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ALTERNATIVES TO THE H1B: THE E VISA FOR INVESTORS AND TRADERS

This article is the second in a weekly series I am publishing presenting the alternatives to the H1B professional visa for those who missed the deadline to apply or who applied and were not lucky enough to be selected in the H1B visa lottery, as a result of the quota on the visas. This article is about the E visa alternative for investors or traders.

For those of you who have an idea for a business, you can often use your Intellectual Property instead of cash to invest in your own start-up and perhaps qualify for this visa. This article explains how.

At a time when it is increasingly difficult to get a valid visa into the U.S., there is a visa for investors from certain countries with which the United States has a special commercial treaty. These are known as E-1 (treaty-trader) and E2 (treaty investor) visas. If the country has the appropriate treaty with the U.S., nationals of that country may enter the U.S. for the purpose of directing and developing the operations of the enterprise (E-2) or for the purpose of conducting trade (E-1).

The E-2 visa applicant must show that he or she has invested or is in the process of investing a substantial amount of capital. The exact meaning of "substantial amount" is not defined but it is generally thought that amounts less than \$100,000 are too small to qualify.

However, some of this amount can be in the form of in-kind investment such as intellectual property or other assets.

We have had success in valuing the intellectual property of our immigrant clients, such as software they invented or an internet platform or application they created, and by investing that IP in their own business, qualified them for an E2 visa.

This can be a good option for persons with an idea for a start-up that have some valuable IP as an asset.

"Substantial" is generally defined as sufficient to show the investor's financial commitment to the enterprise and large enough to show a likelihood of success.

The “substantiality” of the investment will depend upon how much is necessary to start a business in the particular field. So, for example, the cost of starting a franchise window dealership is likely to be less than the cost of opening an airline. The amount necessary to invest in order to qualify for the visa will be less if the business requires less to get started.

The applicant must place at risk the investment, which means that he or she is subject to a loss of the capital if the investment fails. The source of the money can be a loan, but it must be documented and be determined to be a legitimate loan, rather than an investment belonging to another person.

The investment must be in a for-profit enterprise.

The applicant can be either the owner of the enterprise or one of its workers. The owner and national of the treaty country must show that he controls the enterprise by showing ownership of at least 50% of the enterprise. The owner must also have operational control of the entity.

In the case of E-1 treaty-trader visa, the trade conducted by the applicant must be principally between the United States and the treaty country of which the alien is a national. In practical terms, this means that the trade with the U.S. must be over 50% of the volume of international trade conducted by the trader.

For both visas, if the applicant is not the investor or the trader, he must be employed in an executive or supervisory capacity, or possess skills that are highly specialized and essential to the operations of the commercial enterprise.

A college degree is helpful but not a requirement. Generally managers or highly professional positions within companies qualify for an E visa.

If the applicant is outside the U.S., he or she can apply directly at the Consulate. An application with the Immigration Service first is not necessary, as it is with some other visas. If the applicant is in the U.S., he or she can apply for a change of status without leaving the U.S.

WARNING: The above is a summary discussing legal issues. It is not intended to be a substitute for legal advice. We recommend that you get competent legal advice specific to your case.