

Advanced Issues in E Visa Cases

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INTRODUCTION

An investor or a trader seeking to qualify and obtain an E visa faces a myriad of legal, practical and logistic issues before securing such visa. The practitioner must be cognizant of those issues prior to embarking into representation in order to guide the applicant to a successful completion of the task at hand. This practice advisory will focus on specific issues that have consistently been raised by both the Department of State (DOS) and United States Citizenship and Immigration Service (USCIS) in adjudicating these cases. These issues have been raised primarily in small-business scenarios and start-up companies.

PRE-FILING CONSIDERATIONS

Before preparing an E application, the practitioner and the client must thoroughly explore the type of business the applicant will invest or conduct trade. Also, the choice of forum is equally important as the applicant can submit an application for an E visa before DOS in any US Consulate or Embassy with jurisdiction, or apply for a change of status before USCIS. The ramifications of such decision cannot be underestimated. For example, should the applicant decide to apply for a visa abroad, he or she needs to be prepared to spend a considerable time abroad waiting for a resolution by the consulate. This can be detrimental for a start-up business, as constant attention by the owner is needed for a successful beginning of operations. On the other hand, should the applicant apply for a change of status, he or she must be cognizant of the limitations that a change of status application entails, as well as being aware of the travel limitations that a change of status approval will impose on the applicant. Regardless of the decision made, the applicant's ability to freely travel will be affected, and the practitioner should clearly address and prepare the client for those issues.

Another issue that needs to be carefully addressed prior to filing is the client's pre-application conduct in the United States while setting up the business venture. Although a B-1 visitor may enter the United States to seek investment opportunities and set up an investment that qualifies for an E visa,¹ there are certain actions that can be construed by a Consular Officer or Customs and Border Protection (CBP) officer as establishing residence in the United States in violation of a B-1/B-2 visitor status. For example, purchasing a home and spending prolonged periods of time in the United States can lead an officer to conclude that the applicant already resides in the country and may cancel the applicants B1/B-2 visa under section 214(b) of the *Immigration and Nationality Act* (INA). This scenario worsens when the applicant's children are enrolled in

¹ 9 FAM 402.2-5(c)(7)

school. Although certain sections of the *Foreign Affairs Manual* (FAM) and the old CBP's *Inspector's Field Manual*² would stand for the proposition that a minor child would be allowed to attend school if accompanying a parent under B status if incident to status³, CBP Officers, Consular Officers and USCIS have recently strictly interpreted 8 CFR §214.2(b)(7)⁴ to apply to minor children accompanying their parents and have found the parents subsequently inadmissible under INA §212(a)(6)(E)(i)⁵ as smugglers for aiding their children to attend school.

Finally, another potential risk for the would-be investor or trader would be to be found in violation of a visitor status for working in the United States. One of the most frequent questions posed at a practitioner by a client is: "when can I start working on my business?" The answer is simple: "when you have your E visa." However, in practice there is a gray area between the preparatory activities an investor or trader takes to set up an investment and the actual running of the business. It is well settled that self-employment constitutes unauthorized employment.⁶ On the other hand, meeting the requirements of the E visa requires active involvement in setting up the investment or trade business as allowed by 9 FAM 402.2-5(c)(7). Accordingly, careful coordination is always advisable as to the timing of the application and the activities that an applicant may perform in the planning stages of the business venture.

Practice Pointer: It is advisable that the practitioner prepare a detailed letter explaining the stage of development of the business and the activities that the client is contemplated to perform during any temporary stay prior to application. Also, prepare the client and thoroughly explain the intricacies of INA §214(b) during the preparatory stages of the business venture, especially if the client plans to travel abroad while setting up the business. If children are to accompany the investor or trader, it is advisable to counsel the client to obtain F-1 student visas for the children during the preparation of the application, or have the children remain enrolled and attending school in their home country until the visa is adjudicated to prevent either an inadmissible charge as a smuggler under INA §212(a)(E)(6)(i) or for fraud or misrepresentation under INA §212(a)(6)(C) as even the most well-prepared investment or trade enterprise would ultimately result in a

² Please note that CBP has announced that it has discontinued the use of the Inspector's Field Manual. Practice Alert, CBP Liaison Committee, "CBP Is No Longer Using the Inspector's Field Manual" (5/31/13), published on AILA InfoNet at Doc. No. 13052947 (posted May 31, 2013).

³ See Inspector's Field Manual Chapter 15.5(3); 9 FAM 402.1-5(c)

⁴ "An alien who is admitted as, or changes status to, a B-1 or B-2 nonimmigrant on or after April 12, 2002, or who files a request to extend the period of authorized stay in B-1 or B-2 nonimmigrant status on or after such date, violates the conditions of his or her B-1 or B-2 status if the alien enrolls in a course of study."

⁵ "Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible."

⁶ See *Matter of Tong*, 16 I&N Dec. 593 (BIA 1978).

denial of the visa when issues such as the ones described appear before a consular officer or inspection officer.

MEXICO: Reciprocity that might not be Reciprocal and its Collateral Practical Implications

Since 2010, the Department of State's Reciprocity Table for Mexico has been reduced to twelve months (from 60 months for E Visas) for all employment-based nonimmigrant visas. Although such change is not new, the following paragraphs will discuss the ramifications that this change has had on practitioners representing Mexican Nationals. It is also illustrative for consideration of applicants from any other country that may have a reduced reciprocity validity time period under the Reciprocity Table.⁷ The main reason given for the reduction was that Mexico only issued its nonimmigrant visas to foreigners in twelve-month increments. However, on November 9, 2012, Mexico changed its immigration laws allowing for the issuance of temporary (nonimmigrant) visas for up to 48 months.⁸ At the time of this writing, it has been almost four years since Mexico changed its immigration laws and DOS has not modified the Reciprocity Table for Mexico. Furthermore, DOS has stated that it is currently in negotiations with the Mexican government for the reciprocity extension.⁹ However, this begs the question: if Mexico already changed its immigration law to allow for visa issuance of visas for up to four years, what negotiations are needed to adjust the Reciprocity Table?¹⁰

Regardless of the reasons behind maintaining a twelve-month validity time for Mexico, a practitioner should be mindful of this restriction and plan accordingly when representing a client under these limitations. Since the E visas are not petition-based, the E Visa holders are in theory subjected to a yearly review of the bona fides of the business unlike any other nonimmigrant category which is covered by a petition validity period beyond a year (H, L, or O). Accordingly, the practitioner and the client should continuously monitor the progress of the business venture to assess the strengths and weaknesses of a renewal application on a yearly basis. Additionally, consideration should be given to the wait times that the renewal process would entail and the practitioner should plan accordingly.¹¹ Renewal of an E visa in Mexico currently consists of setting a biometrics appointment and delivering an application package at an Application Support Center. The consular officer may take approximately 30 to 45 days to review the application

⁷ US Department of State Reciprocity Tables can be found at www.travel.state.gov

⁸ See http://www.inm.gob.mx/static/Tramites_2013/Info_tramites_migratorios.pdf

⁹ AIALA DOS LIAISON Q&As, DOS Liaison Committee, « AILA Department of State Liaison Meeting Agenda » (04/10/2013) published in AILA Infonet at Doc No. 13050948 (posted May 9, 2013)

¹⁰ INA 221(c) Reciprocity "as practical as possible." Also see 9 FAM 403.8-2

¹¹ E Visa Application procedures in Mexico are centralized in three consular sections: Ciudad Juarez, Monterrey and Tijuana. Their posted procedures can be found at <https://> .

package and either approve the visa renewal, request additional information (usually via e-mail) or call the applicant for an interview. It has been the author's experience that a renewal application may take up to 60 days and other practitioners have reported longer waiting periods. By means of example, in a case where a small business seeks to renew an E visa in Mexico, and the principal has children attending school in the US, the only feasible time to renew a visa would be during the summer since prolonged school interruptions by children might subject the parents to potentially criminal charges under certain state laws.¹² Additionally, the investor or trader has to plan for his absence every year leaving an emerging business improperly attended.

A common issue to Mexican Nationals is the utilization of the Visa Revalidation provisions under 22 CFR §41.112(d). This regulation allows an expired or unexpired visa to be revalidated at a port of entry for an applicant who is in possession of a valid I-94 and is returning from an absence of less than 30 days in a contiguous territory (Mexico or Canada).¹³ Taking into consideration that CBP has the authority to admit an E visa holder for periods of 2 years independently from the validity of the visa,¹⁴ this provision would enable a Mexican national to visit family or friends for less than 30 days and come back to resume status should they be admitted for a two year period with a one year visa. However, not every port-of-entry admits the applicant for the maximum allowable time, and some CBP officers only admit applicants up to the expiration of the visa. Additionally, CBP has recently confirmed that the Visa Revalidation provisions are not available to a visa applicant who has attended a biometrics appointment at an Application Support Center and is awaiting either a visa approval or an interview at a consular post.¹⁵ Consequently, the applicant has to either attend the ASC appointment prior to the expiration of the current visa, so that he or she may come back with an unexpired visa; or remain in Mexico for the entire renewal period. Furthermore, extending the stay of an E visa through filing an I-129 with USCIS is also an option, but its approval will carry the same travel restraints as the applicant will have with an expired visa and the USCIS issued I-94. Renewals and travel restraints make it incumbent on the practitioner to inquire into the clients travel plans on a yearly basis. For example, a practitioner may take a completely different renewal strategy with a treaty trader who constantly travels between Mexico, the United States and other countries for business, than with an investor who owns and operates a small restaurant and only travels to Mexico during the holidays.

Practice Pointer: A practitioner should fully discuss the limitations of the Reciprocity Table with a client prior to the initial E Visa application, as well as the admission periods and extension

¹² See Texas Education Code Sec. 25.095

¹³ See 22 CFR 41.112(d)

¹⁴ See 8 CFR 214.2(e)(19)(i)

¹⁵ AILA National Liaison Meeting with United States Customs and Border Protection, CBP Liaison Committee, (10/28/13), *published on* AILA InforNet at Doc. No. 13112045 (*posted* November 20, 2013).

possibilities that may be available in the future. A system should be developed by the practitioner's office to keep track of the expirations dates of both the visa and each I-94 issued to the client, and discuss the renewal strategy taking into consideration the strengths and weaknesses of the case, the travel needs of the applicant, and the renewal procedures of the consular post.

Following a growing tendency from US Consulates around the world, recently the US Consulate in Ciudad Juarez instituted a 70-page limit to the application binder for E-2 Visas. Excluded from the 70-page limit are the required forms (DS-160, DS-156E and G-28), as well the appointment confirmation, civil documents (such as birth and marriage certificates), divider tabs, and copies of passports and visas. The page limit poses the daunting task on the practitioner to explain the applicant's qualifications with less voluminous documentation, especially when foreign and domestic corporate documents, as well as business plans and complicated tax returns tend to exceed 20 or 30 pages each. The practitioner must carefully select and edit the application binder before DOS to tell the complete story in fewer pages.

E-2 INVESTMENT AMOUNT: There are no Minimal Investments, only Marginal Enterprises.

The amount of investment needed to qualify as a "substantial" investment for an E-2 investor visa has been the subject of considerable discussion among practitioners. It is well settled that there is no minimum investment required.¹⁶ Furthermore, the *Walsh Pollard* case¹⁷ stands for the proposition that an investment is substantial when it is "sufficient to establish a profitable and viable business in the United States."¹⁸ Accordingly, the practitioner's analysis and focus should revolve primarily on the type of business, and its viability as applied to the amount invested to meet the "proportionality test" outlined in the *Foreign Affairs Manual*¹⁹ For example, an investment in an island stand in a shopping mall that would create two to three part-time jobs may clearly qualify as substantial even though the total initial input may be around \$35,000.00. On the other hand, a \$500,000.00 investment in a \$10 Million real estate development project may not. Furthermore, determining the exact amount of investment in a start-up business will be a challenging endeavor since business realities never conform to pre-established budgets. Consequently, it is advisable for the practitioner to first have a clear understanding of the type of business that the investor will undertake to determine how much investment is required, rather than setting an arbitrary amount that could send false expectations to the applicant and the attorney.

¹⁶ See 9 FAM 402.9-6(D) and 8 CFR 214.2(e)(15)

¹⁷ *Matter of Wash and Pollard*, 20 I&N Dec. 60 (BIA 1988)

¹⁸ *Id.* At 68.

¹⁹ See 9 FAM 41.51.N10.4

Practice Pointer: The practitioner should prepare the client to clearly articulate the nature of the business at hand before the consular officer, together with the capital output that the investor has made. The applicant should be able to explain to the consular officer that his or her investment would be substantial in proportion to the nature and size of the business.

COMMERCIALLY VIABLE ENTERPRISE: What Good or Service Does the Investment Provide?

An often overlooked or neglected issue in an E-2 investment application is whether the business is a commercially viable business. The enterprise must be a commercially viable business that continuously produces a good or service beyond a merely passive or speculative investment.²⁰ In today's business environment, it is sometimes difficult to define the services or goods that a particular enterprise is providing. However, given the dynamics of an E-2 application before a consular officer, the practitioner should make an effort to simplify difficult corporate and operative structures to clearly define a particular business in order to distinguish it from a speculative or passive investment. Obviously, an investment in a franchise restaurant will not have a difficulty meeting the "commercially viable" requirement. However, real estate businesses, for example, may pose a different challenge. In the case of real estate investments, there are ventures that are speculative and passive in nature, and there are businesses that may actively produce a good or a service. For example, buying a house with the intention of remodeling it and selling it for a profit may be regarded as a mere speculative investment. On the other hand, developing a shopping mall may involve a day-to-day involvement by the investor making such investment a real and active enterprise.

TIMING OF THE APPLICATION: Too soon can be premature; too late can be dangerous

Another issue in the commercially viable requirement is whether the business has to be open to the public before the time of application. The *Foreign Affairs Manual* requires that the business be "a real and active commercial or entrepreneurial undertaking, producing some service or commodity."²¹ USCIS regulations, on the other hand, state that the business must be a bona fide enterprise that is "real, active, and *operating* commercial or entrepreneurial undertaking which produces services or goods for profit."²² Recently, some US consulates have taken the position that the business needs to be open to the public to meet this requirement. Additionally, some Consular Officers have required applicants who are purchasing existing businesses, to take full possession and operate the businesses under the applicant's name before approving the visa. This position appears to be contrary to the concept of "in the process of investing" as articulated by sections of the FAM that state: "for the alien to be 'in the process of investing,' the alien must

²⁰ See 9 FAM 402.9-6(C) and 8 CFR 214.2(e) (13)

²¹ See 9 FAM 402-9-6(C)

²² See 8 CFR 214.2(e)(13)

be *close to the start of the actual business operations.*”²³ This section clearly permits an applicant to irrevocably commit his or her capital to the investment enterprise and apply for the investment visa before, although close to, the commencement of business operations. Counsel must be weary of this position and monitor the business development as some consulates would find the applicant inadmissible under INA §221(g) and request that the applicant open the business to the public before the visa can be issued. This position by the consular officers would necessitate the careful monitoring of the client’s activities since there is a considerable amount of activities to be performed in order to open a business to the public that could be interpreted as a violation of a B-1 or B-2 stay as explained above.

Practice Pointer: The applicant should be prepared to clearly define and explain the nature of the business which is subject of his or her application, and careful monitoring of the application timing should be followed so that the business is considered to be “operating” upon application.

E-1 TRADE: What is Trade and is Your Client Already Involved in Trade?

Trade, for purposes of an E-1 visa application, includes “goods, services, international banking, insurance, monies, transportation, communications, data processing, advertising, accounting, design and engineering, management consulting, tourism, technology and its transfer, and some news-gathering activities.”²⁴ Services are included in the definition as long as they are “legitimate economic activities which provide other than tangible goods.”²⁵ Taking into account this broad definition, it is quite possible, and frequent, that a foreign entrepreneur may already be involved in trade with the U.S. simply by the nature of his business activities in his home country. This scenario could provide a practitioner with an additional avenue to pursue in order to secure a visa for a client. This avenue will allow a foreign business person to pursue this visa without the necessity of making an investment or secure a job offer. This author has been successful in securing E-1 visas for foreign business persons that have been conducting trade with the United States for years because of the nature of their foreign business. These activities have included purchasing copying equipment in the United States for sale abroad, importing produce from abroad, providing international freight services and purchasing raw materials in the United States for manufacturing abroad.

Another potential advantage of an E-1 visa is the ability to be self-employed. The regulations state that an E Treaty Trader may conduct trade “either on the alien's behalf or as an employee of a foreign person or organization.”²⁶ In an era where the employer-employee relationship must be

²³ See 9 FAM 402.9-6(B)(F)(emphasis added)

²⁴ See 8 CFR 214.2(e)(9)

²⁵ *Id.*

²⁶ See 8 CFR 214.2(e)(1)(i)

clearly established in order to secure other nonimmigrant employment-based visas, this type of visa provides a friendly regulatory framework for the self-employed. Also, there is no requirement to form an entity in the U.S. to qualify for an E-1 visa.

Practice Pointer: The practitioner should thoroughly discuss a client's business activities abroad to determine if there are any that may amount to trade with the United States.

CONCLUSION

A practitioner should be able to discuss the positive or negative aspects of the type of business venture that a client decides to establish prior to preparing an E visa application. Also, a practitioner must be familiar with the consular post's requirements and procedures as this type of visas are not evenly adjudicated around the world.