E-1 and E-2 Nonimmigrants

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INTRODUCTION

The E nonimmigrant is defined at Immigration and Nationality Act[1] (INA) §101(a)(15)(E) as a foreign national entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which they are a national, and the spouse and children of any such foreign national if accompanying or following-to-join the principal:

- Solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which they are a national;
- Solely to develop and direct the operations of an enterprise in which they have invested, or of an enterprise in which they are actively in the process of investing, a substantial amount of capital; or
- Solely to perform services in a specialty occupation in the United States if the foreign national is a national of Australia and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under INA §212(t)(1).

The E category therefore consists of three subcategories: treaty traders (E-1), treaty investors (E-2), and Australians working in specialty occupations (E-3). However, the E-3 classification is very different than the E-1 and E-2 classifications; it applies only to Australian citizens and more closely resembles the H-1B classification than the E-1 or E-2. For this reason, only the E-1 and E-2 classifications will be discussed herein.[2]

Many practitioners prefer to remain on familiar ground, opting for the L-1 and H-1B classifications whenever possible. However, the E-1 and E-2 classifications are two of the most useful nonimmigrant options and should be considered when available.

Despite the increased scrutiny imposed on many other nonimmigrant classifications as a result of Executive Order 13788,[3] also known as “Buy American and Hire American” (BAHA), E-1 and E-2 adjudications remained mostly unaffected, at least in the case of principal traders and principal investors. This was likely because the E-1 and E-2 classifications are based on treaties that have been signed in order to enhance or facilitate economic and commercial interaction between the United States and treaty countries.[4] Of course, some American Immigration Lawyers Association (AILA) members reported increased scrutiny in the adjudication of visa applications submitted by E-1 and E-2 employees.

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[1] Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101–1524).

[2] When the *Consolidated Natural Resources Act of 2008*, Pub. L. 110–229, 122 Stat. 754 (CNRA) was signed into law on May 8, 2008, it extended U.S. immigration laws to the Commonwealth of the Northern Mariana Islands (CNMI). During a brief transition period (November 29, 2009, to December 31, 2014), the CNRA permitted foreign long-term investors who had been admitted to the CNMI with a long-term investor visa under the prior CNMI immigration law to remain there under E-2 status. However, the eligibility requirements were very different than a traditional E-2; the transition period also ended on December 31, 2014. As a result, a discussion of the CNMI-specific E-2 classification is also outside the scope of this article.

[3] On April 18, 2017, President Donald Trump signed BAHA. Its stated goals were to create higher wages and employment rates for U.S. workers, and to protect their economic interests by rigorously enforcing and administering U.S. immigration laws.

[4] 9 FAM 402.9-2(b).

When President Joe Biden signed Executive Order 14005, also known as "Ensuring the Future Is Made in All of America by All of America's Workers," on January 25, 2021, it revoked BAHA. Although Executive Order 14005 directed federal government agencies to "maximize the use of goods, products, and materials produced in, and services offered in the United States" by means of the federal procurement and budgetary process, it did not require immigration agencies to rigorously enforce and administer U.S. immigration laws.

Since being sworn in as the 47th President of the United States, Donald Trump has issued several executive orders related to immigration. None of these executive orders are specifically directed at E-1 or E-2 nonimmigrants. However, at least one executive order has had an indirect effect on E-1 and -E-2 adjudications.

On January 20, 2025, President Trump issued Executive Order 14161. Among other things, it requires the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence to "vet and screen to the maximum degree possible all aliens who intend to be admitted, enter, or are already inside the United States, particularly those aliens coming from regions or nations with identified security risks." As a result of Executive Order 14161, the following changes have recently occurred (among others):

- On September 6, 2025, the Department of State (DOS) announced updated guidance for all nonimmigrant visa applicants, which will likely restrict the availability of visa appointments for third-country nationals. The updated guidance states the following:
  - Nonimmigrant visa (NIV) applicants *should* schedule their visa interview appointments at the U.S. Embassy or Consulate *in their country of nationality of residence*; and
  - Nationals of countries where the U.S. government is not conducting routine nonimmigrant visa operations must apply at the designated embassy or consulate, unless their residence is elsewhere.[5]
- On October 1, 2025, the DOS updated the categories of applicants that may be eligible for a waiver of the NIV interview. E-1 and E-2 visa applicants, with the exception of Taipei Economic and Cultural Representative Office (TECRO) E-1s, are no longer eligible for an interview waiver.[6] The inability of E-1/E-2 visa applicants to obtain interview waivers has significantly increased visa appointment wait times.

In addition, President Trump issued a memorandum entitled "America First Trade Policy" (AFTP) on January 30, 2025.[7] Among other things, the AFTP required the U.S. Trade Representative to specifically assess the impact of the United States–Mexico–Canada Agreement (USMCA) on U.S. workers, farmers, ranchers, service providers, and other businesses and make recommendations regarding the United States' participation in the agreement. It also required the U.S. Trade Representative to review all existing United States trade agreements and recommend any revisions that may be necessary to achieve and maintain a general level of reciprocal and mutually advantageous concessions. While the AFTP did not have any immediate effect on E-1 or E-2 adjudications, it could potentially affect E-1 and E-2 adjudications in the future if the United States decides to withdraw from one or more of its trade agreements.

AUTHORITIES

In addition to the statutory definition above, practitioners should refer to the regulations of the DOS, which appear at 22 Code of Federal Regulations (CFR) §41.51, and the regulations of the U.S. Department of Homeland Security (DHS), which appear at 8 CFR §214.2(e).[8] DOS and DHS rules are similar, but not identical, to each other.

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[5] AILA Doc. No. 25090838.

[6] AILA Doc. No. 25091804.

[7] *See* Presidential Memorandum, *America First Trade Policy* (Jan. 30, 2025), AILA Doc. No. 25012008.

[8] E adjudications within the United States are handled by USCIS, the benefits arm of DHS.

The final regulations of DOS and the former Immigration and Naturalization Service (legacy INS) pertaining to the E classification were first published in the *Federal Register* on September 12, 1997.[9] Although the proposed legacy INS regulations had initially differed from the DOS regulations, legacy INS subsequently altered them so that the final regulations would more closely track the DOS regulations.

Legacy INS's willingness to alter its regulations to conform to DOS regulations reflected the general consensus that primary jurisdiction over the adjudication of E nonimmigrant cases rested with DOS. Although practitioners should always refer first to the DHS regulations in cases involving a change of status or extension of stay, the DOS guidance should also carry weight at the U.S. Citizenship and Immigration Services (USCIS) California Service Center, the only USCIS service center that adjudicates E cases, in the absence of specific USCIS guidance.

Another extremely useful authority is the *Foreign Affairs Manual* (FAM), which is published by DOS.[10] Although the notes contained in the FAM are not binding on consular officers, they can be a valuable source of guidance for practitioners, and they are persuasive authority. Where relevant, the FAM should be cited for visa cases filed with U.S. consulates abroad and even in change of status or extension of stay cases filed with USCIS, where no equivalent reference appears in the DHS regulations.

ISSUES APPLICABLE TO BOTH E-1 AND E-2 NONIMMIGRANTS

Existence of Treaty

The basis of the E-1 and E-2 classifications lies in treaties that were intended to enhance and facilitate economic and commercial interaction between the United States and the treaty country. Therefore, a treaty of Freedom, Commerce, and Navigation (FCN) must exist between the United States and the country of the applicant's nationality.[11] Bilateral investment treaties (BITs) have also been held to be equivalent to an FCN treaty.[12] A treaty country also includes a foreign state that is accorded treaty visa privileges by specific legislation,[13] as in the case of the North American Free Trade Agreement (NAFTA)[14] or its successor, the USMCA.[15]

A list of treaties or the equivalent in effect between the United States and other countries that give rise to E-1 and E-2 eligibility appears at 9 FAM 402.9-10 and also on the DOS website.[16] It is also reproduced at the end of this article as Appendix 1. Some treaties allow for E-1 or E-2 status, but not both. Other treaties contain specific restrictions on E-1 or E-2 eligibility. Practitioners should refer to the list contained in the FAM and, if necessary, the text of the treaty itself.

The most recent additions to the list of eligible countries are as follows:

- E-1/E-2 eligibility for Portugal;[17]
- E-1/E-2 eligibility for New Zealand;[18]

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[9] The DOS final regulations appeared at 62 Fed. Reg. 48149 (Sept. 12, 1997). Legacy INS final regulations appeared at 62 Fed. Reg. 48138 (Sept. 12, 1997). Both became effective on November 12, 1997.

[10] 9 FAM 402.9. The FAM can be accessed at https://fam.state.gov.

[11] INA §101(a)(15)(E); 22 CFR §§41.51(a)(6), (b)(6); 9 FAM 402.9-4(A).

[12] 9 FAM 402.9-4(A).

[13] 22 CFR §§41.51(a)(6), (b)(6).

[14] North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (Dec. 8, 1993).

[15] United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113 (January 29, 2020).

[16] The list of treaty countries can be found at https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html.

[17] On December 15, 2022, Congress passed the *James M. Inhofe National Defense Authorization Act for Fiscal Year 2023* (H.R. 7776) (NDAA), which included the *Advancing Mutual Interests and Growing Our Success Act* (AMIGOS Act). On December 23, 2022, President Biden signed the NDAA and it became Public Law 117-263. However, nationals of Portugal did not become eligible to seek E visas until March 15, 2024.

[18] Legislation authorizing E-1 and E-2 status for citizens of New Zealand was signed into law on August 1, 2018 (see Pub. L. No. 115-226). However, New Zealand citizens did not become eligible for E-1/E-2 status until June 10, 2019.

- E-2 eligibility for Israel;[19]
- E-2 eligibility for Denmark;[20]
- E-1/E-2 eligibility for Chile;[21]
- E-1/E-2 eligibility for Singapore;[22] and
- E-1/E-2 eligibility for Kosovo, Montenegro, and Serbia.[23]

The most recent deletions from the list of eligible countries are as follows:

- On September 24, 2017, President Trump signed Presidential Proclamation 9645 ("Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public Safety Threats"). Among other things, Presidential Proclamation 9645 prohibited Iranian citizens from seeking entry as nonimmigrants (except F, M, and J visas). As a result, E-1 and E-2 visas became unavailable to Iranian citizens on that date. The United States also formally terminated its 1955 Treaty of Amity, Economic Relations, and Consular Rights with Iran on October 3, 2018. On January 23, 2020, USCIS announced that citizens of Iran were no longer eligible for an extension of stay in E-1 or E-2 status or a change of status to E-1 or E-2. However, Iranian citizens currently maintaining E-1 or E-2 status in the United States will be permitted to remain until their current status expires.
- The Government of Bolivia gave notice of termination of its BIT with the United States, effective June 10, 2012. However, Bolivian nationals with qualifying investments in place in the United States as of June 10, 2012, continued to be entitled to E-2 classification until June 10, 2022. The only nationals of Bolivia (other than those qualifying for derivative status based on a familial relationship to an E-2 principal foreign national) who may qualify for E-2 visas at this time are those applicants who are coming to the United States to engage in E-2 activity in furtherance of covered investments established or acquired prior to June 10, 2012.
- On May 18, 2017, the Government of Ecuador provided notice of its intention to terminate its BIT with the United States. On May 18, 2018, DOS formally announced the termination of BIT between the United States and Ecuador. However, Ecuador remains on the list of eligible companies for now because Ecuadorian nationals, with qualifying investments in place in the United States as of May 18, 2018, continue to be entitled to E-2 classification until May 18, 2028. The only nationals of Ecuador (other than those qualifying for derivative status based on a familial relationship to an E-2 principal foreign national) who may qualify for E-2 visas at this time are those applicants who are coming to the United States to engage in E-2 activity in furtherance of covered investments established or acquired prior to May 18, 2018.

In addition to adding Portugal to the list of eligible E-1/E-2 countries, the NDAA also includes provisions to restrict the issuance of E visas to foreign nationals who have acquired citizenship through investment. Specifically, it prohibits the issuance of E-1/E-2 visas to individuals who acquired citizenship through investment until they have been domiciled in that country for "a continuous period of not less than three years." This provision was clearly intended to discourage foreign nationals of non-treaty countries from seeking citizenship by investment in order to acquire E-1/E-2 eligibility.

[19] Legislation authorizing E-2 status for citizens of Israel was signed into law on June 8, 2012 (*see* Pub. L. No. 112-130, 126 Stat. 376). However, Israeli citizens did not become eligible for E-2 status until May 1, 2019.

[20] The effective date of this treaty was December 10, 2008.

[21] U.S.-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, 117 Stat. 909 (*effective* Jan. 1, 2004).

[22] U.S.-Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, 117 Stat. 948 (*effective* Jan. 1, 2004).

[23] Eligibility is due to the fact that these countries are successor states to the former Socialist Federal Republic of Yugoslavia.

Nationality

To qualify for either E-1 treaty trader or E-2 investor status, the applicant must possess the nationality of the treaty country.[24] In most cases, determining nationality is simple. However, establishing the requisite nationality can be difficult in certain situations.

According to DOS regulations, the authorities of the foreign state of which the noncitizen is a national determine the nationality of an individual treaty trader or treaty investor.[25] In unclear cases, practitioners should examine the nationality laws of the treaty country and the language of the relevant treaty in order to determine whether the individual qualifies for E status. For example, in treaty countries where the doctrine of *jus sanguinis* exclusively applies, an individual born within the country's jurisdiction may not be a national of that country.

The nationality of a business is determined by the nationality of the individual owners of that business.[26] A business that is at least 50 percent owned by nationals of the relevant treaty country will be eligible for E status.[27] Where two noncitizens equally own a company, and each possesses a different nationality, the company will possess both nationalities.[28]

Applicants who hold dual nationality (other than U.S. citizenship) may qualify for E status, but they must hold themselves out as nationals of the treaty country in question.[29] Consequently, such an applicant must be documented and be admitted into the United States as a national of the treaty country from which the treaty benefits accrue. However, nationals of a treaty country who also hold U.S. citizenship[30] or U.S. lawful permanent resident status[31] are not considered nationals of the treaty country for the purposes of E eligibility.

The company's country of incorporation is irrelevant to the nationality requirement for E visa purposes.[32] In cases where a corporation is sold exclusively on a stock exchange in the country of incorporation, the consular officer may presume that the nationality of the corporation is that of the location of the exchange (although applicants should still provide the best evidence available).[33] However, where the stock of a corporation is traded in more than one country, the presumption will not apply. In such cases, the applicant will have to establish nationality to the satisfaction of the consular officer. The FAM advises consular officers to request an advisory opinion in appropriate cases.[34]

The source of investment capital is clearly not relevant to the issue of nationality. For example, a corporation that is 50 percent owned by a treaty national will have the nationality of the treaty country, even if 100 percent of the investment capital comes from other investors. Although this scenario might create other eligibility problems, such as the treaty investor's inability to satisfy the substantial investment requirement (unless the corporation acts as the treaty investor), the nationality requirement clearly would be satisfied.

The nationality requirement is easy to satisfy when the treaty business is at least 50 percent owned by treaty nationals. However, if the treaty business is less than 50 percent owned by treaty nationals, it may need to be restructured in order to satisfy the nationality requirement.

One possible solution is to transfer an appropriate number of shares from the non-treaty national to the treaty national. As payment for the shares, the treaty national could execute a loan agreement with an option to later

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[24] 22 CFR §§41.51(a)(6), (b)(6); 9 FAM 402.9-4(B)(a).

[25] *Id*.

[26] *Id*.

[27] 9 FAM 402.9-4(B)(c).

[28] 9 FAM 402.9-4(B)(d).

[29] *Id.*

[30] Verbally confirmed by J. Gorsky, of the DOS Visa Office, at the 2002 AILA Annual Conference. *See also* 22 CFR §40.2(a), which prohibits the issuance of a visa to a national of the United States.

[31] 9 FAM 402.9-4(B)(e).

[32] 9 FAM 402.9-4(B)(b).

[33] *Id.*

[34] *Id.*

repurchase the shares from the non-treaty national at the original price. This option could be exercisable only after the expiration date of the treaty national's visa or upon certain earlier events, such as the treaty national's departure from the business or insolvency. This strategy should satisfy the nationality requirement while also protecting the interests of the non-treaty national.

Some practitioners may believe that they can satisfy the nationality requirement by having the treaty national hold the non-treaty national's shares in a trust. This is because under common law, a trust is not a separate legal entity from the trustee; the trustee is the legal owner of trust assets. If common law controlled, the treaty national trustee, rather than the non-treaty national beneficiary, would legally own the shares. However, DOS has confirmed that it will look to the beneficiaries, rather than to the trustee, when determining the nationality of the treaty business.[35]

Intention to Depart the United States

In order to qualify for E classification, the foreign national must intend to depart the United States upon the termination of their status.[36] However, an applicant does not need to establish an intention to remain in the United States for a specific temporary period of time or the existence of a residence in a foreign country that the applicant does not intend to abandon.[37] The applicant's expression of an unequivocal intent to return when the E status ends is normally sufficient.[38] This intent can normally be expressed by way of a written statement submitted with the E visa application.

A limited form of dual intent still appears to be recognized by DOS, although the guidance has recently become less clear. The current DOS position is that an applicant who is the beneficiary of an immigrant petition will need to satisfy the consular officer that they intend to depart from the United States at the end of their authorized stay, and not stay in the United States to adjust status or otherwise remain in the United States.[39] However, the guidance was more generous prior to April 6, 2018.[40]

The current language suggests that an applicant who is the beneficiary of an immigrant petition will now have a greater evidentiary burden. The elimination of the phrase "regardless of legality of status" could also be interpreted by some overly zealous consular officers as an outright prohibition on dual intent. Nevertheless, the FAM continues to confirm that merely being the beneficiary of an immigrant petition should not be considered conclusive proof of the applicant's intent.

A limited form of dual intent is also recognized by USCIS. The current USCIS position is that an application for initial admission, change of status, or extension of stay in E classification may not be denied solely on the basis of an approved request for permanent labor certification or a filed or approved immigrant visa petition.[41] In addition, an applicant who has already filed an application for adjustment of status may still file for an extension of E status.[42] This clearly shows that an E nonimmigrant may be the beneficiary of a labor certification or immigrant petition, or have an adjustment of status application pending, and remain eligible for E status.

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[35] Verbally confirmed by S. Fischel, Director of Legislation, Regulations and Advisory Assistance for the DOS Visa Office, during the 1999 AILA Annual Conference.

[36] 22 CFR §§41.51(a)(1), (b)(1).

[37] 9 FAM 402.9-4(C).

[38] *Id.* Prior to April 6, 2018, this FAM note stated that an expression of an unequivocal intent to return would normally be sufficient "*in the absence of specific indications of evidence that the foreign national's intent is to the contrary*." However, this language has now been deleted.

[39] *Id.*

[40] *Id.* Prior to April 6, 2018, the FAM note stated that an applicant—the foreign national—*might* satisfy a consular officer that their intent was to depart the United States upon termination of status, and not stay in the United States to adjust status, or otherwise remain in the United States *regardless of legality of status*.

[41] 8 CFR §214.2(e)(5).

[42] INS Memorandum, P. Virtue, Acting Executive Commissioner, *HQ 70/6.2.5, 70/6.2.9* (Aug. 5, 1997), *reprinted in* 74 Interpreter Releases 1226–29 (Aug. 11, 1997).