

Ryan Swanson's 34th Annual Employment Law Webinar



How Foreign-owned Companies Can Bring Workers to the U.S. Using E-Visas

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How Foreign-owned Companies Can Bring Workers to the U.S. Using E-Visas

- E-1: To engage in substantial trade, including trade in goods or services principally between the United States and the treaty country.
- E-2: To develop and direct the operations of an enterprise in which the applicant has invested a substantial amount of capital.
- To work in the enterprise as an Executive, Supervisor, or Essentially skilled employee.

Treaty Countries

- Over 80 countries including Canada, United Kingdom, South Korea, Germany, and Japan.
- Having a treaty does not mean they qualify for both E-1 and E-2.
 - E.g., Jamaica only qualifies for E-2
- Two large omissions — India and China (though Taiwan listed).
- A person entering the U.S. on an E visa must be a national of a treaty country.

Proving Qualifying Nationality

- Look at the nationality of the ultimate individual owners.
 - Trace ownership through the holding companies to individuals
- Nationals of the treaty country must own at least 50 percent.
- Shares owned by U.S. permanent residents cannot be considered in determining the nationality of the business.
- Country of incorporation typically does not matter.
- Publicly traded company – If it is sold exclusively on a stock exchange in the country of incorporation, creates presumption that company has nationality of that exchange/incorporation.

E-2 Substantial Investment in a Real and Operating Business that has the Ability To

- No set figure as to what constitutes “substantial”
- Proportionality Test
- investment sufficient to ensure the investor’s financial commitment to the enterprise
- investment that supports the likelihood that the business is viable
- Funds Must Be “At Risk” — subject to partial or total loss - must be irrevocably committed
 - Equipment
 - Inventory
 - Professional services
 - Prepaid Rents
 - Intellectual property
- Real and operating
- Employ U.S. workers or make economic impact

E-1 Substantial Trade

- Trade must be an exchange, international in scope, and involving qualifying activities
 - Includes export or import
 - Goods are “tangible commodities or merchandise having extrinsic value.”
 - Services are “legitimate economic activities which provide other than tangible goods.” Service is interpreted “in an expansive fashion.”
- However, proceeds must support business activity in the treaty country
- Placing proceeds in a bank account abroad does not indicate a meaningful exchange
- Trade must be principally between U.S. and treaty country
 - 50% of total volume of international trade must be between U.S. and treaty country.

Employees and Nationality

- At least 50% of the corporation must be owned by persons having the nationality of the treaty country to employ persons from the treaty country.
- When a company is equally owned and controlled by nationals of two different treaty countries, employees of either nationality may obtain E visas to work.
- The employee must be an executive, supervisor, or an “essential employee” to obtain an E visa.

Executives & Supervisors

- Position must be principally and primarily executive, or supervisory, as opposed to incidentally or collaterally.
- Duties must show ultimate control and responsibility for the enterprise's overall operation or a major component.

Executives & Supervisors (con't.)

Agency shall consider:

1. whether executive has authority to determine policy and direction;
2. whether supervisor provides supervision for a significant portion of the operation and does not generally involve supervision over low-level employees;
3. whether the applicant possesses executive/supervisory skills and experience;
4. whether salary and title are commensurate with executive/supervisory position;
5. the position within the organizational structure;
6. whether the applicant has responsibility for making discretionary decisions, setting policies, directing and managing business operations, and/or supervising other professional and supervisory personnel; and
7. whether the position requires performance of routine staff work.

Essential Employees

- The service is essential to the efficient operation of the enterprise;
- The skills are necessary for the enterprise; and
- The applicant possesses those skills.

Essential Employees (con't.)

Factors to consider regarding specialized skills are:

1. Short- or long-term need for employee
2. Experience and training necessary to achieve the skills
3. Uniqueness of such skills
4. Availability of U.S. workers with the skills
5. Salary such special expertise can command
6. Degree of proven expertise of the person in the area of specialization
7. Function of the job to which the essential employee is destined

Essential Employees (con't.)

- Ordinary skilled workers can qualify for essential employees which if workers are needed for start-up or training purposes.
- Preferably a “short period of time after which the enterprise will be able to train American employees.
- Knowledge of a foreign language, culture, or country conditions, or previous employment do not by themselves meet the special qualifications requirement.
- Employee’s skills do not have to be “unique” or “one of a kind,” but rather, “indispensable to the success of the enterprise.”
- Whether essential skills are needed or available will vary during the life of an enterprise. Skills that may be needed to start an enterprise may not be necessary after the business is running smoothly.

Process

- Can be filed from within the U.S. to change the persons status to E-1/E-2 or at the U.S. consulates around the world for a visa
- Each consulate has their own specific requirements
- State Department's reciprocity schedules determines the validity of the visa
- Maximum is 5 years at a time
- E-visas are continuously renewable so long as the qualifying entity/trade exists
- Typically granted admission up to 2 years at a time, even if enter day before the visa expires
- E-Visa Company Registration Programs — subsequent applications focus on the employee

Employment by Subsidiary

- May perform work for parent or subsidiary of employer enterprise if:
 - At the time the E status was determined, the applicant provided information about the parent-subsidiary relationship and demonstrated that the subsidiary company independently qualified as an E-2 company.
 - The work performed at the subsidiary must be consistent with job duties at the parent company.

Families of E Visa Holders

- Spouse and children (under 21) can enter the U.S.
- Nationality of the dependent not important
- Children can attend school without changing status, but are not employment authorized
- Spouse is employment authorized incident to status —
 - Meaning they can work for any employer in the U.S. without the need to apply for formal work authorization

Thank you.

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