THE E VISA GUIDE

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INTRODUCTION

As the U.S. lacks a true ‘startup visa’ for foreign entrepreneurs and executives to enter the U.S. to establish and grow a business, the immigration options often boil down to only three discrete options, the L-1 ‘intra-company transfer’ visa, the underutilized O-1 ‘extraordinary ability’ visa, and if lucky the E treaty visas.

What’s worse is that this already small grouping of visa options quickly becomes even smaller due to very rigid requirements. The most common reasons that the L and O visas often fall away as options are due to the L-1 requiring an ongoing and stable non-U.S. business as the anchor for the expansion into the U.S., and the O-1 being focused on an individual’s past proven ability and successes as opposed to the viability of a business. We will compare the L and E in some more detail later.

When available the E visa does in fact often come in to save the day. However, as with all visa options there are trade-offs that are important to understand as they can have critical implications in the short and long term for your business and your family. This guide hopes to lay out these considerations in detail, beyond what you will find scouring the internet. You do not need to become an immigration expert but spending 15 minutes reviewing this guide should help highlight important considerations.

Thank you for your time and we hope you find this to be helpful!

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E VISA BY THE NUMBERS

The thrust behind the creation of the E visa program is to enhance commercial and economic interaction between the U.S. and the eligible treaty country. There are two E visa options to be considered, the E-1 Treaty Trader visa and the E-2 Treaty Investor visa. The E-2 is by far the more popular option between the two with Fiscal Year 2018 numbers showing that a total of 41,181 E-2 visas were issued compared to only 6,542 E-1 visas.

E-1 and E-2 Visas Issued, 2009-2018

YEAR	E-1	E-2	TOTAL
2009	6,432	24,033	30,465
2010	6,279	25,500	31,779
2011	6,807	28,245	35,052
2012	6,907	31,942	38,849
2013	7,283	35,272	42,555
2014	7,330	36,825	44,155
2015	7,425	41,162	48,587
2016	8,085	44,243	52,328
2017	7,063	43,673	50,736
2018	6,542	41,181	47,723

Source: Visa Office, U.S. Department of State.

This discrepancy is normally directly related to the lack of trade as a major focus of the business at hand in applications however I do believe that the E-1 is likely underutilized as trade can encompass much more than physical goods.

E VISA COMPARISON

Although the E-1 and E-2 share many similarities there are some key differences to highlight here. We will dig into these various criteria as they apply in the real-world in the remainder of this E visa guide.

E-1 Visa Basics

- The E visa applicant (beneficiary) must hold treaty country nationality. The list of E-1 treaty countries can be found here.
- The trading firm for which the applicant is coming to the United States must have treaty country nationality.
- The international trade must be "substantial". Must be a sizeable and continuing volume of trade (trade means the international exchange of goods, services, and technology).
- The trade of the U.S. enterprise must be principally between the U.S. and the treaty country. More than 50 percent of the international trade involved must be between the U.S. and the country of the applicant's nationality.
- The applicant must be employed in a supervisory or executive capacity, or possess highly specialized skills essential to the efficient operation of the firm. Ordinary skilled or unskilled workers do not qualify.

E VISA COMPARISON

E-2 Visa Basics

- The investor, or qualifying employee must have the citizenship of the treaty country. The list of E-1 treaty countries can be found here.
- The investment must be substantial and the funds have to be "irrevocably" committed. The investment must be sufficient to ensure the successful operation of the enterprise.
- The investment may not be marginal. The enterprise must show a financial return that significantly exceeds what is necessary to support a living for the investor .
- Speculative or idle investment does not qualify. Uncommitted funds in a bank account or mere ownership of undeveloped land are not considered an investment.
- The investor must be coming to the United States to develop and direct the enterprise. If the applicant is not the principal investor, he or she must be employed in a supervisory, executive, or highly specialized skill capacity.
- The investor must have control of the funds, and the investment must be at risk in a commercial sense. If the funds are not subject to partial or total loss if business fortunes reverse, then the investment is not an investment.

DEPENDENTS

Under both the E-1 and E-2 visas there are great dependent visa options available:

- The spouse and children (under the age of 21 and unmarried) of an E visa applicant are eligible to obtain their own E visas as dependents of the primary visa holder through a simple consular process.

- Spouses can obtain working authorization to work in the U.S. which is relatively rare to find in most U.S. visa options. That said the L-1 visa option does also provide work authorization eligibility.

- Children can enroll in school to study in the U.S. but once children turn 21 they must find their own visa solutions. Often times this is an F-1 student visa or some professional worker visa such as an H-1B.

DEEPER DIVE INTO CRITERIA AND REAL-WORLD CONSIDERATIONS

So with the basic criteria in mind let's take a closer look at what immigration officers are looking for while at the same time raising some important real world business considerations.

CONSIDERATION 1: NATIONALITY OF U.S. ORGANIZATION AND LONG-TERM PLANNING

- At least 50% of the ownership of the legally established U.S. Company must be shown to belong to Treaty Country nationals. This can be aggregated across various owners as long as it can be shown that as a group the total ownership is over 50% in the hands of treaty country nationals.

- Where a foreign corporation is the owner of the U.S. entity, the nationality of the foreign corporation is determined by its owners and this will have to be proven by tracing this ownership back to each individual.

- The creation of the U.S. entity and how ownership is defined is a critical consideration for E-2 immigration purposes. We have often seen this issue pose some challenges both prior to filing, where the plan was not to have at least 50% of the entity owned by treaty country nationals, and down the road when ownership is diluted below 50% due to raising of capital, mergers, or the addition of other owners. Remember that in order for the E-2 to be a valid option and to validly maintain the visa status while in the U.S., the entity must be at least 50% owned by a treaty national or nationals. Do not lose sight of this.

- An E-2 entity will almost always be designated as having one treaty country nationality. The only exception is 50/50 ownership by individuals with two qualifying treaty nationalities. Also if an owner has dual nationality one must be selected and will be assigned to the entity.

- Once again planning ahead and considering short and long terms plans is critical. What if you have plans to raise funding in the U.S. or enter into some other agreement that could dilute the ownership stake below the required 50% mark? Do you have a backup plan for another visa in place?

CONSIDERATION 2: SUBSTANTIALITY AND MARGINALITY OF THE INVESTMENT

The all-time most popular question when it comes to an E-2 application is how much investment is enough? There is no set dollar amount. Instead there is a proportionality test that will be implemented in each case. It is critical to understand this. To understand the issues here we need to look at two important concepts, (a) substantiality and (b) marginality:

A. Substantiality

- The main concept to understand is that the lower the cost and cash flow needs are of running the enterprise, the higher, proportionally, the Officer will want the investment to be in order to be considered substantial.

- In other words, if the capital needed to operate the company at its inception is relatively low (as must be justified via a business plan with thorough projections), then the Officers may expect to see that 100% of that amount is available. As provided by the relevant rules themselves:

- So the capital amount needed depends on the business itself, the industry, and how much it generally costs to set up similar operations. The Officers have discretion in deciding whether a particular investment is substantial. If an Officer determines the business is 'marginal' the E-2 case will be denied.

- For example, a newly-created consulting firm, might only need $50,000 investment to be set up and to become fully operational. As this cost figure is relatively low, a higher percentage of investment is anticipated. So an investment approaching 90–100% would likely be needed to meet the test. Alternatively for a business costing $500,000 the requirement may demand investment upwards of a 60% investment. Of course these are just examples and each case is different but the intention is merely to evidence how this sliding scale is applied.

- It is worth mentioning as well that a U.S. business may be purchased as a qualifying E-2 investment. Normally the value of the business is the purchase price and proof that these funds have been transferred into a third-party escrow/holding account for release upon approval of the E visa is a valid strategy and one which our clients have used in the past.

CONSIDERATION 2 CONTINUED...

B. Marginality

- Another hurdle and key concept which must be understood is the need to prove that the business will not be marginal otherwise it will be denied. A marginal business is one which does not “have the present or future capacity to generate more than enough income to provide a minimal living for the treaty investor and his or her family.” Note however that an enterprise that does not have the capacity now to generate such income but that has a present or future capacity to make a significant economic contribution will not be deemed marginal.

- To evidence this it helps to prove the economic benefit that the enterprise will generate. Ideally this includes evidence of employing U.S. workers upon arrival in the United States immediately or shortly after the E-2 application is approved as well as evidence of the income to be earned.

- Although not a requirement of the E-2, if a related non-U.S. business exists it is helpful to include evidence of the financial success and growth as another data point guiding the case towards approval.

CONSIDERATION 3: AT-RISK INVESTMENT AND POSSESSION OF FUNDS

- Merely transferring cash into a business bank account is not going to cut it. Instead E-2 applications must prove that invested capital is at-risk. The concept of investment is tied to the idea that funds or other capital assets are at risk, in the commercial sense, placed there in the hope of generating a financial return.

- The government expects that such funds are subject to partial or total loss if business fortunes reverse. So at risk funds must be truly at risk of loss and cannot merely sit uncommitted in a bank.

- Of course some cash can and should be transferred to merely sit in a bank account for cash flow needs however the bulk of invested capital should be identified for at-risk needs. This may seem unreasonable as spending money before securing the visa is risky. This is the name of the game however.

- The government has time and time again made it clear that funds placed into a third party escrow/holding account for purchase of an asset, with its release conditioned only on the approval of an E visa, is a satisfactory method by which to prove at-risk funds. In reality only large transactions tend to offer opportunities for such escrow arrangements as sellers are more likely in those instances to go through this hassle of making a purchase contingent on the visa outcome.

- Tied directly to this idea of at-risk investment is also the source of the invested funds. Funds which are secured by the assets of the U.S. will not be counted towards the investment. Instead investments that count include cash, unsecured personal business capital or capital secured by personal assets. Evidence of the source of investments is required to prove this in all applications.

- The investor must also prove that they have been in control of the capital being invested into the business. Possession can usually be easily proven via demonstrated bank statements in the name of the foreign national.

- Be aware also that assets beyond cash can be counted as satisfactory investments. For example the value of the goods or equipment transferred to the United States from abroad may be considered an investment. This also includes intangible property, as long as it can be reasonably valued. Examples include patents valued via the opinion of experts or by assessing the value of contracts generated as a result of the asset.

CONSIDERATION 4: DETAILED BUSINESS PLANS & FINANCIAL PROJECTIONS

- One of the most vital documents in an E-2 application is the five-year business plan including detailed financial projections covering cash flow, balance sheet, and profit/loss statements. There are very specific items that the government will want to see addressed in your business plan so being familiar and preparing for these is critical.

- This immigration focused business plan is often best prepared in partnership with trained immigration business plan writers although certainly this is not required. We have seen great success when our immigration lawyers work directly with our business plan partner and the client to prepare the business plan as this is a vital part of the filing. At the very least an immigration lawyer should review your business plan to ensure nothing stated will cause an unnecessary hurdle.

- Some key topics to be covered by the business plan include:
  - A market analysis, including the names of competing businesses and their relative strengths and weaknesses
  - A comparison of the competition's products and pricing structures
  - A description of the target market/prospective customers of the new commercial enterprise
  - The plan should detail any contracts executed for the supply of materials and/or the distribution of products
  - It should discuss the marketing strategy of the business, including pricing, advertising, and servicing
  - The plan should set forth the business's organizational structure and its personnel's experience
  - Explanation of the business's staffing requirements and a timetable for hiring, as well as job" descriptions for all positions
  - Clear financial projections over the next 5 years

- The business plan will be referenced throughout your application and during your visa interview.

CONSIDERATION 5: JOB DUTIES

- The E visa rules are focused on allowing investors, executives, supervisors, and essential skill employees to enter the U.S. on an E visa. Although the actual investor, having the ability to develop and direct the enterprise can apply for the E-2 and rather easily prove satisfaction of required duties based on ownership stakes, it is important to understand that non-investors are also eligible and can therefore avoid having to look for other problematic visa options such as the H-1B professional worker visas.

- For an employee of a treaty investor to be classified as an E visa holder, the employee must be coming to the United States to engage in duties of an executive or supervisory team member, or must have an essential skill or qualification necessary to the operation of the enterprise.

- Executive or supervisory duties grant the employee ultimate control and responsibility for the enterprise's overall operation or a major component thereof. This is a position of great authority to determine the policies and direction of the enterprise. A supervisory position provides great responsibility for a significant proportion of an enterprise's operations and does not generally involve the direct supervision of low-level employees.

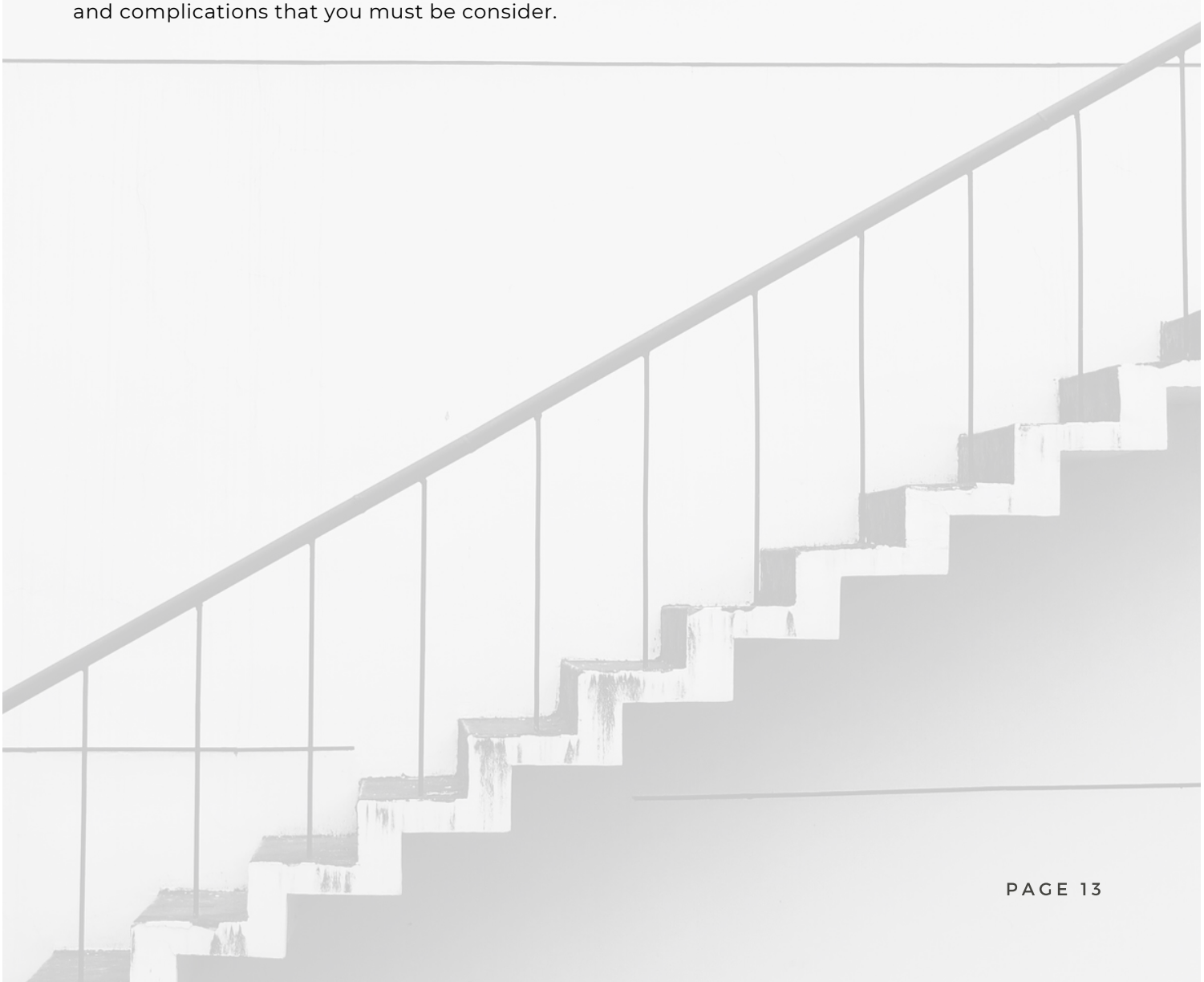
- Where an essential skill employee is the focus, the burden is to prove not only the need for the special qualifications but also the length of time that such skills will be needed.The availability of U.S. workers who are able to execute the duties is another factor considered in determining if in fact the necessary degree of specialization and essentiality exists.

- Accordingly, the job duties are incredibly important in E visa applications. These must be extremely detailed including the percentage of time spent on each provided duty. Working with an experienced immigration lawyer on this is very helpful. Furthermore being able to define with clarity what the job duties are at interview is a key consideration.

CONSIDERATION 6: INTENTION TO DEPART

- One of the drawbacks of the E visa when compared to the L-1 for example is that the E visa rules clearly provide that an E visa holder may not express the intent to stay in the U.S. long term or permanently. This is referred to as the concept of dual intent, when a non-immigrant visa holder such as an E-2 visa holders applies for a Green Card and thereby exhibits their intention to remain permanently.

- For this reason it is once again imperative to properly plan your current and long term immigration strategy to ensure that you are able to stay in the U.S. as long as needed to properly run the new enterprise. Note that although not impossible to obtain a Green Card from E visa there are real traps and complications that you must be consider.



E VISA PROCESS

We herein provide a rough timeline of events when it comes to actual case processing.

Step 1: ASSESSMENT & DOCUMENT COLLECTION (WEEK 1- 3)

ImmiPartner will conduct a thorough assessment of your visa options with data collected through a modern questionnaire. Once engaged we will move on to secure document collection guiding you on the strongest supporting documents and data needed for case preperation. This can be an extensive process, but we got your back.

Step 2: CASE PREPARATION (WEEK 3-4)

ImmiPartner will draft the required E visa legal brief, company support letter, and immigration forms. This will all be compiled along with thorough supporting documents addressing all E visa criteria for your review and signature.

Step 3: DEPARTMENT OF STATE FORM FILING AND APPOINTMENT SETUP (WEEK 4-5)

ImmiPartner will help prepare the required DS online application on your behalf for your review and submission. We will then instruct you how to make the visa fee payment to the government. Then you will be able to select an interview date.

Step 4: CASE SUBMISSION AND INTERVIEW PREP (WEEK 5-6)

ImmiPartner will then be allowed to submit the prepared application to the Consulate for processing in anticipation of your interview. While the case is processing we will engage in two interview preparation calls to ensure you know what to expect and that you understand the key issues and can articulate your purpose for entering the U.S. in a clear, consistent, and concise manner.

Step 5: INTERVIEW AND APPROVAL (WEEK 6-9)

After interview your passport will either be kept for visa process, Hooray, or you will receive a request for additional documentation. IF there is an additional request ImmiPartner will help to respond and complete processing.

Once you have the E visa in your passport you are eligible to enter the U.S. to receive your authorized period of stay (known as your I-94) which dictates how long you may stay on that one trip to the U.S.

L-1 VISA CONSIDERATIONS

As we often see final visa decisions come down to considerations between the E-2 and L-1 visa options we have herein provided a brief summary of key criteria of the L-1 visa option:

- An ongoing non-U.S. based entity, with an established team to continue running operations, is required at all times. The non-U.S. business must remain operational as long as the L-1 visa is required.

- The L-1A executive or manager is required to prove that they have spent at least 1 out of the last 3 years working outside the U.S. with the non-U.S. entity. Note that short trips into the U.S. will not reset this clock but time in the U.S. is not counted towards this time period.

- There must be an ownership relationship in existence between the non-U.S. and U.S. entity at all times. This relationship needs to be an affiliate, parent/sub, or branch relationship.

- As the non-U.S. entity must be operational funds generated from this entity can be used to offset cash flow needs of the U.S. business which can alleviate some investment concerns that arise in the E visa context.

- There is a maximum authorized period of stay of 7 years for L-1A visa holders and 5 years for L-1B specialized knowledge individuals. This being said there is a Green Card category for multinational executives or managers and most successful expansions to the U.S. via the L-1A should result in permanent U.S. residency prior to the 7 year maximum if properly planned.

- The L-1 does clearly allow for the dual intent to express an intention to become a permanent U.S. resident thereby alleviating the need to prove the intention to depart the U.S. upon each application and entry. Note that transitioning from an E-2 to a Green Card is not impossible but with the issue of Dual Intent it is often problematic. This is to be discussed from the beginning with immigration counsel.

- As with the E visa, a dependent spouse and children (unmarried and under 21) are eligible to enter on dependent visas. A spouse is eligible to work in the U.S. and children may attend school.

In conclusion the L-1A is also a great visa option when looking to expand into the U.S.

SOCIAL MEDIA TREND

Although not limited to the E visa, there is a new trend to be aware of regarding your social media profiles. There are now new rules in place requiring the disclosure of all the social media platforms that visa applicants have utilized over the prior five years. The argument provided by the current administration in the U.S. is that this is a necessary addition in order to reduce fraud in applications and to help protect the security of U.S. Citizens.

As this rule is a recent implementation we are yet to see the full ramifications but don't be surprised when you have to disclose the following as part of your E visa or other application to the U.S.:

- The social media platforms you have used within the previous five years;
- Username(s) for each platform, and
- Any email addresses and phone numbers that you have used in the previous five years.

It is important to note that there is no requirement to provide the passwords to any of these profiles so don't do it!

CONCLUSION

Hopefully this guide has provided some real world perspective on the E visa requirements and has helped you determine if you wish to proceed to have your E visa options assessed in more detail. As a closing thought, please note that in my experience it is imperative to work with collaborative lawyers and advisors in the fields of business and tax as well who are open to speaking and engaging with your immigration lawyer as the foundation being established needs to be comprehensive and solid so that you can grow without fear of future legal pitfalls.

Let's discuss your E-2 visa options today! Click here to set up time to chat with one of our E-2 lawyers.

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