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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510–6275

April 24, 2015

VIA ELECTRONIC TRANSMISSION

The Honorable Jeh Johnson
Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528

The Honorable John Kerry
Secretary
U.S. Department of State
Washington, D.C. 20520

Dear Secretaries Johnson and Kerry:

I write to you with questions about the administration of the E-2 treaty investor visa program. I am particularly interested in the E-2 program after reading about the alleged abuses suffered by eleven Filipino nationals who were recently admitted in E-2 status to work for a bakery in Los Angeles.[1]

The E-2 treaty investor visa category authorizes the admission to the United States of nationals of countries with which the United States maintains a treaty of commerce and navigation, as well as their spouse and children, "solely to develop and direct the operations of an 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."[2] The nationality of the company and the alien must be (i) the same; and (ii) on the list of "treaty countries" maintained by the Department of State.[3] Aliens may be admitted in E-2

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[1] See Dave Jamieson, "Filipinos Say They Worked for $3 Per Hour as U.S. Guestworkers," Huffington Post (March 19, 2015), available at http://www.huffingtonpost.com/2015/03/19/e-2-visa-workers_n_6902584.html?1426784830; Kate Linthicum, "Beverly Hills Bakery Accused of Labor Abuse by Workers on Visas," Los Angeles Times (March 19, 2015), available at http://www.latimes.com/local/westside/la-me-guest-workers-lawsuit-20150320-story.html.

[2] INA § 101(a)(15)(E)(ii).

[3] 9 FAM 41.51, Exhibit 1, available at http://www.state.gov/documents/organization/87221.pdf. See also http://travel.state.gov/content/visas/english/fees/treaty.html. Though the statute refers to countries with which the United States has a treaty of commerce and navigation, State Department field guidance indicates that qualifying treaties may also include bilateral investment treaties. 9 FAM 41.51 N3. Countries may also be designated by

status for an initial period of not more than 2 years, but there is no limit on the number of extensions of stay that a treaty investor may be granted. An E-2 treaty investor may retain E-2 status for as long as he or she and the investment enterprise continue to satisfy the E-2 requirements, potentially for decades, though there is no way for the E-2 investor to convert to lawful permanent residence. The spouse, but not the children, of an E nonimmigrant may apply for work authorization.

Despite the language in the statute clearly limiting E-2 status to an alien who has him- or herself invested in a U.S. enterprise, current State Department and DHS regulations authorize E-2 status for either (i) the actual owner of a qualifying investment enterprise or (ii) *employees* of such an enterprise, having the same nationality as the employer, who are working in an executive or supervisory capacity or, "if employed in a lesser capacity, the employee has special qualifications that make the services to be rendered essential to the efficient operation of the enterprise."[4] The Department of State's Foreign Affairs Manual (FAM) provides that, in general, the "essential worker" E-2 sub-category "is intended for specialists and not for ordinary skilled workers."[5] Several factors must be taken into account in determining whether such "essential employees" have the requisite "special qualifications", including—

- the degree of proven expertise of the alien 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; and
- the salary the special qualifications can command.[6]

Significantly, a second factor that must be considered is "[w]hether the skills and qualifications [of the proposed 'essential employee'] are readily available in the United States."[7] The FAM elaborates on this requirement: "This consideration is not a labor certification test, but a measure of the degree of specialization of the skills in question and the need for such."[8] Both Homeland Security and State Department regulations provide that "[s]ome skills are essential only in the short-term for the training of locally hired employees."[9] However, "[i]f an alien establishes that he or she has special

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Congress as eligible for participation in the E-2 program. See, e.g., P.L. 112-130 (designating Israel as an E-2 country).

4 22 CFR §§41.51(b)(2) and (13)(" Special qualifications are those skills that an employee in a lesser capacity brings to a position or role that are essential to the successful or efficient operation of the enterprise."). See also 8 CFR 214.2(e)(3).

5 9 FAM 41.51 N14.3-1.

6 8 CFR 214.2(e)(18)(i). See also 22 CFR 41.51(b)(13)(i).

7 8 CFR 214.2(e)(18)(ii). See also 22 CFR 41.51(b)(13)(ii).

8 9 FAM 41.51 N14.3-2 (c).

9 8 CFR §214.2(e)(18)(ii); 22 CFR 41.51(b)(13)(ii).

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."[10]

In the case of the 11 Filipino nationals I referenced above, the E-2 workers were employed by a bakery chain in Los Angeles owned by a Filipino married couple who are presumably in the United States in E-2 treaty investor status.[11] The workers were allegedly fraudulently induced to leave the Philippines: they had been told that they were going to be employed as skilled bakery chefs and managers, but then claim they were "forced to work for [the bakery] in illegal, oppressive, and discriminatory conditions as domestic servants, physical laborers engaged in landscaping and building maintenance, and retail bakery workers doing a substantial amount of menial work at [the employer's] French bakeries."[12] The workers were allegedly paid less than three dollars per hour.[13] The LA Times article describing the case of the 11 Filipino nationals also mentions the case of a Thai national who pleaded guilty in 2010 to underpaying several employees he brought to the U.S. on E-2 visas to work at his restaurant chain in Colorado.[14]

In light of the media reports detailing such abuse, I question if there is enough administrative oversight over the E-2 program. I am particularly interested in the "essential worker" sub-category of E-2 nonimmigrant. The E-2 essential worker category appears to be yet another example of a regulatorily-created, de facto temporary worker program created outside the legal bounds set by Congress and without any of the worker protections provided by Congress in other categories (such as the H-1B and H-2 programs). And, as the case of the 11 Filipino workers shows, the absence of adequate oversight and monitoring of such programs can lead to shocking abuses of the foreign workers themselves.

Below are questions regarding the E-2 visa program that I am requesting responses:

1. How many people received E-2 visas or were otherwise admitted to the U.S. in E-2 status in FY10-FY14?
   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.
   b. How many of the persons obtaining E-2 status in FY10-14 were E-2 "essential workers"? If your agency does not track this number, could your agency consider beginning to track this number?

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.

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[10] 9 FAM 41.51 N14.3-3(a).
[11] Albado et al v. French Concepts, Inc., Complaint, Case No. BC576048, Superior Court of the State of California, County of Los Angeles, Central District Judicial District (Mar. 18, 2015), at 3 (available at http://big.assets.huffingtonpost.com/lamandecomplaint.pdf).
[12] Id.
[13] Id. at 4.
[14] Kate Linthicum, "Beverly Hills Bakery Accused of Labor Abuse by Workers on Visas," Los Angeles Times (March 19, 2015), available at http://www.latimes.com/local/westside/la-me-guest-workers-lawsuit-20150320-story.html.

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?

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."[15] Does DHS have final authority over all other aspects of E-2 visa policy?

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?

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

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?

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.
   - Why haven't the regulations ever been amended to add E-2 spouses to 8 C.F.R. 274a.12(a)? Are there any plans to do so now?
   - 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?

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[15] Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002, Section 3.a(1)(b) (Sep. 26, 2003), available at http://www.gpo.gov/fdsys/pkg/CDOC-108hdoc131/pdf/CDOC-108hdoc131.pdf.

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?

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?

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?

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[16], and the requirement at 8 CFR 214.2(e)(18)(ii) that adjudicators consider "[w]hether the skills and qualifications [of the proposed 'essential employee'] are readily available in the United States."

I look forward to your responses. If you have any questions, please contact Kathy Nuebel on my staff at 202-224-5225.

Sincerely,

Charles E. Grassley
Chairman

cc:

The Honorable Thomas E. Perez
Secretary
U.S. Department of Labor
200 Constitution Ave. NW
Washington DC 20210

[16] Industries at a Glance: Construction: NAICS 23, U.S. Department of Labor, Bureau of Labor Statistics, available at http://www.bls.gov/iag/tgs/iag23.htm.