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U.S. Immigration Laws Allow Treaty Trader Visas

By Jeffrey S. Moeller

E-2 Treaty Investors

The United States has reciprocal trade treaties with many countries, allowing persons to enter and establish a variety of businesses in each country. A person from another country may be able to obtain a visa to enter the United States as an “E-2” treaty investor if he or she is coming to the U.S. to develop and direct the operation of a business in which the person has invested (or is about to invest) a substantial amount of capital. There must also be a trade treaty with the person’s home country in place. For a list of treaty countries, visit: http://www.travel.state.gov/reciprocity/list_of_treaty_countries.htm.

Unlike most non-immigrant categories, the U.S. consulates abroad, rather than the Immigration and Naturalization Service (INS), usually process applications for E status in the first instance. The method of processing E-2 visas can vary, depending upon where the person is located when applying for the status. E-2 visas can be obtained by petitioning U.S. Citizenship and Immigration Services (USCIS) or by applying



for the status at a U.S. consulate or embassy abroad. Note, however, that not all U.S. consulates and embassies process E-2 visas, and that research on a particular consulate or embassy should be conducted before an appointment is scheduled.

You should know:

- Employees of an E-2 treaty investor who share the same nationality as the primary investor may also be admitted, if they will perform duties requiring special qualifications necessary for the efficient operation of the business.
- The primary investor is initially admitted for two years, but this period can be renewed repeatedly. A

Cont. on page 2

Minority Business Ownership in a Small Business: A Dream Fulfilled or a Nightmare Created?

By Joseph R. Spoonster & Neil Klingshirn

A big part of the American Dream is to own a business. To achieve this dream, many owners start a business with one or more “partners” who are employees and share equally in the profits as owners. This dream can turn into a nightmare, however, if the relationship sours, since employee ownership is even more difficult to unwind than a marriage.

Whether as partners, members, or shareholders, the owners owe one another “fiduciary” duties so that none of them gains personal profit at the expense of the business. They also may not participate in activities that directly conflict with the business’ interest. For example, an owner cannot compete against the business for its business prospects. The law also says that the “majority” or controlling owner has a “heightened” fiduciary duty requiring that owner to act with the utmost good faith and loyalty to the other owners.

This heightened fiduciary duty requires the majority owner

Cont. on page 2

Minority Business Owners, cont. from page 1

to consult and inform the co-owners about all ownership matters. It also gives minority owners an equal opportunity in the business. For example, the majority owner cannot take an excessive salary or bonus, use the business to pay for personal expenses, or charge the business high rent for the majority owner's property.

An owner/employee business relationship can sour when one owner develops a greater role

in the success of the business or takes on more responsibilities than originally planned. Gradually, the other owner's role and participation diminishes. Meanwhile, each is entitled to the same share of the business profits.

The controlling owner might consider several schemes to correct this inequality, each of which is fraught with liability. First, the controlling owner might fire the nonperforming owner. How-

ever, owner/employees are not "employees at will" and cannot be removed without a legitimate business justification. Second, the controlling owner could deprive the nonperforming owner of an equal opportunity in the business, hoping he or she quits. This is a classic "freeze-out" or "squeeze out" that courts have found violate the fiduciary duties. Finally, the controlling shareholder might close the business and set up a new one, leaving the nonperforming owner behind. This is also a violation of fiduciary duties as one owner has taken all of the business opportunities in a competing business.

The law provides no easy way to remove an owner who is no longer contributing to a business. At most, the controlling owner can dissolve the business in court, dissolve it according to the business regulations or bylaws if they allow for dissolution, or buy back the nonperforming owner's interest.

Deciding to share business ownership is a very important decision. Oftentimes the potential for future conflict arising from personality or business issues are not considered when the partnership is formed. Parties often do not create ways to resolve potential conflicts or remove a nonperforming owner. Partnership, operating, shareholder, and employment agreements can offer some help, however, and careful consideration should be given to crafting such agreements to include provisions that address these issues.

Treaty Traders, cont. from page 1

spouse and children may be admitted as well. Spouses may apply for work authorization.

■ The funds to be invested must be committed at the time the visa is issued. The amount varies widely depending on the type of business and the consulate involved. It is difficult for a person to obtain an E-treaty visa for investment funds of less than \$100,000 in U.S. currency, however.

■ The business needs to be something more than a self-employment mechanism; showing how the business will create jobs for U.S. workers greatly improves the chance for success.

■ As long as the amount of capital at risk is substantial, the type of business is not important. Many motels and small businesses are operated by E-2 treaty traders.

■ If the treaty trader is a business rather than an individual, at least 50 percent of the business must be owned by citizens of the treaty nation. The place of incorporation does not matter.

E-1 Treaty Traders

A person may qualify as an "E-1" treaty trader if he or she is coming to the United States to carry on substantial trade in goods or services between the United States and that person's own treaty nation. More than 50 percent of the international trade must be with the applicant's nation. For instance, if the treaty trader is from Canada, more than 50 percent of the international trade must be between the U.S. and Canada.

You should know:

■ These "E-1" businesses may be smaller and have less money at stake than "E-2" companies.

■ The trade can be

in goods (such as an import/export business) or services (such as a special company catering to tourists from one particular nation).

(The E-2) business needs to be something more than a self-employment mechanism; showing how the business will create jobs for U.S. workers greatly improves the chance for success.

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