

The Treaty Investor or E-2 visa is a nonimmigrant visa category available to nationals of countries with which the United States has a treaty or bilateral agreement who make a qualifying investment in the United States. The E-2 does not make the investor a lawful permanent resident with a "green card", but it does allow an investor to remain indefinitely in the United States as long as a qualifying investment exists. Consequently, this visa category is the next best thing to becoming a resident and is the visa of choice for persons who do not qualify for residency, for persons who only want the freedom to come and go from the United States with ease, or for persons who would like to retire in the United States.

IS ANY FOREIGN NATIONAL ELIGIBLE?

No. As previously mentioned, the visa is only available to nationals of countries with which the United States has a treaty or bilateral agreement which makes the visa available. An important point here is that, with the exception of citizens from the United Kingdom, as long as an investor is considered a national of a qualifying country the regulations do not require that the investor reside in that country.

WILL AN INVESTMENT IN REAL ESTATE QUALIFY FOR A TREATY INVESTOR VISA?

Sometimes. To qualify, the investment must be in an active commercial enterprise. Speculative investments in real estate, regardless of the amount spent, do not qualify because of the passive nature of the investment. On the other hand, an investment in real estate associated with plans to develop the real estate will qualify. In addition, commercial or income producing real estate purchases should qualify as active investments for Treaty Visa purposes. It also bears mentioning that money spent buying a personal residence in the United States will not be considered part of the investment, although the value of the U.S. home will be considered part of the investor's assets after making the investment.

There is a common misperception that an investment in rental properties does not qualify for a Treaty Investor visa. The reality is that as few as two rental properties, so long as the investor is actively involved in the management of the properties, will qualify. (Note: The investor cannot reside in any of the rental properties.)

CAN A SINGLE INVESTMENT BE USED BY MORE THAN ONE FOREIGN NATIONAL?

Yes, but this will be limited to two (2) foreign nationals. The limitation arises from the fact that the investor must be able to show control of the investment. This has been interpreted to mean ownership of at least 50% of the enterprise. As such, a single investment would be limited to two 50/50 foreign owners. As to evidence of control, this is resolved by structuring the enterprise so that each foreign investor is able to exercise at least negative control over the enterprise. In addition to owning at least 50% of the stock of a corporation, it is recommended that the investor be named a director and officer of the corporation.

IS THERE ANY LIMIT TO THE USE OF JOINT VENTURES, PARTNERSHIPS OR CORPORATIONS?

Treaty investments can be structured using joint ventures, partnerships, and corporations, as well as sole proprietorships. These structures can be all foreign or a mix of foreign and United States owners. In addition, offshore structures designed to maximize tax savings can be used as long as the ultimate beneficial ownership can be traced to the treaty national. Regardless of the structure used, the requirements of the visa must still be satisfied. If the investment has more than one owner it is recommended that a corporation be used. The reason is that it is very easy, by means of a stock certificate, to show the percentages of ownership in a corporation. With other forms of ownership it can be more difficult to prove that an investor has a controlling interest in the business. By definition, limited partnerships do not qualify for Treaty Investor Visas. The reason is that a limited partner will be unable to show control or ownership of at least 50% of the enterprise.

HOW MUCH MUST BE INVESTED?

Under the current guidelines there is no minimum amount which must be invested. What must be shown is that the amount invested is at least the amount necessary to adequately fund the intended investment. As such, the nature of the investment will usually determine how much must be invested. Investments made through an arms length purchase of an existing business are easier to qualify since the purchase price will determine the fair market value of the enterprise. Although there is no minimum amount that must be invested, the smaller the investment the greater the amount of scrutiny one can expect at the time application is made for the status or visa.

CAN ANY PART OF THE INVESTMENT BE FINANCED?

Yes. Financing is permitted, but there are limits on how much can be financed. Financing is defined by the regulations as any money borrowed that is secured by the assets of the investment enterprise. For that reason, there is no limit on financing that is in the name of the investor or on financing that is either unsecured or solely secured by assets other than the assets of the investment enterprise.

If there are going to be loans financed in the name of the enterprise and/or secured by the assets of the investment enterprise, the following limits will probably apply:

- (a) for investments with a total value less than \$100,000, the limit on financing secured by the investment will probably be 10%.
- (b) for investments with a total value between \$100,000 and \$500,000, the limit on the financing secured by the investment will probably be 25%.
- (c) for investments with a total value between \$500,000 and \$1,000,000, the limit on financing secured by the investment will probably be 40%.
- (d) for investments with a total value between 1 million and 10 million, the limit on financing secured by the investment will probably be 50%.
- (e) for investments with a total value between 10 million and 100 million, the limit on financing secured by the investment will probably be 70%.
- (f) for investments of 100 million or more the limit on financing will probably be 90%.

LET ME STRESS AGAIN THAT THE ABOVE LIMITS ONLY PERTAIN TO FINANCING SECURED BY A LIEN ON THE ASSETS OF THE INVESTMENT ENTERPRISE.

WHEN MUST THE INVESTMENT BE MADE?

The law requires that an investor's funds be committed prior to the approval of the E-2 visa or status. A mere promise to invest, even if backed by a contract, will not be enough. A common method of resolving this problem is to close in escrow with instructions to the escrow agent to disburse the funds upon approval of the visa or status. This approach protects the investor in case the visa is not issued, but satisfies the law since the investor no longer has control over the money.

WHAT HAPPENS IF AN INVESTMENT IS MADE AND THE VISA IS NOT ISSUED?

The investment will not be affected, however, the foreign national will not be able to remain in the United States for the purpose of monitoring the investment. Problems like this can be avoided by proper planning and legal advice prior to making the investment. If the investor is purchasing an existing business, the laws permit a closing in escrow. This means the investor tenders the full purchase price and the seller of the investment signs all of the documents transferring title, but the money and the documents are all kept by an escrow agent who will only release them if the investor visa or status is granted. If it is not granted, the transaction is deemed null and void and the investor would have all of the investment funds returned.

It is strongly recommended that no purchase contract or other legal commitment be signed until the terms of the investment have been reviewed and approved by an attorney who specializes in Treaty Investor (E-2) visas.

WHAT ABOUT THE INVESTOR'S FAMILY?

An investor's immediate family (spouse and unmarried children under the age of 21) will be able to accompany the investor to the United States. The investor and all of the investor's family members will be automatically authorized to attend school in the United States. The investor's spouse can also apply for employment authorization. While the investor will only be permitted to work for the investment enterprise, the investor's spouse, once he/she obtains employment authorization, can work anywhere.

CAN AN INVESTOR BRING EMPLOYEES TO THE UNITED STATES?

An investor will be allowed to bring executive/managerial employees and employees deemed essential to the success of the investment enterprise. All of the employees, however, must be nationals of the same treaty country as the investor.

HOW MUCH TIME MUST AN INVESTOR DEVOTE TO THE MANAGEMENT OF THE INVESTMENT?

There is no requirement that an investor spend a certain amount of time managing their investment. Some investments, like a manufacturing facility or a restaurant, may require a good deal of the investor's time. Other investments, like the management of rental properties require much less of an investor's time. This is

another reason why Treaty Investor status is popular with retirees, they can leave you with plenty of time for golf and fishing.

ARE THERE ANY OTHER REQUIREMENTS?

Yes, these deal with the estimated profitability of the investment, or the number of employees the investment will require. Although this requirement is usually not difficult to satisfy, it is best to determine that it can be satisfied prior to making the investment. Quite often the investment can be made but must be restructured to accommodate this requirement.

Essentially, the investor will need to show that the investment is not designed to merely provide a living income. This is done in **one** of two ways: (1) by providing information showing that the investment will, within five years, return net profits in excess of the investor's living income requirements; or (2) by showing that the investment, even if only providing a living income, will within five years have a positive economic impact on the local economy. If an investment is going to take a few years to generate enough income to support the investor, it may be necessary for the investor to show that he/she has other income or assets they can use to live on until the investment becomes profitable.

HOW LONG DOES IT TAKE TO GET THE VISA OR STATUS?

If the investor is legally in the United States it is possible to make application with the U.S. Citizenship and Immigration Services for a change of status to E-2. This change of status can be accomplished in as little as 15 calendar days. If application is going to be made through a U.S. Consulate for issuance of a Treaty Investor or E-2 visa, how long it takes will depend on the particular United States Consulate. Most take about 30-45 days, but some can take up to 6-12 months. For this reason we recommend that whenever possible an investor obtain a change of status to E-2 and make application for the visa while they are in the United States in the E-2 status.

DOCUMENTS GENERALLY REQUIRED

1. Copy of entire Passport, including blank pages, for every person who will receive a visa.
2. Six months of bank statements to show control over the money which will be used for the investment.
3. Once the money is sent to the United States, copies of wire transfers.
4. Copy of bank statements for United States bank accounts to show deposits.
5. Resume (CV) for the investor.
6. Copies of any checks written in connection with payments required for the investment.
7. Evidence of the formation of the United States corporation.
8. Copy of lease for premises.
9. Copies of any related contracts for such things as equipment and construction, if applicable.
10. Copies of any advertisements related to the business.
11. Evidence of deposits paid to utility companies by the business.
12. Evidence of employees.
13. Copies of stock certificates showing ownership.
14. Breakdown of monthly living income requirements in the United States. Only "hard" or essential living income requirements need be listed.
15. 60 month income/expense projections for business.
16. Projected income for investor for years 1 through 5.
17. Evidence of assets remaining after making the investment. This can include money left in the bank, income from other sources (pensions, etc.), or other assets such as real estate or business interests back home.
18. If there is any financing involved, copies of promissory notes.
19. If part of the investment funds is a gift, a gift letter showing the gift and that the investor is not required to repay the amount gifted.
20. A detailed business plan for the business.
21. Copies of any licenses issued to the business.

22. Copies of the birth certificates of any children accompanying the investor to the United States.
23. Copy of the marriage license and copies of the final decrees of divorce for any previous marriages entered into by the investor and his/her spouse.

Regarding any supporting documentation, originals are not required. Copies, including faxed copies are acceptable. Any document not in English must be submitted with a complete English translation.