

# **E-2 Visa Guide**

## **Investors & Entrepreneurs**



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## **Overview**

The E-2 visa is an excellent option for those looking to start or purchase a business in the U.S. The E-2 visa requires an investment in a business, and the business must hire U.S. workers.

The E-2 visa permits its holders to live in the United States, work for the E-2 enterprise, and bring their spouse and minor children to the United States as well. The E-2 visa provides other ancillary benefits, such as work authorization for the primary visa holder's spouse and the ability to renew the visa indefinitely if the underlying enterprise remains E-2 compliant.

## **Who can apply for an E-2 visa?**

In order to qualify for an E-2 visa, you must be a national of a country with which the U.S. has a particular treaty or agreement relating to trade and investment (we call these countries "Treaty Countries"). The list of Treaty Countries includes many countries in Europe, as well as countries in Africa, Asia, Latin America, and the Middle East. Israel was recently added to the list of E-2 Treaty Countries. Some countries have specific requirements. For example, a U.K. national must also be a resident of the British Isles in order to be eligible. The list of Treaty Countries is updated periodically. For a most up-to-date list of countries, please visit the Department of State website.

## **What are the E-2 visa requirements?**

In addition to the requirement that the applicant be a national of a Treaty Country, the applicant must also invest a "substantial" amount in a real and operating business that the individual will "develop and direct." The investment amount cannot be "marginal," which means that the business must ultimately hire U.S. workers. If the applicant is an employee of the business rather than its owner, the employee must be an executive, supervisor, or an "essential employee." Finally, because the E-2 visa is a temporary, non-immigrant visa, the applicant must show that they intend to depart the U.S. at the end of the visa validity period. The main E-2 visa requirements are further described below.

## **1. E-2 Visa Requirements Related to the Investment**

### ***Source of Funds***

For an E-2 visa, the investment funds can come from any legitimate source, including personal savings, the sale of property, a gift, a loan, inheritance, insurance settlement, or other legal means. The investor must demonstrate that he/she possesses and controls the capital invested and must explain where the money came from.

As noted above, the applicant must be able to show that the source of funds is legitimate, meaning that it was gained through legal, non-criminal means. Demonstrating a legitimate source of funds is accomplished through documentary evidence. The evidence needed will depend on where the money came from (for example, the documentation required to show the legitimacy of personal savings is different from the documentation that would be required in the case of a gift).

### ***Substantial Investment***

One of the most frequent questions we receive from prospective clients is “how much do I have to spend to qualify for an E-2 visa?” The substantial investment requirement can be difficult to understand, especially in today’s economy, where the costs of starting up certain businesses may be relatively low.

In short, while there is no set minimum dollar amount that will be considered “substantial” for E-2 visa purposes, an investment tends to be adequate if it 1) ensures that the treaty investor is financially committed to the successful operation of the enterprise, and 2) is large enough to show that the treaty investor is likely to successfully develop and direct the enterprise.

To make this determination, the government uses what is called the “proportionality test.” The test compares the amount of qualifying funds invested to the cost of an established business at fair market value; or, if the E-2 enterprise is a start-up, an estimate of the cost associated with establishing such a business. If the investor has invested sufficient funds to ensure the successful operation of the enterprise (i.e. purchased all the necessary equipment, inventory, office space, and any other assets needed to open and run the business), then the investment is normally deemed substantial according to the law.

In order to demonstrate that an E-2 investment is substantial, you must present documents that show you have invested 100% (or close to 100%) of the costs to establish or set up the business. For an established business, the cost is determined by its fair market purchase price. To document the investment expenditure, you would typically submit a copy of the purchase sale agreement and proof of payment. If the business is a start-up, you can provide a description of the costs normally associated with starting that type of business. This can include articles from trade publications that describe the cost to start up a business, a letter from a certified public accountant (“CPA”) describing that the entity has spent all of the funds typically required for this type of business,

market research reports that show costs associated to start a similar business, or other related evidence.

***Funds Invested Must Be “At Risk” and Irrevocably Committed***

One of the E-2 visa requirements is that the funds must be committed and “at-risk” prior to approval of the visa. At-risk means that all of the assets invested must be personal assets subject to the risk of loss – in other words, the investor must actually have something to lose. Normally, this means that the money has been spent and the investor cannot get it back. An at-risk investment can also include an irrevocable commitment, such as a lease.

At-risk amounts can include credit card debt or other loans, as long as those debts are secured by personal assets or unsecured – they cannot be secured by business assets or otherwise be in the name of a limited liability business. Uncommitted funds in a bank account are not considered at-risk as the investor can simply remove these funds from the bank account when he/she wishes.

***Potential Expenditures***

Some common E-2 visa expenses can include:

- Setting up and hosting a website
- Computer, tablets, and iPads
- Printer/scanner
- Inventory
- Furniture
- Trademark
- Intellectual property purchase or development
- Employee payroll or payments to independent contractors
- Legal fees
- Leases or rents (you can only include expenses that you have actually paid, including rent for months that you have pre-paid)
- Business entity set up costs
- Office supplies
- Phones
- Utilities
- Training courses (restrictions apply)
- Licensing fees
- Sponsorship or trade show appearances
- Purchase of real property (land building)
- A car or truck, if exclusively used for business (e.g. a food delivery business or a taxi service). It would also be beneficial to license the vehicle as a commercial vehicle.
- Software
- Advertising

Please note that E-2 expenses do not have to be made in the United States and can be items that you purchased in the past (even before the business started), as long as you have a receipt.

### ***Considerations When Purchasing, Rather Than Starting, an E-2 Business***

E-2 visa regulations permit the applicant to start a new business or purchase an existing business. Purchasing an existing business could actually offer benefits to the applicant and may facilitate a strong E-2 application. Certain types of businesses are viewed more favorably by consular officers than others, and purchasing an E-2 friendly company is one of the best methods of securing an E-2 approval.

### ***Due Diligence and Pre-Purchase Considerations***

As with every business endeavor, purchasing a business comes with a certain amount of inherent risk. When purchasing a business for an E-2 visa, that risk becomes amplified, as you must commit to purchasing the business prior to applying for the visa. This exposes you to risk on two fronts: first, the business may fail commercially, and second, the E-2 visa may be denied. It is therefore crucial that you maximize your chances of approval by ensuring that the business is healthy and viable, and that it is the type of business that is likely to be approved for an E-2 visa.

Before purchasing the business, you should carefully scrutinize the company's financial statements, tax returns, and lists of assets to ensure you are paying what the business is worth. No one wants to pay the purchase price of \$500,000 only to find out the company has assets worth \$150,000 and loads of business debt. To prevent this, an assessment should be done before the closing of the sale in which the buyer independently verifies the assertions and representations made by the seller. This due diligence is warranted. Due diligence will also expose weaknesses of the business that could impact the E-2 application. For example, an examination of the company's tax returns may reveal that the business has lost money for the past two years, raising questions about the company's viability that a consular officer may pick up on.

### ***Escrow***

Many of our clients have asked us what will happen to their investment if their E-2 visa is not approved and wonder how the government could expect them to spend money (e.g. purchase a business and transfer funds) before the E-2 visa is actually approved. This is definitely one of the scarier aspects of the E-2 visa, but the fact is that expenditures have to be made and funds have to be transferred before the E-2 visa application is submitted. An applicant faces a risk that the E-2 visa will not be approved, but it is clear that the E-2 visa has been designed for those at the final stages of business operation rather than for those who are "thinking" about starting a business.

If an investor is purchasing a business or an asset, there is an ability to safeguard funds through the use of an escrow arrangement. As an example, if an investor wants to buy a business for \$200,000 and is worried that the visa might not be approved, they can have a lawyer draft an escrow agreement and include terms in the purchase-sale agreement that specify that the funds

would be transferred to an escrow agent instead of the vendor. Once the E-2 visa is approved, the funds would be transferred from the escrow agent to the vendor. An escrow agreement can also be used for the purchase of franchise rights and/or other assets; the key is that the escrow agreement states that the funds will be released after the E-2 visa has been adjudicated.

The key to making sure that the funds are still considered “at-risk” is that the escrow and purchase-sale agreement include the sole contingency that the sale is contingent on the approval of the E-2 visa. As such, if the E-2 visa is approved, the funds would be transferred directly from the escrow agent to the vendor. If the visa is denied, the money would be returned to the investor. The agreements cannot include ANY other contingencies other than the E-2 visa approval, and you should have a lawyer review the agreements carefully before signing. The use of an escrow agreement removes some of the risk that the investor will forfeit funds if the E-2 visa is not approved and ensures that the investor does not have to chase the vendor for their money if they agree to void the sale in the event of an E-2 denial.

## **2. The E-2 Visa Requirements Related to Employment**

The successful E-2 visa applicant will also need to show that the enterprise is not “marginal,” meaning that it has the present or future capacity to financially support the hiring of U.S. workers. Put differently, the applicant must demonstrate that they are not starting an enterprise solely for the purpose of earning a living for themselves and their families.

### ***What is the “marginality requirement”?***

For E-2 purposes, a marginal enterprise is a business that does not have a present or future capacity to generate more than enough income to provide a minimal living for the treaty investor and his or her family. While the law does not specifically mention the creation of jobs, this requirement gets at the core of why the E-2 investor visa exists. That is, a fundamental purpose of the visa is to permit an investor to start a business that will have a positive economic impact on, and expand job opportunities in, the local community within the U.S. As such, the investor must be able to demonstrate that the proposed enterprise will have the ability to provide jobs for individuals other than the investor’s family members, either at the present time or in the near future (usually defined as within a five-year timeframe). However, the marginality requirement does not require that the E-2 enterprise be a large business that hires dozens of employees – there are many successful E-2 businesses that have three employees and do not plan on growing past that.

### ***How do I demonstrate that my business is not marginal?***

For investors purchasing an existing business that already has employees and a profit, the marginality requirement is typically easier to establish. An applicant would submit documentation such as payroll summaries, financial statements, the business’s tax returns, W-2 and W-3 forms, and other relevant documents that demonstrate the number of paid workers the business employs and the wages being paid. If the business is losing money or if its financial viability is in question, then you would also need a business plan that clearly addresses how the investor will direct the business toward profitability. See the following paragraph about start-up enterprises for examples of additional supporting documentation that could strengthen your case.

For start-ups, the marginality requirement can be satisfied by submitting a comprehensive business plan that clearly states the projected future earning capacity within five years from the date the foreign national commences business activities. The business plan must be sufficiently detailed to support a reasonable inference about the job-creation potential of the E-2 enterprise. The plan must be credible and based on objective and verifiable evidence. The plan should also contain a detailed description of the E-2 company’s hiring plan and should provide for the hiring of at least one employee by the second year of operations (and earlier if possible). A key theme of the business plan is that it should be as detailed and accurate as possible, and supported by strong data sources and corroborating evidence throughout.



***What are some reasons petitions get denied for marginality?***

There are a number of reasons petitions can be denied for marginality. Examples include:

- The applicant had a similar business in their home country that either did not perform well or did not have employees. This is a strong signal to examiners that the business in the U.S. will not have the capacity to hire employees.
- A poor business plan that does not show an examiner that the applicant will achieve the stated goals.
- Unrealistic projections in the business plan.
- A bad E-2 visa interview in which the examiner may feel that the applicant is not positioned to advance the company and attract clients.
- Lack of objective documentation to show prospective income (for example, letters of intent, letters from chambers of commerce, etc.).
- A determination by the government that the business is passive (for example, a real estate or investment business).

### **3. The Requirement that the Enterprise Must Be “Real and Operating”**

One question that often comes up when processing E-2 visas is: How “developed” does the business need to be for an E-2 visa? Specifically, many clients wonder whether it is enough to show the government that they “intend” to start a business rather than showing the government that they have already started a business. The clear answer is that the business must be close to the start of operation (or already operating) in order to obtain an E-2 visa. The government has made it clear that the visa is not meant for those merely intending to start a business, but is reserved for those in the final stages before the business begins operations. That is, for an E-2 visa, the E-2 business must be “real and operating.” For example, when one of our E-2 investor clients who opened a gym attended her consular interview, the officer asked her what he would see if he were to visit the gym at that moment. She answered that the space was rented, the equipment was in place, and everything was ready to go. The only thing that was still required to start the E-2 business was the investor receiving the visa. This was the exact answer the consular officer expected to hear, and her E-2 visa was approved.

There are a number of factors that show that a business is real and operating. One key factor is that the investor has actually made the investment in the business. Many ask whether they can satisfy this requirement by simply showing that they have the funds available to invest, or that they have transferred the funds into a business bank account. The clear answer is no. The bottom line is that funds must actually be expended and put at risk (meaning that you cannot get the money back) BEFORE the E-2 visa is granted. Uncommitted funds in a bank account do not meet the requirement; the mere fact that cash is in an account generally does not show that a business is real and operating.

Real and operating can also be demonstrated by showing a combination of the following:

- A legal entity established and registered with the Department of State in the state;
- A signed commercial lease (a commercial lease adds a significant amount of legitimacy to the E-2 visa application; in contrast, a home office generally does not show that a business is real and operating);
- A completed company website;
- Developed company marketing materials (for example, business cards, brochures, and advertising);
- Information showing compensation to employees or contractors (for example, employment contracts, W-2’s, or 1099’s);
- A business bank account and a tax ID for the company;
- That required licenses have been obtained (for example, a liquor license or a license to operate the business);
- Trademark or other intellectual property filings; and
- Contracts with suppliers or clients.

#### **4. The Requirement that the Applicant Must Be in a Position to “Develop and Direct” the Business**

To qualify for the E-2 visa, the applicant must demonstrate that he/she is in a position to “solely direct and develop” the E-2 enterprise. Put simply, the government requires that you own and actively participate in the running of the E-2 company. To show that you are “in a position” to develop and direct the business, you should be able to demonstrate that you own at least 50% of the company such that you have the authority to make decisions. It is also helpful to be able to demonstrate prior experience in running a business or experience in the same industry.

Activity that falls under the “develop and direct” category typically involves business management activities such as the daily management of personnel and business operations, the training and hiring of employees, and the management of the company’s finances. Business development activity, such as direction of marketing activities, pursuing and closing client leads, and meeting with prospective clients, also qualify as directing and developing the business. In some cases, it may be possible to substitute prior experience for proper training to do the job. Note that passive investments are not E-2 eligible.

***If I must “solely” develop and direct the business, can I perform “hands-on” work at my E-2 company?***

In some service-oriented or small businesses, demonstrating that you are performing work that is “solely” focused on developing and directing the E-2 company may be difficult. Managers at small businesses often perform various roles, where some of the activity may be focused on providing goods and/or services to customers (for example, working a cash register during a sale or consulting with a client during a meeting).

It is important that the activities of the E-2 investor applicant be primarily focused on business management and development. Thus, an investor may not qualify for the E-2 visa if he/she plans to engage primarily in “hands-on” work, such as manning the cash register or stocking shelves at a convenience store, or working primarily on consulting projects as the service provider. However, the applicant can perform such duties if they are incidental to their job developing and directing the business. For example, an E-2 investor can review subordinate’s work or assist with a client need, so long as these are not the investor’s primary activities. Also, a service-oriented business is E-2 eligible, but the applicant must demonstrate that they will ultimately perform managerial and strategic functions (rather than, for example, being the service provider at the firm).

USCIS, in particular, has been known to issue Requests for Evidence (RFEs) in cases where service-oriented businesses (for example, a consulting firm) list the investor as one of the primary service providers. This appears to be an increasing trend and requires careful consideration.

## **5. The Requirement that the Applicant Must Intend to Return to Their Home Country at the End of the Visa**

This is not a difficult test to meet and generally requires that you sign a document that indicates you plan to return home once your visa expires. Unlike many other visas, you do not have to show any particular ties to your home country (for example, owning a home there).

### **Additional Steps to Prepare**

#### ***How long are E-2 visas issued for?***

The amount of time an E-2 visa can be granted for varies by country and depends on the agreement between the applicant's country and the United States (the legal term is "reciprocity"). Some countries, such as Egypt and Bangladesh, have reciprocity periods of as little as 3 months, while other countries allow applicants to get an E-2 visa for up to 5 years. Even in cases where the country reciprocity allows the applicant to apply for 5 years, the actual amount of time granted to the applicant is also based on the discretion of the consular officer adjudicating the application.

It is important to keep in mind that the length of E-2 visa validity only governs the time period that you have to enter the country. Once an applicant enters the country, they are given two years in E-2 visa status even if they enter on the last day of their E-2 visa validity.

Toward the end of the visa validity period, the E-2 applicant will have to renew the visa in order to continue to work and reside in the U.S. There is no limit to the number of times an E-2 visa can be renewed for. If the consulate or USCIS officer finds that your E-2 company has continued to operate as expected, your E-2 visa can be renewed indefinitely.

## **Where can I apply for an E-2 Visa?**

### Applying for an E-2 Visa at a Consulate

If you are outside of the United States, you must apply for an E-2 visa at a U.S. consulate. The application is normally done at the U.S. consulate in the country in which you reside, but more than one consular post could be available if the applicant has ties to more than one country.

Most U.S. consulates have specific instructions regarding who can and cannot apply there. It is important that you check the website of the consulate you plan to use and review any instructions that are specific to that consulate. For example, the U.S. consulate in London has a strict rule that only applicants who reside in the U.K. can apply for an E-2 visa there. This is a common rule for most consulates. Consulates located in Non-Treaty Countries (for example, Brazil or South Africa) sometimes also accept E-2 visa applications. These countries, however, typically do not receive many applications; this could work against an applicant if the consulate is not familiar with the rules that apply to E-2 visas.

In some cases, consulates may accept your E-2 visa application if you reside in one country but have citizenship in another country. For example, a person living in Spain with a Canadian passport would have the option of applying in Madrid or Toronto. Venue can be very important with E-2 visas as many consulates have different E-2 visa requirements and some are stricter than others.

While most consulates impose some restrictions regarding who can apply there, some do not. As such, there are a few consulates that will accept applications from those who are not nationals of or reside in the country where the consulate is located. Other consulates may impose specific rules. For example, the U.S. consulate in Toronto will accept applications from nationals that are not Canadian as long as the applicant currently resides in the U.S. As such, someone in the U.S. on, for example, an H-1B visa could apply for an E-2 visa in Toronto, regardless of the applicant's nationality. Other consulates (For example in Belize and the Dominican Republic) will accept E-2 visa renewals from individuals who have no ties to those countries.

You may also be able to apply for an E-2 visa at a consulate if you have some ties to that country, even if you do not have a passport or do not currently live there. Possible ties include having a residency card, paying taxes, or owning property in a specific country. This will be fact-specific, but may be an option.

## Applying for an E-2 Visa While in the U.S. (Change of Status)

Although applying for an E-2 visa at a consulate is usually preferred, there are instances where applying for the E-2 visa through the United States Citizenship and Immigration Services (USCIS) by requesting a change of status may make sense. For example, an applicant who is in the U.S. on a B-visa may apply for a change of status to E-2 status by filing a I-129 petition (the petition must be filed before the I-94 expiration date). Please remember that while this would change the individual's status to E-2 status, it would not result in the individual receiving an E-2 visa (which is needed for the individual to be able to return to the U.S. upon departing). To receive an E-2 visa, the individual would need to proceed through consular processing even if they have already received an approved I-129 petition from USCIS.

If the answer to any of the following questions is “yes,” then you might consider processing your E-2 visa through a change of status petition with USCIS. Even in these instances, however, consular processing may still be preferable since, as noted above, consular processing will be required even if USCIS has already approved the petition.

### ***Do you need your application adjudicated quickly?***

USCIS will process your application in 15 calendar days if you pay an extra “premium processing” fee (at the time of writing, the premium processing fee for E-2 visas was \$2,500). You should keep in mind that the 15-day clock stops if you receive a Request for Evidence (“RFE”), which typically requires additional time to answer. Once you respond to the RFE, you must send the answers back to USCIS; they will then take up to another 15 calendar days to give you a response. It is possible to receive another RFE, but at this point your application is usually approved or denied. While premium processing may be fast, many consulates will process your application just as fast (or faster). For example, the consulate in Toronto will allow you to schedule your interview 10 days after you submit the supporting documentation to them. The submission is done through e-mail, which also eliminates the time and expense of using a courier.

### ***Do you have a very small investment amount?***

One area where we do see a benefit to applying with USCIS is in the area of the required investment amount. As background, the statute that governs E-2 visas says that the investment amount must be “substantial” in relation to the business being started – this means, for example, that whereas a non-capital-intensive business such as a consulting business might require only a \$50,000 initial investment, a capital-intensive business such as an auto manufacturing business might require a substantially higher investment amount. Our experience has been that USCIS applies the law with respect to investment amount fairly consistently and does not deny applications solely due to a low investment amount. This is primarily because USCIS decisions can be appealed, and the applicant is afforded due process rights when in the U.S. In contrast, we have seen that some consulates systematically deny applications where the investment is under a certain amount (for example, we recently encountered a consulate that is likely to deny any application in which the investment is under \$200,000).

It is worth noting that while adjudication at consulates may not be as consistent as USCIS, the applicant must still go to the consulate at some point for visa processing. Also, consular officers are rotated every two years, so a “good” consulate may become a “bad” consulate in very little time. Finally, our firm has regularly processed E-2 visas with low investment amounts at several consulates. At many consulates, the adjudication is done in a manner similar to USCIS; however, there are certain consulates where the battle will be uphill regardless of the application or investment amount. In those cases a change of status may be a good option. The key is that the applicant work with a qualified immigration attorney to carefully assess available venues so that they can make the best decision. The decision is oftentimes not clear-cut, and different facts will result in different decisions.

***Is your visa validity period short (for example, three months)?***

One of the factors related to the length of time that an E-2 visa will be issued for depends on the visa reciprocity between the U.S. and the Treaty Country. In some cases (Iran, Bangladesh, and Armenia, for example), the visa is only issued for three months. In a situation where the reciprocity period is short, a change of status may make more sense, as the short reciprocity restricts the applicant from leaving the country after the visa expires.

As noted earlier, it is important to keep in mind that the length of E-2 visa validity only governs the time period that you have to enter the country. Once an applicant enters the country, they are given two years in E-2 visa status even if they enter on the last day of their E-2 visa validity. The problem of a short visa validity period arises when the E-2 visa holder leaves the U.S. When they leave, they must go back to the consulate in their home country in order to renew the E-2 visa. Some countries limit the number of possible renewals.

***Do you have an outstanding green card petition?***

If someone has filed a green card petition on your behalf (for example, an employment-based green card), you may have an easier time getting an E-2 visa through USCIS than at a consulate. If you have an immigrant petition outstanding, you should speak to a qualified immigration attorney to carefully navigate through this process.

## **The E-2 Visa Interview**

Although the manner in which consulates conduct the E-2 interview may differ somewhat depending on the region, the volume of E-2 applications received by the consulate, and internal operating protocols unique to each consulate, there is still a thread of common questions that runs through the processing of an E-2 visa application, regardless of where it is filed. The questions all get at whether the applicant has met all of the E-2 visa requirements.

The various lines of questioning generally focus on four key points:

- Has a sufficient amount of money been spent to satisfy the consulate’s definition of a “substantial” investment?
- What is the source of the money used to make the key purchases, secure the business premises, and fund the U.S. bank account with working capital?
- What is the investor’s role in the business? Can the investor truly be said to be in a position to develop and direct the business’s operations?
- What are the chances of this business being successful?



## **Can I bring my family as dependents?**

### Spouse and Children

E-2 investors can get an E-2 derivative visa for their spouse and children under 21. E-2 employees have the same ability as investors to bring their spouses and children on derivative E-2 visas. Spouses of E-2 visa-holders can apply for employment authorization to work anywhere in the U.S. Children cannot get work authorization. Both children and spouses may attend school in the U.S.

### Parents and Extended Family

Some nonimmigrant visa holders have household members that fall outside the definition of spouse or child. People in this situation may be faced with the difficult situation of coming to the U.S. to work while leaving behind a person who is an important part of the family, but who does not qualify for a dependent visa. These may include elderly parents for whom the visa applicant cares, or life-long couples who are not legally married and are therefore ineligible for derivative status.

Thankfully, an exception exists that enables individuals in these types of close relationships with nonimmigrant visa holders to accompany them to the U.S and remain with them during the period of their stay. The Department of State and USCIS have consistently had a policy that allows cohabiting partners, extended family members, and other household members who are ineligible for derivative status to potentially obtain a B-2 visa that provides entry into the U.S. (up to a one-year initial visa) and multiple subsequent extensions of status within the U.S. The primary purpose of the household member's trip would be to accompany the principal nonimmigrant, who can be in any nonimmigrant status other than A- or G-visa status.

Since some nonimmigrants come to the U.S. for work commitments of two years or more, this exception can keep close family together in the U.S. for much longer periods of time. While in the U.S. on this extended B-2 status, the visa holder is considered to be a tourist who is traveling for pleasure, and the visa holder must intend to depart the U.S. when the principal visa holder's visa expires. Furthermore, the household member cannot violate the terms of a tourist visa, which include not working in the U.S.

## **E-2- Visa Questions & Answers**

Scott Legal, P.C. has processed hundreds of E-2 visas and we have compiled the top 10 questions that have consistently come up over the last year. All of these questions are regularly asked and are in no particular order.

- 1. What ownership percentage is required for an E-2 visa? Do I have to own 50% or 51% of a company for an E-2 visa? Is 50% ownership sufficient for an E-2 visa?**

An investor must own 50% of the E-2 entity; 50% ownership is sufficient for an E-2 visa. There is a common misconception that one must own 51% of a company in order to be eligible for an E-2 visa, but the regulations are clear that 50% ownership is sufficient.

- 2. How long is an E-2 visa issued for, and what does reciprocity mean? Why is my I-94 only stamped for 2 years when I have a 5-year E-2 visa? How is it possible for an E-2 visa to only be issued for 3 months?**

The maximum duration of an E-2 visa depends on the citizenship of the applicant and ranges from 3 months to 5 years. Other factors that impact the duration of an E-2 visa include the overall strength of the case, the consulate that the applicant applies at, and the examiner who reviews the application. The visa can be renewed indefinitely if certain criteria have been met. Even though some E-2 visas are issued for 3 months, when the applicant enters the U.S., they are given 2 years in E-2 visa status. When they leave the U.S. though, they must apply for a new E-2 visa to reenter.

- 3. What impact has the Trump administration had on E-2 visas? Will Trump impact my E-2 visa?**

We have seen increased scrutiny under the Trump administration across all immigration areas, and this includes E-2 visas. While we have not seen an increase in the number of denials, adjudications are tougher and we tend to push clients to strengthen their cases by increasing the investment amount or showing concrete proof of hiring U.S. workers.

- 4. Do I have to invest before I get the E-2 visa? What if I spend money and don't get the E-2 visa? Do the funds have to be spent or committed before I apply for an E-2 visa? Can I deposit funds in a bank account and get an E-2 visa?**

While there is no guarantee that one will get the E-2 visa, funds must be spent prior to applying. As such, if you are buying a business, you must transfer the funds to escrow or the seller before the E-2 visa application has been submitted. This is often a difficult thing for many, but the government will not issue an E-2 visa based on the mere intent to invest. The investment must have already occurred.

**5. I want to buy an E-2 business. What should I look for? How many employees are needed if I buy an E-2 business?**

Many of our clients obtain E-2 visas by buying existing businesses and often ask us to provide criteria for the ideal E-2 business to buy. While distressed businesses can work, they require extensive explanation and documentation to show that the business will be viable and will ultimately hire U.S. workers. When searching for a business, you should focus on businesses that have 3 or more employees (full-time equivalents) and tax returns that show that the business is well positioned (earning money). Many sellers will indicate that the business is a “cash” business or that they take many expenses to reduce taxable income, but these businesses may not be E-2 visa eligible as an examiner will only be interested in what you can prove.

**6. Can I include intellectual property as part of my E-2 investment?**

Yes. The key is that you can objectively value the intellectual property (“IP”). In order to include IP as part of the E-2 investment, the investor will first need to quantify its value as a dollar amount. IP is intangible and thus difficult to value without demonstrable evidence of its worth. The best forms of evidence are offers or contracts to purchase or license the IP, as this is an efficient way to demonstrate the IP’s market value. You may also use the value of current contracts or subscriptions for the use of the IP to determine its market value. It is important to note that letters of intent to license the software, or other speculative contracts that are based on a future contingency, does not establish the IP’s worth for immigration purposes.

The Foreign Affairs Manual also states that an expert opinion in the IP’s particular field may be submitted as evidence of the IP’s market value. It is important to secure an opinion from a credible source, and that the opinion be based on objective evidence. An examiner may question the valuation of a report or opinion based on information provided solely by the applicant, for example.

**7. I have a service business; how much must I spend? Can I get an E-2 visa with a low investment? Can I invest \$50,000 for an E-2 visa?**

Even though a service business does not require much to get started, you must spend a substantial amount to get an E-2 visa. While investments of \$50,000 are possible, they are very difficult cases to get approved. Most E-2 visas have investments that exceed \$100,000 (e.g. \$50,000 spent and \$50,000 in a business bank account). While obtaining an E-2 visa with a lesser amount is possible, the E-2 visa case should have other significant strengths if the investment amount is below \$100,000.

**8. Should I apply in the U.S. or at a consulate? Should I do a change of status or file at the consulate? Where should I apply for my E-2 visa?**

A visa can only be issued at a U.S. consulate outside of the U.S. Typically, this is the better option for an E-2 visa. There are rare circumstances where filing for a change of status may make sense. For example, processing an E-2 visa at some consulates can be very difficult given the country conditions and the general difficulty associated with getting visas in those countries or regions. In addition, in some cases, visas will only be issued for 3 months with one entry, so a change of status

may be beneficial. If you change to E-2 status in the U.S. and leave the U.S., you must apply for an E-2 visa abroad from scratch. Benefits of a change of status include USCIS's acceptance of a lower investment amount and more consistent adjudication. Applying at the consulate permits one to leave and enter the U.S. for the duration of the visa, and adjudications at some consulates are quite straightforward.

**9. Does an E-2 visa lead to a green card?**

The short answer is no. That being said, there are no nonimmigrant visas that lead to green cards. Instead, if you are eligible to apply for a green card, (e.g. EB-1, EB-2, NIW, marriage) you can apply for one while on an E-2 visa. A common green card category for people on an E-2 visa is an EB-5 investor visa.

**10. Should I apply for an E-2 visa or an L-1 visa?**

In some instances, an applicant may be eligible for both an E-2 visa and an L-1 visa. Generally speaking, the E-2 visa will be the preferred option since it is normally easier to get approved and renew, and can normally be issued for a longer duration than the L-1. However, whether an E-2 or L-1 is preferable depends on the specific facts and circumstances.

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