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The E-2 Investor Visa --
Reserved for Millionaire Aliens?

Not exactly. One misconception about the E-2 non-immigrant visa is that one must make a minimum investment to qualify - the culprit may be confusion with the EB-5[1] green card, which does prescribe a minimum monetary threshold. The reality is, no such threshold exists for an E-2 visa and qualification depends on the interplay of several, equally important factors. Viable business plans may concern anything from real estate development, to a nail salon, or a karaoke business, to name a few.

The qualification hurdle forming the basis for this classification is having treaty country nationality. This means that the investor must be a national of a country that has a Treaty of Friendship, Commerce, and Navigation or its equivalent with the United States.[2] If the investor is an organization, the nationality will be traced to the individual owners of the organization. Furthermore, it must be shown that the national of the treaty country owns at least 50% of the stock of the enterprise and that each principal or employee seeking E-2 status has the same nationality as the treaty enterprise.

Once it is established that the E-2 visa candidate satisfies these basic requirements, he/she must turn to a lengthy list of additional qualification hurdles to obtaining an E-2 investor visa.

In general, a treaty investor candidate must present evidence that will convince a consular officer that the investor intends to enter the United States solely to *develop and direct* the operations of a bona fide enterprise in which he has *invested*, or of an enterprise in which he is actively in the process of investing, a *substantial amount of capital*[3] and that the candidate intends to depart from the United States upon the termination of E-2 status. This statement contains language that has gone through much legislative and case law interpretation, thus I will continue by dissecting and illuminating the instrumental parts.

The *develop and direct* criterion is satisfied if "the business or individual treaty investor does or will develop and direct the enterprise by controlling the enterprise through ownership of at least 50% of the business and by possessing operational control through a managerial position or other corporate device, or by other means.[4]"

The capital requirement is separate and requires a *substantial amount of capital*[5] be invested; this is the test:

(9) A substantial amount of capital constitutes that amount that is:

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[1] The EB-5 warrants a separate discussion and is covered in a separate article.
[2] INA 101(a)(15)(E)
[3] INA 101(a)(15)(E)(ii)
[4] 22 CFR 41.51 (b)(11)
[5] 22 CFR 41.51 (b)

(i)

(A) Substantial in the proportional sense, i.e., in relationship to the total cost of either purchasing an established enterprise or creating the type of enterprise under consideration;

(B) Sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and

(C) Of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise.

(ii) Whether an amount of capital is substantial in the proportionality sense is understood in terms of an inverted sliding scale; i.e., the lower the total cost of the enterprise, the higher, proportionately, the investment must be to meet these criteria.

It is important to note that this test is applied according to the enterprise and general business practices in the field are considered, therefore, a comprehensive, convincing business plan is crucial in assessing the likelihood of success of a given enterprise.

The term *investment* is defined as "the treaty investor's placing of capital, including funds and other assets, at risk in the commercial sense with the objective of generating a profit. The treaty investor must be in possession of and have control over the capital invested or being invested. The capital must be subject to partial or total loss if investment fortunes reverse. Such investment capital must be the investor's unsecured personal business capital or capital secured by personal assets. Capital in the process of being invested or that has been invested must be irrevocably committed to the enterprise. The alien has the burden of establishing such irrevocable commitment given to the particular circumstances of each case. **The alien may use any legal mechanism available, such as by placing invested funds in escrow pending visa issuance, that would not only irrevocably commit funds to the enterprise but that might also extend some personal liability protection to the treaty investor.[6]"**

It is useful to keep in mind that many of the standards discussed above leave space for judgment and discretion on the part of consular officers who review the petitions. As is the case with all visa applications, the burden is on the applicant to render a convincing case, therefore presentation, organization and adequate documentation are tantamount to a successful case. Our firm works very closely with clients to ensure proper evidentiary and organizational benchmarks are satisfied so that you may be confident that your case is presented as persuasively and coherently as possible.

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[6] 22 CFR 41.51 (b)(9)