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The Docket: US Non-Immigrant Visa Categories

Employment visas for entrepreneurs and their management

Thinking about expanding your business to the USA? This month's edition of The Docket looks at your workable options.

Are you playing with the idea of expanding your business activities to the USA – a country with a whopping 300 million available consumers?

Despite certain restrictions, there are still feasible possibilities and opportunities to legally start working, living and starting your business in the United States of America.

If you are about to or already have invested a substantial amount in a new or existing US enterprise – or when your company has had extensive trade with the USA for some time – there are several 'workable options'.

For example, what if you want to supervise operations, have your family close to you, make sure your children attend school, and have your spouse working with you in your own firm. If done right, this is all legally possible. The answer is the so-called E-1 (Treaty Trader) or E-2 (Investor) visa. Both categories allow for multiple years of residence and employment, are renewable and have long validity terms (up to five years).

And this is just the tip of the iceberg. For more in-depth information, visit the AmCham Belgium Business Library and get a detailed overview of conditions applicable to issuance of these two types of visas as well as examples.

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US non-immigrant visa categories
Employment visas for entrepreneurs and their management

This article is the first in a series that addresses practical matters regarding criteria for various United States non-immigrant business visa categories. With the proposed US economy-enhancement package in mind, three business related visa categories will be subject to a concise, practical overview showing possible applicability of these categories and related conditions for issuance of visas. Explanatory text as well as examples have been included.

The subject of this first article will be trade with and investment in the United States and the qualifications for so-called Treaty Trader and Treaty Investor visas.

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A foreigner's employment in the US
It is rather common for foreign enterprises to send managers and specialists to set up a new US enterprise according to the foreign HQ's set of principles; in practice, it is not uncommon to have at least one of foreign HQ's managers present in the United States, for a fixed term or on an intermittent basis, in order to overview operations and to report to HQ.

A non-immigrant visa such as an E-1 or E-2 visa allows for performance of activities in the United States of a temporary nature, which in practice may vary from a couple of days to 5 years. Some categories allow for longer assignments, by means of extensions of visas and work permits, whether or not coupled with performance of activities on an intermittent basis, while remuneration is paid by the US employer, the foreign employer or in case of a salary split, by both. When entering the United States on a non-immigrant visa, one is assumed not to have immigrant intent. The E-visa category is one of the non-immigrant visa types.

E-1 / E-2
The United States and a number of countries, amongst which Belgium and the Netherlands have signed treaties[1] on the international 'exchange' of executives, managers and specialists.

Based on such treaties, a national of a treaty country is given the opportunity to enter the United States as (an employee of) a Treaty Trader or Treaty Investor. A Treaty Trader visa is also known and referred to as an E-1 visa, a Treaty investor visa as an E-2 visa.

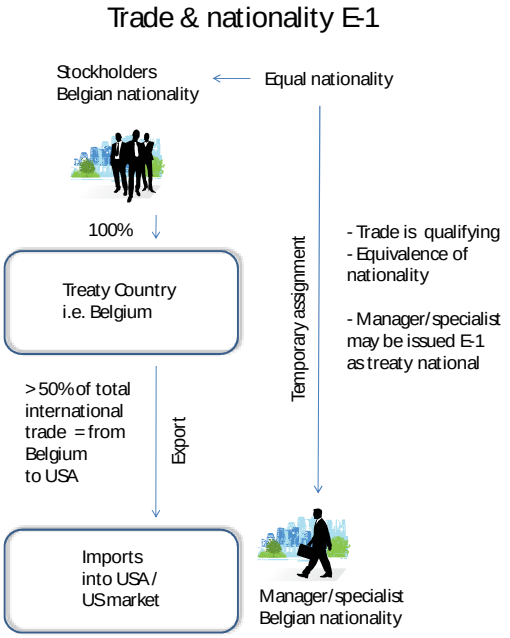
E-1 Treaty Trader visas
E-1 visas are appropriate in the following circumstances:
- A Treaty Trader enters the United States with the purpose of carrying on substantial trade; in order to qualify for substantial trade, such trade must have been in existence and must involve numerous transactions over time.
- Trade may include trade in goods, services and technology. This includes international banking, insurance, transportation and communications services.
- There must be an actual exchange of goods or services between the United States and the treaty country. Trade must be international, title to goods and or services must pass from one treaty party to the other.

The situation whereby a Belgian supply and sales agent is assisting his principal in the purchasing of Taiwan manufactured LCD screens directly exported from and for resale in the United States, would not qualify for E-1 visa issuance, if based on the international trade between Taiwan and the United States. However, the agent is providing services of an international character, he is promoting the international trade in goods from one treaty country to

[1] United States – Belgium Friendship, Establishment and Navigation Treaty, February 21,1961. United States – Netherlands Friendship, Commerce and Navigation Treaty, March 27,1956.

another, here from Taiwan to the United States. The agent is paid by his US principal annex US importer for commission on goods traded. The agent receives sixty percent of his worldwide income from US principals. The provision of services could involve treaty trade. No E-1 visa could be issued based on Taiwan exports to the USA, due to the fact of non-equivalence of nationality of the trade and the trader. However, services provided by the Belgium based agent would qualify for E-1 visa issuance, when the agent would work for a US based importer, and the services provided by the agent would be regarded as E-1 services.

- At least 50% of total international trade conducted by the Treaty Trader must be between the treaty country of the E-visa applicant's nationality and the United States. In case of a Belgian company exporting to the US: such company would have to export at least 50% to or into the United States. Should such exports be less than 50%, for instance, when a company exports to numerous countries worldwide, one could still be eligible for E-1 status and visas, if i.e. the Belgian company has a US based subsidiary, which is responsible for imports of goods from the Belgian company, and subsequent distribution in the US; assuming such company would only import goods from Belgium, the 'more than 50%' threshold for treaty trade would be met, this is the so-called 'reverse situation'.



The example on the left shows a situation, where a Belgian company is fully owned by stockholders having Belgian nationality. Here, we assume that the export of goods to the US by the Belgian company totals 70% of its total international trade. The Belgian company intends to send one of its US market specialists to the USA, to temporarily hold a specialist position.

- o Trade qualifies as Treaty Trade.
- o Belgian owners qualify as Treaty Traders.
- o The specialist is employed by the Belgian company and will be transferred to the USA, while remaining employed and paid by the Belgian company. (Note: the Belgian employee may also be employed and paid by a qualifying US subsidiary.)
- o The specialist qualifies as Treaty Trader employee.

E-2 Treaty Investor visas

E-2 visas are appropriate in the following circumstances:

- For entrepreneurs from treaty countries investing substantially in a U.S. enterprise. ''Investing substantially'' is dependent upon the capital required for the enterprise to become and remain operational, which may vary per industry. The amount of investment made is to be sufficient to successfully develop and direct the enterprise. A proportionality test is applied, which means that, the amount of privately invested funds put at risk is compared to the total amount of costs of setting up or purchasing the enterprise.

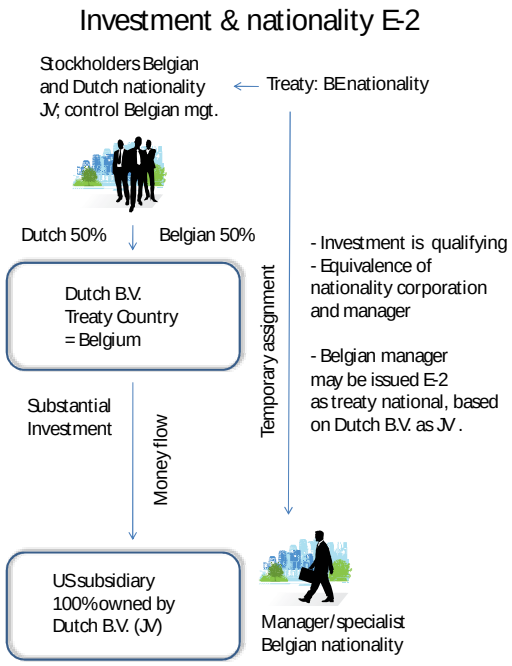
The amount invested in the enterprise is compared to the cost of the business by assessing the percentage of investment made in relation to the total costs of the enterprise. If an amount of $100k is required to set up an enterprise, whereby 80% is invested from the investor's private funds, then this investment could qualify as an E-2 investment. If an amount of $7 million would be required to take over or establish an enterprise, an investment percentage of i.e. 30% equaling $2.1 million could qualify as E-2 investment. The lower the investment, the higher the investment percentage.

The Investor must demonstrate the investment made, including the legitimacy of funds invested. Funds must be invested at risk, in the commercial sense, with the purpose of generating a return. In practice, an E-2 visa application appears only to be feasible, when funds already have been placed at risk.

- For nationals of treaty countries entering the United States to develop and direct investments from the treaty country or to develop and direct its operations. In order to qualify for an E-2 status and investment, the enterprise invested in, must be an active, commercial enterprise. Either the investor or its employees may qualify under E-2. If an employee, her or she must come to the United States to fill an executive or managerial position or must be considered an 'essential employee' (see 'General Conditions for issuance of E-visas to applicants' hereafter).

The example on the right shows a situation, where a joint venture company, a Dutch B.V. equally held by Dutch and Belgian stockholders, is managed and controlled by Belgian management. The Dutch B.V. is considered to have Belgian nationality for Treaty Investor purposes. The Dutch company intends to send two of its product managers to the USA, to hold specialist positions for an anticipated term of 2-4 years. One manager has Belgian and one has Dutch nationality.

- o Investment qualifies as Treaty Investment.
- o Company qualifies as Treaty Investor bades on Belgian control.
- o Both product managers will be transferred to the USA, to be employed by the US company, while socially insured in their home country.
- o The Belgian product manager qualifies as Treaty Investor employee; his nationality and the company's are equal. The Dutch product manager doesn't qualify. There'



Normally, E-status is coupled to a single treaty nationality. In the example above, treaty nationality is determined to be Belgian, because of the Belgian management's controlling interest. If control would be equally divided between Belgian and Dutch management, E-visas could be issued to both Belgian and Dutch qualifying E-2 visa applicants.

General conditions for issuance of E-visas to applicants

Issuance of E-1 and E-2 visas is further dependent upon the following conditions:

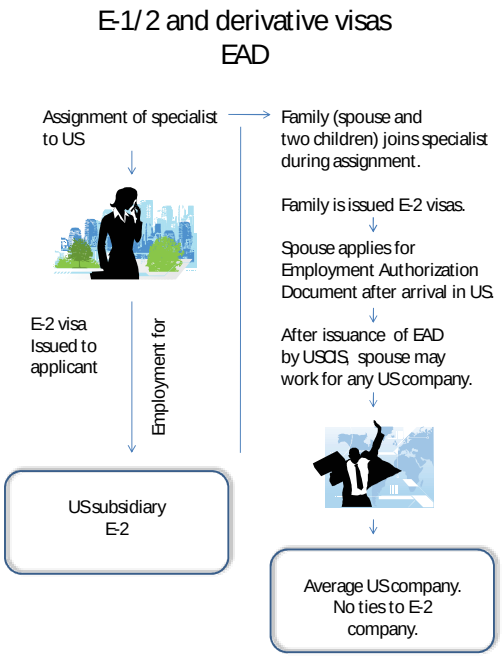
- The requisite treaty between the United States and the treaty country for issuance of E-visas exists. The United States have signed such treaties with Belgium and the Netherlands.
- The applicant possesses the nationality of the treaty country. Nationality must be equivalent to the trading or the investment country.
- The foreign or qualifying company, expatriating the applicant possesses the nationality of the treaty country. Such nationality is determined by the nationality of the ultimate individual owner(s) of the company (the ultimate stockholder(s)). The country of incorporation of the qualifying company is irrelevant for determination of nationality for E-visa purposes.

1. A Belgian chocolate goods trading company exporting 80% of its total trade from Belgium to the United States, could successfully apply for an E-1 visa for their Purchasing Manager Americas, who has Belgian nationality.
2. A Dutch hardware trader living in Belgium, operating a Belgian BvBA which exports 80% of its total trade from Belgium to the United States would not fulfill the nationality equivalence requirement, and could not be issued an E-1 visa.
3. A German biotechnology group with a majority of German stockholders, investing a substantial amount, sufficient enough to qualify under E-2, could successfully apply for issuance of E-2 visas for their German nationality applicants, all considered managers and specialists.
4. An Italian property management group with a majority of French stockholders, investing a substantial amount, sufficient enough to qualify under E-2, could not successfully apply for issuance of E-2 visas for their Italian managers and specialists, due to the lack of equivalence in nationality of the group and its visa applicants.

- The applicant, if an employee, must be working in an executive or supervisory (managerial) position or as a specialist, possessing skills which are considered essential to US operations. Whether an applicant's position in the US is to be considered managerial or executive is dependent upon various circumstances. What is the applicant's position in the foreign company, what is his or her executive or managerial experience, what are his or her daily duties in the foreign company as well as in the US. A first line management position whereby one other employee is supervised would probably not qualify as executive of managerial. An essential employee generally possesses qualifications which are considered scarce and extremely useful and important to the US company's operations.
- The applicant must have the intention to depart the United States when E-status terminates. E-visas are considered non-immigrant visas. An E-visa holder is assumed to have no immigrant intent. E-visas may be issued for short term (one to two years) or for long term (on-going basis). The applicant needs to convince the adjudicating officer of the essentiality of his or her skills, needed for the US company's operations, as well of the time such essential skills will be needed.

Derivative visas

E-1 and E-2 visas allow for issuance of so-called derivative visas for immediate family members of E-2 visa holders.



Derivative visas may be issued for a term equal to that of the E-2 visa of the applicant to be employed in the US.

An advantage of using this visa category for immediate family members, is the possibility of applying for a so-called Employment Authorization Document, abbreviated EAD. Such EAD, when issued by USCIS, allows for employment of the EAD holder – the spouse of the E-2 visa holder - for literally any company in the United States. In short, it provides for more flexibility than the E-2 visa itself. The E-2 visa holder is allowed to work for the treaty company in the United States, but is also restricted to employment for that specific US company. The immediate family member is allowed to choose whatever employer available, and is allowed to switch US employers, without loosing status. The term of an EAD may not exceed the E-visa term.

General corporate questions

- Is it necessary to set up a subsidiary company in the United States in order to comply with E-visa rules and regulations and in order to obtain E-visas?
  No, however common, it is not required to set up a subsidiary company in the United States. It is possible to comply with E-visa rules and regulations when:
  - A subsidiary is set up; as well as when
  - A branch of the foreign company is registered in the United States on state level, by applying for an authorization to transact business; as well as when
  - In case of E-1 (Treaty Trade) substantial trade as in numerous transactions in time have taken place. In such case no US subsidiary or branch is necessary.
- Is it necessary that my employee is transferred to our US subsidiary's payroll when starting employment in the US based on issuance of an E-2 visa?
  No, that is not necessary. The employee may remain on Belgian payroll. The employee may apply for a social insurance declaration, enabling the employee to remain socially insured in the employee's home country, generally with a maximum of 5 years. Both employer and employee need to take fiscal implications of the assignment into consideration.

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General note
The foregoing is not to be considered exhaustive; due to the prescribed length of the article, only general and basic principles and conditions have been described. The contents of this article is of general and informative nature en is not meant to serve as (legal) advice for migration, corporate or trade purposes. No rights are to be derived from the contents of this article.
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