

Investing in America through the E-2 and EB-5 Visa Categories

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For the affluent and the entrepreneurial, the United States remains one of the world's premier immigration destinations. This article outlines two strategies – the E-2 "Treaty Investor" visa¹ and the EB-5 "Employment Creation" green card – that foreign investors may pursue to obtain a variety of privileges in the United States. Investment in a U.S. enterprise may afford the right to spend prolonged periods or immigrate with their immediate families; the right to work; for the E-2 nonimmigrant, the freedom to choose to be taxed as a U.S. resident or nonresident; and, for the EB-5 immigrant, the freedom to retire on a full- or part-time basis and the ability to qualify for U.S. naturalization.

Both the E-2 and the EB-5 categories, however, are studded with complex rules and intricate interpretations, and administered by government officials of varying temperament, talent and expertise. Moreover, there may be more appropriate paths to achieve comparable immigration benefits based on the individual's particular background, education, career history, accomplishments, business activities, or family relationships.

E-2 Visas: The Basics

The authority to issue nonimmigrant E-2 treaty investor visas derives from treaties of friendship, commerce and navigation or bilateral investment that the United States has entered into with over 70 countries of the world² and from implementing legislation found at Immigration and Nationality Act (INA) § 101(a)(15)(E)(ii). The INA allows a citizen of an E-2 treaty country to enter the United States with one's

¹ The discussion of the E-2 visa in this article focuses solely on the benefits to affluent individuals and families who are able and willing to invest capital in a U.S. business enterprise. It does not cover the benefits and obligations applicable to large multi-national enterprises (MNEs) and their employees who may also qualify under the E-2 visa category – a separate topic worthy of a different article. The U.S. Department of State (DOS or State) does not separately report statistics on the issuance of E-2 visas to MNE employees from the E-2s issued to individual investors. Instead, data on these distinct subcategories of E-2 visa are lumped together. Total E-2 visas issued to E-2 principal beneficiaries, spouses, and children have remained constant, however, over the last four fiscal years, ranging between roughly 28,000 to 29,000 visas annually. See U.S. Dep't of State, "Report of the Visa Office 2009, Nonimmigrant Visas Issued by Classification (Including Crewlist Visas and Border Crossing Cards): Fiscal Years 2005 – 2009," [http://www.travel.state.gov/pdf/FY08-AR-TableXVI\(B\).pdf](http://www.travel.state.gov/pdf/FY08-AR-TableXVI(B).pdf). (All hyperlinks in this article are current as of June 12, 2010.)

² The list of treaty countries is accessible at http://travel.state.gov/visa/fees/fees_3726.html.

spouse and minor children (under age 21) for up to two years at a time if he or she is coming “solely to develop and direct the operations of an enterprise in which [the individual] has invested, or of an enterprise in which [he or she] is actively in the process of investing, a substantial amount of capital.”

Only a citizen of a treaty country (including dual nationals who are not U.S. citizens) can qualify as the E-2 investor or “principal,” but the spouse and children of the principal may hold a different nationality. If other requirements are satisfied, two citizens of different treaty countries may qualify for separate E-2 visas as long as they each hold an equal (50%) share of the U.S. treaty investment enterprise.

The State Department succinctly describes the basic E-2 visa requirements³ [with the authors' comments provided in bracketed and italicized text]:

- The applicant must be a national of a treaty country [*although the U.S. investment may be a legal entity distinct from the individual*].
- The investment must be substantial. [*Substantiality depends on the nature of the business; a consulting business will require less of an investment than a manufacturing plant.*] It must be sufficient to ensure the successful operation of the enterprise. The percentage of investment for a low-cost business enterprise must be higher than the percentage of investment in a high-cost enterprise. [*The E-2 investor must hold at least 50% of the investment, and possibly a higher percentage in a smaller business.*]
- The investment must be a real operating enterprise. Speculative or idle investment [*e.g., undeveloped land purchased solely for the purpose of enjoying potential future appreciation in value*] does not qualify. Uncommitted funds in a bank account or similar security are not considered an investment.
- The investment may not be marginal. It must generate significantly more income than just to provide a living to the investor and family, or it must have a significant economic impact in the U.S. [*Economic impact is shown through submission of a detailed business plan offering extensive market analysis and metrics, and substantiating the reasons why the entity projects to hire U.S. employees, or generate substantial profits, usually within a five-year term.*]
- The investor must have control of the funds, and the investment must be at risk in the commercial sense. [*A contingency clause in the purchase agreement dependent on issuance of the E-2 visa is permitted.*] Loans secured with the assets of the investment enterprise are not allowed. [*Funds derived from an equity line or mortgage on the investor's home or unencumbered funds are permissible sources of the investment.*]
- The investor must be coming to the U.S. to develop and direct the enterprise. [*This often is interpreted to mean that the investor, beyond controlling the U.S. treaty entity through 50% or greater stock ownership, must have some relevant education or experience in the proposed business activity or a track record of entrepreneurial success.*] If the applicant is not the principal investor, he or she must be employed in a supervisory, executive, or highly specialized skill

³ See U.S. Dep't of State, *Treaty Traders and Treaty Investors*, accessible at http://travel.state.gov/visa/temp/types/types_1273.html.

capacity. Ordinary skilled and unskilled workers do not qualify. [Typically, the investor will also hold one or more executive posts in the U.S. treaty enterprise.]

E-2 visas may be issued for up to five years and may be renewed as long as the U.S. treaty enterprise is maintained, does not become marginal, and the immigration status of the E-2 entrant has not expired or otherwise been violated. Moreover, unlike other nonimmigrant visa categories, the E-2 visa is not subject to an annual numerical quota or maximum aggregate period of physical presence in the United States.

The E-2 category grants immigration benefits for an unlimited number of years, as long as E-2 business activities continue and immigration formalities are honored, and thus offers benefits that resemble in many ways the coveted “green card” (lawful permanent resident or LPR) status. Thus, the E-2 visa offers advantages over LPR status, except for the benefits that inhere with green card status, namely, the right to: remain permanently; engage in open-market employment (i.e., work distinct from the U.S. treaty investment enterprise); retire or cease employment (and still be allowed to remain in the United States); and qualify for U.S. naturalization. The spouses of E-2 visaholders can obtain open-market employment authorization.

E-2 Visas: Best Practices

- Know the sources of legal authority. Beyond the regulations,⁴ study the detailed guidance in the State Department’s Foreign Affairs Manual.⁵
- Partner with experts. In addition to an immigration lawyer, the E-2 professional-services team should typically include a business plan writer, a financial advisor, a business broker (if buying an existing business), a corporate lawyer, and a tax practitioner with expertise in U.S. and the treaty country’s tax laws, tax treaties and totalization agreements.
- Guide the investor on the optimal structure for both the investment and the U.S. legal entity. The U.S. investment cannot be in the form of an irrevocable trust or a Subchapter S corporation (unless the investor is already a U.S. resident for federal tax purposes), but may be a C corporation, a limited liability company or a partnership. Tiers of intervening foreign entities may be incorporated outside of treaty countries as long as the ultimate owner at the top tier is a treaty national.
- Consider whether the prospective investor should apply for a B-1 intending E-2 visa rather than entering as a WB (waiver business) 90-day entrant under the visa waiver program. It may take more than three months for the investor to identify the best investment opportunity.
- Ascertain local requirements. U.S. consular posts often apply varying interpretations of E-2, and B-1 intending E-2, visa eligibility.

⁴ See 8 C.F.R. § 214.2(e)(2).

⁵ See U.S. Dep’t of State, 9 Foreign Affairs Manual § 41.51.

EB-5 Green Cards: The Basics

Congress created the fifth employment-based preference (EB-5) immigrant visa category in 1990 for immigrants seeking to enter to engage in a commercial enterprise that will benefit the U.S. economy and create or save at least 10 full-time jobs.⁶ The basic amount required to invest is \$1 million, although that amount is reduced to \$500,000 if the investment is made in a “targeted employment area,” defined as a rural area or an area with unemployment of 150% of the national average.⁷

The EB-5 category contains rigorous and complicated requirements that United States Citizenship and Immigration Services (USCIS) adjudicators have had difficulty administering in a consistent, efficient and predictable fashion. Partly for this reason, the annual limit of 10,000 EB-5 green cards has never been reached. Even though relatively few people have used the EB-5 category, EB-5 participants have invested over \$1 billion in a variety of U.S. businesses.⁸

In 1992, to stimulate interest in the EB-5 program, Congress enacted the EB-5 regional center pilot program. The pilot program allows public and private entities to apply to USCIS for regional center designation to develop qualifying investments for foreign investors. Once designated, immigrant investors can qualify under the EB-5 program by making a qualifying investment in a project sponsored by an approved regional center. Approximately 100 regional centers exist.⁹

One advantage regional centers have over the regular EB-5 program is that they can count both direct and indirect jobs. By contrast, people who invest in their own companies can only count the direct jobs they create. Partly for that reason, and partly because many potential investors don't want to run their own companies, over 90% of all EB-5 petitions are filed through regional centers.

Whether a person invests in his or her own company or through a regional center, they first file a petition with USCIS. The petition must show that the person invested \$500,000 or \$1 million in a qualifying company. EB-5 investors must prove that they earned their money legally.¹⁰ Investors must also submit a detailed business plan showing how they will create 10 direct jobs within two years.¹¹ Finally, EB-5 investors must place their money “at risk” in the company; it cannot sit idly in a corporate bank account.

⁶ INA § 203(b)(5), 8 U.S.C. § 1153(b)(5). For a detailed treatment of the EB-5 immigrant investor category, see 3 Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, *Immigration Law and Procedure* § 39.07 (rev. ed. 2010).

⁷ INA § 203(b)(5)(C)(ii), 8 U.S.C. § 1153(b)(5)(C)(ii).

⁸ U.S. Government Accountability Office, No. GAO-05-256, *Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors* (Apr. 2005), <http://www.gao.gov/new.items/d05256.pdf>.

⁹ See <http://www.uscis.gov/eb-5centers>.

¹⁰ See, e.g., Stephen Yale-Loehr & Christopher Repole, “Proving Lawful Source of Funds,” <http://www.millermayer.com/Immigration/EB5Investors/SourceofFunds/tabcid/159/Default.aspx>.

¹¹ *Matter of Ho*, 22 I. & N. Dec. 206 (Assoc. Comm'r, 1998).

Upon approval of the petition, the investor then applies for the green card, either through an immigrant visa application overseas or an application to adjust status in the United States. An investor first receives a conditional green card, valid for two years. At the end of the two years the investor must file another petition with USCIS proving that the jobs really were created and that the money really was at risk.¹² Once that petition is approved, the investor receives a permanent green card.

EB-5 Green Cards: Best Practices

- It can be hard to determine whether a potential EB-5 investment will create enough jobs in two years. The investor should engage competent investment advisors to perform due diligence on the proposed regional center project and the job creation estimates.
- In addition to financial due diligence, arrange for an immigration due diligence on any regional center project. Various web sites offer immigration due diligence checklists.¹³
- Qualifying a person for EB-5 status is one of the most complicated subspecialties in immigration law. A sophisticated team with knowledge of immigration, corporate and tax law are all required. Be sure that an investor deals with experienced EB-5 program advisors and that the regional center provides investor protections and disclosures under state and federal securities law.¹⁴

EB-5 Green Cards v. E-2 Visas: Pros and Cons

- E-2 visa holders can take steps to qualify as nonresidents of the United States for federal income tax purposes. By contrast, EB-5 green card holders are considered U.S. residents for tax purposes and must pay taxes on their worldwide income. Moreover, people who have had green card status for eight of the last 15 tax years are subject to a mark-to-market income tax if they surrender their green cards, even if the individual's property holdings have not been sold or transferred.
- E-2 visa holders can invest whatever amount of money is needed for their investment. Usually it is over \$100,000. EB-5 investors must invest \$500,000 or \$1 million.
- E-2 visa holders must prove their continued investment is not "marginal," meaning that they have other income to live on. By contrast, EB-5 holders have no such requirement.
- E-2 visa holders need not create a set number of jobs (although job-creation is helpful to show that the E-2 investment is not marginal). EB-5 investors must create or save at least 10 jobs.

¹² See, e.g., Kristal Ozmun & Stephen Yale-Loehr, "I-829 EB-5 Petitions: Evidence of Job Creation in the Regional Center Context," <http://tinyurl.com/3yadrgu>.

¹³ See, e.g., Miller Mayer, Due Diligence Questions for Regional Centers, <http://tinyurl.com/2dm37h4>.

¹⁴ See generally Jennifer Mercier Moseley, Angelo A. Paparelli, Ladd W. Mark & Carolyn Lee, *The Relevance of U.S. Securities Laws to Immigrant Investors, EB-5 Regional Centers and Their Advisors*, 14 Bender's Immigr. Bull. 938 (Aug. 1, 2009).

- E-2 visa holders either must invest in the company or be an executive or supervisor or have essential skills. EB-5 investors can be limited partners, with only limited duties involving corporate policy or management.
- Children of E-2 visa holders can be in the United States, but may only stay in E-2 status until age 21 and may have to pay out-of-state tuition to go to college. Children of EB-5 investors are considered U.S. residents and therefore may qualify for in-state tuition more easily.

Conclusion

Scaling the investor visa provisions of U.S. immigration law can be rough climbing. Whether through investment or another strategy, the prudent émigré or long-term nonimmigrant to America will enlist a qualified sherpa, in this case, an experienced immigration lawyer, to help avoid or minimize legal impediments, bureaucratic underbrush, and other dangers. As prior adventurers have learned, the prize can be well worth the journey.