Investment-Based Immigration for the Small Business Entrepreneur

By John F. Koryto and Kevin D. Battle

Small businesses have a far larger impact on the United States economy than the term implies, accounting for almost half of our nation's economic activity.[1] Small businesses have a similar outsized influence on Michigan's economy and are created at much higher rates by immigrants to the U.S.[2] Thus, attorneys as key business advisors should become familiar with immigration law requirements and procedures to assist foreign national entrepreneurs to open new businesses and invest in Michigan. "Foreign nationals," defined for this article as individuals who do not have U.S. citizenship or permanent resident status, must satisfy specific immigration law and visa classification requirements when pursuing small business opportunities in the U.S. The immigration law and procedures require early analysis just like other critical legal issues.

This article provides an overview of immigration law requirements to aid business lawyers in identifying issues. Here, the focus is on foreign national entrepreneurs with limited capital—as little as $20,000 or less—who with advance planning can still launch successful small business ventures and attain investor visa classification.

Our goal in this article is to explain basic investment-based immigration requirements to promote concurrent business and immigration law planning. Discussion is limited to the nonimmigrant or temporary visa classification, specifically the E-2 Treaty Investor visa class.[3] An entrepreneur may also pursue a Green Card or permanent resident status, but larger investment amounts and job creation numbers are required. These heightened requirements, combined with considerably longer government processing times, push most individuals seeking to open a small business toward the nonimmigrant E-2 visa class as a first step.

A common challenge for the would-be entrepreneur is that those already in the U.S. in another employment-based visa class have limited employment authorization. In such a case, the foreign national's authorized business activities are limited to those described in the visa petition. For example, an entrepreneurial H-1B worker cannot legally open her own business, even if she has the time, talent, and financial resources to do so.[4] Business activities that are outside the scope of the approved visa petition are not allowed; these activities are grounds for visa cancellation and likely to bar future immigration benefits.[5] H-1B visa holders are limited to working for an approved petitioning employer, and in general, a self-petition or self-employment is not permitted.[6] H-1B visas have other requirements that essentially prevent an entrepreneur from obtaining this visa class; a bona fide job opening for any qualified worker must exist, and there is an obligation to pay a wage at or above the area prevailing wage rate.

Other popular temporary visa classifications that allow individuals to live and work in the U.S., such as the L-1 Intracompany Transfer visa, require employment abroad for at least one year at a related or commonly owned affiliate, and limit the purpose of residing in the U.S. to working for the petitioning affiliate employer.[7] Other sources of income, unless considered "passive income," are not permitted for the H-1B or L-1 visa classes. TN visas, available to nationals of Canada and Mexico, also require a job opportunity, and establishing a new small business is not allowed.[8]

However, foreign national investors are eligible for nonimmigrant visas in the E-2 Treaty Investor classification.[9] The Immigration and Nationality Act of 1952 created the E-2 visa category.[10] The act as amended in 1990 states that a foreign national granted an E-2 visa may enter the U.S. under a treaty of commerce and navigation between the U.S. and the foreign national's country to develop and direct the operations of an enterprise in which he or she has invested, or is actively in the process of investing, a substantial amount of capital.[11] The E-2 visa classification allows a foreign national to be admitted to the U.S. for an initial two-year period; additional two-year incremental extensions will be approved, with no limits on the number of extensions, when the treaty investor demonstrates the business is operating, remains viable, and employs other U.S. workers.[12] The principal treaty investor must be actively involved, managing the investment, or working at the business.[13]

Significantly, the spouse and children (under the age of 21) of treaty investors are also eligible to obtain E-2 visa status.[14] A spouse is admitted in E-2 visa status and able to obtain work authorization without an employer's sponsorship and without any restrictions on the type of employment. Further, the E-2 class can be used to bring other foreign nationals to the U.S. to work in an executive or

At a Glance

Small businesses have an outsized influence on Michigan's economy and are created at much higher rates by immigrants to the United States. Attorneys as key business advisors should become familiar with the immigration law requirements and procedures to assist foreign national entrepreneurs to open new businesses and invest in Michigan.

Foreign national investors are eligible for nonimmigrant visas in the E-2 Treaty Investor classification, provided the investor is a citizen of a country with an appropriate treaty or trade agreement with the U.S.

Investment opportunities are truly unlimited; E-2 visas may be granted for opening a well-known brand franchise or a unique new business concept.

Every E-2 visa requires a bona fide business that is a real and active commercial or entrepreneurial undertaking producing some service or good.

supervisory capacity, or where the worker is essential to opening or operating the business.[15] The foreign national employees must be of the same nationality as the principal treaty investor to obtain E-2 visa classification.[16]

E-2 visa requirements

Treaty between the U.S. and the foreign country

To qualify for an E-2 visa, there must be a "treaty of commerce and navigation" between the U.S. and the country of the foreign national's nationality. Qualifying treaties include treaties of friendship, commerce, and navigation and bilateral investment treaties.[17] The U.S. Department of State maintains a list of the treaty countries at https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html [https://perma.cc/ZQ5G-FH8Q] (accessed July 28, 2020).[18]

Nationality

The treaty investor must hold the same nationality, meaning citizenship, of the treaty country. The investment may be through a business entity. With these investments, the nationality is determined by the nationality of the individual owners of the business, where "ownership must be traced as best as practicable to the individuals who are ultimately its owners."[19] Nationals of the treaty country must own at least 50 percent of the business.[20] When determining whether 50 percent of the business is owned by nationals of a treaty country, foreign nationals who hold U.S. lawful permanent residence (Green Cards) cannot be considered in determining the nationality of the business.[21]

Treaty national has invested or is in the process of investing

To successfully secure an E-2 visa, the treaty investor must have already invested or be actively in the process of investing capital in the U.S. business.[22] Regulations define "investment" 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."[23] The treaty investor must possess and control the capital invested or to be invested.[24] The treaty investor must be able to demonstrate the lawful source of the investment through bank statements, wire transfers, inheritance documentation, or other means; the source of funds will be under scrutiny to assure the funds were not obtained, directly or indirectly, through criminal activity.[25]

The investment must also clearly be "at risk," meaning the funds must be subject to partial or total divestment if the business fortunes reverse.[26] At-risk funds include a treaty investor's personal assets, such as personal funds, mortgages on a personal dwelling used as collateral, and equipment, machinery, and other unencumbered assets placed into the business.[27] A reasonable amount of cash from the investor transferred to business bank accounts may be counted as at-risk investment funds.[28]

The investment is substantial

The treaty investor's investment of assets or other capital must be substantial.[29] Specifically, investment must be more than a marginal investment solely to allow the treaty investor to earn a living. To obtain the E-2 visa, the amount of the investment and subsequent business activities must demonstrate the ability to employ U.S. workers in the future. There is no specific dollar amount required to establish the minimum amount for an investment to be considered substantial.[30] Instead, visa approval generally requires evidence of the initial start-up cost of the business, the nature and extent of the business activities to date, and other indications of a viable business that will lead to job creation. A well-drafted business plan that explains how and when investment funds will be used is critical to obtaining E-2 visa status.[31]

A real and operating commercial enterprise

Every E-2 visa requires a bona fide business that is a real and active commercial or entrepreneurial undertaking producing some service or good.[32] The business "cannot be a paper organization or an idle speculative investment held for potential appreciation in value, such as undeveloped land or stock held by an investor who does not demonstrate intent to direct the enterprise."[33] Successful E-2 visa applications require evidence that the business is actively running or will open soon upon visa approval; evidence should include utility expenses, business licenses secured, photographs of the physical space for office or manufacturing operations, a lease or real estate purchase agreement, purchase orders, other business-related invoices, and contracts showing operations are underway or soon to be underway.

Investor must develop and direct the enterprise

The principal treaty investor, meaning the investor seeking E-2 visa classification, but not other foreign nationals requesting E-2 visas as executive, supervisory, or essential skills workers, must demonstrate the intent and ability to develop and direct the U.S. enterprise, in contrast to an intent to compete in the U.S. labor market as skilled or unskilled labor.[34] The ability to develop and direct the enterprise also requires showing that the principal investor has effective control of the enterprise, whether by majority ownership, 50 percent ownership and managerial control, or other indicia of effective control.[35]

Application process

Foreign nationals residing outside of the U.S. must apply at a U.S. consulate to secure an E-2 visa. To apply, a foreign national must pay a nonimmigrant visa fee and complete a DS-160 Online Nonimmigrant Visa Application.[36] After completing the application, the foreign national schedules an interview at the consulate, where procedures may vary. Most consulates have a dedicated unit for initial screening of the application, and many do not allow interviews to be scheduled until after the initial screening. The consular officer will review the application and supporting documents and approve, deny, or request additional evidence.[37]

If the foreign national is already in the U.S. on another nonimmigrant visa status, a petition may be filed requesting a change to E-2 visa status with the U.S. Citizenship and Immigration Service.[38] A similar review and decision process will occur, but no interview is required. Unfortunately, the service's review and decision on a petition are likely to require several months, leading most entrepreneurs to prefer the consulate application.

Closing comments on treaty investment in Michigan

The state of Michigan is a particularly attractive option for treaty investors looking for new investment opportunities. Not only does the state offer access to the Great Lakes, but also direct access to Canada through multiple locations, such as the Detroit–Windsor Tunnel, Ambassador Bridge, Sault Ste. Marie International Bridge, and Blue Water Bridge. Michigan also boasts 15 public universities and more than 25 private colleges and universities, which provide a direct pipeline to talent necessary to assist treaty investors in operating and maintaining successful businesses. Further, Michigan offers vast opportunities for companies providing goods and services to several critical industries, such as automotive, furniture, and healthcare. Investment opportunities are truly unlimited; E-2 visas may be granted for opening a well-known brand franchise or a unique new business concept.

In closing, we return to the starting point of the new business venture, the point where the business lawyer, with an understanding of the E-2 visa requirements, offers the greatest assistance. The success of the E-2 visa application is largely dependent on the available supporting documentation. The business lawyer can assist with documenting that the investor's funds are truly at risk and subject to loss. While the investor's personal funds or assets must be at risk, the amount of risk can still be controlled or limited. Business lawyers can assist with the placement of funds in escrow to purchase a building or other business assets, subject to E-2 visa classification approval. Entity formation documents, such as a limited liability company's member agreement, and other business records must also be prepared with the E-2 visa requirements in mind. During the visa application process, business entity ownership and managerial control provisions are closely examined. As the investment need not be of money or capital alone, business lawyers can help document the value of invested assets,

including equipment, machinery, and other goods transferred to the business enterprise. Accordingly, business lawyers with an appreciation of the E-2 visa requirements are best able to advise the small business entrepreneur on the business, personal, and immigration-related issues. ■

John F. Koryto is a member of Miller Johnson, PLC, and co-chair of the firm's immigration practice group. He has more than 25 years' experience preparing all types of employment-based visa petitions for corporations seeking to staff U.S. business operations with skilled foreign nationals in various managerial or technical positions. His work also involves addressing the legal and practical requirements of employing foreign nationals in many occupations. He can be reached at korytoj@millerjohnson.com.

Kevin D. Battle is an associate with Miller Johnson, PLC, focusing on employment and family-based immigration matters. In addition to E-2 Treaty Investor visas, he assists employers with the immigration procedures to hire and retain foreign nationals in the medical and engineering fields, among other professional occupations. His work also includes Form I-9 Employment Verification audit and compliance assistance. He can be reached at battlek@millerjohnson.com.

ENDNOTES

1. *Small Businesses Generate 44 Percent Of U.S. Economic Activity*, US Small Business Admin, Office of Advocacy (January 30, 2019) <https://advocacy.sba.gov/2019/01/30/small-businesses-generate-44-percent-of-u-s-economic-activity/> [https://perma.cc/7PMD-VBL8]. All websites cited in this article were accessed July 30, 2020.
2. *Michigan 2018 Small Business Profile*, US Small Business Admin, Office of Advocacy (2018) <https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-MI.pdf> [https://perma.cc/QPX3-PL8Y].
3. 8 USC 1101(a)(15)(E).
4. 8 CFR 214.2 (h)(11)(iii)(A).
5. 8 CFR 214.2(e)(8).
6. *Id.*
7. 8 CFR 214.2(l)(1)(ii)(A).
8. 8 CFR 214.6(b).
9. 8 CFR 214.2(e)(3).
10. 8 USC 1101(a)(15)(E).
11. *Id.*
12. 8 CFR 214.2(e)(19)–(20).
13. 9 FAM 402.9-6(F).
14. 22 CFR 41.51(a)(3).
15. 8 CFR 214.2(e)(3).
16. 8 CFR 214.2(e)(17)–(18).
17. 9 FAM 402.9-4(A).
18. 9 FAM 402.9-10.
19. 8 CFR 214.2(e)(7).
20. 22 CFR 41.51(b)(2)(ii).
21. 9 FAM 402.9-4(B)(e).
22. 8 USC 1101(a)(15)(E).
23. 8 CFR 214.2(e)(12).
24. *Id.*
25. 9 FAM 402.9-6(B)(b).
26. 9 FAM 402.9-6(B)(c).
27. *Id.*
28. *Matter of Lee*, 187 I&N 2348 (1975), available at <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/17/2348.pdf> [https://perma.cc/BF4E-JZX5].
29. 9 FAM 402.9-6(D).
30. *Id.*
31. 9 FAM 402.9-6(D)(c)(4).
32. 9 FAM 402.9-6(C).
33. *Id.*
34. Nonimmigrant Classes; Treaty Aliens; E Classification, 62 FR 48,138, 48,144 (September 12, 1997) (to be codified at 22 CFR 41 and 8 CFR 214).
35. 9 FAM 402.9-6(F)(f).
36. 22 CFR 41.103(a)(1).
37. 9 FAM 504.9-2.
38. 8 CFR 248.1(a).