



Glenn M. Cooper

GrayRobinson, P.A.
333 S.E. 2nd Avenue, Suite 3200
Miami, Florida 33131
305-416-6880
glenn.cooper@gray-robinson.com

401 East Las Olas Blvd., Suite 1000
Fort Lauderdale, Florida 33301
954-713-7822

The E-1 Treaty Trader & The E-2 Treaty Investor Visa

United States immigration laws provide nonimmigrant visa status for a national of a country with which the United States maintains a treaty of commerce and navigation. The E Treaty Visa applies to a national of foreign treaty country who is coming to the United States to carry on substantial trade, including trade in services or technology, principally between the United States and the treaty country (E-1 visa), or to develop and direct the operations of an enterprise in which the national has invested, or is in the process of investing a substantial amount of capital (E-2 visa).

Countries with Treaties for E-1 Visas

Argentina, Aruba, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brunei, Canada, China (Taiwan), Colombia, Costa Rica, Croatia, Denmark, Estonia, Ethiopia, Finland, France, Germany, Gibraltar, Greece, Honduras, Ireland, Israel, Italy, Japan, Korea, Latvia, Liberia, Luxembourg, Macedonia, Mexico, Netherlands, Netherlands Antilles, Norway, Oman, Pakistan, Paraguay, Philippines, Serbia Montenegro, Slovenia, Spain, Suriname, Sweden, Switzerland, Thailand, Togo, Turkey, U.K., Wallis and Futura Islands, and Western Sahara.

Countries with Treaties for E-2 Visas

Argentina, Armenia, Aruba, Australia, Austria, Bangladesh, Belgium, Bosnia and Herzegovina, Bulgaria, Cameroon, Canada, China (Taiwan), Colombia, Congo, Costa Rica, Croatia, Czech Republic, Egypt, Ethiopia, Finland, France, Germany, Gibraltar, Grenada, Honduras, Iran, Ireland, Italy, Japan, Kazakhstan, Korea, Kyrgystan, Liberia, Luxembourg, Macedonia, Mexico, Moldova, Morocco, Netherlands, Netherlands Antilles, Norway, Oman, Pakistan, Panama, Paraguay, Philippines, Poland, Romania, Senegal, Serbia Montenegro, Slovakia, Slovenia, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Thailand, Togo, Tunisia, Turkey, U.K., Wallis and Futura Islands, and Western Sahara.

Qualifying Under the Treaty (Treaty Company's Ownership)

Company or individual engaging in investment in the U.S. must have the same nationality as the treaty country:

- The "nationality" of the company engaging in investment is the nationality of those persons who own at least 50% of the stock of the corporation. The place of incorporation or principal place of business is not relevant to determining nationality.
- The "nationality" of the persons owning the corporate stock is their country of citizenship.

Nationality of the Employee or Principal

The principal trader or investor (the primary treaty alien) and employees of the treaty enterprise (the employee treaty aliens) must have the same nationality as the treaty enterprise.

Special Requirements for Traders

A person may be issued an E-1 Treaty Trader visa if:

- The individual or the firm has the nationality of the treaty country (at least half of the company must be owned by a national of the treaty country).
- There must be substantial trade (more than 50 percent) between the U.S. and the country of nationality. Trade includes the exchange, purchase or sale of goods or services or the transfer of technology.
- The individual is either the principal trader, who is coming to the U.S. to engage in substantial trade, or an executive, manager or employee with special skills essential to the company.

Special Requirements for Investors

Treaty-investor status depends first on three things:

1. A treaty between the United States and the country of which the treaty enterprise is a "national."
 2. At least 50% ownership of the investing enterprise by nationals of the treaty country.
 3. Citizenship in the treaty country by principal investors and enterprise employees seeking admission through the treaty enterprise.
- **Active Investment**
The investor must make an irrevocable commitment of funds that represents an actual, active investment.
 - **Substantial Investment**
The investment must be substantial, taking into account only those financial transactions in which the investor's own resources are at risk.
 - **Creation of Jobs**
The investment cannot be marginal in nature, that is, one which will only support the investor and his or her family; in most cases it should create job opportunities for U.S. workers.
 - **Essential Role in Enterprise**
The person for whom treaty-investor status is sought must fill a key role with the company, either as the investor who will develop and direct the investment, or as a qualified manager or specially trained and highly qualified employee necessary for the development of the investment.

What Is An Active Investment?

A qualifying investment must be "active"; that is, the business enterprise underlying the investment must represent a real operating enterprise productive of some service or commodity.

What Is a "Substantial" Investment?

No absolute test can be applied in determining whether or not an investment is substantial. The government uses an elaborate series of tests to evaluate whether or not the "substantiality" requirement has been met. These tests are quite complex.

The Amount of the Investment

USCIS and State Department have reconfirmed that there is no minimum dollar amount necessary in order for the investment to be considered substantial. In reaching this conclusion, the government agencies approved an investment of well under \$50,000 in a service business—an automotive design firm that supplied skilled designers to U.S. auto manufacturers on a consultancy basis. This ruling clearly opens the E-2 category to investments in service enterprises requiring very little capital for start-up expenses, since the principal "investment" in the enterprise is the knowledge and skills of the employees.

In order for an investment to be considered substantial, it must meet one of two tests:

- It must be proportional to the total value of the particular enterprise in question (a test usually applied to investment in existing businesses), or
- It must be an amount normally considered necessary to establish a viable enterprise of the type contemplated (a test normally applied to new businesses).

Types of Financial Transactions Making Up the Investment

Not all financial transactions incurred in setting up the business enterprise can be counted toward calculating the amount of the investment. As noted, mere possession of uncommitted funds in a bank account in no way indicates that an investment has even been made.

Even when an investment has clearly occurred, only those transactions in which the alien is personally at risk in the event of business failure can be counted. Following is a listing of qualifying and non-qualifying investments under State Department guidelines.

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 for purchase of equipment, property, or start-up inventory. (Remember, cash reserves alone, without evidence that the business enterprise has been undertaken, will not satisfy the requirement of an "active" investment.)
- Value of purchased equipment and property.

Non-qualifying Investments

- Mortgage debt or other loans secured by the enterprise assets.
- Loans for which the lending institution has recourse against a guarantor in the event of nonpayment 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 the start-up of the enterprise. Such costs are assumed to be paid out of income generated by the enterprise and are not a part of the investment attributable to the investor.

What Is a "Marginal" Investment?

No explicit requirement exists that an investment create employment for U.S. workers. This requirement is read into another requirement—that the investment not be marginal; that is, it must not be solely for the purpose of earning a living for the investor and his or her family. It is therefore important to be able to affirm, and to demonstrate, that the investment will create jobs for U.S. workers.

What Constitutes an "Essential Role" In the Enterprise?

As already noted, both the principal investor and certain employees can obtain treaty-investor status.

Principal Investors

In order for one of the investors to enter the U.S. as a treaty investor, however, he or she must be responsible for the development and direction of the investment.

This is obviously the case when the investor owns the whole enterprise, but not necessarily true when there is more than one investor.

Employees of the Investing Enterprise

Two classes of employees may be accorded treaty-investor status:

- Treaty nationals serving in a managerial capacity.
- 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.
 - continuously monitor and develop product improvement and quality control.

In effect, the employees must be essential for the company's operation. A key aspect of determining how essential an employee is to the operation is whether U.S. workers have the necessary skills to fill the positions

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. The U.S. government has a policy establishing one year as the rule of thumb for the necessity for start-up personnel. Renewal of visas for start-up personnel after one year often occurs, however, if the employer affirms the need for their continued presence. Note, however, that recently the granting of E status to employees has increasingly tightened.

Family Members of the E Visa Holder

Family members of the E visa holder are entitled to enter the United States with the visa holder. Included in this category are the spouse of the visa holder, as well as minor unmarried children under the age of 21. Once children attain the age of 21 or get married, they are no longer eligible to remain in the United States in treaty status. Spouses of E visa principals may request employment authorization (work permit) from the Immigration Service. Children of E visa principals cannot obtain explicit employment authorization from the Immigration and Naturalization Service during their stay in the United States.

Duration of E Visas and Status in the United States

E Visas are generally issued for five (5) years by a United States Consulate (sometimes less based upon reciprocity with that country). The initial visa may be granted for two (2) years. Renewal of an E Visa may be granted by the Consulate as long as eligibility continues and the treaty remains in force. Eligibility means (among other things) that the subject trade or investment must remain actively in existence.

At the border, E Visa holders are generally admitted to the United States for two years. Extensions of stay in the United States may be granted for up to two years at a time from the appropriate USCIS Regional Service Center or if the E visa holder departs and re-enters the US, he/she should be given a new two year stay up until the visa expiration at which point the visa should be renewed at the U.S. consulate abroad.