The U.S. Department of Homeland Security's
Responses to Chairman Grassley's April 24, 2015 Letter

1. How many people received E-2 visas or were otherwise admitted to the United States in E-2 status in FY10-FY14?

The Department of Homeland Security (DHS) defers to the Department of State (DOS) to provide the number of E-2 visa issuances during the requested time period.

For its part, DHS accounts for admissions made by E-2 visas holders. The numbers provided represent a distinct count of E-2 admissions by fiscal year. They do not represent multiple admissions under the same E-2 Visa. The table does not reflect how many persons are residing in the United States with a status of E-2. Rather, it is merely a representation of how many persons distinctly arrived and were admitted under that status.

For Fiscal Year (FY) 2010 through FY 2014, the total E-2 admissions, including treaty investors, spouses, or children, were as follows:

E-2 Admissions	
FY 2014	210,131
FY 2013	183,166
FY 2012	167,362
FY 2011	154,807
FY 2010	151,055

a. Please provide the numbers of E-2 visas received by nationals of the top ten countries of origin of E-2 visa recipients in FY10-14.

DHS defers to DOS to answer this question.

b. How many of the persons obtaining E-2 status in FY10-14 were E-2 "essential workers"?

DHS and DOS do not track whether an E-2 nonimmigrant is an essential employee, an employee of an E-2 principal treaty investor who engages in duties of an executive or supervisory character, or is the principal investor.

If your agency does not track this number, could your agency consider tracking this number?

DOS is responsible for processing E-2 applications for applicants living abroad at the time of filing. For this type of applicant, DOS would need to agree to track E-2 employees separately from E-2 investors.

U.S. Citizenship and Immigration Services (USCIS) is responsible for processing E-2 applications for foreign nationals who are living in the United States at the time of filing.

If a foreign national is already in the country in another lawful nonimmigrant status, he or she may file Form I-129 to request a change of status to E-2 classification. If the desired E-2 employee is currently in the United States in another lawful nonimmigrant status, the qualifying employer may file Form I-129 on the employee's behalf.

USCIS is also responsible for processing extension of stay requests for E nonimmigrants. E-2 treaty investors and E-2 employees are allowed a maximum initial stay of two years. Requests for extension of stay may be granted in increments of up to two years for each extension request. There is no maximum limit to the number of extensions an E-2 nonimmigrant may be granted.

USCIS will consider tracking adjudications of applications to change status to or extend stay in the various types of E-2 nonimmigrant statuses separately.

2. Though the statute refers to countries with which the United States has a treaty of commerce and navigation, State Department field guidance at 9 FAM 41.51 N3 indicates that qualifying treaties may also include bilateral investment treaties.

a. Must a treaty of commerce and navigation or bilateral investment treaty include investor visa provisions for a country's nationals to become eligible for E-2 status?

b. Does a country lose E-2 status if the underlying treaty of commerce and navigation or bilateral investment treaty is abrogated?

i. Which, if any, countries have lost E-2 status since FY10?

ii. When a country loses E-2 status, are nationals of that country currently in E-2 status required to depart the United States immediately?

DHS defers to DOS to answer these questions.

3. Which federal agency has final determination over setting E-2 visa policy? The DHS-DOS Memorandum of Understanding regarding implementation of section 428 of the Homeland Security Act gives the State Department final responsibility over determining "what is a qualifying treaty of commerce and navigation." Does DHS have final authority over all other aspects of E-2 visa policy?

Due to the nature of the U.S. immigration system, no single federal department or agency has sole authority over the E-2 nonimmigrant classification for foreign national treaty investors. In addition to DHS and DOS respective authorities over the E-2 classification under the cited provision in the DHS-DOS Memorandum of Understanding regarding implementation of section 428 of the *Homeland Security Act*, the Secretary of Homeland Security has authority under section 103 of the *Immigration and Nationality Act* (INA) to administer and enforce immigration law. Under section 214(a) of the INA, the Secretary also has the authority to establish conditions on the admission of nonimmigrants.

For his part, the Secretary of State, as the President's principal foreign policy advisor, is responsible for the formulation of foreign policy and the execution of approved foreign policy as directed by the President and in accordance with 22 U.S.C. § 2656. DOS also has the authority, under section 101(a)(45) of the INA, to establish the meaning of the term "substantial" in section 101(a)(15)(E)(ii) of the INA, after consultation with appropriate governmental agencies.

The E-2 classification implicates visa reciprocity concerns for U.S. citizens seeking similar privileges abroad and may also raise foreign policy implications. In recognition of those considerations, DHS coordinates E-2 visa policy closely with DOS to ensure uniform administration of the E-2 program and to avoid any adverse impact on similarly situated U.S. investors and their employees abroad.

With respect to actual administration of the E-2 program, DHS, through U.S. Customs and Border Protection (CBP), exercises authority over the admissibility of an E-2 nonimmigrant visa holder into the United States, and through USCIS, to extend the stay of a foreign national currently in the United States as an E-2 investor or to change the status of a foreign national in the United States in another nonimmigrant classification to E-2 nonimmigrant status. DOS adjudicates applications for E-2 visas at consular posts abroad. In recognition of DOS's experience in adjudicating such applications, DHS considers DOS's Foreign Affairs Manual (FAM) notes regarding the E-2 classification as useful, non-binding guidance in assisting its adjudicators in making decisions pertaining to applications to change to or extend E-2 nonimmigrant status.

4. In light of the definition of the E-2 category, restricted to aliens coming "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," what is the legal basis for the creation of the sub-category of E-2 "essential workers," who are neither developing an enterprise in which they have invested nor directing the operations of such an enterprise?

The authority for affording E-2 classification to certain "essential workers" (as well as certain executives and supervisors) is specifically set forth in DHS regulations at 8 CFR 214.2(e)(3). Authority to include essential (or other) workers was explained in the implementing final rule, which was promulgated pursuant to notice and comment rulemaking in 1997, as follows: "Although section 101(a)(15)(E) of the Act is silent on whether employees may be admitted in E nonimmigrant visa classification, USCIS has historically deemed appropriate the admission of non-executive or supervisory employees having special qualifications which make their skills essential, i.e., indispensable to the success of the investment." See Nonimmigrant Classes; Treaty Aliens; E Classification, 62 Fed. Reg. 48,138, 48,144 (INS Sept. 12, 1997).

Moreover, as noted above, the INA provides nonimmigrant classification for individuals entitled to enter the United States pursuant to the provisions of a qualifying treaty. See INA 101(a)(15)(E). The treaties themselves provide for the entry for employees of investors. For

example, the bilateral investment treaty with Bangladesh states that "subject to the laws relating to the entry and sojourn of aliens, nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, directing, administering or advising on the operation of an investment to which they, or a company of the first Party *that employs them*, have committed or are in the process of committing a substantial amount of capital or other resources."

5. **According to the FAM, "[i]f an alien establishes that he or she has special qualifications and is essential for the efficient operation of the treaty enterprise for the long term, the training of United States workers (for) (as) replacement workers is not required." 9 FAM 41.51 N14.3-3. Does that mean that in the case of short-term "essential workers," employers are expected to train United States workers to replace these employees? See 9 FAM 41.51 N14.3-1(b)(2) and N14.3-3(b). See also 8 CFR §214.2(e)(18)(ii) ("Some skills are essential only in the short-term for the training of locally hired employees.").**

   USCIS defers to DOS to answer the parts of this question regarding the FAM.

   If so, how does USCIS or the Department of State determine that such training has occurred?

   Where the skills are determined to be transferrable, DHS may make a determination as to whether the employer has in fact provided training to others at the time it adjudicates the employee's application to extend his or her stay in this country, or at the time CBP adjudicates a request for readmission in E-2 classification.

6. **Does either the Department of State or USCIS keep track, or even inquire, how much E-2 "essential workers" are being paid? Are there any mechanisms in place to flag cases in which the "essential workers" are being paid wages below the prevailing wage or even below the minimum wage?**

   USCIS is unable to electronically track the salaries of persons who obtain E-2 status. This information is not transferred from the form and recorded in USCIS systems. Consequently, there currently are no mechanisms to electronically flag the wages of essential workers or to determine whether they are below the prevailing or minimum wage levels. Although this is the case, the treaty investor employing such workers must show that the investor has invested in or is in the process of investing in a "bona fide enterprise" in the United States.

   USCIS may consider, however, whether wages appear unusually low with respect to the position offered in determining whether an employee is truly essential and will actually engage in the proposed activity in the United States. See 8 CFR 214.2(e)(18)(i). USCIS may ask the applicant to explain the unusually low wage. Payment of a wage below a statutorily mandated minimum wage would be illegal, and thus, a basis for denying a request for E-2 nonimmigrant classification.

7. **The Immigration and Nationality Act directs the Attorney General (now the Secretary of Homeland Security) to authorize E-2 dependent spouses to engage in employment in the United States and to issue them the proper work permits. INA 214(e)(6). Neither the Attorney General nor the Secretary, however, ever amended the regulations at 8 C.F.R. 274a.12(a) to add E-2 dependent spouses to the list of aliens authorized to be employed without restrictions.**

    a. **Why haven't the regulations ever been amended to add E-2 spouses to 8 C.F.R. 274a.12(a)?**

    Section 214(e)(6) of the INA can be implemented without amending DHS regulations.

    Are there any plans to do so now?

    Amending the regulations is under consideration, but a rulemaking has not yet been placed on the Unified Agenda.

    b. **Since E-2 spouses aren't referenced at 8 C.F.R. 274a.12(a) or 274a.13(a) in the list of categories of aliens who must apply for an Employment Authorization Document (EAD), by what authority is USCIS requiring E-2 spouses to file an application for an EAD?**

    The Secretary of Homeland Security is authorized to grant employment authorization to the spouses of E-2 nonimmigrant visa holders either by providing the spouse with "an employment authorized endorsement" or by providing him or her with some "other appropriate work permit." INA 214(e)(6). The spouses of E-2 nonimmigrant visa holders may request employment authorization by submitting a Form I-765, *Application for Employment Authorization.*

8. **Does USCIS require E-2 employers to notify USCIS when an E-2 employee has absconded from the worksite, finished their work early, or had their employment terminated?**

    There is no statutory or regulatory requirement that an E-2 employer notify USCIS when an E-2 employee has ceased employment.

9. **Are E-2 workers eligible to receive Transportation Worker Identification Credential (TWIC) cards granting them unescorted access to secure port facilities? If so, what mechanism is in place to revoke such cards if an E-2 worker absconds or is terminated from employment?**

    Individuals admitted under the E-2 nonimmigrant classification are eligible to apply for a Transportation Worker Identification Credential (TWIC), if they successfully pass the security threat assessment and otherwise are eligible. The TWIC itself does not grant a person unescorted access to secure areas of facilities or vessels regulated by the Coast Guard

under the *Maritime Transportation Security Act*. Facility Security Officers make the ultimate decision on whether or not to allow a TWIC holder to enter their facility without escort, and such decisions are typically based on a bona fide need to work or conduct business in the facility. If the Transportation Security Administration (TSA), which governs the TWIC program, learns that a person's E-2 nonimmigrant status is no longer valid, that person's TWIC is entered on a Canceled Card List, which is available to all TWIC stakeholders. Furthermore, under 49 CFR 1572.105(b)-(d), employers are required to retrieve the TWIC from an applicant whose E-2 status has expired, and E-2 nonimmigrants are required to surrender their TWIC when their status expires. Also, if an employer terminates the employment of an E-2 nonimmigrant or the E-2 nonimmigrant otherwise ceases working for the employer, the employer must notify TSA within 5 days, retrieve the TWIC, and return it to TSA if possible.

10. May E-2 "essential workers" be placed at third-party worksites by the E-2 employer? If so, must the E-2 worker continue to maintain an employer-employee relationship with the E-2 employer? If not, why not?

An E-2 non-immigrant visa holder may be placed at a third party worksite under certain conditions. E-2 visa holders maintaining an employee-employer relationship with their E-2 employer may perform duties and responsibilities at a third-party worksite if the off-site work is indicated in the E-2 nonimmigrant visa application at the time it was made.

The Form I-129 specifically asks whether the E-2 employee will work off-site. DHS regulations at 8 CFR 214.2(e)(8)(iii) require prior DHS approval where there will be a substantive change in the terms or conditions of E status. Depending on the specific facts presented, a change from on-site to off-site employment may be considered to be a substantive change. To obtain this approval, the employer typically would be required to file a new Form 129, with the E-1/E-2 supplement.

Unless a new Form I-129 is filed and approved, an E-2 employee working for the original employer after a substantive change in the terms or conditions of the E-2 employment, or in any capacity for a different employer, would violate the terms of the E-2 admission. This violation could make the individual subject to removal as a deportable alien under INA 237(a)(1)(B) and (C). The violation of status and unauthorized employment might also adversely affect the individual's ability to acquire lawful permanent residence through adjustment of status. See INA 245(c)(2), (7), & (8), (k).

11. May persons coming to the U.S. to perform construction or basic fabrication work be considered E-2 "essential employees"? If so, please explain how such "ordinary skilled workers" could possibly qualify as E-2 "essential employees", particularly in light of the 9.5% unemployment rate in the construction industry and the requirement at 8 CFR 214.2(e)(l8)(ii) that adjudicators consider "[w]hether the skills and qualifications [of the proposed 'essential employee'] are readily available in the United States."

We cannot categorically state that an E-2 essential employee may never perform construction or "basic" fabrication work. Whether a person qualifies as an executive, supervisor, or

essential skills, E-2 employees possessing special qualifications must always be determined on a case by case basis. Whether an applicant has specialized qualifications that make his or her services essential is determined by assessing, among other factors:

- The degree of proven expertise of the individual in the area of operations involved;
- Whether others possess the applicant's specific skill or aptitude;
- The length of the applicant's experience and/or training with the treaty enterprise;
- The period of training or other experience necessary to perform effectively the projected duties;
- The relationship of the skill or knowledge to the enterprise's specific processes or applications;
- The salary the special qualifications can command; and
- Whether the skills and qualifications are readily available in the United States.[1]

[1] See 8 CFR 214.2(e)(18)(i) and (ii).