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The E—2 Treaty Investor Visa Dilemma: Violations Of Law And Limitations On Foreign Investment

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NOTES

THE E-2 TREATY INVESTOR VISA DILEMMA: VIOLATIONS OF LAW AND LIMITATIONS ON FOREIGN INVESTMENT

TIANA J. CHERRY*

Although the Immigration and Nationality Act established the E-2 treaty investor visa (“E-2 visa”) to attract foreign investors to the United States, the visa requirements limit many individuals from being eligible to invest in the United States’ economy. To be eligible for the E-2 visa, the potential investor must show that he or she is a citizen of a country that the United States has negotiated a treaty of Friendship, Commerce, and Navigation (“FCN”), a Bilateral Investment Treaty (“BIT”), or the equivalent. This requirement is in direct conflict with the Most Favoured Nation (“MFN”) nondiscrimination obligation, which the United States agreed to under the General Agreement on Trade in Services (“GATS”). This Note considers the treaty requirement of the E-2 visa and evaluates how it conflicts with the MFN resulting in limits on potential foreign investment. It then analyzes the proposed E-2 Visa Improvement Act’s ability to remedy the conflict. Ultimately, the E-2 Visa Improvement Act provides no solution and the E-2 visa, as currently written, is discriminatory. This Note concludes that the E-2 visa requirements drive potential investors to other countries and the United States must comply with the MFN

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obligation by broadening the E-2 visa to increase foreign investment.

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INTRODUCTION

“Entrepreneurship is as much a part of the American experience as baseball, jazz, and Disneyland.”¹ Immigrants have a long history of contributing to the American experience by starting successful businesses in the United States.² Immigrants founded many of America’s most iconic companies, such as: AT&T, Capital One, Colgate-Palmolive, Goldman Sachs, Kohl’s, Kraft, Pfizer, and Procter & Gamble.³ In fact, immigrants

1. Larry W. Cox, *Five of Your Neighbors Who Are Starting Companies*, in THE ENTREPRENEUR NEXT DOOR: CHARACTERISTICS OF INDIVIDUALS STARTING COMPANIES IN AMERICA 28 (2002).

2. See Jason Wiens ET AL., *Immigrant Entrepreneurs: A Path to U.S. Economic Growth*, EWING MARION KAUFFMAN FOUND. (Jan. 22, 2015), <http://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/immigrant-entrepreneurs-a-path-to-us-economic-growth> (stating that immigrants have consistently been more entrepreneurial than native-born Americans for more than a century).

3. See PARTNERSHIP FOR A NEW AMERICAN ECONOMY, THE “NEW AMERICAN” FORTUNE 500 1 (2011) (identifying the aforementioned companies among the most influential fortune-500 companies founded by immigrant entrepreneurs).

or children of immigrants founded more than forty percent of Fortune 500 companies in 2010.⁴ Despite the obvious economic benefits that many immigrants bring to the United States, the treaty requirement of the E-2 treaty investor visa (“E-2 visa”)⁵ has a discriminatory impact that prevents many potential investors from contributing to the United States’ economy.⁶

This Note considers the treaty requirement of the E-2 visa and how it impacts foreign investment in the United States. It begins by discussing the origin and purpose of the E-2 visa and introduces the discriminatory treaty requirement for E-2 visa eligibility.⁷ Next, it provides a thorough analysis of the treaty requirement to reveal how it is in direct conflict with the Most Favoured Nation (“MFN”) obligation of the General Agreement on Trade in Services (“GATS”).⁸ It then discusses ways that exemptions to the MFN obligation cause discrimination within the treaty requirement and evaluates whether the E-2 Visa Improvement Act provides a solution to the problematic impact of the treaty requirement. It also considers the impact that the E-2 Visa Improvement Act, if adopted, could have on the MFN obligation. It recommends that the E-2 Visa Improvement Act be rejected, that the United States remedy the discriminatory component of the treaty requirement by complying with its MFN obligation, and that all members of the World Trade Organization be eligible for E-2 visas.⁹ Finally, it concludes that the treaty requirement of the E-2 visa, as currently written, is discriminatory, it violates the United States’ MFN obligation, and the aforementioned changes should be made to increase foreign investment.¹⁰

4. See Dane Stangler & Jason Wiens, *The Economic Case for Welcoming Immigrant Entrepreneurs*, EWING MARION KAUFFMAN FOUND. (Sept. 8, 2015), <http://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/the-economic-case-for-or-welcoming-immigrant-entrepreneurs> (reporting on Partnership for a New American Economy’s finding that forty percent of Fortune 500 companies in 2010 were founded by an immigrant or the child of an immigrant).

5. See generally Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 (a)(15)(E)(ii) (2015) [hereinafter *E-2 visa*].

6. See Stangler & Wiens, *supra* note 4 (asserting that U.S. law “provides no dedicated means for immigrant entrepreneurs to launch innovative companies in the United States”).

7. See *infra* Part II.

8. See *infra* Part III.

9. See *infra* Part IV.

10. See *infra* Part V.

II. THE DISCRIMINATORY NATURE OF THE E-2 TREATY REQUIREMENT

A. Development of the E-2 Nonimmigrant Visa

The United States offers immigrant and nonimmigrant visas to foreign nationals interested in entering the United States.¹¹ The United States Code defines an “immigrant” as “every alien” except those listed within the various nonimmigrant categories.¹² Immigrant visas, which are also known as “green cards,” allow foreign nationals to obtain Lawful Permanent Residency (“LPR”) status and permanently live and work in the United States.¹³ Conversely, nonimmigrant visas allow foreign nationals to enter the United States with temporary residency.¹⁴ Section 1101 of the United States Code describes the classes of aliens who are specifically excluded from the definition of immigrant.¹⁵ To qualify as a nonimmigrant, an individual must fit within one of the nonimmigrant statutory categories outlined in the Immigration and Nationality Act (“INA”), such as: tourists, business visitors, students, temporary workers, and temporary business investors.¹⁶

Nonimmigrant visas were incorporated into federal law through the Immigration and Nationality Act of 1924 (“1924 Act”).¹⁷ The 1924 Act created the numerical categories of nonimmigrant visas and codified the

11. See Leslie K. L. Thiele & Scott T. Decker, *Residence in the United States Through Investment: Reality or Chimera?*, 3 ALB. GOV'T L. REV. 103, 106 (2010) (explaining that the two visa categories were developed for foreigners seeking to enter the United States independent from family or employment relationships).

12. See 8 U.S.C. § 1101(a)(15) (2015) (defining the term “immigrant” and identifying the visa categories that do not qualify as “immigrant” visas).

13. See Stephen M. Hader & Scott D. Syfert, *The Immigration Consequences of Mergers, Acquisitions, and Other Corporate Restructuring: A Practitioner's Guide*, 24 N.C.J. INT'L L. & COM. REG. 547, 555 (1999) (stating that the common name for LPR status is the “green card” and further explaining that “permanent” residency is permitted provided that the LPR holder does not engage in criminal activity or actions that could result in the removal of the LPR's permanent status and deportation from the United States).

14. See Palma R. Yanni, *Business Investors: E-2 Non Immigrants and EB-5 Immigrants*, 92-08 IMMIGR. BRIEFINGS 1 (1992) (explaining nonimmigrant visas as “temporary”).

15. See Hader & Syfert, *supra* note 13, at 555 n.19-20 (explaining that the term nonimmigrant is not specifically defined in the statute, but instead, the term immigrant is described and visa categories that do not qualify as immigrant visas are provided).

16. 8 U.S.C. § 1101(a)(15)(a)-(v) (2015) (listing the nonimmigrant categories); see also Stephen H. Legomsky & Cristina Rodriguez, *IMMIGRATION AND REFUGEE LAW AND POLICY* 360-61 (6th ed. 2015) (listing various nonimmigrant visa categories).

17. See Stephen Pattison, *The Curious Case of the Treaty Trader/Investor Visa: How Diplomacy and Immigration Law Intersect to Promote the Trade and Investment in the United States*, 12-06 IMMIGR. BRIEFINGS 1 (2012) (explaining that nonimmigrant visas were first established through the 1924 Act).

treaty merchant category, which later became known as the E-1 visa.¹⁸ When the United States began receiving a significant increase in international investment, the Immigration and Nationality Act of 1952 (“1952 Act”) expanded the 1924 Act to create an “E” visa category, which includes both E-1 (treaty merchant) and E-2 (treaty investor) visas.¹⁹

The 1952 Act further established the treaty requirement for E-2 visas.²⁰ The 1952 Act, as amended in 1990,²¹ states that E-2 visa holders may only enter the United States pursuant to a “treaty of commerce and navigation between the United States . . . 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”²² Today, the E-2 visa category remains in Title 8 of the United States Code, § 1101(a)(15)(E)(ii).²³

B. *The Purpose and Structure of the E-2 Visa*

The purpose of the E visa category is to permit the temporary admission of nationals from countries that the United States has a treaty of Friendship, Commerce, and Navigation (“FCN”), a Bilateral Investment Treaty (“BIT”), or comparable treaty arrangement to increase foreign investment in the United States.²⁴ The North American Free Trade Agreement (“NAFTA”) and the more recent Free Trade Agreements with Chile and

18. See *id.* (explaining the foundation of the E visa category); see also Hedayat Tahbaz, *E Visas: An Analysis of the Legislative History and Proposed Governing Regulations*, 3 U. MIAMI Y.B. INT’L L. 151, 155 (1995) (noting that the E-1 visa was established prior to the E-2 visa).

19. See Catherine Sun, Note, *The E-2 Treaty Investor Visa: The Current Law and the Proposed Regulations*, 11 AM. U. J. INT’L L. & POL’Y 511, 514 (1996) (explaining the E visa category development and stating that the E-2 visa was specifically created due to an increase in foreign investment).

20. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 101, 66 Stat. 163 (1952) (codified at 8 U.S.C.A. § 1101(A)(15)(E) (1952)) (allowing both traders and investors to enter the U.S. on E visas); see also Pattison *supra* note 17 (establishing that only nationals from countries in which the U.S. had particular treaties with would eligible for E visas).

21. See Immigration and Nationality Act of 1990, Pub. L. No. 101-649, §101, 104 Stat. 4978 (1990) (explaining that the requirements include the national being from a country with a requisite treaty with the U.S. amongst additional requirements).

22. *Id.*

23. 8 U.S.C. § 1101(a)(15)(E)(ii).

24. See Elizabeth Espin Stern, *Intracompany Transferees (L-1) and Treaty Traders/Treaty Investors (E-1/E-2)*, A.L.I.-A.B.A. 105, 112 (2005) (explaining that “the basic purpose of the E visa category is to permit temporary admission of nationals of countries with which the United States has these treaty arrangements”); see also Sun, *supra* note 19, at 514 (explaining that the E-2 visa was specifically created with the purpose of increasing foreign investment in the United States).

Singapore allow nationals of these countries to apply for E treaty visas.²⁵ The Department of State and the United States Citizenship and Immigration Services (“USCIS”) oversee E–2 visas to ensure that treaty countries are able to apply for the E treaty visas.

The Department of State maintains a list of treaty countries with the effective date of the treaty.²⁶ It also identifies whether certain treaties authorize nationals to receive the E–1 visa, the E–2 visa, or both.²⁷ Provisions for adjudicating E–2 visas are located in the Department of State’s Foreign Affairs Manuel (“FAM”).²⁸ Under the FAM, consular officers are instructed to adjudicate E visa cases “to facilitate international investment in accordance with the terms of a *ratified treaty*.”²⁹ The consular officer ensures that a treaty exists between the United States and the country of the applicant’s nationality.³⁰ The consular officer then acts as both the adjudicator and the court of last appeal by determining whether the evidence satisfies the provisions of the statute and regulations.³¹ Afterward, this officer determines whether the visa application will be approved or denied.³² Alternatively, the USCIS’s role is to approve or deny E–2 visa holder’s adjustment of status applications.³³

Together, these organizations develop the requirements to obtain and maintain E–2 visas, thus empowering the E–2 visas’ operability. Although E–2 visas are functional, E–2 visas discourage the growth of foreign investment in the United States.³⁴ Specifically, the treaty requirement for an E–2 visa limits who is eligible to apply for an E–2 visa and it conflicts with the United States’ MFN obligation to the World Trade Organization under the GATS.³⁵

25. Stern, *supra* note 24, at 112.

26. See generally *Treaty Countries*, U.S. DEP’T OF STATE (last visited June 19, 2016), <https://travel.state.gov/content/visas/en/fees/treaty.html> (maintaining the list of treaty countries for both E–1 and E–2 visa holders).

27. See *id.* (identifying the countries that are eligible E–1 classification and E–2 classification and listing the countries twice when they are eligible for both).

28. *Id.*

29. See Pattison, *supra* note 17 (explaining the consular officer’s role in determining treaty status).

30. *Id.*

31. See *id.* (stating that “the consular officer is both the adjudicator and the court of last appeal”).

32. *Id.*

33. See *id.* at n.12 (explaining that the USCIS only deals with the adjudication aspect of E visas when an applicant is seeking to adjust their immigrant status).

34. See *infra* Part III.

35. See *id.*

C. *The Discriminatory Treaty Requirement*

Most comparable treaties exist as Free Trade Agreements (“FTAs”) between the United States and other countries.³⁶ If a potential investor is from a country without a FCN, BIT, or a comparable treaty listed by the United States, they are not eligible to obtain an E-2 visa.³⁷ Although “comparable” treaties are not specifically defined,³⁸ the E-2 visa classification is extended to Canadian,³⁹ Mexican,⁴⁰ Singaporean,⁴¹ Chilean,⁴² and Jordanian⁴³ nationals under their respective FTAs. However, there is no widely accepted rule that all FTAs are considered comparable treaties.⁴⁴ Countries that have FTAs with the United States are not always able to determine whether their country has an agreement comparable to FCNs or BITs because FTAs were not enacted as treaties.⁴⁵ The lack of description on comparable treaties leaves many potential investors clueless as to whether they qualify as an eligible foreign investor for an E-2 visa.⁴⁶ While most Western European countries are parties to FCNs, BITs, or comparable treaties with the United States,⁴⁷ non-Western European countries, such as mainland China, Brazil, and India, do not have the requisite treaties with the United States that enable their citizens to qualify for E-2 visas.⁴⁸

36. *Id.*

37. *See generally Treaty Countries, supra* note 26 (listing all countries that have a requisite treaty with the United States, which provides those countries’ citizens eligibility to apply for the E-2 visas).

38. *See* William T. Worster, *Conflicts Between United States Immigration Law and The General Agreement On Trade in Services: Most-Favored-Nation Obligation*, 42 TEX. INT’L L. J. 55, 97 (2006) (explaining that it is not entirely clear that FTAs are properly classified as FCNs or BITs).

39. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 341, 107 Stat. 2057 (1992) (codified at 19 U.S.C. § 3401 (2006)).

40. *Id.*

41. U.S.–Sing. Free Trade Agreement Implementation Act, Pub. L. No. 108-78, § 401, 117 Stat. 948 (2003).

42. United States–Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, § 401, 117 Stat. 909, 939-46 (2003).

43. United States–Jordan Free Trade Area Implementation Act, Pub. L. No. 107-43, § 301, 115 Stat. 243 (2001).

44. *See* Worster, *supra* note 38, at 97 (stating that “it is not entirely clear that FTAs are properly classified as FCNs or BITs since they were not enacted as treaties.”).

45. *Id.*

46. *Id.*

47. *See* Hader & Syfert, *supra* note 13, at 567 (explaining that “most Western European countries are parties to such treaties”).

48. *See generally* U.S. DEP’T OF STATE, *supra* note 26.

D. The MFN Obligation Not to Discriminate

In 1994, the United States agreed to the World Trade Organizations' ("WTO")⁴⁹ MFN obligation in the General Agreement on Trade in Services.⁵⁰ The MFN obligation states that all WTO members "shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country."⁵¹ This provision prohibits WTO members from discriminating against other member nations.⁵²

There are two standards for discrimination under the MFN: "de jure" discrimination and "de facto" discrimination.⁵³

De jure discrimination occurs when the nationality of the service provider is expressly noted as a criterion for qualifying admission, regardless of the scope of its applicability. De facto discrimination exists when a measure operates in such a way as to create a discriminatory effect against a particular nationality, compared to other nationalities . . . [and] regardless of intent.⁵⁴

A footnote within the MFN obligation regarding the Annex on Movement of Persons states that "the sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment."⁵⁵ This footnote implies that exempting some countries and not others is a form of discrimination. By allowing some citizens of countries that are WTO members to obtain E-2 visas, but not others, the United States has committed a per se violation of the "no less favorable" MFN treaty provision.

49. See generally General Agreement on Trade in Services Part II, Art. II (1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (binding the United States to the Most Favoured Nation ("MFN") agreement).

50. See *id.* (stating that the MFN clause in Article II of the agreement applies "[w]ith respect to any measure covered by this Agreement").

51. See *id.* (stating that there is a requirement under the WTO that all member nations be treated equally).

52. *Id.*; see also WORLD TRADE ORGANIZATION, PRESS PACK, 4TH MINISTERIAL CONFERENCE, (Nov. 9-13, 2001) (explaining that WTO member nation's standards "should not discriminate between countries").

53. See Worster, *supra* note 38, at 74 (enumerating the standards of discrimination under the MFN).

54. *Id.* at 74-75.

55. See General Agreement on Trade in Services Part II, *supra* note 49, at 306 n.1 (explaining the WTO's interpretation of the MFN obligation).

III. THE E-2 TREATY REQUIREMENT VIOLATES THE MFN OBLIGATION NOT TO DISCRIMINATE AND LIMITS POTENTIAL FOREIGN INVESTMENT

A. Exemptions to the MFN Obligation Allow WTO Member Nations to Discriminate Against Other Countries

The twist to de jure and de facto discrimination under the MFN obligation is that all WTO member nations that negotiated the GATS had a single opportunity to schedule country-specific exemptions for certain measures that would otherwise violate the MFN obligation.⁵⁶ These exemptions allow WTO member nations to continue discriminatory measures past the effective date of the GATS.⁵⁷ If a member nation did not schedule the exemption on or before the GATS took effect, the nation was precluded from doing so without prior consent of other WTO member nations.⁵⁸

In addition to scheduling the exemption, the WTO member nations were required to enter the date that the exemption would expire, which was not to exceed ten years.⁵⁹ The ten-year duration was not to be viewed as a minimum period of exemptions, but as a maximum period of transition during which members were required to actively seek ways to bring these inconsistent measures into conformity with the MFN.⁶⁰

The United States requested that nonimmigrant aspects of bilateral treaties for trade and investment be exempted from the MFN obligation.⁶¹ The exemption states:

Government issuance of treaty trader or treaty investor non-immigrant visas that extend a special visa category to nationals of treaty partners in executive and other personnel category engaged . . . solely to develop

56. See General Agreement on Trade in Services Part II, *supra* note 49, at 286 (stating that “a Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions”); see generally THE U.S. SCHEDULE OF COMMITMENTS UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES, USITC 78 (Dec. 13, 1997) (listing exemptions, the countries to which exemptions apply, intended duration, and the conditions that create the need for each exemption in categories such as the movement of persons, taxation measures, and transport services).

57. *Id.*

58. See Worster, *supra* note 38, at 82 (stating that “[a]s new nations join the WTO, they are likewise granted an initial opportunity to schedule and are barred from amending thereafter without consent”).

59. See General Agreement on Trade in Services Annex on Art. II Exemptions, *supra* note 49, at 305 (stating that “[i]n principle, such exemptions should not exceed a period of 10 years.”).

60. See Worster, *supra* note 38, at 83 n.211 (interpreting the ten-year expiration of the MFN exemption).

61. *Id.* at 85.

and direct the operations of an enterprise in which a natural person has invested or is actively in the process of investing a substantial amount of capital.⁶²

The exemption clarifies that this measure applies to “countries with whom the United States has a [FCN], a [BIT], or certain countries as described in Section 204 of the Immigration Act of 1990.”⁶³ In other words, the United States specifically requested that E-2 visas be allowed to violate the MFN obligation by asking for this exemption.⁶⁴

B. *The Treaty Requirement Conflicts with the MFN Obligation*

The E-2 visa requirement conflicts with the MFN obligation because the United States discriminates against citizens of countries without a FCN or BIT by prohibiting those citizens from receiving E-2 visas.⁶⁵ The language of the E-2 visa requirement states “an alien is entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national.”⁶⁶ However, the E-2 visa is in violation of the MFN obligation for three reasons.

First, the E-2 visa imposes a discriminatory effect on individuals from nations without requisite treaties.⁶⁷ Specifically, individuals from countries with the requisite treaty can enter the United States on an E-2 visa, while individuals who are from countries without the requisite treaty cannot enter.⁶⁸ The language of the E-2 visa reveals that the E-2 visa requirements are effectively an example of de facto discrimination, which is in violation of the United States’ obligation under the MFN.⁶⁹ By

62. See THE U.S. SCHEDULE OF COMMITMENTS UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES, USITC 78 (Dec. 13, 1997) (providing a chart that outlines the United States’ final list of Article II MFN exemptions regarding the movement of persons).

63. *Id.*

64. See Worster, *supra* note 38, at 98 (2006) (stating that “the very fact that the United States has listed this category as needing an exemption from MFN implies that the United States believes that the discriminatory E category inherently violates MFN”).

65. Compare Yanni *supra* note 14, at 1 (stating the treaty requirement of the E-2 visa) with Worster, *supra* note 38, at 74 (enumerating the standards of discrimination under the MFN).

66. Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(a)(15)(E) (2014).

67. See Worster, *supra* note 38, at 96 (concluding that the nationality requirement is “potentially discriminatory” after stating that nations such as Brazil, India, and Cuba are ineligible for the E-2 visa).

68. *Id.*

69. *Id.* at 116.

allowing only foreign nationals from countries that have a FCN, BIT, or comparable treaty with the United States to apply for the E-2 visa, a de facto discriminatory effect arises because without these treaties, some WTO member nations are ineligible to invest in a U.S. business through the E-2 visa.⁷⁰

Second, although the United States requested that the E-2 visa be exempted from its MFN obligation,⁷¹ the E-2 visa can no longer be considered an exemption because the ten-year maximum transition period has already expired.⁷² Although the exemption is listed as indefinite,⁷³ it was slated for elimination on January 1, 2005, the ten-year anniversary of the entry into force of the GATS.⁷⁴ In 2001, the Secretariat of the WTO also made it clear that exemptions to the MFN obligation were meant to be temporary, despite certain country-specific requests.⁷⁵ The WTO has since expressed goals to eliminate all exemptions to the MFN obligation in their entirety.⁷⁶

Third, even if the exemption were in effect, FTAs are not covered under this exemption.⁷⁷ The treaty requirement limits E-2 visa eligibility to citizens of nations with a FCN, BIT, or comparable treaties with the United States.⁷⁸ However, the “comparable” portion of the treaty requirement

70. *Treaty Countries*, *supra* note 26 (listing countries that have treaty investor provisions in effect with the United States).

71. THE U.S. SCHEDULE OF COMMITMENTS UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES, *supra* note 62, at 78 (listing the U.S. exemption from the MFN obligation).

72. *See* Worster, *supra* note 38, at 86 (stating that this exception was “slated for elimination on January 1, 2005, the ten-year anniversary of the entry into force of the GATS”).

73. THE U.S. SCHEDULE OF COMMITMENTS UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES, *supra* note 62, at 78.

74. Worster, *supra* note 38, at 86; *see also* General Agreement on Trade in Services Annex on Art. II Exemptions, *supra* note 49, at 305 (stating that the “exemptions should not exceed a period of 10 years”).

75. Special Session of the Council for Trade in Services, Report of the Meeting Held on 5, 8 and 12 Oct. 2001, Note by the Secretariat, ¶ 84, S/CSS/M/12 17 (Nov. 28, 2001) (“The Annex on Article II Exemptions allowed for a temporary deviation from the MFN principle, but recognized that these exemptions constituted an irregular situation and that all Members would have to eliminate them eventually.”).

76. Worster, *supra* note 38, at 83 (“[T]he Council has already issued Procedures for the Certification of Terminations, Reductions and Rectifications of Article II (MFN) Exemptions,” which eliminate exemptions to the discrimination requirement).

77. *See generally* THE U.S. SCHEDULE OF COMMITMENTS UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES, *supra* note 62, at 78 (omitting FTAs from the list of MFN exemptions).

78. Hader & Syfert, *supra* note 13, at 567 n.90 (stating that section 101(a)(15)(E) of the Immigration and Nationality Act “requires the existence of a Treaty of Friendship, Commerce, and Navigation (or a comparable treaty) between the United States and

used to provide E-2 visas to citizens from nations with which the United States has negotiated an FTA is not covered under the MFN exemption.⁷⁹ The MFN exemption only applies to “countries with whom the United States has a FCN, BIT or certain countries as described in Section 204 of the Immigration Act of 1990.”⁸⁰ Since section 204 of the Immigration Act of 1990 is only specific to treaty traders and not treaty investors, the countries listed in section 204 cannot be used to identify a “comparable” treaty.⁸¹ Although the E-2 visas have been extended to Canadian,⁸² Mexican,⁸³ Singaporean,⁸⁴ Chilean,⁸⁵ and Jordanian⁸⁶ nationals under their respective FTAs, there are no indications that these agreements are exempt because there is no widely accepted rule that all FTAs are considered “comparable” treaties.⁸⁷ Therefore, FTAs are not exempted from the MFN obligation because these countries are not considered FCNs or BITs, despite the fact that the United States has allowed citizens from countries with FTAs to obtain E-2 visas.

C. *The Treaty Requirement Limits Potential Foreign Investment*

The treaty requirement is in direct conflict with the United States’ entrepreneurial history. A study has shown that immigrants or their children founded more than 40% of the 2010 Fortune 500 companies.⁸⁸ Furthermore, just shy of 20% of the newest Fortune 500 companies between the periods of 1985 and 2010 have an immigrant founder.⁸⁹ For

another nation to receive E visa status”).

79. THE U.S. SCHEDULE OF COMMITMENTS UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES, *supra* note 62, at 78.

80. *See id.* (citing the reference to “countries to which the measure applies”).

81. *See* Immigration and Nationality Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, Sec. 204 (1990) (noting that the point heading for section 204 is for “treaty traders” and that section 204 only makes amendments to “section 101(a)(15)(E)(i)”).

82. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 341, 107 Stat. 2057 (1992) (codified at 19 U.S.C. §3401 (2006)).

83. *Id.*

84. U.S.–Sing. Free Trade Agreement Implementation Act, Pub. L. No. 108-78, § 402, 117 Stat. 948 (2003).

85. United States–Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, § 402, 117 Stat. 909, 939-46 (2003).

86. U.S.–Jordan Free Trade Area Implementation Act, Pub. L. No. 107-43, § 301, 115 Stat. 243 (2001).

87. Worster, *supra* note 38, at 97 (explaining that it is not entirely clear that FTAs are properly classified as FCNs or BITs).

88. Steven A. Ballmer ET AL., *The “New American” Fortune 500*, NEW AM. ECON. 2 (2011), <http://www.renewoureconomy.org/sites/all/themes/pnae/img/new-american-fortune-500-junE-2011.pdf> (statistically showing that the United States has profited from foreign entrepreneurs).

89. *Id.* (showing that the newest Fortune 500 companies were founded by

example, in 2005, Indian immigrants founded 26% of startups in Silicon Valley.⁹⁰ Despite the United States' history of creating new businesses through foreign investment, entrepreneurs from countries without the requisite treaties have not been able to temporarily reside in the United States to start their businesses.⁹¹

The treaty requirement reveals that the options currently available to foreign-national entrepreneurs are outdated and inadequate in the United States immigration system.⁹² Restrictive policies, like the treaty requirement, are problematic because they cause foreign entrepreneurs to invest their money in countries other than the United States.⁹³ Limiting who can invest in the United States through the treaty requirement essentially pushes foreign investors to countries like Australia, Canada, Chile, China, and Singapore because these countries do not have such requirements and offer incentives such as stipends, labor subsidies for employees, expedited visa processes for bringing in startups, which the United States does not offer through the E-2 visa.⁹⁴ The result is that companies that might have launched in the United States are now taking root elsewhere.⁹⁵

immigrants or their children).

90. Vivek Wadhwa, *Foreign Born Entrepreneurs: An Underestimated American Resource*, EWING MARION KAUFFMAN FOUND. 177, 178 (Nov. 24, 2008), <http://www.kauffman.org/what-we-do/articles/2008/11/foreignborn-entrepreneurs-an-underestimated-american-resource>.

91. See Pam Prather, *The E-2 Visa: U.S. Misses Out on Foreign Entrepreneurs*, BASHYAM & SPIRO LLP (Jan. 16, 2012), [http://www.bashyamspiro.com/immigration-meditation/2012/01/16/the-e-2-visa-u-s-misses-out-on-foreign-entrepreneurs/\(expressing-that-the-lack-of-options-creates-a-serious-need-for-immigration-reform-in-the-United-States\)](http://www.bashyamspiro.com/immigration-meditation/2012/01/16/the-e-2-visa-u-s-misses-out-on-foreign-entrepreneurs/(expressing-that-the-lack-of-options-creates-a-serious-need-for-immigration-reform-in-the-United-States)).

92. Stuart D.P. Gilgannon, *The Land of Opportunity: Why More Must Be Done to Encourage Immigrant Entrepreneurship In the United States*, 15 DUQ. BUS. L. J. 1, 26 (2015) (“[O]pportunities for immigrant entrepreneurs do exist within our present system, [but] such measures are outdated and fail to adequately recognize the value that allowing highly-skilled and educated foreign nationals to create small startup enterprises can have on our national economy.”).

93. See generally VIVEK WADHWA, *THE IMMIGRANT EXODUS: WHY AMERICA IS LOSING THE GLOBAL RACE TO CAPTURE ENTREPRENEURIAL TALENT* 16–18 (2012) (“Restrictive US immigration policies and the rise of other countries’ economies are driving talent elsewhere.”).

94. See Gilgannon, *supra* note 92, at 16 (stating that these countries recognize the opportunities that come with attracting entrepreneurs).

95. See *id.* (explaining how aggressive recruitment policies detract entrepreneurs from investing in the United States).

D. The Impact of Proposed Changes to the E-2 Visa through the E-2 Visa Improvement Act

Representative David Jolly (R-Florida) proposed the E-2 Visa Improvement Act.⁹⁶ On April 16, 2015, proposed bill H.R. 1834 was assigned to a congressional committee for consideration before sending it on to the House or Senate as a whole.⁹⁷ The bill seeks to amend the INA to permit a nonimmigrant E-2 visa holder who has been in the United States for at least ten years and who has created full-time employment for at least two individuals the opportunity to apply for permanent residency.⁹⁸ Additionally, the bill seeks to limit the amount of issuable E-2 visas to 10,000 visas per fiscal year and to change the age requirement of the accompanying child of a visa holder from twenty-one to twenty-six years of age.⁹⁹ What the proposed bill does not attempt to change is the discriminatory treaty requirement of the E-2 visa, a change that has the potential to increase foreign investment opportunities in the United States.

Instead of resolving the treaty requirement that violates the United States' MFN obligation, the E-2 Visa Improvement Act creates a further detriment because it proposes to place a cap on how many E-2 visas are issued each fiscal year.¹⁰⁰ Proposing to reduce the number of visas available would likely lead to further discrimination regarding which individuals are eligible to enter the United States under the E-2 visa. This is because there would have to be a process to determine which 10,000 visa applicants was eligible to obtain the E-2 visa under the new proposal. Since the E-2 Visa Improvement Act fails to identify the ways that preference will be given to E-2 visa applicants, there is no way to determine that the proposal will in any way remedy the United States' failure to comply with its obligations under the MFN.

IV. RECONCILING LIMITATIONS OF THE E-2 VISA

Given the strong role that immigrants have played throughout the history of the United States in the creation of new businesses, the United States should be more welcoming to foreign entrepreneurs from countries without FCN, BIT, or comparable treaties with the United States by changing the treaty requirement. Since foreign investment is a leading contributor to the United States economy, it is imperative that E-2 visa remain attractive.

96. E-2 Visa Improvement Act of 2015, H.R. 1834, 114th Cong. (2015).

97. *Id.*

98. *Id.* (suggesting ways to improve the E-2 visa).

99. *Id.*

100. *Id.* (proposing to place a cap of "[n]ot more than 10,000 [E-2] visas" issuable to foreign entrepreneurs each year).

A. The United States Should Comply with its MFN Obligation

The United States' failure to comply with its MFN obligation creates challenges for citizens of many countries.¹⁰¹ Notable WTO member nations excluded from E-2 visa eligibility are South Korea, Brazil, India, and Cuba.¹⁰² When citizens from these countries are excluded from obtaining E-2 visas, the United States loses investment from people who could substantially drive the economy.¹⁰³ To remedy the loss of potential foreign investment, the treaty requirement should be expanded to include all WTO member nations.¹⁰⁴ Although the E-2 visa treaty requirement has withstood some challenges,¹⁰⁵ it still conflicts with the MFN obligation under the WTO and the United States should start addressing the limitations of the E-2 visa.

The United States should also make an effort to eliminate its de facto discrimination because the United States' ten-year exemption to the MFN obligation is expired. As a result, all foreign nationals from WTO member nations would be eligible to apply for the E-2 visa.¹⁰⁶ This change would widen the pool of eligible E-2 visa applicants and in turn increase the amount of foreign investment in the United States, which would greatly stimulate economic development.¹⁰⁷

B. The E-2 Visa Improvement Act Should Not be Adopted

Although the E-2 Visa Improvement Act provides beneficial suggestions to changing the E-2 visa requirements, it should not be adopted as it currently reads because it does not encompass a solution that remedies the discriminatory treaty requirement. The proposed bill is beneficial because it would allow E-2 visa holders to have a smoother transition from temporary residency in the United States to permanent residency.¹⁰⁸ A path

101. See Worster, *supra* note 38, at 96 (stating that the challenges exist primarily because the United States has not complied with the MFN obligations).

102. See *id.*, for a list of countries excluded from E-2 visa eligibility.

103. See Prather, *supra* note 91 (explaining the consequences of excluding certain classes of entrepreneurs).

104. See Ballmer *supra* note 88, at 1 (stating that the newest Fortune 500 companies were founded by immigrants or their children).

105. See Worster, *supra* note 38, at 96 (naming discriminatory workplace legislation as a challenge that the E-2 treaty requirement has withstood).

106. See *id.* at 86 (explaining the impact of the United States' conformity to its MFN obligations).

107. Thiele & Decker *supra* note 11, at 146 (“[I]ncreasing the number of investments to the United States . . . would be a greater benefit to the United States, with a larger increase in economic development.”).

108. See generally E-2 Visa Improvement Act of 2015, H.R. 1834, 114th Cong. (2015).

toward citizenship is imperative. By allowing a path towards citizenship, the United States can guarantee a continuation of foreign investment,¹⁰⁹ which is the purpose of the E-2 visa.¹¹⁰

Furthermore, the E-2 Visa Improvement Act is helpful for future legislation because it proposes to change the age of dependents from twenty-one to twenty-six years of age.¹¹¹ By increasing the age limit of dependents from twenty-one to twenty-six, dependents of E-2 visa holders will have a longer amount of time to apply to remain in the United States. This change will serve as an incentive for foreign investors to invest in the United States and challenge other countries' attempts to compete with the United States' investment measures.

The remaining proposed amendment to the Act, however, is not beneficial. The E-2 Visa Improvement Act's proposal to place a cap on the amount of E-2 visas will further limit foreign investment in the United States because it reduces the number of investors on E-2 visas. Moreover, there is no suggestion that any proposal stated in the E-2 Visa Improvement Act will remedy the United States' failure to comply with its obligations under the MFN. Therefore, it should not be adopted.

CONCLUSION

The E-2 visa treaty requirement is discriminatory and it violates the United States' MFN obligation signed under the GATS. In reforming the E-2 visa, the United States should comply with its MFN obligation to expand the amount of applicants eligible to apply for the E-2 visa and to increase foreign investment in the United States.

109. Sun, *supra* note 19, at 557 (“[T]he United States would benefit if the treaty investors, who have proven their capability and commitment to contribute to the United States economy, are allowed to reside in the United States permanently, thereby guaranteeing the continuation of their investments.”).

110. *Id.* at 514 (explaining that the E-2 visa was specifically created “to promote the goals of increasing international investments and attracting foreign investments to the United States”).

111. H.R. 1834.