



United States Department of State

Washington, D.C. 20520

15 JUN 16 PM 3: 34

JUN 12 2015

Dear Mr. Chairman:

Thank you for your letter of April 24 regarding your concerns about E Treaty Investor nonimmigrant visas, particularly those issued to individuals as “essential employees” in Treaty Investor enterprises. The Department of State has prepared responses to matters that fall under its jurisdiction, which are enclosed. The Department of Homeland Security (DHS) will send a separate response for those issues over which it has authority.

We hope this information is useful. Please do not hesitate to let us know if we can be of further assistance.

Sincerely,

A handwritten signature in cursive script that reads "Julia Frifield".

Julia Frifield
Assistant Secretary
Legislative Affairs

Enclosures: As stated.

The Honorable
Charles E. Grassley, Chairman,
Committee on the Judiciary,
United States Senate.

Q1. How many people received E-2 visas or were otherwise admitted to the U.S. in E-2 status in FY10-FY14?

We have reviewed the issuance records contained in the Consolidated Consular Database (CCD) for information to respond to your questions about E-2 visa issuance. The data shown for Fiscal Year (FY) 2015 reflects E-2 issuances through March 31, 2015.

For FY 2010 through FY 2015, Total E-2 nonimmigrant visa issuances were as follows:

E-2 Visas Issuances	
FY 2015	18,385
FY 2014	36,817
FY 2013	35,265
FY 2012	31,940
FY 2011	28,244
FY 2010	25,485

Q1a. 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.

The ten countries receiving the most E-2 nonimmigrant visas vary from year to year. For FY 2010 to 2015, nationals from Japan were issued the greatest number of E-2 nonimmigrant visas. Again the data shown for FY 2015 is through March 31, 2015.

Nationalities Issued the Greatest Number of E-2 Nonimmigrant Visas for FY 2010 to 2015			
FY 2015		FY 2014	
<i>Country</i>	<i>Total Issuances</i>	<i>Country</i>	<i>Total Issuances</i>
Japan	5,632	Japan	11,438
Germany	2,006	Germany	3,731

France	1,476	GRBR	2,914
GRBR	1,427	Mexico	2,706
Mexico	1,142	France	2,641
Canada	1,112	Canada	2,590
South Korea	945	South Korea	1,766
Italy	909	Spain	1,480
Spain	744	Italy	1,404
Thailand	246	Argentina	536
FY 2013		FY 2012	
<i>Country</i>	<i>Total Issuances</i>	<i>Country</i>	<i>Total Issuances</i>
Japan	11,333	Japan	10,130
Germany	3,811	Germany	3,847
Mexico	2,994	South Korea	3,041
Canada	2,609	Mexico	2,937
GRBR	2,487	Canada	2,221
South Korea	2,425	GRBR	1,979
France	2,218	France	1,741
Spain	1,299	Spain	1,042
Italy	1,173	Italy	924
Sweden	446	Sweden	347
FY 2011		FY2010	
<i>County</i>	<i>Total Issuances</i>	<i>County</i>	<i>Total Issuances</i>
Japan	9,160	Japan	8,577
South Korea	3,260	South Korea	3,320
Germany	3,249	Germany	3,134
Mexico	2,076	GRBR	1,932
Canada	1,920	France	1,503
GRBR	1,796	Mexico	1,366
France	1,660	Canada	1,115
Spain	758	Spain	540
Italy	680	Italy	529
Australia	378	Netherlands	345

Q1b. 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?

Currently the statistical data maintained by the CCD does not differentiate among E-2 nonimmigrant visas issued to investors, employees in an executive or supervisory capacity, essential employees, and their spouses and children. We are exploring the possibility of recording the issuance or refusal of E-2 visas to essential employees in a different way to permit those applications to be tracked separately.

Q2. 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.

22 CFR 41.51(b)(5) states that a treaty country for E-2 visa purposes is a foreign state with which a qualifying treaty of friendship, commerce, and navigation, or its equivalent, exists with the United States, or has been accorded treaty visa privileges by specific legislation. Among the types of treaties deemed the equivalent of a treaty of friendship, commerce, and navigation is a bilateral investment treaty (BIT). As described in the Department of State's Letter of Submittal, dated February 19, 1986, of the bilateral investment treaty with Turkey, such treaties:

"are consistent in purpose with Treaties of Friendship, Commerce and Navigation (FCNs) which the United States negotiated from the early years of the Republic until the last successful negotiations with Thailand and Togo in the late 1960s. They continue the U.S. policy of securing by agreement standards of equitable treatment and protection of U.S. citizens carrying on business abroad, and institutionalizing processes for the settlement of disputes between investors and host countries, and between governments. We expect that a series of bilateral treaties with interested countries will establish greater international discipline in the investment area. The BIT was designed to protect investment not only by treaty but also by reinforcing traditional international legal principles and practice regarding foreign direct private investment. In pursuit of this objective, the model BIT adopts FCN language and concepts. Traditional FCN provisions granting rights which are not important to the typical U.S. investor were eliminated and replaced with more specific language concerning investment protection. Perhaps most significantly, the BIT goes beyond the traditional FCN to provide investor-host country arbitration in instances where an investment dispute arises." (Senate Treaty Doc. 99-19)

Q2a. 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?

In most cases, yes. A treaty deemed a qualifying treaty of commerce and navigation, or its equivalent, as discussed in 22 CFR 41.51(b)(5) and 9 FAM 41.51 N3, must contain appropriate provisions addressing the entry of the treaty country's nationals for those nationals to become eligible for E-2 status. For example, our bilateral investment treaty (BIT) with Rwanda does not contain provisions related to entry of foreign nationals, and therefore Rwandan nationals are not eligible for E-2 visas. The United States concluded protocols with three countries - Finland, Ireland, and Denmark - to add temporary entry provisions to earlier treaties of friendship, commerce, and navigation in order to establish a basis for E-2 visas for the nationals of those countries. Note that, in some cases, E-2 status can also be based on legislation, as in the case of Israel. [(See Public Law 112-130 (June 8, 2012); see also 48 U.S.C. 1806(c)(1) (creating E-2 status for certain investors in the CNMI)].

Q2b. Does a country lose E-2 status if the underlying treaty of commerce and navigation or bi lateral investment treaty is abrogated?

- 1.) Which, if any, countries have lost E-2 status since FY2010?**
- 2.) When a country loses E-2 status, are nationals of that country currently in E-2 status required to depart the United States immediately?**

In the event that a treaty is abrogated by either party or that other enabling instrument is annulled, continuation of the issuance of E-2 visas as well as the possibility of investors remaining in the United States would depend on the terms of the treaty or enabling instrument. Since FY 2010, only the Government of Bolivia has given notice of intent to terminate the bilateral investment treaty under which E-2 visas are issued. Despite Bolivia's having given notice on June 10, 2012, the provisions of the treaty continue to apply for an additional 10 years to all covered investments existing at the time of termination. This means that Bolivian nationals with qualifying investments in place in the United States by June 10, 2012, will continue to be entitled to E-2 classification until June 10, 2022. The only E-2 visas that will be issued to nationals of Bolivia (other than those qualifying for derivative status based on a familial relationship to an E-2 principal alien) during that timeframe will be to applicants who are coming to the United

States to engage in E-2 activity in furtherance of covered investments established or acquired prior to the date of termination.

Q3. 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?

Because of the nature of the U.S. immigration system, no single federal department or agency has sole and final authority over foreign national investors. In addition to 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 to administer and enforce immigration law, and 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. Section 101(a)(45) of the Immigration and Nationality Act (INA) provides that the meaning of the term "substantial," for purposes of section 101(a)(15)(E)(ii) of the INA, is as established by the Secretary of State, after consultation with appropriate governmental agencies. The E-2 classification includes visa reciprocity concerns for U.S. citizens seeking similar privileges abroad and may also involve foreign policy implications. In recognition of those considerations, DHS coordinates E-2 visa policy closely with the Department of State to ensure uniform operation of the E-2 program and to avoid any adverse impact on similarly situated U.S. investors and their employees abroad. While DHS has independent authority to issue E-2 regulations, its regulations and those of the Department of State are identical in most important respects. DHS exercises authority over determinations of whether to grant entry to an E-2 nonimmigrant visa holder into the United States, to extend the status of a foreign national granted entry as an E-2 investor or to change the status of a foreign national in the United States in another nonimmigrant class to E-2 nonimmigrant status. DHS considers the Department of State's Foreign Affairs Manual (FAM) notes regarding the E-2 classification as useful, nonbinding guidance in assisting its adjudicators in deciding requests for E-2 status.

Q4. 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?

Inclusion within the E-2 classification of certain "essential employees" is described in narrowly drawn Department of State and DHS regulations, at 22 CFR 41.51 and 8 CFR 214.2(e). Citing 22 CFR 41.51, House Report 107-187 notes:

"Alien employees of a treaty trader or treaty investor may receive E visas if they are coming to the U.S. to engage in duties of an executive or supervisory character, or, if employed in a lesser capacity, if they have special qualifications that make the services to be rendered essential to the efficient operation of the enterprise."

The ability to make an investment is not limited to individuals, but also extends to business organizations and other entities. Prior to 1987, the relevant Department of State regulation referred to investors and those they employed "in a responsible capacity," terminology that had been used in protocols to various FCN treaties, including those with Korea, Belgium, and the Netherlands. Since 1987, the regulation has provided further clarity, referring to an employee "coming to the United States to engage in duties of an executive or supervisory character" and an employee having "special qualifications that make the services to be rendered essential to the efficient operation of the enterprise." These provisions are consistent with the relevant treaties. Model language utilized in pre-2003 BIT negotiations expressly referred to employees and was incorporated into BITs concluded prior to 2004. 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."

Q5. 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?

Each case must be evaluated on its own merits for a determination of the nature of the skills involved. Where it is established that the employer's need is long-term in nature, there is an expectation that training of U.S. replacement workers will not occur in the short-term, such as during the start-up phase of a U.S. operation. There may be instances where certain skills may not be transferrable without disruption to the investor's business. To ensure against abuse, the "essential employee" criteria are very narrowly drawn: This category is available only to persons having the same nationality as the investor, who in turn, must have the nationality of the treaty country. There are different circumstances under which an essential employee may be admitted to cover both long-term and short-term needs of the treaty enterprise. Short-term needs may include the training of U.S. workers to work for the treaty enterprise. Department of State and DHS regulations specifically recognize that, depending on the type of business involved, an employer's need for a worker's "special qualifications," and therefore, the worker's essentiality, can be time-limited. In such cases, DHS regulations and 9 FAM guidance provide for the employer to show evidence of the period of time the skills will be needed before such skills will eventually be passed on to U.S. workers. In those cases where skills are determined to be transferable, there is the opportunity, at the time of application for another E-2 visa, extension of stay or readmission in E-2 status, to ascertain whether the alien had, in fact, provided such training, and to require the alien to demonstrate both that he or she still possessed the specialized skills and that the skills were still needed for the efficient operation of the enterprise.

Q6. 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?

All E-2 applicants are asked on the DS-160, Online Application for Nonimmigrant Visa, to provide his or her annual U.S. salary and benefits package. The applicant provides two separate numbers: salary and allowances/benefits. If, in the application or the visa interview, the applicant reports being paid below the prevailing or minimum wage, this would call into question whether the applicant is an essential employee.

Questions 7 through 9 address issues that pertain to foreign nationals already in E-2 status in the United States. The Department of State has no jurisdiction over individuals physically present in the United States. We understand that the Department of Homeland Security, which has sole jurisdiction over those matters, is responding separately.

Q10. 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?

Work location would be one of the factors for a consular officer to consider in determining whether an applicant qualifies for E-2 status as an essential employee; however, location at third-party worksite would not preclude qualification if the investor and the applicant establish that there would be an employer-employee relationship between either the treaty investor or the U.S. enterprise that it develops and directs and the applicant.

Q11. 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 2 I 4.2(e)(18)(ii) that adjudicators consider "[w]hether the skills and qualifications [of the proposed 'essential employee'] are readily available in the United States."

Essentiality must be assessed on the particular facts of an individual application. Although no labor certification test applies, there is a measure of the degree of specialization of the skills in question and the need for such. Once the business has established the need for the specialized skills, the experience and training necessary to achieve such skills must be analyzed to confirm their special qualities. The visa applicant must prove that he or she possesses these skills, by demonstrating the requisite training and/or experience. In assessing specialized skills and their essentiality, the consular officer considers such factors as the degree of proven expertise of the alien in the area of specialization; the uniqueness of the specific skills; the function of the job to which the alien is destined; the salary such special expertise can command; and the availability of U.S. workers.

In assessing the claimed duration of essentiality, the officer looks to the period of training needed to perform the contemplated duties and, in some cases, the length of experience and training with the firm.