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### *Indian H1-B Green Card Purgatory - A Solution*

Many Indian citizens who have lived and worked in the United States under H1(b) and are now awaiting lawful permanent residency (Green Card) through EB-2 or EB-3 have been stuck in immigration purgatory that, like the purgatory from Dante's inferno, will never end. The current priority date for Indians is July and October 2009. For those with priority dates after 2010, the actual wait time will be many decades long. Realistically, the green card through H1-B dream has become a nightmare.

It is a horrible thing that the US has not fulfilled its promises. Indian nationals came here, did everything according to the rules: got good jobs, paid taxes and now are stuck in visa-status purgatory. There is no impetus to change the system. Employers like it this way, as it has made a whole class of people indentured servants. Even worse, the status-quo is under attack. The Trump Administration has threatened to end spousal EAD, which could cripple people financially and they have gone as far as to suggest that all H1-B holders undergo labor recertification under heightened standards that could end their current status in the very near term.

The E2 visa is a path out of this mess. 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 his or her investment in the United States. The applicant's spouse can receive an EAD and the children (if foreign born) can attend school. In many ways, the H-1B holder's life will continue much the same as before. A critical difference is that the applicant cannot work as an employee of a company in the US. For many, especially for those in the IT field, the solution is to have the applicant form his or her own IT consulting company and then to provide services for the former employer as an independent contractor. They would also be able to take on additional clients under their business. Ironically, many employers would prefer this form of relationship but are legally required to hire workers as employees. In this case, where it would be illegal to hire a person as an employee, the only alternative is to hire the worker as a contractor. This arrangement is significantly beneficial to the employer as they avoid payroll tax expense.

As noted above, the E-2 visa is a treaty specific visa. It is only available to citizens of certain countries. India is not one of them.<sup>1</sup> While it would seem that not being a citizen of an E-2 eligible country is a complete roadblock, in fact, it is not. The solution requires some creativity and expense. To qualify the applicant must first obtain citizenship in a country that does have the correct treaty with the US. Obtaining citizenship to most countries is a very time-consuming process often taking years, if it is possible at all; however, there are quite several countries that have citizenship by investment programs, and a number of these also have the required US treaty. Many, such as those in Europe, require extremely high investment amounts. The two best candidates with respect to cost and speed are Turkey and Grenada. The Turkish program is very new and the government is still working out procedures. Grenada, which is a small island nation off the coast of Venezuela, has been operating an extremely efficient citizenship by investment program for over 20 years.

#### **Step 1: Obtaining Grenada Citizenship**

The first step in getting an E-2 visa to the US is applying for Grenadian citizenship. To do this, the applicant chooses a government approved project. Grenada recently lowered the minimum investment from \$350,000 to \$220,000. The investment must be kept for at least three years, after which it can be sold. The single investment supports the citizenship of the applicant, the spouse, children and even adult parents. Grenada also offers an option to obtain citizenship by donating \$150,000 to the government. There is a risk with that

option with respect to the E-2 visa. The E-2 is a non-immigrant visa the logical consequence of which is that the holder will eventually return to Grenada after they are done with their US business. In the adjudication of the E-2 visa it is imperative to prove that the applicant does not have the intent to emigrate to the US. By obtaining Grenadian citizenship through investment, the applicant is creating greater connections to Grenada financially, and for some projects, through the direct ownership of real estate. These connections help prove the needed intent.

The Grenadian government imposes several significant fees. Some of the fees are based on the number of people who will receive citizenship. In addition there are the legal/consulting fees to help with the application process itself. In total, for a typical family of four, the fees would be approximately \$100,000.

The application process typically takes 60-90 days to process. It often takes investors up to 30 days to evaluate, select a project, and assemble all the needed materials for the application. Accordingly, the total time from start to finish is typically 3-4 months at which point the applicant will be a Grenadian citizen and entitled to file for the E-2 visa. The applicant does not need to visit Grenada to undertake the process. However, it is advisable to visit, at least in the period prior to the consular appointment (described more fully below), so it helps establish the local connections. When there, the applicant can obtain a driver's license, open a local bank account, and often it is advisable to rent an apartment or undertake other steps which help establish deeper local connections.

### **Step 2: Applying for the E-2 Visa**

Once the applicant receives his or her Grenadian passport, the person is legally eligible to apply for the E-2 visa to the United States. The visa is premised on the applicant coming to the US to manage a US business. The business can be in anything that is legal in the US. Certain businesses, such as Cannabis or Cryptocurrencies are best to be avoided due to the potential conflict with federal banking and other laws. 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 avoid the question of whether the amount is material, is \$150,000. Often, when investing in a business created by a third-party, investment amounts required can be \$300,000 and up. There is no limit on the size of the investment.

Most commonly, investors used the E-2 visa to come to the US to manage a business that they themselves would run on a day-to-day basis. Many people assume that this is a requirement. The actual requirement is that the "Applicant is in a position to develop and direct the enterprise" [emphasis added] See (9 FAM 402.9-6(F)). Given the phrasing of this requirement, it is entirely possible for an investor to invest in a business that will be managed by a third-party, while still meeting the terms of the requirement. This would allow the applicant to spend his or her time as otherwise desired and even to live in a different city than where the investment is located. If an investment in a third-party managed company is desired, it is imperative that the applicant engage competent advisors to structure the investment and company legal agreements with the utmost care.

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 required elements. 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.

Typically, it is advisable to have the applicant apply at the consulate responsible for Grenada (which happens to be in Barbados). During the current pandemic, it may not be possible as the consulate is closed, nor may it

be safe to travel even after it reopens. It is possible for a person in the US under a valid status to apply for a change of status without going to a consulate by filing for a change of status (Form I-129) directly with USCIS. Upon approval, the applicant will have a valid E-2 status and can stay in the US for a continuous two-year period.<sup>2</sup> To travel, the E-2 status holder would then have to apply for the visa at either the Barbados consulate or a another consulate. The visa itself is granted for up to five years and each entry is valid for two continuous years.

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 program<sup>3</sup>, 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 is 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 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.

Domestic-based processing of the petition to change status has the added benefit of speed. The consulates typically take a few weeks to a few months to grant an interview appointment. Prior to the pandemic, a typical delay for Barbados was 2-3 months. In the time immediately following the reopening of the consulate for non-immigrant visas, it is impossible to predict the wait given the potential for pent up demand during the extended closure. When processing the change of status domestically, premium processing is available, which results in adjudication within 15 days of filing. The fees associated with the change of status are not large: Premium processing: \$1440 (once for the whole family); I-129 (main applicant) \$460, I-539 (each dependent) \$370 and \$85 biometric fee. Typical legal fees are \$10,000 and the applicant should plan on another \$20,000 for the management consulting and business plan writing needed to support the application and overall process. An applicant should expect additional legal and other consulting costs for businesses that are larger and/or more complex than a small IT consulting business.

If the applicant is not physically in the US, then there is no choice but to start the process through the consular process. As noted above, that was typically a 2-3-month process. Given the possibility of delays due to high demand at the consulates upon their resumption of full services, potentially interested applicants may save considerable time by filing their petitions as soon as possible.

With respect to other expenses of the process, typical legal fees are \$10,000 and the applicant should plan on another \$20,000 for the management consulting and business plan writing needed to support the application and overall process. For very complicated and/or larger businesses, the consulting fees can be considerably higher. Fortunately, all the fees spent on the consulting would be included in the minimum investment required by the regulations.

The E-2 visa business plan and other materials can be prepared during the processing time for the Grenadian citizenship. The total time to obtain E-2 status, including the allocation of 30 days for Grenadian project selection can be accomplished in as little as 4-5 months for applicants located in the US. For those outside the US, the timeline is 5-7 months.

In summary, the budget for the Grenada and E-2 processes, inclusive of all fees, expenses and investment is approximately \$520,000. Of that amount \$220,000 is the investment in the Grenada project and \$150,000 is an investment in an applicant's own company.

## **How to 'Convert' an E-2 Visa into a Green Card**

The E-2 visa cannot be directly 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. That is open to citizens of all countries. The negatives of EB-5 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. Prior to the EB-5 program rule changes in November of 2019, it was fairly easy to locate any project in a high unemployment area (regardless of where it was located or what was the unemployment rate). After the rule change, it became much harder. Following the receipt of the E-2 visa, the holder can then apply for a green card under the EB-5 program, and if the company and investments are structured correctly, most, if not all, of the investment made at the E-2 stage will count toward the minimum required by the EB-5 program.

The most stringent requirement for the EB-5 program is job creation as each investor's investment must create ten full-time positions. With E-2 visa, the business is generally required to show that it will create at least 2-3 full-time positions. There is no requirement that the positions be employees of the company, as independent contractors will suffice. EB-5 requires that the jobs created be those of employees for the business that is the recipient of the investment funds. The job creation requirement can be satisfied either by showing the creation of the jobs, or by affiliating with a government approved 'Regional Center', which is allowed to prove job creation with the use of econometric formulae.

Typically, smaller projects have not utilized the regional center approach due to the added cost. In addition, it is often difficult to substantiate econometrically calculated job creation in purely service businesses, such as IT consulting as the econometric formulae are weighted toward capital expenditures.

The budget to create materials needed for an EB-5 petition is significant. For smaller projects, the minimum is usually \$50,000 to \$75,000 and much more for larger ones. Third-party created EB-5 projects typically charge a one-time 'administrative fee' of \$50,000 to help recover their set up costs.

For a more detailed description of the EB-5 program, see <http://e3ig.com/wp-content/uploads/2020/08/EB-5.pdf>.

## **Proving the Legality of the Source of Investment Funding**

Both Grenada and the US (for both E-2 and EB-5) require that the capital for each of the investments 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. The amount of proof and documentation for Grenada and the E-2 visa is similar and not particularly onerous. For EB-5, USCIS has basically required the equivalent of a forensic audit to document the flow of all funds back to the source. A proper EB-5 source of funds often involves thousands of pages of materials. Typical legal fees for representing an investor and preparing the source of funds is \$15,000 (for EB-5). This is in addition to the cost of the project materials needed to support the filing described above.

## **Conclusion**

The purpose of this white paper was to describe a potential immigration solution for Indian nationals in the US on H1-B who effectively have no chance of ever getting a Green Card based on their H-1B status. The E-2 visa business plan and other materials can be prepared during the 2-3 months processing time for the

Grenadian citizenship. Given the availability of premium processing for the change of status from H1-B to E-2, the E-2 change of status should be just the processing time (plus shipping delays) of 15 to 30 days. Accordingly, the total time to obtain E-2 status, including the allocation of 30 days for Grenadian project selection can be accomplished in as little as 4-5 months. The budget, inclusive of all fees, expenses and investment is approximately \$520,000. Of that amount \$220,000 is the investment in the Grenada project and \$150,000 is an investment in an applicant's own company.

The Grenada to E-2 solution is far faster than the alternative EB-5 pathway, which takes at least two years and costs nearly \$1 million (inclusive of fees and expenses) at a minimum. The E-2 visa does not provide a green card, but it does allow the holder to live in the United States for what could be virtually an unlimited amount of time. In sum, it can end the H1-B nightmare and help many Indian families to regain control of their lives.

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<sup>1</sup> For a full country list of E1 and E2 Visa Treaties, see <http://e3ig.com/wp-content/uploads/2020/08/E-1-and-E-2-summary-chart-3-1.pdf>

<sup>2</sup> In the US system, a visa permits the holder to enter the US, the status allows the person to remain there legally. It is entirely possible for a person to have a legally valid status, without having a visa. In such a case, when the person departs the US and wishes to re-enter, he or she is required to first obtain a visa.

<sup>3</sup> 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