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Immigration Options for Start-Ups,
Investors & Entrepreneurs

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Introduction

- ❖ Navigating U.S. immigration law can be daunting for companies unfamiliar with the options, eligibility requirements, and process. Corporate immigration counsel can be a strategic partner to help guide your organization through this complex area.
- ❖ This presentation will provide an overview of the immigration/visa options for companies looking to open operations in, or bring talent to, the United States.

Presentation Outline

- ❖ **B-1 Business Visitor Visas**
 - ❖ What is permitted under the law.
- ❖ **E-1 Treaty Trader & E-2 Treaty Investor**
 - ❖ Options for owners/investors and essential employees.
- ❖ **L-1 (intra-company transferee) and New Office L's**
 - ❖ Established international companies and opening new operations in the U.S.

Presentation Outline

- ❖ EB-5, Immigrant Investor Visa
 - ❖ The Pursuit of Permanent Residence (the “green card”) through investment.
- ❖ Other options for bringing executives and skilled employees into the U.S.
 - ❖ O-1 (extraordinary ability in business).
 - ❖ H-1B, Specialty Occupation Professionals.
 - ❖ H-3 Trainees.

B-1 Business Visitors

- ❖ B-1 Business Visitor Visas are appropriate for situations where someone needs to enter the U.S. for business meetings, attend a conference, to receive training, to negotiate contracts, or for taking orders (for products manufactured outside of the U.S.).
- ❖ The B-1 Visitor should not receive compensation from a U.S. source, should not engage in “productive employment,” and the benefit of the activities should accrue to the company abroad.
- ❖ There are specific activities that might be deemed “work,” but that are approved for B-1 Visitors, such as servicing, repairs and installations of equipment that are governed by after sales service agreements.

B-1 Business Visitors

- ❖ B-1 Business Visitor Visas are also appropriate for investors and entrepreneurs who are coming to the U.S. to set up the initial business operations (i.e. obtain/sign a lease, incorporate, establish bank account, etc.) but who will not receive remuneration from the U.S. and who will not otherwise provide “productive” work.

E-2 Treaty Investors

- ❖ An E-2 Treaty Investor Visa is a nonimmigrant visa that enables a national of a treaty country (a country with which the United States maintains a treaty of commerce and navigation) to be admitted to the United States based on an investment he or she will be controlling while inside the United States.
- ❖ The U.S. and Argentina have had Bi-lateral treaties of commerce and navigation since October 20, 1994.
- ❖ In order to qualify for E-2 Investor Visa: 1) Requisite treaty must exist; 2) Individual and/or business possess the nationality of the treaty country; 3) Applicant has invested or is actively in the process of investing; 4) Enterprise is a real and operating commercial enterprise; 5) Applicant's investment is substantial; 6) Investment is more than a marginal one solely for earning a living; 7) Applicant is in a position to "develop and direct" the enterprise; 8) Applicant, if an employee, is either in a managerial position or possesses essential skills to the firm's operations in the U.S.; and 9) Applicant intends to depart the United States when the E-2 status terminates. Source: 9 FAM 41.51 N1.2

E-2 Treaty Investors

- ❖ Individual and/or Business must Possess the Nationality of the Treaty Country
- ❖ Individuals: The nationality of the individual is determined by the authorities of the country of which the Foreign National claims nationality (i.e. citizenship).
- ❖ National of the treaty country MUST own at least 50% of the business.
- ❖ Foreign Nationals who are also U.S. permanent residents cannot be counted toward determining at least 50% ownership.
- ❖ Business: The nationality of a business is determined by the nationality of the individual owners of that business.
- ❖ The country of incorporation is irrelevant to the nationality requirement for E visa purposes.
- ❖ Both individual and company must satisfy the 50% rule. Source: 9 FAM 41.51 N3.1

E-2 Treaty Investors

- ❖ Individual Applicant Must Invest or be in the Process of Investing
- ❖ Possession and Control of the Funds – The Applicant must demonstrate possession and control of the funds, including the funds already invested in the enterprise (i.e., Savings, gift, inheritance, etc.).
- ❖ Inheritance of a business does not constitute an investment.
- ❖ Source of funds can be either from outside of the USA or inside.
- ❖ Investment Connotes Risk - Foreign National investment must be at risk . If the business goes bad and the funds are not subject to partial or total loss, then it is not an “investment.”
- ❖ Funds must be irrevocably committed. Mere intent to invest, or uncommitted funds in the bank account, or even prospective investment arrangements, entailing no present commitment, will not suffice. Source: 9 FAM 41.51 N8.1-1

E-2 Treaty Investors

QUALIFYING INVESTMENTS

Loans secured by the Investor's own assets, such as a mortgage on his or her real property.

Unsecured loans granted on the basis of the investor's signature.

Cash reserves placed in a business account at the disposal of the business account for purchase of equipment, property, or start-up inventory.

(Note: cash reserves alone, without evidence that the business enterprise has been undertaken, will not satisfy the requirement of an "active" investment.)

NON-QUALIFYING INVESTMENTS

Mortgage debt or other loans secured by the enterprise's assets.

Loan for which the lending institution has recourse against a guarantor in the event of non-payment by the investor.

Cash not held in reserve by the corporation, such as cash held in personal bank accounts.

Rental payments, inventory, purchases and other recurring costs beyond start-up of the enterprise. These costs are assumed to be paid out of the income generated by the enterprise and not part of the investment.

E-2 Treaty Investors

Business Loans and Indebtedness

Q. Does mortgage debt or commercial loans secured by the assets of the enterprise count towards the investment?

A. No, because there is no requisite element of risk. For example, if the business in which the Foreign National is investing is used as collateral, funds from the resulting loan or mortgage are not at risk, even if some personal assets are also used as collateral.

Q. What does count toward the investment?

A. Only indebtedness collateralized by the Foreign National's own personal assets, such as a second mortgage on a home, or unsecured loans, such as a loan on the Foreign National personal signature may be included, since the Foreign National risks the funds in the event of a business failure.

E-2 Treaty Investors

Enterprise must be a real operating commercial enterprise

The enterprise must be real and active commercial enterprise; The enterprise must produce some service or commodity; The enterprise cannot be a paper organization or an idle speculative investment; The enterprise must be for profit, thus, eliminating non-profit organizations from consideration for the E-2 category.

Applicant's investment is substantial

No set dollar figure constitutes a minimum amount of investment to be considered "substantial" for E-2 visa purposes; The investment must be sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and Investment must be proportionally substantial
Proportionality Test: The amount of qualifying funds invested, and the cost of an established business; or If a newly created business, the cost of establishing such a business. Source: 9 FAM 41.51 N10.2

E-2 Treaty Investors

Investment must be more than marginal

The investment must not be solely for the purpose of earning a living for the investor and his or her family. The marginality of an investment enterprise is measured by its capacity to employ U.S. workers other than the investor and his or her family members. Determining if the investment is marginal: Is the business enterprise the type that of necessity, will require employees beyond the investor in order to operate?

Will the business be conducted on a scale that will assure this employment?

Can reliable projections of income be made that show that sufficient funds will be generated beyond a living wage for the investor, such that money will be available to pay salaries to U.S. workers?

E-2 Treaty Investors

Applicant is in a position to "develop & direct" the enterprise

In accordance with Section 101(a)(15)(E)(ii) of the Immigration and Nationality Act (INA), it must be shown that a national (or nationals) of the treaty country, through ownership, or by other means; develop and direct the activities of the enterprise. The type of enterprise being sought will determine how this requirement is applied.

Employer Qualification

In order to qualify to bring an employee into the United States under INA 101(a)(15)(E), several criteria must be met: a) The prospective employer must meet the nationality requirement. If the employer is an individual, the employee must be of the same treaty country. If the employer is a corporation or other business organization, at least 50 % of the ownership must have the same nationality as the treaty country; b) The employer and the employee must have the same nationality; and c) The employer, if not a resident abroad, must be maintaining "E" status in the United States.

E-2 Treaty Investors

If E-2 applicant is an employee: must work in managerial position or must possess essential skills applicable to the firm's operations.

Two classes of employees may be accorded treaty-investor status: 1. Treaty nationals serving in a managerial capacity; and 2. Treaty nationals who serve in technical capacities, requiring special training and qualifications, and who are needed to: Establish the enterprise (start-up); Train or supervise persons serving in technical positions, such as manufacturing, maintenance, or repair technicians; and Continuously monitor and develop product improvement and quality control.

When employees are brought to the U.S. for start-up of the enterprise, it is expected that once start-up has been completed, U.S. workers will be trained to fill these positions.

E-2 Treaty Investors

Factors to determine if the employee is essential

Factors to consider include:

The employee's degree or proven expertise in area of operations;

The uniqueness of the specific skills; The function of the job to which the applicant is destined;

The salary such special expertise will command;

The employees skills need to be indispensable to the success of enterprise;

The availability of U.S. workers.

Factors that are not material as to whether the employee is essential: Knowledge of a foreign culture; Knowledge of a foreign language; or Previous employment with the company.

E-2 Treaty Investors

Applicant intends to depart the United States when the E-2 status terminates

Applicant must have an intent to depart the U.S. upon termination of status. Applicant does not need to keep a separate residence in a foreign country. Applicant may sell his/her residence and move household effects to the U.S.

Spouses and Children of E-2 Investor

The spouse of an E-2 investor is entitled to derivative status in the same classification as the principal applicant.

The spouse of an E-2 investor can apply for work authorization after entering the U.S. with an E-2 visa.

The children under 21 can also accompany their parents to the U.S. on an E-2 visa. The children can attend school in the U.S. in E-2 status.

E-1 Treaty Trader

An E-1 Treaty Trader Visa is a nonimmigrant visa that enables a national of a treaty country (a country with which the United States maintains a treaty of commerce and navigation) to be admitted to the United States based on trade conducted by the E-1 Trade enterprise substantially between the “home” country and the United States.

In order to qualify for E-1 Investor Visa: 1) Requisite treaty must exist; 2) Individual and/or business possess the nationality of the treaty country; 3) the Trade must be “principally” between U.S. and Treaty country (more than 50% of volume of international trade.

Criteria very similar to E-2 but based upon international trade.

L-1 Intra-company Transferee

The L-1 “intra-company transferee” Visa is available to a foreign national who is being transferred from an employer outside the US, to a related (branch, affiliate, parent, subsidiary, etc.) employer in the US. In order to qualify, the employee must have worked for a related company outside the US for at least 1 year in the last 3 years, prior to coming to the US.

L-1A Executive/Manager

A foreign national employee who will be transferred to the US in an executive or managerial capacity may obtain an L-1A Visa. It is initially issued for a 3 year period, and may be extended up to a total of 7 years. An intra-company manager/executive has greater options for green card processing, as long as he/she has 1 year of executive/managerial experience with the company abroad prior to coming to the US.

Generally, the L-1A manager will need to manage professional subordinate employees, but “functional manager” cases can also be approved. Time spent out of the US while on an L-1A, can be added to the time an L-1A employee can work in the US (referred to as recapture).

L-1 Intra-company Transferee

L-1B Specialized Knowledge

A foreign national employee who will be transferred to the US to fill a role which requires “specialized knowledge” of the organization’s products, services, research, equipment, proprietary processes or other functions, and has gained the specialized knowledge outside the US with a related company, may obtain an L-1B Visa.

The L-1B Visa may be granted for an initial 3 year period and extended up to a total of 5 years. The specialized knowledge must be uncommon to the organization and cannot include skills that may be easily acquired by an entry-level US-based employee. L-1B applications have experienced extensive additional scrutiny in the past few years by USCIS. As a result, both new L-1B applications, and extensions, may not necessarily be approved, even for situations which clearly fit this test.

L-1 Intra-company Transferee

“New Office” L-1 Petitions

Companies that decide to set up a new US company would need to file a “new office” L-1 petition with USCIS, for any L-1 workers (L-1A or L-1B) who need to come to the US during the US entity’s first year of operation.

Extensive information is needed to prove that a US company has been set up to qualify for the initial new office L-1. Approvals are given for only 1 year. To apply for time beyond the additional 1 year period, extensive information must be provided to prove that the company is in existence and an ongoing entity.

To be exempt from this new office L-1, the US company must be operational for more than 1 year, and not just incorporated for over 1 year. In addition, companies that purchase an appropriate stake in an existing US company, which itself had been in existence for over 1 year, do not have to file a new office L-1. In this scenario, their employees can apply for L-1s as soon as the purchase is complete.

EB-5 Immigrant Investor

The Immigrant Investor Program, commonly referred to as the EB-5 Program, was created by the U.S. Congress to stimulate the U.S. economy through job creation and investment by foreign investors.

Foreign investors must meet specific United States Citizenship and Immigration (USCIS) requirements to obtain their permanent residency through the [EB-5 visa program](#). In general, the investor must meet capital investment amount requirements, job creation requirements, and must ensure that the business receiving the investment qualifies for the EB-5 program. EB-5 visa applicants, their spouse, and their children under 21 will obtain their permanent residency green card once all requirements have been successfully met and approved by the USCIS.

EB-5 Immigrant Investor

Required EB-5 Investment Amount

EB-5 visa applicants are typically required to make either a \$500,000 or \$1 million capital investment amount into a U.S. commercial enterprise. The EB-5 investment can take the form of cash, inventory, equipment, secured indebtedness, tangible property, or cash equivalents and is valued based on U.S. dollar fair-market value.

The minimum amount of capital required for the EB-5 visa program may be decreased from \$1 million to \$500,000 if the investment is made in a commercial entity that is located in a [Targeted Employment Area \(TEA\)](#). The EB-5 project must either be in a rural area or in an area that has high unemployment in order to qualify for TEA designation.

High unemployment areas are geographic locations that have an unemployment rate that is at least 150 percent of the national unemployment rate at the time of the EB-5 investment. Rural areas are geographic regions that are outside of a city that has a population of 20,000 or more. Rural areas can also be geographic regions that are outside of what the U.S. Office of Management and Budget has designated as metropolitan statistical areas.

EB-5 Immigrant Investor

EB-5 Job Creation Requirements

The USCIS requires that EB-5 investments result in the creation of 10 full-time jobs for U.S. workers. These jobs must be created within the 2 year period after the investor has received their conditional Permanent Residency. In some cases the investor must be able to prove that their investment led to the creation of direct jobs for employees who work directly within the commercial entity that received the investment. However, the EB-5 investor may only have to show that 10 full-time indirect or induced jobs were created if the investment was made in a Regional Center. Indirect jobs are those created in businesses that supply goods or services to the EB-5 project. Induced jobs are jobs created within the greater community as a result of income being spent by EB-5 project employees.

EB-5 Immigrant Investor

Capital Investment Requirements

Capital means cash, equipment, inventory, other tangible property, cash equivalents and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair-market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act. Required minimum investments are:

General. The minimum qualifying investment in the United States is \$1 million.

Targeted Employment Area (High Unemployment or Rural Area). The minimum qualifying investment either within a high-unemployment area or rural area in the United States is \$500,000.

- ❖ A **targeted employment** area is an area that, at the time of investment, is a rural area or an area experiencing unemployment of at least 150 percent of the national average rate.
- ❖ A **rural area** is any area outside a metropolitan statistical area (as designated by the Office of Management and Budget) or outside the boundary of any city or town having a population of 20,000 or more according to the decennial census.

Other Immigration Options

Other immigration/visa options utilized by businesses to transfer talent to the U.S., or to employ non-U.S. talent, include: O-1 visa; H-1B visa; and H-3 Trainee visas.

- ❖ O-1 visas are for individuals who have international recognition for their outstanding work.
- ❖ H-1B Specialty Occupation visas are for individuals who have a Bachelor's degree (or equivalent) in a field that is required of their position in the U.S. (i.e. a computer technology related position and the individual has a Bachelor's degree in computer engineering, computer science, engineering or mathematics).

Other Immigration Options

- ❖ H-1B Specialty Occupation visas are limited by an annual “cap” on the amount that are issued each year.
 - ❖ 65,000 for Bachelor’s H-1B’s.
 - ❖ 20,000 for allotted for individuals who obtained a Master’s or higher degree from a U.S. institution.

H-3 Trainee Visas are for individuals who will receive training in the U.S. and that training will benefit them in their career – outside of the U.S.

- ❖ Proposed training not available in home country;
- ❖ Beneficiary not placed in a position which the company regularly employs U.S. workers;
- ❖ No productive employment unless incidental to training.

Visa and Immigration Options

QUESTIONS?



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