

E-2 Treaty Investor Visa

Summary

- A treaty-based investment visa that is only available to citizens of countries with the correct type treaty with the US;
 - Grenada to E2 strategy allows a citizen of any country to obtain an E-2 (see the Case Study (see <http://e3ig.com/how-to-get-an-e-2-visa-if-youre-not-from-an-e-2-country-august-2020/>))
- Investments can be \$150K-\$500K+.
- Very fast processing (a few weeks or months).
- The visa (ability to enter the US) is typically 1-5 years, shorter in the case of a few countries.
- Renewable for an unlimited number of times (fewer renewals for a few countries)
- Dependent visas for Spouse (can get EAD) and children under 21 years old.
- There is no direct path to a green card, but the investment can be credited against minimum for EB-5.

The E-2 visa is an investor treaty-based visa. It is a non-immigrant visa that allows the applicant to live in the US to manage or direct his or her investment. The applicant's spouse can receive an EAD and the children (if foreign born) can attend school (domestically born children are US citizens and do not require visas).

The regulations do not specify an exact amount of investment. The business must be material and is required to produce enough income to support a living wage for the applicant. Typically, the minimum amount of a business the applicant will manage directly, to be safe, is \$150,000. Often, when investing in a business created by a third-party, investment amounts required can be \$300,000 or more (due to the nature of the business, not the regulations). There is no limit on the size of the investment.

The visa itself is typically granted for one to five years (with some exceptions) and are typically renewable for an unlimited number of times so long as the underlying business meets the qualifications. For a full listing of visa terms and number of renewals for each country with whom the US has the needed treaty, click here: <http://e3ig.com/wp-content/uploads/2020/08/E-1-and-E2-summary-chart-3-1.pdf>.

Note, to qualify for a E2 visa, an investor does not have to be currently residing in a treaty country. However, the investor does have to be citizen from a treaty country. It is not enough to just maintain a legal permanent residency in a treaty country.

One of the key criteria for an E-2 business is that the investor is actively involved in developing or directing the investment enterprise through at least 50 percent ownership or managerial control. Typically, the investor must own at least 51% of the business (two investors from the same country can own 50% each). The degree to which an investor must actively manage the business is an often-misunderstood topic. Legally, there are ways to satisfy the 'active involvement' requirement without being the day-to-day manager. To do this, the E-2 business and management arrangements must be carefully constructed. It is also possible for an E-2 investor to sponsor one or more key employees for E-

2 visas for no additional investment capital. The employees must come from the same country, be a supervisory employee, and essential to running the company.

The E-2 visa cannot be converted into a green card; however, it is entirely possible to use the initial E-2 investment as the basis for a petition for a green card based on the EB-5 category. The EB-5 process is open to citizens of all countries. The negatives are the cost and processing speed. To qualify for EB-5, the total business investment is \$900,000 in a high unemployment area and \$1.8 million otherwise. For a more fulsome description of the EB-5 visa see here <http://e3ig.com/investment-based-visas/>.

US regulations require that the capital for the E-2 investment come from funds that are owned by the investor and are legally sourced. Generally, that means that if loans are taken to provide the needed investment capital, those loans should be secured by collateral owned by the investor with a value that is at least equal to the amount of the loan. Further, the source of funds must be proven to be from legal sources, such as trade/business, investment income, gifts or inheritance.

A key to the application is to prepare a very thoroughly documented business plan that clearly shows the economic impact of the business, the labor creation and the other elements required. It is important to note that different consulates often have different rules of how they interpret the regulations, which will therefore change what is included in the application to some degree. It is also important to have taken meaningful steps towards the execution of the business plan. While some consulates will allow an investor to place funds in escrow (pending approval of the E-2 visa petition) for the purchase of an existing business, most want to see that the investment has been consummated and concrete steps undertaken. In the context of a new business, these steps can include forming the entity, completing business registrations and renting an office.

Structurally, investment capital must be 'at risk' meaning that there must be a risk of loss associated with the business. Accordingly, the investment cannot be a loan or guaranteed, but must be an equity investment. Additionally, the investment must be irrevocably committed, which means that the investor cannot demand her or her capital back.

The company in which the investment is made can engage in any legal business or trade. It is best to avoid potentially issue laden industries such as cannabis. Also, the business cannot be seen as being something purely passive. For example, investing in real estate would not work, as there may be nothing for the company to do with the investment once the property is acquired. In contrast, investing in a real estate services business would be perfectly permissible, even one that owned real estate as part of its activities.

Approval rates for E-2 visas are very high. As reported by the Government Accountability Office in their July 2019 study of the E-2 program¹, denial rates over the last five years were 16.7%; however, over 95% of the denials were premised on either investor ineligibility (e.g. not being a citizen of a treaty country) or inadequate documentation. Accordingly, if an applicant is in fact from a country with the correct treaty and that person engages qualified advisors to prepare the documentation, the denial rate can be expected to be less than 1%. Moreover, qualified advisors should help the applicant prepare for the in-person consular interview. Consular officers in all immigration matters have nearly unlimited discretion

¹ See United States Government Accountability Office, Report to the Chairman of the Joint Economic Committee, Non-Immigrant Investors, *Actions Needed to Improve E-2 Visa Adjudication and Fraud Coordination*, July 2019

whether or not to grant a visa. It is essential that the applicant is fully prepared and as with any serious undertaking, has the right team to support his or her efforts.

The E-2 process can be implemented fairly quickly. If an applicant is applying from outside the US, the applicant would file a DS-160 (including all supporting documentation) electronically with the applicable consulate. The consulate will review the materials and allow the applicant to schedule an interview. Prior to the pandemic, this process usually took several weeks' to a few months' time. The visa itself is usually stamped in the applicant's passport (and those of his or her dependents) at the conclusion of the interview. Currently, most consulates are closed and those that are reopening may not be processing DS-160 applications as they are focusing first on emergency and urgent visa matters.

If the applicant is legally in the United States, he or she may file to change status directly with USCIS by filing form I-129. Premium processing is available in which the application is then processed in 15 days. No interview is required. This allows the petitioner (and dependents) to remain in the US for two years and the status can usually be renewed. Note, upon leaving the US, prior to reentry, the applicant would have to apply for a visa at a foreign consulate (typically that of the home country, but there are exceptions). It is important to start the visa application process with sufficient lead time so as not to affect the overall travel schedule.

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