)(i)(A)–(C) (2009).

[83] *See In re* Walsh & Pollard, 20 I. & N. Dec. 60, 64, 68 (B.I.A. 1988) (setting forth the test and holding that a small investment in a consulting "job shop" was substantial when (1) the amount invested was sufficient to establish a viable business of this type; (2) the total amount of the investment had already been made; and (3) the business was successfully operating); 9 FAM § 41.51 n.10.2(a)(1) (2001).

[84] 9 FAM § 41.51 n.10.2(b)(2) (2009).

[85] *Id.* § 41.51 n.10.2(b)(3) (2009) (including examples of how to document the actual cost of establishing a business to the point of being operational).

[86] *Id.* § 41.51 n.10.4 (2001).

funds in the business," and the investment is deemed to be "substantial."[87]

The USCIS and the DOS use an inverse sliding scale to evaluate the substantiality of an investment under this test.[88] The lower the cost of the enterprise, the greater the required percentage of investment is needed to be considered "substantial."[89] For the computer software company discussed above, virtually all the capital required for that investment must have been invested or committed in the short term to qualify as substantial. In the case of heavy manufacturing, however, an initial investment of ten percent to twenty-five percent of necessary capital has been deemed sufficient, particularly when the business plan shows ongoing capital contributions by the owners over the coming years.

The second element of the regulations' three-part test is that the amount invested must be "[s]ufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise."[90] While every case is evaluated on its own facts, a small enterprise will draw a more critical review on this point.

The third element for determining substantiality is that the capital invested must be sufficient to make it likely "that the treaty investor will successfully develop and direct the enterprise."[91] Undercapitalized businesses struggle to succeed, and foreigners with no U.S. credit record will have more difficulty obtaining credit and loans than an American investor might.

c. Investment in a Bona Fide Enterprise

"The enterprise must be a real, active and operating commercial or entrepreneurial undertaking which produces services or goods for profit."[92] Also, the enterprise "cannot be a paper organization or an idle speculative investment held for potential appreciation in value, such as undeveloped land or stocks."[93] Investments in non-profit enterprises such as schools or associations are also not considered as qualifying investments for investment purposes.[94]

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[87] *Id.*
[88] *See id.*
[89] *Id.*
[90] *Id.* § 41.51 n.10.2(a)(2) (2001).
[91] *Id.* § 41.51 n.10.2(a)(3) (2001).
[92] 8 C.F.R. § 214.2(e)(13) (2009); *see* 22 C.F.R. § 41.51(b)(8) (2009).
[93] 9 FAM § 41.51 n.9 (2002).
[94] Nonimmigrant Classes; Treaty Aliens; E Classification, 62 Fed. Reg.

This requirement, that the enterprise be an "active and operating" enterprise, appears to contradict the regulation discussed above that permits the investor to be "in the process of investing." If the investor is in the process of making a large investment, the enterprise might not yet be operating. It is also difficult to read in harmony with the provisions authorizing closure of an E transaction into escrow.[95] In reality, the enterprise need not actually be operating if there has been substantial progress towards operating. The application for the E visa can be supported by a business plan showing how the funds are being invested and how the firm will operate once it opens for business.

The other problem faced by investors who seek to develop treaty enterprises is admission into the United States before the E visa is granted. The foreign investor must be able to enter the United States to develop the business to the point that it qualifies as a "bona fide enterprise" but must avoid accusations of working illegally. Long periods in the United States or frequent border crossings can lead, at some point, to a Customs and Border Protection (CBP) officer at the border challenging the investor's intentions.

This problem may be resolved by using a B-1 business visitor visa[96] until the E visa is granted. Such a strategy is appropriate according to the FAM.[97] When applying for the B-1 visa, the applicant should note his or her intent to establish a treaty enterprise in the United States and request an annotation on the B-1 visa as an "intending E visa applicant." If the B visa holder then applies for a change of status in the United States, the annotation will protect the applicant from charges of misrepresentation upon admission. It would also alert the CBP officer at the border that the intended activity had been disclosed to a U.S. consulate and approved as consistent with B-1 status.

48,138, 48,142 (Sept. 12, 1997) (to be codified at 8 C.F.R. pt. 214). Charter schools, which are often run as for-profit enterprises, may be acceptable, particularly if evidence of job creation is present. *See id.*

[95] INA § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E) (2006); 22 C.F.R. § 41.51(b)(7).

[96] *See* 22 C.F.R. §§ 41.31–41.33; *see also* 8 C.F.R. § 214.2(b)(1)–(2).

[97] 22 C.F.R. § 41.51(b)(1)(i) (requiring that the investor be "investing a substantial amount of capital in [a] bona fide enterprise in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living"); *see* 8 C.F.R. § 214.2(e)(15).

d. Marginality

An investment will not qualify for treaty status if the enterprise resulting from the investment is "marginal." An enterprise is marginal if it generates a living solely for the treaty investor and the investor's family members.[98] This is consistent with the purposes of the multilateral and bilateral investment treaties: to generate jobs in the other treaty country's territory. If the investment generates jobs only for the investor, then there is no net benefit to the host country.[99]

The USCIS and DOS recognize that a new investment may be marginal for several years. Both the USCIS and the DOS regulations provide that an enterprise that does not yet have the capacity to generate more than a minimal living for the investor's family, but that has the present or future capacity to "make a significant economic contribution," is not a marginal enterprise.[100] Investment enterprises have five years in which to realize income-generating capacity.[101] USCIS has recognized the value of a business plan in establishing the investment's future capacity to make the required economic contribution (usually expressed in terms of future employment of Americans).[102]

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[98] 8 C.F.R. § 214.2(e)(15); 22 C.F.R. § 41.51(b)(10).

[99] *See* Kun Young Kim v. Dist. Dir. of the U.S. INS, 586 F.2d 713, 717–18 (9th Cir. 1978) (holding that an investment in a drive-in theater was marginal because of the small income generated for the investor, where the investor was relying on family support for other necessary income). This case might have been decided differently under the 1997 regulations, which would consider the employment of U.S. workers as part of the "economic contribution" of the enterprise. *See* 8 C.F.R. § 214.2(e)(15); 22 C.F.R. § 41.51(b)(10).

[100] 8 C.F.R. § 214.2(e)(15); 22 C.F.R. § 41.51(b)(10); *see* 9 FAM § 41.51 n.11 (2009), *available at* http://www.state.gov/documents/organization/87220.pdf.

[101] 8 C.F.R. § 214.2(e)(15); 22 C.F.R. § 41.51(b)(10).

[102] In an important decision in 1998, the INS Administrative Appeals Office described what should be included in such a plan:

> A **comprehensive** business plan . . . should contain, at a minimum, a description of the business, its products and/or services, and its objectives. The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set

4. Qualifying Function

The treaty alien must be coming to the United States "solely to develop and direct" a treaty enterprise within the meaning of the E regulations.[103]

a. Capacity to Develop and Direct the Enterprise

Treaty investors must demonstrate that they have or will have the ability to "develop and direct" the enterprise, i.e., that the investor either must or will control the enterprise within a reasonable time.[104] To have the required ability to "develop and direct" the enterprise, the investor must demonstrate ownership of at least fifty percent of the treaty enterprise or must hold "operational control through a managerial position or other corporate device."[105] Absent proof of control by the treaty alien, "other individuals who do have the controlling interest are in a position to dictate how the enterprise is to be developed and directed," regardless of the wishes of the treaty investor.[106] This imperils the ability of the investor to obtain or retain E visa status.

A treaty investor can establish operational control with less than a fifty percent share of ownership "by other means."[107] The investor might use a voting agreement by which the investor obtains disproportionate representation on, or control of, the enterprise's board of directors' or shareholders' meetings. The investor may also exert sufficient control by utilizing management responsibilities. Even a 50/50 joint venture might give an investor sufficient "negative control" over company decision-making to justify a finding of control, or there may be other evidence of "effective control" at ownership levels below fifty percent.[108]

> forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

In re Ho, 22 I. & N. Dec. 206, 213 (B.I.A. 1998) (footnote omitted).

[103] 8 C.F.R. § 214.2(e)(16); 22 C.F.R. § 41.51(b)(11).

[104] 8 C.F.R. § 214.2(e)(16); 22 C.F.R. § 41.51(b)(11).

[105] 8 C.F.R. § 214.2(e)(16); 22 C.F.R. § 41.51(b)(11).

[106] *In re* Lee, 15 I. & N. Dec. 187, 189 (B.I.A. 1975).

[107] 8 C.F.R. § 214.2(e)(16); 22 C.F.R. § 41.51(b)(11).

[108] 9 FAM § 41.51 nn.12–12.2 (2001), *available at* http://www.state.gov/

b. Incidental Activities

Individual treaty investors may engage in compensable activities that are incident to the terms and conditions of the E classification. "Acceptable incidental activities are those which are reasonably related to, and a necessary outgrowth of the treaty employment forming the basis of the treaty alien's E nonimmigrant visa classification."[109]

The INS suggested, as an example, that it would be reasonable to expect a manager to perform—temporarily—the duties of the persons whom the manager supervises as an incidental activity to the manager's normal managerial functions.[110] However, a treaty investor who regularly performs lower-level duties or engages primarily in skilled or unskilled labor rather than participating in management will not qualify for E status. A treaty investor may perform "hands on" duties only if they are incidental to the investor's development and direction of the enterprise.[111]

An individual treaty investor cannot create a treaty enterprise in the United States on a part-time basis while simultaneously engaging in other employment in the United States unrelated to the E business.[112] The treaty investor also may not manage the E business in the United States on a part-time basis because of other U.S. business interests or employment.[113] The investor's activities in the United States must be limited solely to developing and directing the U.S. activities which justify the E classification.[114] Side employment is not permitted. The treaty investor may, however, manage the E business in the United States on a part-time basis because of the investor's other business interests and income overseas.

USCIS regulations adopt the holdings of a line of cases which analyze whether particular treaty investors acted as true entrepreneurs in providing goods and services (and were thus eligible for extension of their E status), or whether they acted more as individual workers. The cases hold that a bona fide

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documents/organization/87220.pdf.

[109] Nonimmigrant Classes; Treaty Aliens; E Classification, 62 Fed. Reg. 48,138, 48,140 (Sept. 12, 1997) (to be codified at 8 C.F.R. pt. 214); *see* 8 C.F.R. § 214.2(e)(17).

[110] Nonimmigrant Classes; Treaty Aliens; E Classification, 62 Fed. Reg. at 48,140.

[111] *Id.* at 48,144 (to be codified at 8 C.F.R. pt. 214).

[112] *See* 9 FAM § 41.51 n.4.3 (1993).

[113] *See* 8 C.F.R. § 214.2(e)(2)(i)–(iii).

[114] 8 C.F.R. § 214.2(e)(2)(ii).

investor may engage in some activities ordinarily performed by an employee or worker if the investor acts primarily to direct, manage, and protect the investment. The owner of a motel may perform related maintenance work or the owner of a small store may act as the store's cashier, as long as those activities are directed to the growth and protection of the treaty investment. The test is whether the owner and entrepreneur are competing with other business owners and entrepreneurs (in the provision of motel rooms or shoes), rather than with American employees (seeking maintenance work or cashier positions).[115]

D. Duration: The E-2 Visa as a Long-Term Visa Option

The E visa provides an excellent means to obtain long-term nonimmigrant status for the investor and the investor's family members. In contrast to other nonimmigrant visas, such as the H and L, there are no statutory or regulatory limits on the duration of E status for the principal investor. E-2 status can usually continue to exist as long as the underlying trade or investment continues,[116] assuming that the requirements for E status continue to be met. The underlying E visa stamp or authorized stay can be renewed with appropriate applications to the USCIS or to U.S. consulates overseas.[117]

The indefinite duration of E status is supported by USCIS's recognition that E status holders may have "dual intent."[118] Dual intent arises when an individual in the United States simultaneously harbors two conflicting intentions: the intent to remain permanently in the United States as a permanent resident and the intent to depart the United States at the

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[115] *See* Lauvik v. INS, 910 F.2d 658, 661–62 (9th Cir. 1990) (allowing a trailer park owner to perform related maintenance work). A number of cases confronted a similar issue under a previous INA provision for immigrant investors. *See In re* Ruangswang, 16 I. & N. Dec. 76, 80 (B.I.A. 1976) (holding that a foreign national who worked full time in a dry cleaning business was not an investor where her labor was not incidental to the management of her business because "it consume[d] most of her time" and was her "primary function"); *In re* Ko, 14 I. & N. Dec. 349, 350–51 (B.I.A. 1973) (allowing a shoe store owner who managed and directed the enterprise to also work as cashier in his own shoe store).

[116] 8 C.F.R. § 214.2(e)(20)(iii).

[117] The only exception to this general rule that E status may last indefinitely relates to personnel being transferred to a new business to assist in the start-up of an enterprise. These individuals may be limited to a two-year term of stay because the need for their services may conclude as the company grows. § 214.2(e)(20)(ii).

[118] *See* § 214.2(e)(5) (now referred to as immigrant intent).

termination of nonimmigrant status if an application for permanent residency status is not successful.[119] The E visa regulations did not specifically permit "dual intent" for E status holders for many years, although DOS and INS practice had acknowledged the applicability of the "dual intent" provisions to treaty investors.[120]

When the INS issued its regulations in 1997, it formally recognized "dual intent" for E status holders. Although E status holders must maintain an intention to depart from the United States at the end of their E status, an application by the E-2 investor for initial admission, change of status, or extension of stay in E classification will not be denied solely because the foreign national has an approved request for permanent labor certification or a pending or approved immigrant visa petition.[121]

Another consequence of the indefinite duration of E status is the fact that E status holders need not maintain foreign residences.[122] Most other nonimmigrant status holders must demonstrate that they are maintaining a foreign residence to which they will return at the end of their nonimmigrant stay in the United States. However, neither the INA itself nor the USCIS or DOS regulations require that E status holders maintain a foreign residence.[123]

This does not make E status "permanent." E status holders must maintain valid nonimmigrant intent or risk losing their status. They must intend to depart the United States at the termination of E status, although the statute does not require E status holders to claim that they are entering the United States "temporarily."[124] The cases distinguish between a "desire" to stay in the United States permanently and an expressed intent to do so—the latter may bar grant or renewal of E visa status, but the former will not.[125]

E. Employment of E-2 Treaty Dependents

The E visa is one of only two nonimmigrant visas that permits the spouse of the primary visa holder to work. The INA was

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[119] *Id.*

[120] *See* § 214.2(e)(8).

[121] § 214.2(e)(5).

[122] 9 FAM § 41.51 n.15 (2002), *available at* http://www.state.gov/documents/organization/87220.pdf.

[123] *See id.*

[124] 8 C.F.R. § 214.2(e)(1)(ii); 22 C.F.R. § 41.51(a)(1)(ii) (2009).

[125] Lauvik v. INS, 910 F.2d 658, 661 (9th Cir. 1990).

amended effective January 16, 2002 to authorize the employment of spouses (but not dependents) of E visa holders who have been admitted under § 101(a)(15)(E) of the INA.[126]

Work authorization for an E visa spouse is not automatic. The USCIS must make a determination that the applicant is the spouse of a person admitted as an E treaty alien. The dependent spouse of a treaty alien must therefore request an Employment Authorization Card by filing with the USCIS Form 1-765, Application for Employment Authorization Document.[127] If the treaty investor is requesting E status through a change of status in the United States, the request of employment authorization is concurrently filed with the change of status request. If the treaty investor applies for an E visa at a U.S. consulate overseas, the application for employment authorization is filed after the E visa is granted and the E treaty investor and family members enter the United States.[128]

The work authorization provisions for spouses of E treaty aliens do not extend to other dependents. E dependent children are not legally permitted to work, and other dependents who are teenagers, college students, or adults (e.g., a mobility-impaired adult family member or an unemployed widowed mother) who may seek a work outlet for their time and talents are also

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[126] *See* Act of Jan. 16, 2002, Pub. L. No. 107-124, 115 Stat. 2402, 2402; *see also* Memorandum from William R. Yates, Deputy Executive Assoc. Comm'r, Immigration Serv. Div., USCIS Office of Field Operations on Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determinations on the Requisite Employment Abroad for L Blanket Petitions to Reg'l Dirs., Dist. Dirs., Officers-In-Charge, Serv. Ctr. Dirs. (Feb. 22, 2002), http://www.uscis.gov/files/pressrelease/E_LEmpAuthPub.pdf. Prior to this amendment, spouses and dependents could work but would have to obtain an independent visa status to do so.

[127] INA § 214(e)(6), 8 U.S.C. § 1184(e)(6) (2006) (providing that E visa spouses are authorized to work and directing the Attorney General to provide such spouses with either an "employment authorized" endorsement or other appropriate work permit). USCIS has never issued implementing regulations to clarify this provision, but in policy memoranda has stated that an E visa spouse must be issued an employment authorization card in order to work in the United States. *See* Memorandum from William R. Yates, *supra* note 126. USCIS reserved 8 C.F.R. § 274a.12(a)(17) for issuance of Employment Authorization Document (EAD) cards to E visa spouses, but has never updated its regulations to implement this requirement. To add confusion to the matter, the Social Security Administration has taken the position that an EAD card is not required of an E visa spouse prior to issuance of a Social Security number. Rather, submission of evidence of the marriage to the principal E-2 alien is sufficient for Social Security purposes. *See* Social Security Administration, Employment Authorization for Nonimmigrants, https://secure.ssa.gov/apps10/poms.nsf/lnx/0100203500!opendocument (last visited Jan. 8, 2010).

[128] *See* 8 C.F.R. § 214.2(e)(21)(ii).

prohibited from working. Long-term E visa holders who came to the United States when their children were small now find those children becoming teenagers or young adults seeking employment. Options for these dependents are very limited, and always involve change to an independent visa status.

Dependents attending or planning to attend a university or college may find it advantageous to change from E to F-1 student status. The F-1 visa regulations prohibit employment in the first academic year of study, but "on-campus" employment is permitted.[129] After completion of the first academic year, students have a limited ability to work on economic hardship grounds.[130] Students also have the opportunity under defined conditions to engage in "curricular practical training" and "optional practical training,"[131] which can be compensated employment within the restrictions of the F-1 visa.

H visas are an option for college-educated dependents, but there are significant barriers to the use of this visa: the cost of the H visa is a major deterrent,[132] as is availability, due to the limits on the number of H visas that can be issued each year.

F. Transition to Legal Permanent Resident Status

E visa holders are eligible to become legal permanent residents of the United States.[133] For E investors who own or control their own businesses, there are substantial hurdles to converting from nonimmigrant to immigrant status.

> The legal permanent resident process in the United States normally involves four steps:
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> (1) labor certification, or test of the U.S. labor market for qualified U.S. workers, currently through the PERM procedure defined by

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[129] § 214.2(f)(6)(i)(H) (deeming on-campus employment "part of the academic program of a student otherwise taking a full course of study").

[130] § 214.2(f)(9)(ii)(c).

[131] § 214.2(f)(10)(i)–(ii).

[132] Government filing fees alone in 2009 were $2,320 for companies with more than twenty-five employees—apart from any other legal fees or related fees for credentials evaluations. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., INSTRUCTIONS FOR FORM I-129, PETITION FOR A NONIMMIGRANT WORKER 4 (2009), http://www.uscis.gov/files/form/i-129instr.pdf; U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., G-1055, FEE SCHEDULE (2007), http://www.uscis.gov/files/nativedocuments/G-1055.pdf.

[133] *See* 8 C.F.R. § 248.1; *see also* U.S. Citizenship & Immigration Services, Green Card Eligibility, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=80f63a4107083210VgnVCM100000082ca60aRCRD&vgnextchannel=80f63a4107083210VgnVCM100000082ca60aRCRD (last visited Jan. 8, 2010) [hereinafter Green Card Eligibility].

the Department of Labor;[134]

(2) a visa petition by the U.S. sponsoring employer;[135]

(3) an application by the individual to have the visa issued to them through the adjustment of status or consular processing procedure;[136] and

(4) actual issuance of the "green card"—either at the border or through USCIS.

Some categories of "green cards" skip the labor certification step and permit applicants to go directly to the visa petition. It is these categories which are of greatest interest to the E visa holder because the labor certification stage creates difficulties for the E investor seeking to transition to legal permanent resident status.

An E investor seeking a "green card" through labor certification must test the U.S. labor market, according to the Department of Labor rules, to prove that there is no minimally qualified and available U.S. worker to take the offered position.[137] When the owner of the E business advertises for a U.S. worker to replace himself or herself as the head of the E treaty investment, the Department of Labor is unlikely to believe that there truly is a position available. In some cases, the facts may prove that there is a bona fide job opening, e.g., the treaty investor wishes in the future to focus on marketing rather than operation of the business and is looking to replace himself or herself in the CEO role. However, that is a difficult case to make, particularly if the E business is relatively small.

For this reason, E visa investors must often look at the immigrant visa categories which do not require a labor certification. These include all of the visas in the employment-based first preference category (outstanding researchers, aliens of extraordinary ability, and multinational managers[138]), as well as visas in the employment-based second preference where the individual alien is coming to perform work that is in the "national interest."[139] The standards for these visas are high and the criteria very specific. Treaty investors cannot assume that they will meet these standards.

The employment-based fifth preference, the EB-5 category, provides a "green card" based on investment in the United

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[134] *See* Green Card Eligibility, *supra* note 133.
[135] 8 C.F.R. § 248.3(a).
[136] § 248.3(b).
[137] INA § 212(a)(5)(A)(i)(I), 8 U.S.C. § 1182(a)(5)(A)(i)(I) (2006).
[138] INA § 203(b)(1), 8 U.S.C. § 1153(b)(1).
[139] INA § 203(b)(2)(B)(i), 8 U.S.C. § 1153(b)(2)(B)(i).

States.[140] Does this visa provide an avenue for the E treaty investor?

II. RESIDENCE THROUGH INVESTMENT: LEGAL PERMANENT RESIDENCE THROUGH THE EB-5 INVESTOR CATEGORY

Legal permanent resident (LPR) status in the United States confers on a foreign national the right to live and work in the United States for an unlimited time period.[141] One possible route to LPR status for a foreign national has been through investment in the United States.[142] This road, however, has never been an easy one, and immigration to the United States through investment has historically been only minimally used. The intricacies of the immigrant investor visa program also make it difficult for an E visa investor to directly transition to LPR status through investment.

A. Historical Background

"From 1965 to 1978 investors were eligible to immigrate to the United States in a nonpreference category."[143] Applicants for nonpreference immigrant visas were exempted from the general labor certification requirement upon a showing of an investment of at least $10,000 (later $40,000) "in a U.S.-based business employing at least one U.S. worker."[144] "[I]nvestors were not differentiated from other nonpreference immigrants,"[145] and nonpreference visas were only available on the off-chance that there were unused visas from one of the preference categories, limiting the program's usefulness. In September 1978, high demand for visas in the preference categories led nonpreference visas to become permanently unavailable, effectively ending this means of immigration for investors.[146]

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[140] INA § 203(b)(5)(A), 8 U.S.C. § 1153(b)(5)(A).

[141] INA § 101(a)(20), 8 U.S.C. § 1101(a)(20).

[142] INA § 203(b)(5)(A), 8 U.S.C. § 1153(b)(5)(A).

[143] IMMIGRATION & NATURALIZATION SERV., REPORT TO CONGRESS ON EB-5 INVESTOR VISA PROGRAM (1999), *available at* http://www.immigrationlinks.com/news/news028.htm.

[144] *Id.*

[145] *Id.*

[146] *Nonimmigrant Business Visas and Adjustment of Status: Hearing Before the Subcomm. on Immigration & Refugee Policy of the S. Comm. on the Judiciary*, 97th Cong. 107 (1981) (statement of Richard Goldstein, Esq., President, N.Y. Chapter, American Immigration Lawyers Association).

1. Regular EB-5 Program

In IMMACT 1990, Congress provided foreign investors with a new avenue to LPR status.[147] The EB-5 category sets aside approximately 10,000[148] immigrant visa numbers per federal fiscal year for foreign investors and their spouses and children.[149] At least 3,000 of the visa numbers are reserved for investments in rural areas or areas of high unemployment.[150] Investors must also invest a specific amount of capital in a new commercial enterprise which will create employment for at least ten full-time jobs for U.S. workers.[151] Furthermore, $500,000 is the minimum qualifying investment amount for commercial businesses located in "rural areas"[152] or "targeted employment areas";[153] $1 million is the minimum qualifying amount of investment for all other businesses.[154] Moreover, legislative history suggests that Congress anticipated that as many as 4,000 foreign investors and their families would seek LPR status each year, resulting in annual investments of $4 billion and the creation of 40,000 jobs annually.[155]

2. Regional Center Pilot Program

Initial usage of the EB-5 program was weak. In 1992, to encourage further use of the EB-5 program, Congress enacted the

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[147] Pub. L. No. 101-649, § 121, 104 Stat. 4978, 4989.

[148] The total number of immigrant investor visas available in a year is limited to 7.1% of the worldwide allotment of immigrant visas. INA § 203(b)(5)(A), 8 U.S.C. § 1153(b)(5)(A) (2006). INA § 201(d) sets this figure as at least 140,000, with the possibility for additional visa numbers in the unlikely event that there are unused employment or family visas. 7.1% of 140,000 is 9,940, so each year there are at least 9,940 EB-5 visa numbers available. While we will use the 10,000 figure to ease discussion, bear in mind that the actual annual allotment may be slightly smaller.

[149] INA § 203(b)(5)(A), 8 U.S.C. § 1153(b)(5)(A).

[150] INA § 203(b)(5)(B)(i), 8 U.S.C. § 1153(b)(5)(B)(i).

[151] INA § 203(b)(5)(A)(ii), 8 U.S.C. § 1153(b)(5)(A)(ii).

[152] INA § 203(b)(5)(B)(iii), 8 U.S.C. § 1153(b)(5)(B)(iii) (defining rural area as "any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States)").

[153] INA § 203(b)(5)(B)(ii), 8 U.S.C. § 1153(b)(5)(B)(ii) (defining targeted employment area as "at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate)").

[154] INA § 203(b)(5)(C)(i), 8 U.S.C. § 1153(b)(5)(C)(i).

[155] 135 CONG. REC. S7858-02, S7874 (1989).

Immigrant Investor Pilot Program (Pilot Program).[156] Through this program, foreign investors in a USCIS-approved "economic unit" known as a "Regional Center" could pool resources and have a larger positive impact on the economy.[157] As of June 24, 2009, there were forty-nine approved and active Regional Centers, with another forty-one regional center applications pending at USCIS as of June 22, 2009.[158] Regional Centers must focus on a specific geographic location, but that can be fairly broad (the Georgia Regional Development Center Regional Center covers the entire state of Georgia[159]) or limited (the Anacostia Regional Center covers Wards 7 and 8 of Washington, D.C.[160]).

The requirements of the Pilot Program are less restrictive than those of the traditional EB-5 program. Regional Centers are located within a targeted employment area; thus, only $500,000 must be invested instead of $1 million. The job creation requirement is also lightened—an investor in a Regional Center need only prove "'indirect' . . . rather than 'direct' . . . creation" of ten U.S. jobs.[161] This is advantageous to investors who have less money to invest, making it easier for the EB-5 process to be successful, thus broadening the appeal of the program.

The Pilot Program was originally scheduled to end on September 30, 2003, but Congress reinstated and extended it for five years through a November 2003 statute, with a new sunset

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[156] *See* Act of Oct. 6, 1992, Pub. L. No. 102-395, § 610, 106 Stat. 1828, 1874.

[157] *See* Press Release, U.S. Citizenship and Immigration Servs., USCIS Announces September 17, 2004, Public Meeting to Address Regional Centers and the Immigrant Investor Pilot Program (Aug. 12, 2004), http://www.uscis.gov/files/pressrelease/08_12_04.pdf.

[158] *See* Invest in the USA & Am. Immigration Lawyers Ass'n, EB-5 Questions for USCIS Stakeholders Conference Call (June 24, 2009), http://www.eb5center.com/files/uscis_stakeholders_Q_and_As_June_24_2009.pdf.

[159] U.S. Citizenship & Immigration Services, Immigrant Investor Regional Centers, http://www.uscis.gov/portal/site/uscis/menuitem.5af9 bb95919f35e66f6 14176543f6d1a/?vgnextoid=d765ee0f4c014210VgnVCM100000082ca60aRC RD&vgnextchannel=facb83453d4a3210VgnVCM100000b92ca60aRCRD (last visited Jan. 8, 2010).

[160] *Id.*

[161] Press Release, U.S. Citizenship and Immigration Servs., *supra* note 157 ("The requirement of creating at least 10 new full-time jobs may be satisfied by showing that, as a result of the investment and the activities of the new enterprise, at least 10 jobs will be created indirectly through an employment creation multiplier effect. To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used, such as multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting tools which support the likelihood that the business will result in increased employment.").

date of October 1, 2008.[162] This was later extended again to March 6, 2009,[163] and now September 30, 2009.[164]

B. Overview of the EB-5 Green Card Application Process

The procedural steps to obtain and secure LPR status under the EB-5 program (both the regular process and the Pilot Program) are quite complex. The basic process involves the following steps:

(1) The immigrant investor invests (or must be in the process of investing) the qualifying amount of capital in the chosen investment vehicle;
(2) An immigrant investor files Form I-526 with USCIS, documenting the qualifying investment in the United States and evidence (usually a business plan) demonstrating that at least ten United States jobs (direct for regular process, indirect for Pilot Program) will be created as a result of the investment;
(3) If granted, the investor either processes the immigrant visa at a United Sates Consulate overseas or applies for adjustment of status in the United States;
(4) The immigrant investor is granted conditional permanent residence status, valid for two years, during which time the investment must result in the creation of at least ten United States jobs (direct for regular process, indirect for Pilot Program);
(5) Prior to the end of the two year conditional period, the investor files a second petition with USCIS, this time on Form I-829, to remove the conditions and become a full LPR. In this second petition, the immigrant investor must document that the required job creation has actually taken place, or can be expected to have occurred within a reasonable period of time;
(6) If granted, the investor is given a new unconditional green card.[165]

C. Basic Requirements of EB-5 Program

In order to qualify for LPR status as an EB-5 immigrant investor, an individual must: (1) invest or be actively involved in the process of investing, (2) in a new commercial enterprise, (3) with capital in the amount of $1 million ($500,000 for rural or

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[162] *Id.*
[163] *See* Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, § 106, 122 Stat. 3574, 3575 (2008).
[164] *See* Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524.
[165] *See* 8 C.F.R. § 216.6 (2009).

targeted employment areas), (4) to benefit the United States economy and create no fewer than ten full-time positions for United Sates workers.[166]

Each of these requirements can cause difficulty for a would-be immigrant investor. Additionally, in many cases these requirements are different from the requirements for an E visa investor.

1. Invest or Be Actively in the Process of Investing

An EB-5 investor must have invested or be in the process of investing at the time the initial application is filed.[167] The phrase "process of investing" is effectively meaningless, because USCIS requires that the full required minimum investment be "at risk for the purpose of generating a [financial] return" at the time the initial application is filed.[168] This means that an investor cannot just invest part of the required capital or build up to the required minimum over time. It is also not sufficient to have merely the intention to make the investment or to have promised or pledged the investment.[169] Rather, the investor must show that the required amount of capital has been actually committed to the enterprise at the time the visa application is made.[170]

2. New Commercial Enterprise

This simple phrase imposes two separate requirements: the enterprise must be both "new" and "commercial."

First, to be "new," the enterprise must have been formed after the effective date of the IMMACT 1990—November 29, 1990.[171] An enterprise formed before this date will only qualify if the investor restructures, reorganizes, or expands an existing business sufficiently such that a new enterprise results.[172] Thus, it is difficult for an E visa investor to transition a pre-1990 enterprise into a qualifying EB-5 investment.

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[166] INA § 203(b)(5)(A)–(C), 8 U.S.C. § 1153(b)(5)(A)–(C) (2006).
[167] INA § 203(b)(5)(A)(i), 8 U.S.C. § 1153(b)(5)(A)(i).
[168] 8 C.F.R. § 204.6(j)(2).
[169] *Id.*
[170] *Id.*
[171] Memorandum from William R. Yates, Acting Assoc. Dir. for Operations, BCIS on Amendments Affecting Adjudication of Petitions for Alien Entrepreneur (EB-5) to Serv. Ctr. for Dirs., BCIS Officer Dirs., and Dir., Nat'l Benefits Ctr. (June 10, 2003), http://www.uscis.gov/files/pressrelease/EB5_061003.pdf.
[172] 8 C.F.R. § 204.6(h)(2)–(3).

Second, the enterprise must be a "commercial" enterprise. "[A]ny for-profit [enterprise] formed for the [purpose of engaging in the] conduct of lawful business" will qualify as a commercial enterprise.[173] This includes "sole proprietorship[s], partnership[s] . . . , holding compan[ies], joint venture[s], corporation[s], business trust[s], or other entit[ies] publicly or privately owned."[174] A "new commercial enterprise" does not include non-commercial activity, "such as owning and operating a personal residence."[175] It also excludes any type of not-for-profit activity, even if such activity involves the establishment of an enterprise (e.g., a sheltered workshop, school, or religious establishment) and creates jobs.[176]

3. Capital

"Capital" is defined as "cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur."[177] "Capital" does not include loans by the petitioner or other parties.[178] Indebtedness secured by assets owned by the investor (typically via a promissory note payable to the enterprise) may be considered capital, "provided that [the investor] is personally and primarily liable and that the assets of the . . . enterprise upon which the petition is based are not used to secure any of the indebtedness."[179] The investment is considered to be "at risk" if the investor must, without exception, make all the required payments on the note.[180] All capital is valued at fair market value in U.S. dollars at the time it is given.[181]

In a key difference from the rules governing the E-2 nonimmigrant investors, USCIS has taken the position that retained earnings cannot count as "capital" for EB-5 purposes.[182]

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[173] § 204.6(e) (defining "commercial enterprise").
[174] *Id.*
[175] *Id.*
[176] *See id.*
[177] *Id.* (defining "capital").
[178] *In re* Soffici, 22 I. & N. Dec. 158, 168 (B.I.A. 1998).
[179] 8 C.F.R. § 204.6(e).
[180] Stephen Yale-Loehr, *EB-5 Immigrant Investors* 6 (2003), http://www.usa-immigration.com/litigation/2003%20EB-5%20update.doc.
[181] *Id.*
[182] Letter from Efren Hernandez, Chief, Business and Trade Branch, USCIS to Stephen Yale-Loehr, (June 4, 2004), http://www.usa-immigration.com/litigation/Letter%20on%20Retained%20Earnings.pdf; *see* Kenkhuis v. INS, No. 3:01-CV-2224-N, 2003 U.S. Dist. LEXIS 3334, at *6–*7

USCIS's position is that all capital invested in a qualifying commercial enterprise must be both "new" to the enterprise and fully at risk from the beginning of the investment.[183] This makes it impossible for an E-2 investor to grow a small business into a qualifying enterprise for EB-5 purposes.

"Capital" also excludes any "[a]ssets acquired, directly or indirectly, [through] unlawful means."[184] The investor has the burden to establish that the invested funds were not acquired by unlawful means. It is important that the investor be able to document precisely how the funds came to the investor: this issue is one of the most frequent stumbling blocks for a potential EB-5 investor. Earned income is generally easy to document, but it can be difficult to prove that capital acquired by the investor through a gift, inheritance, or sale of property was not somehow, even indirectly, acquired through unlawful means.

The EB-5 regulations require submission of the following types of documentation to establish that capital used in the new enterprise was acquired through lawful means:

(1) The investor's "foreign business registration records";

(2) The investor's personal and business tax returns, or other tax returns of any kind filed anywhere in the world within the previous five years;

(3) Documents identifying any other source of money; or

(4) Certified copies of "all pending governmental civil or criminal actions" and proceedings, or any "private civil actions" involving money judgments against the investor within the past fifteen years.[185]

Investors from countries with looser monetary controls or tax reporting systems can find it difficult to generate the required documentation or paper trail for the source of the invested funds.

The EB-5 regulations differ from E visa practice in another way on the definition of "capital": start-up costs considered to be part of the investment for E-2 applications are disregarded for EB-5 purposes.[186] Because the required minimum capital

(N.D. Tex. Mar. 6, 2003) ("The definition of 'invest' . . . requires an infusion of new capital, not merely a retention of profits of the enterprise.").

[183] Letter from Efren Hernandez to Stephen Yale-Loehr, *supra* note 182 ("[T]he full amount of capital must be placed at risk from the commencement of the investment, which would not be the case with making up the difference for the use of retained earnings . . . . Regardless of the nature of the business, corporation, sole-proprietorship, etc., a reinvestment of retained earnings is simply not an infusion of new capital into a business.").

[184] 8 C.F.R. § 204.6(e).

[185] *See* § 204.6(j)(3).

[186] Yale-Loehr, *supra* note 180, at 19.

($500,000 or $1 million) must be fully invested in the new commercial enterprise for the purpose of job creation, USCIS has held that start-up costs, such as attorney's fees related to the EB-5 application or administrative costs associated with an EB-5 Regional Center, do not count toward meeting this minimum figure.[187]

4. Benefit the United States Economy and Create No Fewer Than Ten Full-Time Positions for United States Workers

A qualifying investment must "benefit the United States economy" and "create full-time employment for not fewer than 10" U.S. workers, exclusive of the EB-5 investor and his immediate family members[188] and nonimmigrant aliens.[189] It is unclear what kind of investment would create ten or more full-time positions for U.S. workers and *not* benefit the U.S. economy. The statute offers no guidance on this issue. It appears, however, that the investor must show that the commercial enterprise will somehow benefit the U.S. economy above and beyond the job-creation activities. Therefore, the investor should present evidence that the enterprise has some additional benefit to the U.S. economy, such as evidence that the enterprise provides goods or services to the U.S. economy.

The investment must also create full-time employment for at least ten U.S. workers.[190] The jobs created must be full-time, i.e., a minimum of thirty-five working hours per week, regardless of who fills the position.[191] "A job-sharing arrangement, whereby two or more . . . employees share a full-time position shall count as full-time employment provided the hourly requirement per week is met."[192] Investment in the traditional EB-5 program requires the investment to directly create ten U.S. jobs, but investment through the Pilot Program need only result in an indirect creation of jobs.[193] Any "direct and indirect . . . jobs that are created by the petitioner's investment and that are expected to last at least 2 years may . . . count as permanent jobs for Form

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[187] *See* IMMIGRATION & NATURALIZATION SERV., *supra* note 143.

[188] INA § 203(b)(5)(A)(ii), 8 U.S.C. § 1153(b)(5)(A)(ii) (2006).

[189] 8 C.F.R. § 204.6(e) (defining "qualifying employee").

[190] INA § 203(b)(5)(A)(ii), 8 U.S.C. § 1153(b)(5)(A)(ii) (requiring that jobs must be created for U.S. citizens, LPRs, "or other immigrants lawfully authorized to be employed in the United States").

[191] 8 C.F.R. § 204.6(e) (defining "full-time employment").

[192] *Id.*

[193] § 204.6(m)(7).

I-526 and I-829 purposes," even construction jobs.[194] For regional center petitions and for purposes of indirect job creation, USCIS officers may consider economic models that rely on certain variables to show job creation and the amount of investment to determine whether the required infusion of capital or creation of direct jobs will result in a certain number of indirect jobs.[195]

The purpose of the EB-5 program is for foreign investment to result in job creation in the United States, so obviously the jobs need not exist at the time the initial investment is made. Also, USCIS does not require the job creation to take place at the time the I-526 petition is filed. USCIS takes the position that, "[f]or purposes of the Form I-526 adjudication and the job creation requirements," the investor has two years and six months from the date of the adjudication of the Form 1-526 within which to establish employment of ten full-time U.S. workers.[196] USCIS will require, however, that a "business plan filed with the Form I-526 reasonably demonstrate[] that the requisite number of jobs will be created by the end of this . . . period."[197]

D. Problems with the EB-5 Program

"[A]pproximately 10,000 immigrant visas per year" are available in the EB-5 category, but fewer than 1,000 visas are used annually.[198] There is near universal agreement that the EB-5 system as it currently operates is not functional. USCIS has recognized that immigration to the United States through investment has, for a number of reasons, been well below that anticipated by Congress.[199]

A 2005 Government Accountability Office Report attributed the

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[194] Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations, Office of Domestic Operations, USCIS on EB-5 Alien Entrepreneurs - Job Creation and Full-Time Positions to Service Ctr. Dirs., Regional Dirs., Dist. Dirs., Field Office Dirs., and Nat'l Benefit Ctr. Dir. (June 17, 2009), http://www.uscis.gov/files/nativedocuments/eb5_17jun09.pdf.

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., EMPLOYMENT CREATION IMMIGRANT VISA (EB-5) PROGRAM RECOMMENDATIONS 1 (2009), http://www.dhs.gov/xlibrary/assets/CIS_Ombudsman_EB-5_Recommendation_3_18_09.pdf. "Between 1992 and 2004, 6,024 EB-5s were issued, which averaged approximately 500 per year. 'The bill's supporters predicted that about 4,000 millionaire investors, along with family members, would sign up, bringing in $4 billion in new investments and creating 40,000 jobs [annually].'" *Id.* at 1 n.3 (citations omitted).

[199] *See* IMMIGRATION & NATURALIZATION SERV., *supra* note 143.

low participation in the EB-5 program to various factors including "an onerous application process; lengthy adjudication periods; and the suspension of processing on over 900 EB-5 cases—some of which date to 1995—precipitated by a change in USCIS's interpretation of regulations regarding financial qualifications."[200] Citing the same report, the Congressional Research Service traced the low participation in the EB-5 program to "the rigorous nature of the LPR investor application process and qualifying requirements; the lack of expertise among adjudicators; uncertainty regarding adjudication outcomes; negative media attention on the LPR investor program; lack of clear statutory guidance; and lack of timely application processing and adjudication."[201]

In an effort to respond to these issues in 2005, USCIS announced its intention to revitalize the EB-5 program and its establishment of the Investor and Regional Center Unit (IRCU).[202] While this effort had some limited success (USCIS "received 1,257 Form 1-526 petitions in FY 2008"[203]), and EB-5 processing times have improved, problems remain with the program.

1. Investor Uncertainty over the Success of Green Card Application

A major drawback to the EB-5 program is that the EB-5 statute provides for a two-year conditional residence period, but

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[200] U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRANT INVESTORS: SMALL NUMBER OF PARTICIPANTS ATTRIBUTED TO PENDING REGULATIONS AND OTHER FACTORS 3 (2005), http://www.gao.gov/new.items/d05256.pdf.

[201] CHAD C. HADDAL, CONGRESSIONAL RESEARCH SERV., FOREIGN INVESTOR VISAS: POLICIES AND ISSUES 7 (2009), http://assets.opencrs.com/rpts/RL33844_20090224.pdf (citing U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 200, at 8–11.)

[202] U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 198, at 10 n.33 ("The IRCU reviews and approves the submissions of applicants seeking Regional Center designation. Applicants are required to provide a 'detailed prediction regarding the manner in which the [R]egional [C]enter will have a positive impact on the regional and national economy . . . .' 8 C.F.R § 204.6(m)(3)(iv) (2008). The proposal must be supported by 'economically or statistically valid forecasting tools, including, but not limited to, feasibility studies . . . and/or multiplier tables.' 8 C.F.R. § 204.6(m)(3)(v) (2008). 'To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used. Such methodologies may include . . . economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.' 8 C.F.R. § 204.6(m)(7)(ii) (2008).").

[203] *Id.* at 11.

does not guarantee investors that they will obtain LPR status at the end of that period.[204] The EB-5 program requires that the investment of a large sum of money result in documented employment creation prior to the removal of conditions on the conditional green card. Potential EB-5 investors may be deterred out of concern that they will be unable to create the ten or more jobs or that other factors may impede their ability to sustain their investment over the two-year period, resulting in their failure to meet the terms of the program and, subsequently, loss of status. Investors could find themselves having invested a large sum of money in an enterprise that they cannot remain in the United States to supervise. Investors from treaty countries could be able to convert to E-2 investor status, but that status is not the investor's original goal, and has its own unique limitations, as discussed above.

2. EB-5 Program Instability

Investors have been reluctant to use the EB-5 program because the legal landscape supporting the program has been particularly unstable. Between 1993 and 1997, the legacy INS issued interpretive guidance on a number of key legal issues related to the EB-5 program that was later repudiated by the agency, leaving investors who relied on this guidance in limbo.

For example, INS General Counsel guidance stated that investors could "obtain status without actually committing their entire investment amount to the business."[205] Programs developed wherein investors were granted conditional green cards after placing capital in an escrow account and were contractually guaranteed return of their principal after the conditions on the green cards were removed.

In 1998, the then-INS Administrative Appeals Office (AAO) released four decisions instituting "more restrictive interpretations of the law" by rejecting guidance previously issued.[206] "These changes caused much concern among current

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[204] *See* 8 C.F.R. § 216.6 (2009).

[205] U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 198, at 7.

[206] *Id.* at 8. "The AAO is the appellate body within USCIS with primary authority to review most service center decisions." *Id.* at 8 n.25. "Precedent decisions are those decisions specially designated to provide controlling legal principles and interpretations which are 'binding on all Service employees in the administration of the Act.'" *Id.* at 8 n.26 (citing *In re* Ho, 22 I.&N. Dec. 206 (1998); *In re* Hsiung, 22 I. & N. Dec. 201 (1998); *In re* Izummi, 22 I. & N. Dec. 169 (1998); *In re* Soffici, 22 I. & N. Dec. 158 (1998); 8 C.F.R. § 103.3(c) (2008)).

and potential EB-5 investors, and introduced new and significant uncertainties into the EB-5 program."[207] If applicants could not trust guidance issued from the INS General Counsel on the EB-5 program, then there were no reliable sources of information on the program. The changes in law resulting from the AAO decisions led many investors to forego their EB-5 investments and filings. In addition, USCIS took action to remove some existing investors from the United States based on the precedent decisions.[208] In light of these actions, many would-be immigrant investors turned away from the EB-5 program and have instead pursued options in more stable immigration pathways.

3. Investor Worldwide Income Subject to United States Taxation

United States legal permanent residents are subject to United States taxation on their entire worldwide income: by virtue of their immigration status, they are tax residents of the United States.[209] Conditional residents under the EB-5 program are also treated as "tax residents" of the United States during the two-year conditional period, and are also taxed on their worldwide income, even though they risk losing their "green card" status if the condition is not later lifted.[210] This policy may serve as a disincentive to investors who have substantial holdings outside the United States, especially when combined with the uncertainty regarding ultimate approval of the conditions on the green card.

4. Availability of Alternative Nonimmigrant Classifications

Potential immigrants may have other routes to achieve LPR status that are less expensive and more certain than the EB-5 route. If an immigrant wishes to enter the United States by means of an investment, he or she may choose an alternative nonimmigrant classification, such as the E or L nonimmigrant classifications,[211] and transition to LPR status from those classifications.

In particular, if the investor has an existing business overseas, the investor may be able to structure the new U.S. investment as

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[207] *Id.* at 8.

[208] *Id.* at 9.

[209] *See* INTERNAL REVENUE SERV., BASIC TAX FOR GREEN CARD HOLDERS: UNDERSTANDING YOUR U.S. TAX OBLIGATIONS (2006), http://www.irs.gov/pub/irs-pdf/p4588.pdf.

[210] *Id.*

[211] *See* 8 C.F.R. § 214.2(e)(1), (*l*) (2009).

a related entity to the overseas company. Doing so could, with the right facts, make it possible for the investor to come to the United States on an L-1A Intracompany Transferee visa.[212] This visa segues into a "green card" application in the advantageous employment-based first preference, which eliminates the labor certification requirement. This would be faster, cheaper, and more certain that the EB-5 investment category.

E. United States Citizenship and Immigration Services' "Solutions" to Problems with the EB-5 Program

The USCIS Ombudsman[213] recently identified a number of problems with the EB-5 program and made eight recommendations to improve the program.[214] The Ombudsman's recommendations were:

(1) Finalize regulations to implement the special 2002 EB-5 legislation which offers a certain subgroup of EB-5 investors a pathway to cure deficiencies in their previously submitted petitions.
(2) Issue Standard Operating Procedures (SOPs) for Form I-526 (Immigrant Petition by Alien Entrepreneur) and Form I-829 (Petition by Entrepreneur to Remove Conditions) that specifically direct EB-5 adjudicators to not reconsider or re-adjudicate the indirect job creation methodology in Regional Center cases, absent clear error or evidence of fraud.
(3) Designate more EB-5 Administrative Appeals Office . . . decisions as precedent/adopted decisions to provide stakeholders, investors, and adjudicators a better understanding of the application of existing USCIS regulations to given factual circumstances.
(4) Engage in formal rulemaking to further develop rules that will promote stakeholder and investor confidence as well as predictability in adjudicatory processes.
(5) Form an inter-governmental advisory group to consult on domestic business, economic, and labor considerations relevant to EB-5 adjudications.

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[212] *See* 8 C.F.R. § 214.2(*l*).

[213] The Citizenship and Immigration Services Ombudsman "is an independent office that reports directly to the Deputy Secretary of Homeland Security, [which] . . . [a]ssists individuals and employers in resolving problems with USCIS; [i]dentifies areas in which individuals and employers have problems in dealing with USCIS; and [p]roposes changes to mitigate identified problems." U.S. Department of Homeland Security, Citizenship and Immigration Services Ombudsman, http://www.dhs.gov/xabout/structure/editorial_0482.shtm (last visited Jan. 8, 2010).

[214] *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 198, at 2.

(6) Offer a Special Handling Package option to EB-5 investors for faster adjudication of Forms I-526, I-829, and related applications for a higher fee.
(7) "Prioritize" the review and processing of all Regional Center EB-5 related petitions and applications to foster the immediate creation and preservation of jobs.
(8) Establish a program to promote the EB-5 program overseas in coordination with the U.S. Departments of State and Commerce.[215]

USCIS, for the most part, gave these recommendations short shrift. For example, in response to the Ombudsman's recommendation that more EB-5-related AAO decisions be designated as precedent/adopted decisions, thus providing all parties with "a better understanding of the application of existing USCIS regulations to given factual circumstances," USCIS stated that it would prefer "to issue new policies through formal rulemaking or policy guidance" than through AAO decisions.[216] At the same time, in response to the Ombudsman's recommendation to "[e]ngage in formal rulemaking to . . . promote stakeholder and investor confidence as well as" improve adjudicatory predictability, USCIS stated that it lacked the resources to conduct the rulemaking process because it was busy issuing other rules with a higher priority.[217] Thus, USCIS has declared that it is unwilling to designate more AAO decisions as precedent/adopted decisions, but it is simultaneously unable to issue formal rules to clarify the EB-5 process. This means that users of the EB-5 program will remain in a realm of uncertainty with no clear path out for the foreseeable future.

While USCIS has recently improved its processing times for EB-5 cases, the waits continue to be longer than is consistent with business realities.[218] USCIS has acknowledged that processing times need to be improved, but that it "intends to meet the targeted cycle times before it pursues adding EB-5 applications to Premium Processing Service."[219] Moreover, USCIS then opined that it could not meet the statutory deadlines of the

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[215] *Id.*

[216] Memorandum from Michael Aytes, Acting Deputy Dir., USCIS on Response to Recommendation 40, Employment Creation Immigrant Visa (EB-5) Program Recommendations to Richard Flowers, Acting Citizenship and Immigration Servs. Ombudsman 3 (June 12, 2009), http://www.dhs.gov/xlibrary/assets/uscis_response_cisomb_rec_40.pdf.

[217] *See id.*

[218] *See Senate Judiciary Committee Holds Hearing on EB-5 Regional Center Program*, 86 INTERPRETER RELEASES 1982, 1983 (2009).

[219] Memorandum from Michael Aytes, *supra* note 216, at 3–4.

Premium Processing Service, so it would offer no such service.[220]

CONCLUSION

Recent hearings before Congress evoked strong support for the EB-5 program, particularly the Regional Centers. There were many characterizations of the program as a "win-win situation," promoting economic development with no cost to the taxpayers, with the instability of the Regional Center program repeatedly highlighted as the leading problem.[221] However, while making the program permanent will help address one disincentive to using the EB-5 visa, that solution alone will not create a vibrant stream of in-bound investment into the United States.

The United States' tight focus on preventing abuse of the EB-5 program has kept that program from expanding. Over-control, a narrow definition of capital, and an overly rigid insistence on detailed documentation of the source of funds, even in the absence of any indicators of fraud, have slowed the expansion of the program. Beyond the almost paranoid focus on the source of funds for the investment, the United States must also question the viability of requiring an investment of $500,000–$1,000,000, plus investments of time, talent, and energy, while providing limited regulatory guidance and almost no precedential case law on the standards for granting of such visas.

Increasing the number of investments to the United States, even if an occasional investment did not generate the full ten jobs within two years, would be a greater benefit to the United States, with a larger increase in economic development, than the current level of over-control. It is apparent, however, that USCIS lacks the motivation to fix the problems associated with the EB-5 program, even when encouraged to do so by Congress. This is a disappointing situation, as it is at this time, more than ever, that the United States could benefit from more people seeking to invest large amounts of money into new and distressed

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[220] *See id.*

[221] *See Senate Judiciary Committee Holds Hearing on EB-5 Regional Center Program*, *supra* note 218, at 1983. Statements that the program would not financially burden taxpayers are not entirely accurate: states such as Vermont and Alabama, which have designated their entire states as Regional Centers, have incurred overhead costs in establishing the Regional Centers and funding their operations. *See* Alabama Center for Foreign Investment, About Us, http://www.acfi-alabama.com/about.html (last visited Jan. 8, 2010); Vermont Department of Economic Development, VT EB-5 Regional Center, http://economicdevelopment.vermont.gov/Programs/EB5/tabid/389/Default.aspx (last visited Jan. 8, 2010).

businesses.

The E-2 Treaty Investor program creates some investment in the United States, but does not take the place of a functional and vibrant EB-5 investor visa. The E-2 visas do lead to investment in the United States, but usually on a smaller scale, because the E-2 category has neither a prescribed minimum capital investment nor any job creation requirement (apart from the "marginality" test). The E-2 program allows foreign investors to "test the waters" for a United States investment, but fails to provide any realistic ability for these successful investors to convert their E-2 investment into a long-term investment with legal permanent resident status. While USCIS reasons that it wants "new" capital invested to justify a "green card," both new capital and reinvested capital lead to the creation of new jobs. Successful small businesses should be encouraged to expand by providing the lure of a "green card" when an acceptable level of investment, reinvestment, or turnover is achieved. USCIS would be well served to stop looking at every EB-5 investment as a potential fraud case and to start viewing these investments of foreign capital as opportunities for growth and expansion of the United States economy.[222]

[222] The United States would do well to look closely at the successful model for investor visas used by Canada. That country's openness and flexibility to inward investment after the hand-over of Hong Kong to Chinese administration has resulted in a large, vibrant, and financially successful immigrant community in Vancouver, B.C. and other cities.