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# THE E-2 TREATY INVESTOR VISA: THE CURRENT LAW AND THE PROPOSED REGULATIONS

Catherine Sun\*

## INTRODUCTION

For foreign investors who do not have one million dollars to exchange for a "green card," many immigration practitioners regard the E-2 treaty investor visa<sup>2</sup> as "the next best thing to permanent resident status."<sup>3</sup> With an investment of less than \$50,000,<sup>4</sup> and for as long as

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\* J.D., 1997, American University, Washington College of Law; B.A., George Mason University. The author thanks the following for their assistance in the preparation of this Comment: Professor Michael Maggio, Mr. Cornelius D. Scully, Mr. H. Edward Odom, and the staff of the *American University Journal of International Law and Policy*.

1. See generally Elliott Fertik, Comment, *Reforming the Immigrant Investor Program of the Immigration Act of 1990*, 15 U. PA. J. INT'L BUS. L. 649 (1995) (examining the failure of the immigrant investor visa that is available to immigrants who invest at least \$1 million in a new business that creates at least ten full-time jobs). If the foreign investor invests \$500,000 in a rural area or in an area with a high unemployment rate, the investor remains eligible for an EB-5 visa. *Id.* at 655; see Palma R. Yanni, *Business Investors: E-2 Nonimmigrants and EB-5 Immigrants*, IMMIGR. BRIEFINGS, Aug. 1992, at 18-27 (discussing the immigrant investor visa and its historical foundation).

2. Immigration and Nationality Act (INA) § 101(a)(15)(E)(ii), 8 U.S.C. § 1101 (a)(15)(E)(ii).

3. Manfred Rosenow, *How Foreigners Can Work Temporarily in This Country*, MIAMI HERALD, May 20, 1991, at 13BM; see 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 17.01 (1994) (stating that the E visa, a nonimmigrant visa, most similarly parallels an immigrant visa); David Grunblatt et al., *The U.S. Nonimmigrant Visa System*, in BASIC IMMIGRATION LAW 1992, at 81 (PLI Litig. & Admin. Practice Course Handbook Series No. 433, 1992) (noting that the benefits accorded to an E visaholder are as essentially equivalent to those rights held by a permanent resident).

4. See *In re Walsh & Pollard*, Interim Dec. No. 3111, 1988 BIA LEXIS 55, at

the E-2 investor maintains an E-2 status, the treaty investor can enjoy the benefit of an indefinite duration of stay in the United States and the ability to engage in the investment, as well as other incidental activities.<sup>5</sup>

The steady increase in international investments and in the number of Bilateral Investment Treaties (BITs) signed in the past decade makes the E-2 treaty investor visa one of the more popular nonimmigrant visas,<sup>6</sup> particularly with the "upper echelon of [the] international business society."<sup>7</sup> In contrast to the immigrant investor visa (EB-5),<sup>8</sup> the number of E-2 visas issued remains high.<sup>9</sup>

The E-2 visa brings tremendous benefits to the United States because it encourages foreign investors to contribute substantially to the United States economy through capital infusion and job creation.<sup>10</sup> In addition, it allows expansion of the United States economy to many developing treaty nations.<sup>11</sup> Unfortunately, the State Department and the Depart-

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\*136 (1988) (holding that a \$20,000 investment in an engineering design service constituted a substantial investment, permitting the principal treaty investor to qualify his employees).

5. GORDON ET AL., *supra* note 3, § 17.01; Manfred Rosenow, *\$1 Million Investment Can Lead to Citizenship*, MIAMI HERALD, Apr. 22, 1991, at 14BM (discussing the benefits of the treaty investor visa).

6. See Yanni, *supra* note 1, at 3 (stating that the number of E-2 visas issued has nearly doubled from 1987 to 1991); see also U.S. DEP'T. OF STATE FOREIGN AFFAIRS MANUAL: PART II - NONIMMIGRANT VISAS, No. 9, 22 C.F.R. § 41.51, note 1, reprinted in IMMIGR. L. SERV. (CBC) 81 (June 1994) [hereinafter FAM] (reporting on the increasing popularity of the E visa).

7. Grunblatt et al., *supra* note 3, at 404.

8. INA § 203(b)(5), 8 U.S.C. § 1153(b)(5) (1990) (added by Immigration Act of 1990 § 121). The number of applications received and the number of immigrant investor visas issued remain extremely low compared to the 10,000 visas available for immigrant investors. *Id.*; see Fertik, *supra* note 1, at 650 (stating that of the 725 applications submitted in the first two years, the INS approved only 296).

9. See Yanni, *supra* note 1, at 3 (stating that the number of E-2 visas issued has steadily increased from 11,812 in 1987, to 20,584 in 1991). Nationals of Japan, the United Kingdom, Germany, France, Korea, and Taiwan receive a majority of the E-2 visas. *Id.* Citizens of Japan, the United Kingdom, France, Canada, and Germany received more than 80% of the E-2 visas issued in 1990. *Id.*; see AUSTIN T. FRAGOMEN ET AL., IMMIGRATION PROCEDURES HANDBOOK § 3.2(a) (1995) (stating that Japanese nationals account for nearly half of the issued E visas).

10. Cf. FAM, *supra* note 6, at 85-86, notes 9-10 (defining substantial investment by the value of the business investment and permitting proof of job creation as proof of non-marginality).

11. Interview with Cornelius D. Scully, Director of the Office of Legislation, Regulations, and Advisory Assistance, State Department Visa Office, and H. Edward

ment of Justice Immigration and Naturalization Service (INS) proposed regulations,<sup>12</sup> now pending for more than four years, may limit the use and benefits of the E-2 visa substantially.<sup>13</sup>

This Comment analyzes the statute, regulations, and agency guidelines governing the E-2 treaty investor visa. Part I recounts the background of the E-2 visa. Part II analyzes the current law on the E-2 classification. Part III compares and contrasts the two long-pending versions of the proposed rules with the present E-2 regulations and guidelines. Part IV presents recommendations for the final regulations. Finally, this Comment concludes that the language of the proposed rules will discourage many eligible foreign investors from making bona fide investments and contributions in the United States. More importantly, treaty nations could counter-impose similarly strict requirements on United States investors abroad, impeding United States international economic expansion. This Comment urges adherence to the purpose and intent of the visa classification and the BITs which are to retain flexibility in visa requirements and adjudications in order to draw foreign investments to the United States and to facilitate and protect United States investments abroad.

## I. BACKGROUND

### A. LEGISLATIVE HISTORY AND AGENCY AUTHORITY

The esteem and special privileges that today's E-2 treaty investors hold originated in the late 1800s<sup>14</sup> from the favored status of the treaty

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Odom, Chief of the Advisory Opinions Division, State Department Visa Office, in Washington, D.C. (Sept. 28, 1995) (stating that the treaty investors, in individual or corporate capacities, have made "very significant and major contributions to local employment and to the United States economy").

12. Nonimmigrant Classes; Treaty Aliens E Classification, 56 Fed. Reg. 42,952 (1991) (to be codified at 8 C.F.R. pt. 214) (proposed Aug. 30, 1991) [hereinafter INS Proposal] (proposing the codification of existing policy guidelines); Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, 56 Fed. Reg. 43,565 (1991) (to be codified at 22 C.F.R. pt. 41) (proposed Sept. 3, 1991) [hereinafter DOS Proposal] (proposing the promulgation of interpretative note material in the State Department's Foreign Affairs Manual).

13. See *infra* note 220 and accompanying text (discussing the concern that the more stringent proposed regulations may restrict the utility of the E-2 visa).

14. See Yanni, *supra* note 1, at 2 (stating that while the restrictive immigration law of the late nineteenth century did not apply to treaty merchants, nor prevent the United States from granting admission to treaty merchants, this same law denied admission to other citizens); see also GORDON ET AL., *supra* note 3, § 17.02 (providing a discussion on the admission status of Chinese merchants).

merchants,<sup>15</sup> later known as treaty traders.<sup>16</sup> Historically, the American door is open to merchants who desire to conduct trade in the United States temporarily.<sup>17</sup>

The Immigration and Nationality Act (INA) of 1924 created the treaty trader (E-1) class.<sup>18</sup> With the increase in international investment, the 1952 INA expanded the E-1 treaty trader class to create the E-2 treaty investor class<sup>19</sup> in order to promote the goals of increasing international investments and attracting foreign investments to the United States.<sup>20</sup>

15. See Yanni, *supra* note 1, at 2 (stating that in the late nineteenth century, the United States desire for international trade resulted in the exemption of foreign merchant traders from the restrictive United States immigration laws); GORDON ET AL., *supra* note 3, § 17.02 (discussing that despite formal Chinese Exclusion Laws, the Chinese merchant qualified for entry as one of the few protected categories under the 1880 Treaty between the United States and China).

16. GORDON ET AL., *supra* note 3, § 17.02.

17. See *id.* § 17.02 (stating that the 1924 Act did not subject the treaty merchant to numerical limitations because the treaty merchant did not qualify under the Act's definition of an "immigrant"); Yanni, *supra* note 1, at 2 (remarking that "the 1990 Act continued and expanded a long tradition of admitting foreigners for the purpose of pursuing investments in the U.S.").

18. Immigration and Nationality Act (INA) § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E) (1924); GORDON ET AL., *supra* note 3, § 17.02.

19. Immigration and Nationality Act (INA) § 101(a)(15)(E)(ii), 8 U.S.C. § 1101(a)(15)(E)(ii)(1952); H.R. REP. NO. 1365, 82d Cong., 2d Sess. 44 (1952). The legislative history declares that E-2 classification provides that aliens may enter the country temporarily to participate in "developing or directing the operations of a real operating enterprise and not a fictitious paper operation." *Id.*

20. See Richard S. Goldstein, *Non-Immigrant Treaty Trader and Treaty Investor Classification: Current Developments and Trends*, in A.L.I.-A.B.A. COURSE OF STUDY IMMIGRATION LAW, No. C394, at 109, 134 (1989) (stating that the purpose of the E-1 visa is to facilitate transnational trade); see also Mark A. Ivener, *Regulations and Case Studies in Representing E-1 Treaty Traders, and E-2 Treaty Investors*, in 25TH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 452 (PLI Litig. & Admin. Practice Course Handbook Series No. 355, 1992) (stating that the E-1 and E-2 visas mean to stimulate the United States economy by creating employment opportunities and investment operations, and by infusing new capital into the United States).

A nonimmigrant E-2 visaholder, is defined as:

an alien 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, and the spouse and children of any such alien if accompanying or following to join him . . . solely 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.

In the interpretation and adjudication of the E-2 visas, the statute itself provides very limited guidance.<sup>21</sup> The State Department and the INS both have authority to draft rules and guidelines for the E-2 classification.<sup>22</sup> The State Department, however, retains the primary authority over E-2 matters because it holds the sole responsibility to negotiate and interpret treaties and agreements that provide the basis for granting E-2 visas.<sup>23</sup> In particular, practitioners refer to the State Department's For-

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Immigration Act of 1990 (IA), Pub. L. No. 101-649, 121, 104 Stat. 4978 (1990) (codified at 8 U.S.C. § 1101); see INA § 101(a)(15)(E)(ii) (1990) (defining the E visa with the same language).

21. See *Nice v. Turnage*, 752 F.2d 431, 432 (9th Cir. 1985) (quoting *Kun Young Kim v. INS*, 586 F.2d 713, 716 (9th Cir. 1978)) (asserting that the legislative history provides "little assistance" in setting forth requirements for E-2 visas); see also Howard S. Myers III & Elizabeth A. Thompson, *A Practitioner's Guide to Business Visas: Part I*, IMMIGR. BRIEFINGS, June 1988, at 9 (stating that "[m]any of the [E-2 definitional] components are not statutory but created by implementing regulations, operations manuals, or policy memoranda"); Charles M. Miller, *United States Immigration Planning for Cross-Border Mergers and Acquisition*, 27 SAN DIEGO L. REV. 831, 833 (1970) (characterizing the statute as a "basic framework of requirements that defines the treaty investor classification").

22. INA §§ 103-104 (setting forth the responsibilities of the two agencies); see 22 C.F.R. § 41.51 (1994) (providing the State Department with the authority to issue regulations on E visas); 8 C.F.R. § 214.2(e) (1991) (outlining the INS regulations on E visas); Martin J. Lawler, *E & L Visas for Foreign National Specialist Workers*, in 2 IMMIGRATION AND NATIONALITY LAW 288, 288 (Edwin R. Rubin et al. eds., Am. Immigr. Lawyers Ass'n 1989) (listing the relevant publications for E-2 requirements as: the State Department Foreign Affairs Manual (FAM); 22 C.F.R. § 41.51; 8 C.F.R. § 214.2(e); and INS Operations Instructions 214.2(b),(e)); Miller, *supra* note 21, at 833 (stating that in addition to the statute, the regulations and policies promulgated by both the State Department and the INS also affect E visa case preparation); see also Myers & Thompson, *supra* note 21, at 9 (stating that both the State Department and INS regulations and policy comprise many of the E-2 definitional provisions).

23. See Goldstein, *supra* note 20, at 199 (stating that State Department is responsible for accepting applications and issuing visas to the treaty investor or its qualified employees); see also H. Ronald Klasko, *Proposed E Visa Regulations: No Treaty Between the INS and the State Department*, 68 INTERPRETER RELEASES (Fed. Pubs. Inc.) 1417, 1418 (Oct. 11, 1991) [hereinafter Klasko] (stating that the INS traditionally defers to the State Department on issues of E-1 and E-2 eligibility); *INS Proposes E Visa Regulations*, 68 INTERPRETER RELEASES (Fed. Pubs. Inc.) 1113 (Aug. 30, 1991) (stating that the INS relies on the State Department's FAM in adjudicating E visa applications); IMMIGRATION AND NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS (OI) § 214.2(e) (1991), reprinted in IMMIGR. L. SERV. (CBC) 159, 160 (June 1991) [hereinafter INS OPERATIONS INSTRUCTIONS] (requiring consultation of FAM notes to 22 C.F.R. § 41.40 and § 41.41 when considering matters involving treaty traders and investors).

eign Affairs Manual interpretative notes (FAM) as the "Consuls' Bible" in E-2 matters.<sup>24</sup>

## B. THE PRECONDITION OF A TREATY OR AGREEMENT

The existence of an authorizing treaty or agreement signed between the United States and the country whose nationality the treaty investor claims creates the basis of an E-2 treaty investor visa.<sup>25</sup> Prior to 1981, the Treaty of Friendship, Commerce, and Navigation (FCN) constituted the sole instrument that conferred either or both the E-1 and E-2 eligibility status.<sup>26</sup> The BIT, which authorizes E-2 classification,<sup>27</sup> aims

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Until its recently proposed rules in 1991, the INS only promulgated two paragraphs of guidelines on the requirements for the admission, extension, and maintenance of E-2 treaty investor status. 8 C.F.R. § 214.2(e) (1991); see Yanni, *supra* note 1, at 3 (emphasizing that a "a mere two paragraphs" outline INS regulations regarding E nonimmigrant status). Only after the passage of the 1990 Act did the INS endeavor to provide comprehensive regulations on E status. *Id.*

24. Richard S. Goldstein, *Practice Tips for Treaty Trader and Treaty Investor Visa Matters*, in 2 IMMIGRATION & NATIONALITY LAW HANDBOOK 156, 158 (R. Patrick Murphy et al. eds., 1994); Lawrence D. Bastone, *An Analysis of "E" Treaty Alien Categories and Pending Regulations*, in A.L.I.-A.B.A. COURSE OF STUDY, No. C942, at 193, 195 (1994) (referring to the FAM).

25. INA § 101(a)(15)(E)(ii), 8 U.S.C. § 1101(a)(15)(E)(ii); FAM, *supra* note 6, at 81, notes 1.2, 2; see e.g., FRAGOMEN ET AL., *supra* note 9, § 3.2 (outlining the applicable to E visa requirements); GORDON ET AL., *supra* note 3, § 17.03 (same); Myers & Thompson, *supra* note 21, at 9 (same); Ronald F. Storette, *U.S. Immigration and Nationality Law: Non-Immigrant Employment Visas and U.S. Permanent Residence*, in 23RD ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 75 (PLI Litig. & Admin. Practice Course Handbook Series No. 404, 1990); see also *In re Inguanti*, 11 I. & N. Dec. 393, 394 (1965) (holding that the INA does not require the United States to issue an E-2 visa to an Italian treaty investor applicant when a corresponding treaty providing for the entry of investors between the United States and Italy does not exist).

26. See Ann A. Ruben, *Recent Developments in Treaty Visa Practice*, in 2 IMMIGRATION & NATIONALITY LAW HANDBOOK 147, 154 (R. Patrick Murphy et al. eds., 1994) (explaining the history of the FCN treaty in conferring E status eligibility); *Citizens of Seven Countries to Gain E-2 Investor Status Under New Treaties*, 69 INTERPRETER RELEASES (Fed. Pubs. Inc.) 1601, 1601-02 (Dec. 21, 1992) [hereinafter *Citizens of Seven Countries*] (illustrating the importance of the FCN treaty as an authorizing treaty to gain E status); *Citizens of Eight Countries to Gain E-2 Status Under New Treaties*, 66 INTERPRETER RELEASES (Fed. Pubs. Inc.) 58 (Jan. 13, 1989) [hereinafter *Citizens of Eight Countries*] (same); Timothy R. Hager, Comment, *Recognizing the Judicial and Arbitral Rights of Aliens to Review Consular Refusals of "E" Visas*, 66 TUL. L. REV. 203, 208 (1991) (same) (citing *Citizens of Eight Countries*); *Poles, Panamanians to Gain E-2 Status Under New Treaties*, 68 INTERPRETER RE-

to encourage and protect mutual investments by the nationals of both countries and to guarantee equal treatment of the investors of both countries.<sup>23</sup>

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LEASES (Fed. Pubs. Inc.) 390 (Apr. 1, 1991) [hereinafter *Poles, Panamanians to Gain E-2 Status*] (same); GORDON ET AL., *supra* note 3, § 17.03 (stating that not all of the treaties conferring and authorizing E status constitute FCNs; liberally construed treaties may qualify as FCNs vis-a-vis E status authorization). The last negotiations of the FCN agreements ended in the late 1960s. *Id.*

The 1948 signing of the General Agreement on Tariffs and Trade (GATT) eliminated the need for FCNs shortly thereafter. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187; *Citizens of Seven Countries*, *supra*, at 1602. Some multilateral trade agreements, such as GATT, however, do not cover investment issues. *Id.*

27. GORDON ET AL., *supra* note 3, § 17.03; *Citizens of Seven Countries*, *supra* note 26, at 1602 (describing how BITs accord E-2 status).

28. See FAM, *supra* note 6, at 81, note 1 (reminding the consulate officers of the goal that E classification should increase and stimulate trade and investment between the United States and the treaty nation); Ruben, *supra* note 26, at 154 (stating that BITs facilitate foreign investments abroad); *Citizens of Eight Countries*, *supra* note 26, at 58 (stating that the BITs should encourage and protect American investment transactions in developing countries).

The BITs protect United States investors in four ways. First, the BITs provide "competitive equality," which ensure equal treatment of United States and domestic investors by the host country. Secondly, the BITs guarantee American investors the right to transfer funds using a market rate of exchange and thirdly, provide international arbitration as a forum for investment disputes. Fourthly, the BITs protect United States investors if expropriations should occur. *Bilateral Investment Treaties With the Czech and Slovak Federal Republic, the People's Republic of the Congo, the Russian Federation, Sri Lanka, and Tunisia, and Two Protocols to Treaties with Finland and Ireland: Hearing Before the Senate Comm. On Foreign Relations*, 102d Cong., 2d Sess. 2 (1992).

The BITs ordinarily become effective 30 days after ratification and remain enforceable for at least a 10 years. *Citizens of Seven Countries*, *supra* note 26, at 1601; *Citizens of Eight Countries*, *supra* note 26, at 58.

Some BITs permit treaty investors to employ any professional, technical, and managerial personnel of any nationality, while others limit the investors' employees to top managerial personnel. *Citizens of Seven Countries*, *supra* note 26, at 1603; *Citizens of Eight Countries*, *supra* note 26, at 58-59; Robert E. Banta, *Recent Developments in the E Visa Category*, in 2 IMMIGRATION AND NATIONALITY LAW 253, 256 (Edwin R. Rubin et al. eds., Am. Immigr. Lawyers Ass'n 1989) (proposing the rationale that this restriction serves to force foreign employers "to fill a certain percentage of their positions with local nationals").

The State Department explains that the former broader provision is "to provide freedom of choice with respect to positions requiring special expertise or skills" and to exclude partially the treaty investors from the enforcement of United States antidiscrimination law: the treaty investor may discriminate based on nationality. *Citizens of Seven Countries*, *supra* note 26, at 1603; *Citizens of Eight Countries*, *supra*



Recently, the United States has employed other means of expanding the E-2 eligibility, such as free trade agreements,<sup>29</sup> exchange of reciprocal E-2 benefits,<sup>30</sup> and protocols of amendments.<sup>31</sup>

Currently, the United States has treaty trader relationships with over forty countries, and treaty investor relationships with over thirty countries.<sup>32</sup>

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note 26, at 59; Banta, *supra* at 256.

Although the FCN and BIT requirements and interpretations concerning the E-2 visa status remain substantially the same, the model BIT contains a provision that added the activities of "establishing, administering, and advising" to the FCN provision of "developing and directing" an investment. *Citizens of Seven Countries*, *supra* note 26, at 1602-03. The flexible nature of modern investment resulted in the broadening in the scope of activities permitted by the treaty. *Id.* at 1603; *see* Hager, *supra* note 26, at 209 (stating that BITs significantly expand the number of eligible E-2 visa applicants by enlarging the role of the investor with respect to the investment).

29. Canada-United States Free Trade Agreement, Jan. 2, 1989, U.S.-Can., 27 I.L.M. 281 (1988). The United States-Canada Free Trade Agreement conferred treaty trade and treaty investors rights on Canadian citizens on January 1, 1989. *Id.* North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289, 605 (1993); *see* North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (implementing NAFTA in United States law). Mexican citizens became eligible for E status on January 1, 1994, the effective date of NAFTA. *Id.*

30. *See* IA of 1990 § 204, 8 U.S.C. § 1101(a) (granting implicitly E-2 benefits to Swedish and Australian nationals upon the exchange of reciprocal E-2 benefits between the two countries); *see also* GORDON ET AL., *supra* note 3, § 17.03[2][a] (stating that under the indirect language of the Immigration Act of 1990, Australian and Swedish nationals may receive E benefits provided that Australia and Sweden confer similar benefits to Americans); FRAGOMEN ET AL.; *supra* note 9, § 3 (providing a similar discussion of reciprocal E benefits between treaty countries).

31. *See* FAM, *supra* note 6, at 81-89, notes 1-14, exhibit 1 (listing United States protocols with Finland and Ireland as amending and broadening existing FCNs to include E-2 eligibility); *see also* GORDON ET AL., *supra* note 3, § 17.03. The amendment of the protocol takes effect immediately upon ratification rather than 30 days later. *Citizens of Seven Countries*, *supra* note 26, at 1603. The purpose of the protocols, like the BITs, is to provide reciprocal treatment for Finnish and Irish investors equal to that received by United States investors in Finland and Ireland. *Id.* at 1603-04.

32. INA § 101 (1990); *see* FAM, *supra* note 6, at 81-89, notes 1-14, exhibit 1 (listing the treaties containing treaty trader and treaty investor provisions between the United States and other countries).

## C. BENEFITS AND USES OF THE E-2 VISA

Of the nonimmigrant visas, foreigners favor the E-2 treaty investor visa the most because of its unique benefits.<sup>33</sup> First, the INS generally issues E-2 visas for a five year period, with five year extensions and multiple entries available.<sup>34</sup> The initial period of stay is one year with unlimited incremental extensions of one or two years.<sup>35</sup> In addition, INS automatically extends the E-2 duration of stay for one year upon each new entry of the visaholder into the United States.<sup>36</sup> Second, unlike most other nonimmigrants, E-2 visaholders need not maintain a foreign residence,<sup>37</sup> nor are they required to assert a definite period of stay.<sup>38</sup>

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33. See Grunblatt et al., *supra* note 3, at 81 (stating that the substantial benefits E status confers are comparable to the benefits that permanent resident status entails); Hager, *supra* note 26, at 207 (listing the numerous benefits provided by E visas); Miller, *supra* note 21, at 833 (stating that "no other nonimmigrant status offers the depth and quality of immigrant benefits to qualifying foreigners" as those provided by the E-1 and E-2 visas).

34. GORDON ET AL., *supra* note 3, § 17.01; Grunblatt et al., *supra* note 3, at 1-3; see FRAGOMEN ET AL., *supra* note 9, § 3.1 (discussing the advantage of lengthy and multiple extensions); Myers & Thompson, *supra* note 21, at 10 (providing a similar discussion on the advantages of allowing multiple year extensions).

35. INA § 214.2(e).

36. Grunblatt et al., *supra* note 3, at 85. Less than 30 days of traveling to Canada or Mexico, however, will not trigger the automatic extension upon entry to the United States. *Id.*

37. FAM, *supra* note 6, at 89, note 14. As a nonimmigrant visa holder, the treaty investor must declare unequivocal intent to depart upon termination of the E-2 status. *Id.* E-2 status terminates when the treaty investor no longer maintains the requirements of an E-2 classification or when the visaholder changes employers without INS approval. 8 C.F.R. § 214.2(e) (1990); see Yanni, *supra* note 1, at 8 (providing a discussion on the requirements a treaty investor must adhere to when E-2 status terminates).

An E-2 nonimmigrant, however, can possess dual intent. See FAM, *supra* note 6, at 89, note 14 (stating that an E-2 visaholder can petition for an immigrant visa and at the same time, possess the requisite intent to depart the United States upon termination of visa status and not remain in the United States illegally).

An E-2 visaholder may maintain, without being inconsistent for the purposes of United States immigration laws, intent to remain permanently in the United States lawfully and nonimmigrant intent to depart. *Id.*; see also *Garavito v. INS*, 901 F.2d 173, 176-77 (1st Cir. 1990) (analyzing the doctrine of dual intent when an alien attempts to change the classification of their visa to category E-2); *Lauvik v. INS*, 910 F.2d 658, 661 (9th Cir. 1990) (holding that a nonimmigrant who enters the United States as an employee or officer of an organization can develop a subjective intent to stay indefinitely in the United States without violating their visa or immigration laws). See generally Myers & Thompson, *supra* note 21, at 3-4 (discussing the pre-

Third, E-2 status permits treaty investors to engage in various incidental activities to the investment without prior approval.<sup>39</sup> Lastly, E-2 status affords the same E-2 benefits to the holders' (accompanying) spouse and/or unmarried children under twenty-one years of age. The same family members do not have to hold the same nationality as the principal treaty investor and may work without being subject to deportation proceedings.<sup>40</sup> If the principal treaty investor becomes a permanent resident, the dependents still retain or obtain E-2 status as long as the principal treaty investor remains eligible for the E-2 status.<sup>41</sup>

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sumption of immigrant intent and briefly, dual intent).

38. See FAM, *supra* note 6, at 89, note 14 (stating that merely expressing unequivocal intent to depart the United States upon the termination of E-status suffices); Yanni, *supra* note 1, at 8; Myers & Thompson, *supra* note 21, at 10 (noting FAM's requirements); Goldstein, *supra* note 24, at 112 (discussing FAM's statement's); Hager, *supra* note 26, at 207; GORDON ET AL. *supra* note 3, § 17.08.

39. FAM, *supra* note 6, at 83, note 7; see GORDON ET AL., *supra* note 3, § 17.07[1] (stating that so long as the investment purpose remains paramount . . . [the treaty investor could engage] . . . in social, educational, entertainment and cultural activities"); see also S. REP. NO. 1515, 81st Cong., 2d Sess. 563 (1950) (discussing the various eligibility requirements that E-2 visa holders must maintain). The treaty investor, however, cannot change employers without prior INS approval. GORDON ET AL., *supra* note 3, § 17.07[1]; *E Visas/H-1 Petitions/L-1 Petitions- Updates*, in 1994 IMMIGR. L. UPDATE: NEW DEV., PROC. & REG. 205, 207 (N.Y. St. B. Ass'n, New York, N.Y.), Mar. 3-4, 1994, at 205, 207 [hereinafter *E Visas Updates*] (stating that incidental activities may continue as long as E-2 eligibility continues).

40. INS OPERATIONS INSTRUCTIONS, *supra* note 23, § 214.2(e); *INS Discusses Employment of E-2 Dependents*, 66 INTERPRETER RELEASES 376 (Apr. 3, 1989) [hereinafter *INS Discusses Employment*] (correspondence reply by Lawrence J. Weinig, INS Deputy Assistant Commissioner for Adjudications) (providing clarification of certain issues regarding the employment of dependents of E-2 nonimmigrants and subsequent applications for an amendment of status); see e.g., Banta, *supra* note 28, at 257 (stating that the INS confirms that employment by E-1 and E-2 dependents will not result in their deportation); Yanni, *supra* note 1, at 9 (stating that dependents accompanying a nonimmigrant investor or employee can obtain E-2 visas with the same duration of stay as the principal family member); GORDON ET AL., *supra* note 3, § 17.07 (providing a similar discussion on dependents obtaining E-2 status); Grunblatt et al., *supra* note 3, at 8 (same). The INS does not authorize employment by E-2 treaty investors, dependents, however, they confirm that their employment will make them ineligible for change or adjustment of status. *INS Discusses Employment*, *supra* at 376; Grunblatt et al., *supra* note 3, at 88. "The violation of visa status through employment . . . is not viewed as harshly as to warrant a deportation remedy because of the esteem in which E visaholders are held, and the important foreign policy consideration to encourage bilateral trade and investment." *Id.* Ineligible E-2 dependents could obtain permanent resident status or another nonimmigrant status, by way of the visa route, through consulates abroad. GORDON ET AL., *supra* note 3, § 17.07.

41. Yanni, *supra* note 1, at 9; GORDON ET AL., *supra* note 3, § 17.07; see *More*

In sum, investors prefer the E-2 visa because it provides easy and "immediate entry [to as well as] . . . continued presence in the U.S."<sup>42</sup> Treaty investors who need to reside in the United States for an extended period of time find the E-2 visa particularly useful to oversee or work in a treaty enterprise.<sup>43</sup>

## II. CURRENT LAW

Although the Immigration and Nationality Act accords E-2 status to principal treaty investors only,<sup>44</sup> the regulations make the E-2 visa available to employees of the treaty employer.<sup>45</sup> In order to establish E-2 treaty investor eligibility, the applicant must meet the specific agency-created elements or tests in each of the following statutorily mandated requirements.<sup>46</sup>

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on *Adjustment of Status for Dependents of E Nonimmigrants*, 67 INTERPRETER RELEASES 951, 952 (Aug. 27, 1990) (stating that an investor's daughter could remain in the United States under derivative E-2 status, while the investor undergoes consular processing of adjustment of status to United States permanent residency).

42. Grunblatt et al., *supra* note 3, at 81. The nonimmigrant E-2 benefits resemble the rights conferred on immigrant visaholders. *Id.*; Miller, *supra* note 21, at 833.

43. FRAGOMEN ET AL., *supra* note 9, § 3.

44. INA § 101(a)(15)(E)(ii); see Paul W. Ferrell, *The Corporate Alien and Treaty Visa Nationality*, 7 GEO. IMMIGR. L.J. 283 (1993) (stating that the INA barely deals with treaty corporations or treaty employees, and does not address the question of treaty employee visa eligibility requirements).

45. See 22 C.F.R. § 41.51(c) (1991) (defining "employee" of treaty trader or investor); see also FAM, *supra* note 6, at 87, note 13 (providing that a treaty employer's E-1 or E-2 status entitles a treaty employee to the same status); INS OPERATIONS INSTRUCTIONS, *supra* note 23, § 214.2(e); *State Dept. Discusses E Visa Status*, 71 INTERPRETER RELEASES 1361 (Oct. 7, 1994) [hereinafter *State Dept. Discusses E Visa Status*] (stating that the principal investor gives rise to employee E status because the statute does not authorize independent investor E status for employees).

46. FAM, *supra* note 6, at 81, note 1.2. For a brief overview of the E-2 visa eligibility requirements, see Storette, *supra* note 25, at 5; Goldstein, note 20, at 123; *E Visas Updates*, *supra* note 31, at 206-07; Lawler, *supra* note 22, at 289-91; Sarah A. Tobocman & Larry S. Rifkin, *Employment of Nonimmigrant Aliens After IMMACT90*, FLA. B. J., May 1992, at 14-15; Ivener, *supra* note 20, at 2-3; Margaret C. Makar, *Foreign Entrepreneurship in the United States*, 23 COLO. LAW. 35, 35 (1994); Ethan E. Kaufman, *Staffing Business Operations with Foreign Nationals: The Nonimmigrant (Temporary Visa Options)*, N.J. LAW. Feb.-Mar., 1995, at 4-5; Steven C. Bell, *Nonimmigrant Visa Categories: The Nonpetition Categories*, in PLI CONTINUING LEGAL ASSISTANT TRAINING (R) WORKSHOP FOR LEGAL ASSISTANTS 1994: BASIC IMMIGRATION PROCEDURES 43 (PLI Litig. & Admin. Practice Course Handbook Series

1. Possession of the nationality of the treaty country.<sup>47</sup>
2. Active and substantial investment (employer only).<sup>48</sup>
3. Specific role in the enterprise (for employer, it is to develop and direct; for employee, the position must either be executive/supervisory or essential).<sup>49</sup>

4. Nonimmigrant intent to depart.<sup>50</sup>

The remainder of this section will discuss in detail the first three statutory requirements.

#### A. TREATY AND NATIONALITY<sup>51</sup>

The treaty permits only the nationals of the treaty countries to apply for the E-2 visa.<sup>52</sup> This requirement applies to the principal investor

No. 500 (1994)).

47. See FAM, *supra* note 6, at 81, note 1.2 (citing to 22 C.F.R. § 41.51 and listing the requirements for the E-2 treaty investor).

48. *Id.*

49. *Id.*

50. INA § 214(b); Myers & Thompson, *supra* note 21, at 3 (citing 22 C.F.R. § 41.11 (1991)).

51. See FAM, *supra* note 6, at 81, note 3 (defining nationality as that "determined by the authorities of the country of which the alien claims nationality, or by the alien's country of birth or subsequent country of citizenship"). A national of a country is defined as one who owes "permanent allegiance to [that] state." See Yanni, *supra* note 1, at 4 (quoting INA § 101(a)(21), 8 U.S.C. § 1101(a)(21)). Ordinarily, the passport tendered proves nationality. Yanni, *supra* note 1, at 4; GORDON ET AL., *supra* note 3, § 17.03[3][a].

The legally and politically predominant citizenship that an applicant holds provides the nationality of a dual national for determining investor status. FAM, *supra* note 6, at 81, note 3.3; see *In re Ognibene*, 18 I. & N. Dec. 425, 427-28 (1983) (holding that the applicant, who the United States admitted as an Italian citizen, with which the United States had no E visa authorizing agreement in 1983, cannot now use citizenship as a "badge of convenience" by employing his Italian citizenship to qualify for E-2 status). The nationality established by a dual national "at the time of his entry to the United States . . . is his sole or operative nationality for his duration of his temporary stay in the United States. *Id.* at 428; see also *In re Damioli*, 17 I. & N. Dec. 303 (1980) (finding a native born United States citizen who gained Italian nationality through marriage did not qualify for treaty investor status because she failed to relinquish her United States citizenship voluntarily). The employer cannot interchange dual nationalities to receive certain government benefits by claiming one nationality over the other. *Id.* at 307.

52. See *supra* note 25 and accompanying text (discussing E status eligibility and requirements for classification). Stateless persons cannot qualify for E-2 visas. Yanni, *supra* note 1, at 4.

(individual or business organization)<sup>53</sup> and to the employee treaty investor, who must possess the same nationality as the principal treaty investor.<sup>54</sup> As previously noted, however, the dependents of the principal treaty investor need not satisfy the nationality requirement.<sup>55</sup>

United States citizens and permanent residents cannot confer E-2 status upon the employee treaty investor.<sup>56</sup> Furthermore, the INS will not consider them as an owner of the treaty enterprise to satisfy the nationality requirement.<sup>57</sup>

The nationality of a company is the country of citizenship of the individual owners whose ownership comprises at least fifty-percent of the business.<sup>58</sup> This fifty-percent rule also applies to multi-level businesses by tracing the ultimate owners' nationality.<sup>59</sup> The company's

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53. FAM, *supra* note 6, at 81, note 3; *see, e.g.*, FRAGOMEN ET AL., *supra* note 9, § 3.2 (c); Myers & Thompson, *supra* note 21, at 7-8; GORDON ET AL., *supra* note 3, § 17.03.

54. *See supra* note 39 and accompanying text (discussing the investment and eligibility requirements for treaty investors and employees); *see also In re Lee*, 15 I. & N. Dec. 187, 189 (Reg. Comm'r 1975) (holding that relevancy of the nationality of the enterprise applies only when the applicant seeks E-2 status as an employee). When the applicant applies for individual investor treaty status, the INS does not preclude the applicant from eligibility simply "by the fact that the enterprise is presently owned by a person or persons who are not themselves treaty investors." *Id.*

55. 22 C.F.R. § 41.51(d) (1991).

56. *See In re Damioli*, 17 I. & N. Dec. 303, 305-06 (Reg. Comm'r. 1980) (holding that since the INS precludes eligibility of United States citizens for treaty investor status, foreign employees cannot obtain E-2 status through their United States employers).

57. *See also State Dept. Discusses E Visa Status*, *supra* note 45, at 1361 (quoting a correspondence by H. Edward Odom, Chief of the State Department Advisory Opinions Division for Visa Services) (stating that if the Canadian owner of a treaty enterprise became a lawful permanent resident of the United States, employees cannot obtain E-2 status, even if the employer does not reside in the United States).

58. 22 C.F.R. § 41.51 (c)(2) (1991); FAM, *supra* note 6, at 82, note 3.1 (stating the nationality of a corporation or treaty investor status is the nationality of persons who own at least 50% of stock in the corporation); *see, e.g.*, GORDON ET AL., *supra* note 3, § 17.03[3][b] (same); FRAGOMEN ET AL., *supra* note 9, § 3.2(b) (same); Grunblatt et al., *supra* note 3, at 82 (same); *E Visas Updates*, *supra* note 39, at 207 (same).

The owners must also be holders of the E visa if residing in the United States. 22 C.F.R. § 41.51(c)(2) (1991); GORDON ET AL., *supra* note 3, § 17.03[3][b].

59. *See supra* note 52 and accompanying text (discussing the definitive meaning of nationality). For publicly-traded companies, where difficulties arise in establishing nationality through stock ownership records, the INS presumes nationality in the country where the company primarily lists and exchanges its stock. FAM, *supra* note 6, at

place of incorporation or principal place of business holds no weight in the determination of its nationality for E-2 visa eligibility.<sup>60</sup>

## B. ACTIVE INVESTMENT

The FAM interprets an active investment as that which involves the possession and control of irrevocably committed funds that the treaty investor places at his or her personal risk.<sup>61</sup> Under the element of possession and control, the treaty investor may obtain funds from inside or outside the United States,<sup>62</sup> as long as the investor acquires them from legitimate sources.<sup>63</sup> To establish the element of irrevocably committed

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82, note 3.2. The applicant should provide the best available evidence to support the presumption. *Id.*; see, e.g., *State Dept. Discusses Standards for Corporate Nationality for E Visas*, 66 INTERPRETER RELEASES 101, 101 (Jan. 23, 1989) (stating that where the INS cannot determine nationality by a percentage of stock out, it presumes nationality lies where the principal trading and exchanging of stock occur); FRAGOMEN ET AL., *supra* note 9, § 3.2(b) (stating for large public companies where the INS faces difficulty in determining ownership, the INS presumes the firm possesses the nationality of the country where it initially lists its stock); GORDON ET AL., *supra* note 3, § 17.03 (stating that the INS can presume nationality of a company lies in the country of its incorporation, if its stock "is widely dispersed and is sold exclusively on an exchange in that country").

60. FAM, *supra* note 6, at 82, note 3.2.; see e.g., FRAGOMEN ET AL., *supra* note 9, § 3.2(b); *E Visa Updates*, *supra* note 39, at 207; Ferrell, *supra* note 44, at 3-6 (arguing that pursuant to the INA definition, the place of incorporation presumes corporate nationality).

61. FAM, *supra* note 6, at 83, note 7.

62. *Id.* at 83-84, note 7.1-1.

63. See *id.* at 83-84, note 7.1-1 (listing examples of legitimate sources of obtaining funds as: savings, gifts, inheritances, and contests). The utilization of such funds in an enterprise constitutes an investment. *Id.* The INS, however, precludes inheritance of a business as an investment, although purchasing the enterprise with the inherited funds would constitute an investment. *Id.* But see *Inherited Business OK for Treaty Investors*, INS Says, 69 INTERPRETER RELEASES 426 (Apr. 6, 1992) (quoting a correspondence by Lawrence J. Weining, Acting INS Assistant Commissioner for Adjudications) (stating that inherited businesses could qualify as a substantial investment if the investor possesses actual ownership). The INS could require proof that the treaty investor applicant provided the funds for investment. See *Nice v. Turnage*, 752 F.2d 431, 432 (9th Cir. 1985) (holding as insufficient, the proof provided by treaty investor applicant of source of funds for investment purposes). Because the INS requires immigrant investors to show that they obtained the capital for investment by lawful means, the INS could also impose such a duty upon nonimmigrant investors. 8 C.F.R. §§ 204.6, 204.6(e) (1990); see *Lee v. Thornburg*, No. Civ. A. 90-3940-I, 1992 U.S. Dist. LEXIS 701, at \*4 (D.La. Jan. 14, 1992) (stating that the existence of family funds, in and of itself, fails to provide sufficient proof that the treaty investor has

funds, the applicant must show more than a mere intent to invest<sup>64</sup> and must demonstrate that the business operation is set to begin.<sup>65</sup> Finally, the element of risk requires that the treaty investor employ the funds "in the hope of generating a financial return," and not merely place the funds in a bank account or in a speculative investment.<sup>66</sup> The FAM also specifies that capital must be subject to partial or total loss if busi-

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personal possession and control of funds).

64. FAM, *supra* note 6, at 84, note 7.1-3(b).

65. *Id.* note 7.1-3(b). If the alien investors have reached only the stage of signing contracts or searching for suitable locations, the FAM does not consider the investors to have irrevocably committed the capital and "in the process of investing." *Id.*; see *Sun Hee Han v. Hendricks*, 949 F.2d 399 (9th Cir. 1991) (holding that an applicant's deposit of \$6,000 in a \$415,000 enterprise at the time of the application does not attain the stage of close to the start of the business operation); *Myers & Thompson*, *supra* note 21, at 12 (stating that the process of investing requires being close to the start of business); *Grunblatt et al.*, *supra* note 3, at 82 (noting that contract signing or a location search fails to satisfy the requirement of close to the start of business); *GORDON ET AL.*, *supra* note 3, § 17.06[2][a].

Essentially, the treaty applicant must reach "a point of no return." *Yanni*, *supra* note 1, at 5; *GORDON ET AL.*, *supra* note 3, § 17.06[2][a]. If the commitment is pending upon the issuance of the E-2 visa, the FAM still considers the commitment irrevocable. FAM, *supra* note 6, at 84, note 7.1-3; *GORDON ET AL.*, *supra* note 3, § 17.06.

An application by a treaty investor who has already invested has a better chance of approval than an application by one who is "actively in the process of investing." *GORDON ET AL.*, *supra* note 3, § 17.06; see *Goldstein*, *supra* note 20, at 150 (stating that practical experience in Europe and Asia shows that the application of a treaty alien who "actively [engages] in the process of investing," faces extreme difficulty in obtaining approval).

66. FAM, *supra* note 6, at 84, note 7.1-2; see *In re Chung*, 15 I. & N. Dec. 681 (1976) (finding that the applicant failed to establish the active investment element when the only evidence submitted was \$10,400 worth of a savings account held for future investment in a shoe manufacturing business); *In re Heidland*, 14 I. & N. Dec. 563 (1974) (holding that "funds deposited in an idle bank account cannot be considered as part of an investment").

The FAM, however, holds that a reasonable amount of cash held in a bank account for routine business operations constitutes an active investment. FAM, *supra* note 6, at 84, note 7.1-2.



ness fortunes reverse.<sup>67</sup> The FAM defines a qualifying enterprise as real, active, for profit, and producing some service or commodity.<sup>68</sup>

### C. SUBSTANTIAL INVESTMENT

The Immigration Act of 1990 delegates the power to define the term "substantial" to the State Department.<sup>69</sup> The State Department persistently rejects the idea to set a specific minimum dollar amount in determining substantiality, in order to conform with the flexible nature of modern international investments.<sup>70</sup> Instead, the State Department em-

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67. FAM, *supra* note 6, at 84, note 7.1-2; *see* Goldstein, *supra* note 20, at 150 (stating that an applicant should demonstrate that if the business fails, they possess more than enough capital, to close-up the operation, and return to their home country).

Thus, only loans secured by the applicant's own personal assets qualify as an active investment, whereas the FAM deems loans guaranteed by the assets of the enterprise as qualifying because they lack an element of risk. FAM, *supra* note 6, at 84, note 7.1-2; *see In re* Ognibene, 18 I. & N. Dec. 425, 428-29 (1978) (holding that an applicant's real estate transactions, based on mortgage debt or commercially secured loans, have no requisite element of risk). An applicant cannot consider loans guaranteed by a party other than the treaty applicant as part of the applicant's investment. *See In re* Csonka, 17 I. & N. Dec. 254 (1978) (holding that possessing an intent to invest fails to satisfy the requirement of investment).

68. FAM, *supra* note 6, at 84-85, note 8; Yanni, *supra* note 1, at 5. A fictitious paper operation does not qualify as a valid enterprise. GORDON ET AL., *supra* note 3, § 17.06, n.5 (citing H.R. REP. NO. 1365, 82d Cong., 2d Sess. 44 (1952)) (stating that Congress contemplated investments as real operating enterprises, and not as fictitious paper businesses).

69. Immigration Act § 204 (1990) (defining substantial as "such an amount of trade or capital as is established by the Secretary of State, after consultation with appropriate agencies of government").

70. Goldstein, *supra* note 20, at 160; *see* FAM, *supra* note 6, at 85, note 9.1 (declining to set a minimum dollar figure for the substantiality requirement); DOS Proposal, *supra* note 12, at 43,565-67 (stating that the flexible approach accommodates various sizes of businesses); *see also* Grunblatt et al., *supra* note 3, at 85 (stating that the test for substantiality avoids excluding small businesses from obtaining E-2 status).

Some practitioners assert that the Consuls and the INS officers generally consider investments in excess of \$100,000 as obtaining the substantiality requirement. Barbara W. Loli, *Recent Developments in the "E" Practice*, in 2 IMMIGRATION AND NATIONALITY LAW HANDBOOK 110, 112 (R. Patrick Murphy et al. eds., 1991). Others claim that a minimum investment of \$250,000 is sufficient to meet the substantiality requirement. Manfred Rosenow, "Substantial" Investment Key to Gaining Residency, MIAMI HERALD, Dec. 7, 1992, at 19BM.

plays the "proportionality test" and the "marginality test" in evaluating the substantiality of the investment.<sup>71</sup>

The "proportionality test" requires an assessment of the percentage of interest the treaty investor has in the enterprise.<sup>72</sup> The test weighs the amount invested<sup>73</sup> against the cost or value of a business.<sup>74</sup> The FAM describes the "proportionality test" as an "inverted sliding scale."<sup>75</sup> Thus, the higher the cost of the business, the lower the percentage of investment amount required to meet the test.<sup>76</sup> The FAM provides ex-

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The INS, unlike the State Department, favors a bright line test setting a specific dollar figure. Loli, *supra*, at 112; see *In re Walsh and Pollard*, Interim Dec. No. 3111, 1988 BIA LEXIS 55, at \*136 (1988) (upholding the State Department's flexible test while rejecting the INS argument that a minimum dollar amount necessarily satisfies the "substantiality test").

71. FAM, *supra* note 6, at 85-86, notes 9, 10.

72. See *id.* at 85, note 9.3 (comparing the amount invested to the cost or value of the business). Thus, the INS does not consider the value of the investment alone as a sufficient factor. *Id.*; see also Goldstein, *supra* note 20, at 151 (illustrating the comparison between the amount invested and the value of the business).

73. See Myers & Thompson, *supra* note 21, at 2 (stating that the INS defines the amount of qualifying funds invested as the value of the investor's assets at risk in the enterprise); Grunblatt et al., *supra* note 3, at 85. Qualifying funds can include cash invested in the enterprise, monthly payments for leased property or equipment, and the purchasing value of goods or equipment for the business operation. FAM, *supra* note 6, at 84, note 7.2.

74. FAM, *supra* note 6, at 85, note 9.1; see e.g., Miller, *supra* note 21, at 834; Goldstein, *supra* note 20, at 127; Myers & Thompson, *supra* note 21, at 12; Yanni, *supra* note 1, at 6.

The FAM defines the cost of an established business as its purchase price or the fair market value. FAM, *supra* note 6, at 85, note 9.1. An applicant may compute the actual value of an established business from its tax valuation. Goldstein, *supra* note 20, at 127. The FAM defines the cost of establishing a business as the actual amount or the amount normally considered necessary to make the particular type of business operational. FAM, *supra* note 6, at 85, note 9.1. This part of the "proportionality test" may pose a problem because it involves the use of personal judgement or knowledge of United States businesses by the consular officer. Goldstein, *supra* note 20, at 129; see *State Dept. Summarizes Recent AILA Liaison Meeting*, 67 INTERPRETER RELEASES 211, 212-13 (Feb. 26, 1990) (stating that small to medium sized businesses need not have an investment of at least 50% investment if the prevailing practice in setting up such businesses do not have such a requirement).

75. FAM, *supra* note 6, at 85, note 9.3.

76. *Id.* at 85, note 9.3; see Miller, *supra* note 21, at 834 (stating that the consular officer uses a subjective standard to determine the reasonableness of the applicant's investment amount for the type of business contemplated). The FAM instructs the officer to "draw on personal knowledge of the United States business scene." Myers & Thompson, *supra* note 21, at 12 (directing officers to use personal

amples of what constitutes the percentage requirements for businesses with different establishing costs.<sup>77</sup> The FAM deliberately chooses vague language to avoid creating the impression of a bright-line test.<sup>78</sup> The State Department continues to stress that it provides examples only to demonstrate the concept of the test.<sup>79</sup>

In order to meet the substantiality requirement, the treaty investor must also satisfy the "marginality test."<sup>80</sup> Substantiality involves the applicant's assets in the investment enterprise, whereas marginality refers to the applicant's estimated return on the investment.<sup>81</sup> The FAM defines marginality as "solely for the purpose of earning a living."<sup>82</sup> To demonstrate that the enterprise is more than marginal, that is, not merely for subsistence, the applicant must present proof that he or she has other sources of income,<sup>83</sup> that the return from the business exceeds normal

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knowledge of business environments to determine reasonableness of investments); *see* Goldstein, *supra* note 20, at 128 (stating that the consular officer uses personal knowledge of the United States business climate to determine reasonableness of the applicant's estimate for the particular type of business involved).

77. *See* FAM, *supra* note 6, at 85, note 9.3 (noting several examples in assessing the "proportionality test").

78. *Id.* The examples contain a flexible choice of language such as "would easily meet the test," "might require," "demand generally," "might be needed," "might suffice," and "a much lower percentage". *Id.*

79. *See id.* (requiring consideration of all factors and not simply performing an arithmetic exercise).

80. *Id.* at 86, note 10; Yanni, *supra* note 1, at 7.

81. Goldstein, *supra* note 20, at 129; FRAGOMEN ET AL., *supra* note 9, § 3.2(e); *see* FAM, *supra* note 6, at 85-86, notes 9.3, 10 (providing examples for evaluating an investment in order to determine if investment provides only for the livelihood of the applicant).

82. FAM, *supra* note 6, at 86, note 10; *see* Myers & Thompson, *supra* note 21, at 12 (stating that the belief that an investment should create employment opportunities rather than simply providing livelihood forms the basis of the "marginal investment" test).

83. *See* FAM, *supra* note 6, at 85, note 9.3 (providing the proportionality test); Goldstein, *supra* note 20, at 129 (noting that substantial income from other sources can indicate that investment exceeds the marginal level); Grunblatt et al., *supra* note 3, at 5; *see, e.g.,* Kwang Woon Choi v. INS, 798 F.2d 1189, 1191 (8th Cir. 1986) (holding that the INS should consider stock certificates as proof of additional sources of income to disprove marginality); Dong In Chung v. INS, 662 F. Supp. 474, 475 (9th Cir. 1987) (holding that the "marginality test" must apply to each situation in its entirety, and an investor's evidence of significant assets other than a motel investment may preclude a finding of marginality); Lauvik v. INS, 910 F.2d 658, 661 (9th Cir. 1990) (finding that an alien with substantial assets, other than a trailer park investment, as meeting the marginality requirement); *In re Kung*, 17 I. & N. Dec. 260, 262

living costs,<sup>84</sup> or that the business will create employment opportunities or contribute to the local economy.<sup>85</sup> Similar to the "substantiality test," the "marginality test" permits the consular officers some flexibility in adjudicating E-2 visas.<sup>86</sup>

#### D. ROLE OF THE EMPLOYER: TO DEVELOP AND DIRECT

Both the principal and employee treaty investor must perform a specific and important role in the enterprise.<sup>87</sup> The INA requires that the principal treaty investor develop and direct the operations of an enterprise.<sup>88</sup> The State Department interprets "developing and directing" an operation to mean a person having a controlling interest in the enterprise either by means of at least fifty-percent ownership, or by managerial authority and responsibilities, if ownership is fifty-percent or less in a joint venture or corporate investment structure.<sup>89</sup> Thus, a partner in a

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(Reg. Comm'r. 1978) (finding that although the franchisee invested \$53,000 in a marginal enterprise, the enterprise could not be considered as marginal when the franchisee had an additional \$46,000 of reserved funds).

84. See FAM, *supra* note 6, at 85, note 9.3 (providing the proportionality test).

85. *Id.* But see *Kun Young Kim v. INS*, 586 F.2d 713, 716 (9th Cir. 1978) (holding that producing an economic advantage to a local economy alone does not make an investment substantial).

86. See FAM, *supra* note 6, at 86, note 10 (instructing the consulate officers to consider the fact that newly formed businesses or businesses undergoing changes often do not generate a significant amount of return).

87. See FAM, *supra* note 6, at 86-87, notes 11, 13 (requiring the treaty investor to develop and direct, and the treaty employee to have executive and supervisory or essential responsibility).

88. INA § 1101(a)(15)(E)(ii). The INA also limits the investor's activities to "solely" developing and directing. *Id.* But see *Yanni*, *supra* note 1, at 5 (arguing that the FAM places minimal emphasis on this limit and permits incidental activities). See also *supra* note 46 and accompanying text (discussing the E-2 visa eligibility requirements); GORDON ET AL., *supra* note 3, § 17.06 (stating that ambiguity remains about the purpose of the word "solely"); *Lauvik*, 910 F.2d at 661 (holding that a treaty investor could perform some menial tasks as long as his primary function involves directing, managing, and protecting his investment).

89. FAM, *supra* note 6, at 86, note 11; *Kwang Woon Choi v. INS*, 798 F.2d 1189, 1192 (8th Cir. 1986); see *In re Lee*, 15 I. & N. Dec. 187, 190 (Reg. Comm'r. 1975) (holding that an applicant's investment of \$10,000 in a \$90,000 enterprise does not give him a controlling interest in the enterprise and thus, he does not satisfy the statutory requirement of "develop and direct").

The standard form of business partnerships, however, will not ordinarily give rise to a sufficient controlling interest. *Id.* Goldstein, *supra* note 20, at 151 (noting that the 51% rule will not necessarily be enforced). Control by ownership alone does

joint venture could have control through negative control,<sup>90</sup> and a minority shareholder could "develop and direct" the corporation by exercising de facto or operational control.<sup>91</sup>

#### E. ROLE OF THE EMPLOYEE: EXECUTIVE AND SUPERVISORY

A majority of E-2 applicants are treaty employees.<sup>92</sup> The treaty employee meets the important role requirement by either: performing principally, as opposed to incidentally, executive and supervisory responsibil-

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not necessarily meet the "develop and direct" test if evidence exists showing that the control may be lost through pledging stock, giving proxies, or surrendering rights by contract. GORDON ET AL., *supra* note 3, § 17.06; *sic In re Walsh & Pollard*, Interim Dec. No. 3111, 1988 BIA LEXIS 55, \*136, 137 (1988) (stating that "[t]he particulars of each enterprise should be reviewed to determine whether by organizational or structural device the investor is in a position to 'develop and direct'").

90. FAM, *supra* note 6, at 86, note 11.1. Negative control occurs when two equal partners each retain full management rights and responsibilities. *Id.* Thus, decisions bind both partners. *Id.*; see also Yanni, *supra* note 1, at 4-5 (recognizing the recent practice of measuring control by veto power of the 50% owner).

91. FAM, *supra* note 6, at 86, note 11.2 (discussing negative control); Goldstein, *supra* note 20, at 129; see Myers & Thompson, *supra* note 21, at 12 (noting that de facto or operational control can be obtained through a management agreement, different forms of stocks, or even technical competence in the area not possessed by other stockholders); Miller, *supra* note 21, at 5 (providing that the terms of the franchise agreement will also be examined to determine the amount of control the investor franchise recipient retains); see also *In re Kung*, 17 I. & N. Dec. 260, 263-64 (Reg. Comm'r. 1978) (finding that an investor applicant has the ability to develop and direct when non-limiting factors overshadow the limiting requirements of the franchise agreement); *State Dept. Speaks on Amount of Control for E-2 Investor Status*, 69 INTERPRETER RELEASES 1212, 1213 (Sept. 28, 1992) (stating that a 50% owner must demonstrate negative control to prove the ability to develop and direct).

92. See Grunblatt et al., *supra* note 3, at 86 (stating that those in the restaurant business frequently use E-2 visas because restaurant managers and chefs often apply as E-2 employees); Deborah J. Notkin, *Nonimmigrant Visa Options for the Restaurant Industry*, in 2 IMMIGRATION & NATIONALITY LAW HANDBOOK 82 (R. Patrick Murphy et al. eds., 1995).

ities;<sup>93</sup> or by possessing special skills necessary for the operation of the enterprise.<sup>94</sup>

The State Department failed to provide a specific definition for the terms "executive and supervisory."<sup>95</sup> Rather, the State Department considers determinative factors on a case-by-case basis, when evaluating the executive and supervisory nature of the employee position.<sup>96</sup>

#### F. ROLE OF THE ESSENTIAL EMPLOYEE

To qualify as an essential treaty employee, the applicant must possess special skills that are vital to the operation of the enterprise.<sup>97</sup> The FAM sets forth four examples of essential functions dividing them into categories of long-term and short-term need.<sup>98</sup>

The employee may perform one of the following four types of functions: 1) to be involved in the start-up of the enterprise, using the employee's familiarity with, and knowledge of, the peculiarities of the overseas operation (short-term);<sup>99</sup> 2) to train and supervise personnel in

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93. FAM, *supra* note 6, at 87, note 13; INS OPERATIONS INSTRUCTIONS, *supra* note 23, § 214.2(e) (noting that a qualified technician may receive a classification as a treaty trader if he qualifies as a national of a treaty country); Grunblatt et al., *supra* note 3, at 85; *see In re Walsh and Pollard*, Int. Dec. 3111, 1988 BIA LEXIS 55, \*136, 137-38 (1988) (stating that treaty employees do not have to meet the "develop and direct" requirement); H. Ronald Klasko, *Significance of Matters of Walsh and Pollard*, in 2 IMMIGRATION AND NATIONALITY LAW 267, 278-80 (Edwin R. Rubin et al. eds., Am. Immigr. Lawyers Ass'n 1989) (commenting on whether treaty employees have to meet the "develop and direct" test).

94. *See* FAM, *supra* note 6, at 87, note 13 (discussing the requirements for the E-1 or E-2 employee).

95. Yanni, *supra* note 1, at 16; *see* FAM, *supra* note 6, at 87-88, note 13.2 (providing, without a definition, the relevant factors to be considered in evaluating the executive and supervisory element).

96. FAM, *supra* note 6, at 87-88, note 13.2. These factors, among others, include: 1) the title of the position; 2) the position within the company hierarchy; 3) the duties, 4) the extent of control and responsibility; 5) the number and skill levels of employees to be supervised; 6) the compensation; and 7) prior executive or supervisory experience. *Id.*

97. *Id.* at 87, note 13.3; GORDON ET AL., *supra* note 3, § 17.04; Ruben, *supra* note 26, at 152; Yanni, *supra* note 1, at 17.

98. *See* FAM, *supra* note 6, at 88, note 13.3-1 (stating that the examples represent the extremes of a broad spectrum that allows consular officers to obtain some perspective on the length of time that employers will need employees to perform essential functions).

99. *See* FAM, *supra* note 6, at 88, note 13.3-1 (discussing the duration of essential functions).

the manufacturing, maintenance and repair functions (short-term);<sup>100</sup> 3) to develop continuously product improvement and quality control (long-term);<sup>101</sup> 4) to provide service unavailable in the United States (long-term).<sup>102</sup>

The State Department considers the E-2 visa as designated specifically for specialists in order to protect the ordinary skilled workers in the United States.<sup>103</sup> Therefore, the essential treaty employee bears the burden of proof<sup>104</sup> in establishing: the specialized qualities of these skills;<sup>105</sup> the essentiality of, or the need for, the special skills;<sup>106</sup> possession of these skills;<sup>107</sup> and the period of duration for such skills.<sup>108</sup>

For the short-term essential employee, who possesses transferrable skills, the treaty employer must train replacement United States workers within a reasonable time frame,<sup>109</sup> which the consular officer can set at the time of the application.<sup>110</sup> Again, the FAM adheres to a flexible

100. *Id.*

101. *Id.*

102. FAM, *supra* note 6, at 89, note 13.3.

103. *See id.* at 88, note 13.3-1 (stating that the Immigration Law Service intentionally designed the E classification for specialists and not for ordinary skilled workers); *see also* Yanni, *supra* note 1, at 17 (stating that the INS mainly used the E-2 classification to increase employment opportunities for United States workers).

104. FAM, *supra* note 6, at 88-89, notes 13.3-1, 13.3-2; Goldstein, *supra* note 20, at 199 (referring to the State Department Visa Office's response to interrogatories for clarification on eligibility requirements).

105. *See* FAM, *supra* note 6, at 88, note 13.3-2 (discussing the general factors for the consideration of E-2 qualifications).

106. *See id.* at 88, note 13.3-1 (discussing the duration of "essential" status).

107. *See id.* at 88-89, note 13.3-2 (discussing the general factors considered in determining the qualifications of E-2 employees).

108. *See id.* at 88, note 13.3-1 (discussing the duration of essentiality).

109. *See id.* at 89, note 13.3-3 (citing to 22 C.F.R. § 41.51) (stating that the FAM refers the consular officers to the factors in note 13.3-2 to determine the reasonable time frame for training and replacement). One may determine "reasonableness" by such factors as the length of experience and training that the current employee had with the company. *Id.*

110. *Id.* at 89, note 13.3-3; *see* Goldstein, *supra* note 20, at 202-03 (explaining that the FAM contains an implicit requirement to train if the employees have readily transferrable skills and that they need not train and replace employees who possess essential skills for an indefinite length of time); *see also* Lawler, *supra* note 22, at 292 (stating that consular officers must recognize and consider conditions in the American labor market).

The FAM generally permits the start-up essential employees of an enterprise a stay of one to two years. FAM, *supra* note 6, at 89, note 13.3-1; *see*, FRAGOMEN ET AL., *supra* note 9, § 3.2(e) (stating that the duration of stay for start-up personnel, as

standard in evaluating the essentiality element by using a set of general factors rather than a clear definition for essentiality.<sup>111</sup> The FAM also specifies that the essential employee need not have prior work experience with the treaty employer, unless the employee can only acquire skills through previous employment.<sup>112</sup>

### III. COMPARISON OF STATE DEPARTMENT AND INS PROPOSED RULES

Historically, the INS accorded great deference to the State Department on the rules and interpretations of the E-2 visa.<sup>113</sup> The landmark case of *In re Walsh and Pollard*,<sup>114</sup> however, demonstrates the disagreement between the INS and the State Department concerning their views on

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a rule of thumb, lasts for one year); Miller, *supra* note 21, at 836 (stating that essential treaty employees who receive an E-2 visa based on their familiarity with overseas operation, are authorized to stay for a one-year period). The State Department designated start-up essential employees as "TDY" (temporary duty), whose visa cannot be revalidated in the United States. GORDON ET AL., *supra* note 3, § 17. The "TDY" designation within the agreement between the treaty employee and the issuing post signals that their stay is limited to one year. *Id.*

111. See FAM, *supra* note 6, at 88-89, note 13.3-2 (listing general factors to be considered in evaluating the element of essentiality).

In assessing the degree of specialization and the essentiality of the skills, the set of factors to be considered include: 1) the degree of expertise; 2) the uniqueness of the skills; 3) the duties; 4) the compensation; and 5) the availability of United States workers. *Id.* Language skills alone will not otherwise classify an employee as a specialized and essential skill employee. GORDON ET AL., *supra* note 3, § 17.04(3).

To establish that an employee possesses these skills, the treaty employee must present evidence of proper training and/or experience. FAM, *supra* note 6, at 89, note 13.3-2; Goldstein, *supra* note 20, at 201-02. Finally, the consular officer will examine the time period of such training and the level of experience the employee has to determine the duration of essentiality. FAM, *supra* note 6, at 89, note 13.3-2.

112. FAM, *supra* note 6, at 89, note 13.3-4.

113. See *supra* note 23 and accompanying text (discussing the authority the State Department has in determining E-1 and E-2 eligibility requirements). This authority exists because the negotiation and interpretation of BITs, the prerequisite to the issuance of an E-2 visa, remains within the sole authority of the State Department. *Id.* Further, the treaty investor can apply exclusively through a United States consulate abroad without prior approval by the INS. Klasko, *supra* note 23, at 1418; Yanni, *supra* note 1, at 3. The INS, in a few cases, will adjudicate E-2 matters only when it receives an application for an extension of E status or for a change of nonimmigrant status. Klasko, *supra* note 23, at 1418.

114. See *In re Walsh and Pollard*, Interim Dec. No. 3111, 1988 BIA LEXIS 55, at 136 (1988) (analyzing the elements of a substantial investment).



the visa.<sup>115</sup> As a result of this case, and at the request of many field offices, the INS proposed its own regulations for the E-2 visa.<sup>116</sup> The State Department proposed its own rules to define "substantial" pursuant to the congressional order.<sup>117</sup> Additionally, it proposed rules to codify the FAM interpretative notes.<sup>118</sup>

During the past four years in which the two sets of proposed rules have been pending,<sup>119</sup> immigration practitioners have expressed a general concern that these rules, particularly those of the INS, will impose more stringent requirements upon the treaty investors than the current regulations,<sup>120</sup> and thus, substantially limit the utility of the E-2 visa to

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115. *See id.* (illustrating the disagreement between the State Department regulations and the INS on the issues of substantiality of investment and the role of treaty employees). The Board of Immigration Appeals gave weight to the State Department regulations and the INS history of accorded deference. *Id.* at 182-83. The Board of Immigration Appeals stated that "if the [INS] disagrees with the regulations of the [State Department], it should take advantage of the existing mechanisms of inter-agency consultation to convince the [State Department] to change its regulations." *Id.*

116. *See* INS Proposal, *supra* note 12, at 42,952-53 (stating that many INS field offices requested publication of INS E-2 regulations instead of consulting the FAM); Klasko, *supra* note 23, at 1418 (stating that INS newly proposed E visa regulations can be traced to the *Walsh and Pollard* decision).

The current INS regulations on E-2 classification merely consists of two paragraphs briefly addressing the issues of the treaty alien's duration, extension of stay, and change of employer. 8 C.F.R. § 214.2(e) (1993). The INS Operations Instructions also provide very limited guidance on the issues of treaty employees and dependents of treaty aliens. INS OPERATIONS INSTRUCTIONS, *supra* note 23, § 214.2(e). In fact, it directs INS examiners to consult the FAM interpretative notes on E matters. *Id.*

117. *See supra* note 70 and accompanying text (discussing the State Department's authority to define the substantiality requirement).

118. DOS Proposal, *supra* note 12, at 43,565 (Summary) (providing a brief description of those who can obtain E classification); *see* 22 C.F.R. § 41.51 (describing the classification of treaty trader, treaty investor, treaty employee, dependents of treaty alien, representatives of foreign information media, and classification of Canadian and Mexican nationals as relating to labor disputes). The interpretative notes of the FAM contain most of the rules governing the adjudication of E-2 visas. *See* FAM, *supra* note 6, at 81-89, notes 1-14 (providing the relevant requirements and tests to determine E classification).

119. *See* Interview with Cornelius D. Scully and H. Edward Odom, *supra* note 11 (stating that the State Department's final regulations have subsequently been approved by the OMB and signed by the Assistant Secretary). The State Department's final regulations will be published simultaneously with the INS final regulations. Publication has been delayed due to staff shortage and other bureaucratic problems. *Id.*

120. *See* FRAGOMEN ET AL., *supra* note 9, § 3.2(e) (warning that the INS proposals on essential employees could impose new restrictions on admission).

well-qualified foreign investors.<sup>121</sup> In a recent interview with State Department Visa Office officials, the officials stated that during an informal agency meeting several years ago, the two agencies resolved the differences of the proposed rules.<sup>122</sup> Therefore, the State Department's proposed rules, which largely codify the FAM notes,<sup>123</sup> will be the prevailing rules.<sup>124</sup>

Unfortunately, the apparent language differences of these two sets of proposed rules could easily lead to inconsistent and contradictory adjudications of E-2 visa requirements.<sup>125</sup> Moreover, INS current application

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121. See Klasko, *supra* note 23, at 1417, 1419 (stating that the proposed regulations could restrict the usefulness of the E visa and that the language and substantive differences between the two sets of rules are problematic); FRAGOMEN ET AL., *supra* note 9, § 3.2(e) (advising treaty employers to qualify treaty employees at United States consulates abroad to take advantage of the State Department's less stringent regulations, as the INS may already be applying its own more stringent proposed rules ).

122. Interview with Cornelius D. Scully and H. Edward Odom, *supra* note 11 (stating that regardless of the stylistic and linguistic differences between the two agencies' rules, the substance of the two final rules will largely be the same).

To ensure uniformity in the adjudication of E-2 visas, the State Department has agreed to act as an "informal consultant" to INS officers, after rejecting the INS request for field officers to seek the formal State Department advisory opinion for future guidance. *Id.* To keep these future consultations between the two agencies as informal as possible, the two agencies will probably be communicating by telephone or fax. *Id.* The State Department officials are also hoping, in the future, to link its vast E-mail system that connects with the majority of its posts overseas with the INS E-mail network in order to establish on-line immediate access. *Id.*

123. *Id.* The preamble emphasized that the proposed rules merely reiterated the State Department's current policy regarding treaty investors and retained the flexible approach toward the adjudication of E-2 visas. See DOS Proposal, *supra* note 12, at 43,566 (emphasizing that the proposed rules do not raise new concepts and that the State Department has rejected replacing the exercise of judgment with bright-line tests in consideration of the ever changing nature of the business industry and its need for flexibility and adaptability).

124. See Interview with Cornelius D. Scully and H. Edward Odom, *supra* note 11 (stating that the INS acceptance of the State Department's position possibly resulted from the change of INS staff over the past few years).

125. See Klasko, *supra* note 23, at 1417, 1419 (stating that the material linguistic and substantive differences between the two sets of proposed rules are problematic because they could result in inconsistent E-2 adjudications); see also Theodore Ruthizer, *Update From the Immigration and Naturalization Services Recent Development in the L-1, F-1, E-1/E-2 Visa Categories*, in 25TH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 9 (PLI Litig. & Admin. Prac. Course Handbook Series No. 9, 1992) (stating that the dramatic differences and conflicts between the two sets of proposed rules have caused much controversy).

of some of its proposed rules<sup>126</sup> necessitates an analysis of the proposed rules, as one set of the rules may provide more favorable eligibility requirements for the foreign investor than the other.

The remainder of this section will compare the INS and State Department proposed rules as the basis of formatting definitions of the statutory requirements of nationality, active and substantial investment, and roles of the employer and employee.

#### A. FORMAT AND DEFINITIONS

Both sets of the proposed regulations provide a list of basic definitions<sup>127</sup> which substantially parallel each other, and closely follow the definitions in the current State Department regulations.<sup>128</sup> Both versions proceed to address regulations in the similar general order of nationality, substantial and active investment, role of the employer, and role of the employee.<sup>129</sup>

The INS version, however, organizes its regulations by such categories as definitions, admission, classification criteria, and duration, which

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126. See FRAGOMEN ET AL., *supra* note 9, § 3.2(e) (warning that recent applications decided by the INS indicate that it is applying its proposed rules on essential treaty employees in the adjudication process).

127. See INS Proposal, *supra* note 12, at 42,952, 42,954-55 (defining applicant, employee treaty alien, primary treaty alien, trade, treaty alien, treaty company, and treaty country); DOS Proposal, *supra* note 12, at 43,565, 43,569-70 (defining treaty trader, treaty investor, employee and dependents of treaty aliens, and representatives of foreign information media).

128. DOS Proposal, *supra* note 12, at 43,569-70. The State Department's version virtually mirrors its current definitions. *Id.* Although, it adds the phrase "in the position to develop and direct the enterprise" into the definition for "treaty investor" possibly for the reason of placing emphasis on the importance of such role. *Id.* The State Department's version also omits the labor dispute provision found in the current State Department regulations. *Id.*; see 22 C.F.R. § 41.51 (providing the general labor dispute provision).

The INS version groups E-1 and E-2 visaholders as "treaty aliens." INS Proposal, *supra* note 12, at 42,954. Unlike the current and proposed State Department regulations, the INS version also specifically distinguishes a primary treaty alien from an employee treaty alien and provides a separate definition for treaty company. *Id.*; see 22 C.F.R. § 41.51 (defining separately, treaty trader and treaty investor and placing provisions of primary treaty alien and treaty company under the employee treaty alien definition). The INS definitions, however, parallel those found in the current and proposed State Department regulations. INS Proposal, *supra* note 12, at 43,569-70.

129. INS Proposal, *supra* note 12, at 42,952-55; DOS Proposal, *supra* note 12, at 43,565-66.

make interpretation of regulations easier and more orderly than the State Department regulations.<sup>130</sup> The State Department's proposed rule sets forth the E-2 requirements entirely in the definitional format without distinguishing the requirements from its tests or elements.<sup>131</sup> This method results in an overwhelming number of issues to be considered equally and simultaneously in the adjudication of E visas.<sup>132</sup>

## B. NATIONALITY

Regarding the subject of the nationality requirement, both sets of the proposed rules reiterate the FAM notes.<sup>133</sup> The INS version incorporates substantially more detail from the notes than does the State Department version.<sup>134</sup> The incorporation of FAM notes will facilitate consistency in the adjudications of E-2 visas by both agencies because it requires the INS officers to abide by the FAM notes which the consulate officers follow strictly.<sup>135</sup>

## C. ACTIVE INVESTMENT

The two versions concur with each other and with the FAM notes in regard to the "active investment" requirement.<sup>136</sup> The State Department

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130. INS Proposal, *supra* note 12, at 42,954-57.

131. See DOS Proposal, *supra* note 12, at 43,569-90 (providing definitions for the E-2 requirements, tests, and elements, but not differentiating among their relative functions and importance). For instance, the Proposal merely defines treaty country and nationality of the treaty country in two separate paragraphs. *Id.*

132. DOS Proposal, *supra* note 12, at 43,565.

133. Klasko, *supra* note 23, at 1422 (stating that no significant differences exist between the proposed rules and the current regulations on the issue of nationality). Compare DOS Proposal, *supra* note 12, at 43,566 (requiring that the treaty alien be of the nationality of the treaty country) and INS Proposal, *supra* note 12, at 42,955 (requiring the treaty alien or employer to possess the nationality of the treaty country) with FAM, *supra* note 6, at 81-82, note 3 (stating the same criterion).

134. Compare INS Proposal, *supra* note 12, at 42,955 (stating INS adoption of both the FAM "fifty-percent" rule and the "place of incorporation" provision) with DOS Proposal, *supra* note 12, at 43,570 (expressing the State Department's restatement of FAM's general introduction on the nationality requirement and placing emphasis on tracing the ownership of a corporation).

135. See Goldstein, *supra* note 24, at 158 (illustrating the extent to which the consuls adhere to the FAM by referring to the FAM as the "Consuls' Bible").

136. Klasko, *supra* note 23, at 1420 (stating that the proposed regulations on what constitutes an active investment are relatively consistent with the current rules). Compare INS Proposal, *supra* note 12, at 42,955 (requiring that the investment be in a

version codifies all of the elements of an "active investment" described in the FAM notes.<sup>137</sup>

By contrast, the INS proposed regulations eliminate the FAM element of "possession and control" of funds from the active investment requirement.<sup>138</sup> The INS proposal adds research facilities and market research to the State Department's list of examples of idle speculative investment, thus unreasonably limiting the number and scope of qualifying enterprises.<sup>139</sup>

The INS and State Department failed to draft regulations for the current FAM notes explaining what constitutes "irrevocably committed."<sup>140</sup> This omitted note permits investment conditioned upon the issuance of the E-2 visa and requires merely that the applicant be close to the start of the operations and not already engaged in the actual operations.<sup>141</sup> The omission of this note will narrow the active investment requirement unreasonably because few foreign investors would desire to take the risk by making substantial investment in the United States without a visa guarantee.

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real business enterprise which produces goods or services) *with* DOS Proposal, *supra* note 12, at 43,570 (stating that the enterprise must be a real and active one that produces goods or services for profit) *and* FAM, *supra* note 6, at 83, note 5 (containing the same requirement).

137. See DOS Proposal, *supra* note 12, at 43,570 (codifying the three elements of "possession and control," "irrevocably committed," and "risk" in the proposed "investment" provision and almost copying the entire introductory notes on enterprise into the proposed provision of "bona fide enterprise"); see also FAM, *supra* note 6, at 83-84, note 7.1 (enumerating these elements).

138. See INS Proposal, *supra* note 12, at 42,955 (incorporating the elements of "irrevocably committed," "bona fide enterprise," and "risk" into its proposed provision of "real operating enterprise").

139. Compare INS Proposal, *supra* note 12, at 42,955 (offering these examples) *with* DOS Proposal, *supra* note 12, at 43,570 (omitting these examples).

140. Compare FAM, *supra* note 6, at 84, note 7.1-3 (defining the term "irrevocably committed") *with* DOS Proposal, *supra* note 12, at 43,570 (failing to define the term) *and* INS Proposal, *supra* note 12, at 42,955 (failing also to define the term).

141. FAM, *supra* note 6, at 84, note 7.1-3; see Yanni, *supra* note 1, at 5 (suggesting that the State Department proposed regulations should clarify that the applicant does not necessarily have to be in the actual operation of the business and can be in the process of investing); Klasko, *supra* note 23, at 1421 (recommending the adoption of the FAM provision that declares applications acceptable pending upon the issuance of the visa).

## D. SUBSTANTIAL INVESTMENT

The two sets of proposed rules and the current law resemble each other on the subject of substantial investment.<sup>142</sup> The State Department promulgates into regulations the two tests of substantiality established in the FAM.<sup>143</sup> The State Department, however, does not adopt the language of "no minimum dollar amount" in defining the scope of the meaning of "substantial."<sup>144</sup> Instead, it provides a brief definition for "substantial amount of capital."<sup>145</sup>

The INS version adds two tests to the substantiality requirement by incorporating the elements of "direction and development"<sup>146</sup> and "real operating enterprise."<sup>147</sup> This addition, however, does not change the current law. The INS merely merges the requirements of active and substantial investment and the role of the employer into one requirement entitled "substantial investment," and the content of these elements does not vary greatly from that of the FAM.<sup>148</sup> The INS version, however,

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142. See Klasko, *supra* note 23, at 1421 (stating that the two proposed rules are consistent with each other on the issue of substantiality of investment). Compare INS Proposal, *supra* note 12, at 42,955 (requiring that the investor direct and develop a real enterprise, that the investment constitute a "significant proportion" of the business' starting cost, and that said business be more than "marginal") and DOS Proposal, *supra* note 12, at 43,570 (employing nearly identical criteria) with FAM, *supra* note 6, at 85-86, notes 9, 10 (providing the same criteria). But see Bastone, *supra* note 24, at 211 (stating that a potential inconsistency could arise in applying the proportionality test when the State Department defines enterprise "value" as the "purchase price" and the INS defines it as the "total value of the business," which allows more discretion).

143. DOS Proposal, *supra* note 12, at 43,570. The preamble explains that the flexible approach applied to these tests was retained because of congressional consent to the State Department interpretation of substantial investment and to foster the goal of the BIT, which is to have a flexible standard to encourage mutual investment and to accommodate all business sizes. *Id.* at 43,567-68.

144. *Id.*

145. See *id.* (stating that a "[a] substantial amount of capital constitutes that amount which is sufficiently ample to ensure the investor's financial commitment to the successful operation of the enterprise as measured by the proportionality test").

146. See INS Proposes E Visa Regulations, *supra* note 23, at 1114 (listing the four tests to be satisfied under the INS "substantial investment" requirement). Compare INS Proposal, *supra* note 12, at 42,955 (including these two tests) with FAM, *supra* note 6, at 85, note 9 (explaining substantiality without using these tests).

147. See *supra* note 146 and accompanying text (analyzing the substantial investment requirement of the INS Proposal and comparing it with the FAM).

148. Compare INS Proposal, *supra* note 12, at 42,955 (including these two elements in the merged section) with FAM, *supra* note 6, at 84-86, notes 8, 11 (ex-

restricts the substantiality requirement by adding the word "significant" to the proportionality test.<sup>149</sup>

The two agencies seem to have compromised in uniformly modifying the FAM examples concerning conduct which could constitute "substantial."<sup>150</sup> The INS demonstrates its bright-line test policy in its creation of broader categories of business values,<sup>151</sup> higher minimum percentages,<sup>152</sup> and more stringent language in its requirements.<sup>153</sup> The State Department maintains its flexibility approach by continuing to insist that the examples are not rigid bright-line tests,<sup>154</sup> but mere presumptions of substantiality.<sup>155</sup>

Several problems may arise from the newly created examples on the inverted sliding scale. As compared to the examples in the FAM notes, the agencies used more rigid and conclusive language,<sup>156</sup> which one could easily construe as setting a minimum standard to be met in evalu-

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plaining these requirements separately).

149. See INS Proposal, *supra* note 12, at 42,955 (requiring that the investment be a "significant" proportion of the enterprise's total value); see also FAM, *supra* note 6, at 85, note 9 (using the "proportionality" test, but declining to explicitly require that the proportion be "significant").

150. FRAGOMEN ET AL., *supra* note 9, § 3.2; 56 Fed. Reg. 42,567-68; 56 Fed. Reg. 42,955.

151. Compare DOS Proposal, *supra* note 12, at 43,570 and INS Proposal, *supra* note 12, at 42,955 (setting the dividing amounts for the three categories of business values as \$500,000 and \$3,000,000) with FAM, *supra* note 6, at 85, note 9.3 (setting the dividing amount for the six examples of business values as \$50,000, \$100,000, \$500,000, \$1 million, \$10 million, and \$100,000 million).

152. Compare DOS Proposal, *supra* note 12, at 43,570 and INS Proposal, *supra* note 12, at 42,955 (requiring minimum investments of 75% for an enterprise costing less than \$500,000, 50% for one costing more than \$500,000 but not exceeding a \$3,000,000 cost, and 30% for one costing more than \$3,000,000) with FAM, *supra* note 6, at 85, note 9.3 (stating that the investment percentages of 90-100, 75-100, 60, 50-60, 30, 10 would meet the "substantiality test").

153. Compare INS Proposal, *supra* note 12, at 42,955 (using the words "*minimum percentage of investment required*" in the examples) (emphasis added) with *supra* note 78 and accompanying text (citing FAM examples that function only as general guidelines).

154. See INS Proposal, *supra* note 12, at 42,955 (stating that applying the inverted sliding scale as a rigid, bright-line test contravenes its purpose); Klasko, *supra* note 23, at 1421 (stating that the scale serves as a guideline, not as a conclusive test).

155. DOS Proposal, *supra* note 12, at 43,570.

156. Compare *id.* at 43,567 (emphasizing what "would" qualify instead of what "might" qualify) and INS Proposal, *supra* note 12, at 42,955 (showing percentages that are likely to suffice) with FAM, *supra* note 6, at 85, note 9.3 (stressing that given figures "might" qualify).

ating substantiality.<sup>157</sup> Second, the agencies set an extremely broad range of the business cost amount within each of the three examples on the inverted sliding scale.<sup>158</sup> For example, a seventy-five percent investment in an enterprise worth \$50,000 differs tremendously from a seventy-five percent investment in another estimated at \$500,000. Such broad requirements pose a substantial disadvantage to smaller businesses, which contradict the preamble's stated goal of accommodating all business sizes by maintaining flexibility and exercising sound judgment.<sup>159</sup>

The two sets of proposed regulations offer differing interpretations of the "marginality tests." The INS version more stringently construes the marginality test. For example, the creation of job opportunities or the showing of a positive economic impact alone would not satisfy its marginality test.<sup>160</sup> The State Department, however, would not consider an enterprise that makes a significant economic impact as marginal, even if the return does not significantly exceed the living costs.<sup>161</sup>

Other than this conflict, the two sets of proposed rules impose similar restrictions to the FAM notes on marginality. They both require the return to be "significantly" greater than subsistence.<sup>162</sup> Neither set of proposed rules, however, considers other additional sources of income or assets in the determination of marginality.<sup>163</sup> Finally, they both shift the focus of the test from the individual investor (return and other assets) to the enterprise (job creation and positive economic impact).<sup>164</sup>

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157. Klasko, *supra* note 23, at 1421.

158. See DOS Proposal, *supra* note 12, at 43,570 (measuring the percentage of investment required by the total value of a business or the total cost to start a new business); INS Proposal, *supra* note 12 at 42,955 (following the same measurements as the State Department).

159. Yanni, *supra* note 1, at 7; see Ruthizer, *supra* note 125, at 9 (describing the high-figured requirements as unusually harsh).

160. INS Proposes E Visa Regulations, *supra* note 23, at 1114-15 (citing 56 Fed. Reg. 42,955-56 (1991)).

161. State Dept. Proposes E Visa Revisions, 68 INTERPRETER RELEASES 1151, 1152 (Sept. 9, 1991) (citing 56 Fed. Reg. 43,570 (1991)).

162. Compare DOS Proposal, *supra* note 12, at 43,570 (declaring the "significantly greater than subsistence" requirement) and INS Proposal, *supra* note 12, at 42,956 (providing the same standard) with FAM, *supra* note 6, at 86, note 10 (stating that the alien must intend and prove that the enterprise will earn more than a mere living for the alien's family).

163. Compare DOS Proposal, *supra* note 12, at 43,570 (declining to mention the factors of additional sources of income or assets to evaluate the investment) and INS Proposal, *supra* note 12, at 42,956 (declining also to mention these same factors) with FAM, *supra* note 6, at 86, note 10 (ignoring the two factors altogether).

164. See *supra* note 163 and accompanying text (discussing how both sets of pro-



## E. ROLE OF THE EMPLOYER: TO DEVELOP AND DIRECT

No significant difference exists between the INS and State Department proposed rules on the role of the treaty employer.<sup>165</sup> The two versions codify the FAM notes on the "develop and direct" requirement.<sup>166</sup> The agencies agree on the FAM's methods of obtaining control by greater than fifty-percent ownership, fifty-percent ownership in a joint venture or equal partnership if the investor retains veto power or negative control, and by less than fifty-percent ownership if the investor possesses de facto control.<sup>167</sup>

The difference in choice of words again may result in different interpretations of the rules. First, a discrepancy exists between the two proposed regulations on whether the investor possesses control by simply having fifty-percent ownership or whether the investor must have a minimum of fifty-one percent ownership.<sup>168</sup> Second, the State Department version contains the words "in the position" to develop and direct, while the INS version follows the statute by requiring "solely" to develop and direct.<sup>169</sup> The INS proposal uses more restrictive language because the investor must only engage in the actual developing and directing of the enterprise.<sup>170</sup> This language is problematic because one

posed rules require the return to be significant).

165. See Bastone, *supra* note 24, at 209 (stating that both the INS and State Department agree on the subject of "direct and develop").

166. DOS Proposal, *supra* note 12, at 43,570 (explaining similarity between the two proposed rules and FAM regarding marginality); INS Proposal, *supra* note 12, at 42,955; see Klasko, *supra* note 23, at 1422 (recognizing the consistency between the two proposed rules and FAM on the subject of marginality).

167. INS Proposal, *supra* note 12, at 42,955 (explaining that the applicant bears the burden of controlling investment); DOS Proposal, *supra* note 12, at 43,570 (stating that if the individual investor stands in a position to control the enterprise, that investor stands in a position to "develop and direct").

168. Compare INS Proposal, *supra* note 12, at 42,955 (requiring more than 50% ownership) with DOS Proposal, *supra* note 12, at 43,570 (retaining the FAM language of control requiring at least 50% of the business); see FRAGOMEN ET AL., *supra* note 9, § 3.2(e) (stating that equal shares of ownership in a joint venture alone may not satisfy the "develop and direct" requirement in the proposed rule).

169. See Klasko, *supra* note 23, at 1423 (stating that the intention to distinguish may or may not be purposeful, but could be problematic). Compare DOS Proposal, *supra* note 12, at 43, 570 (requiring the investor to occupy a position in which he or she can develop and direct the enterprise) with INS proposal, *supra* note 12, at 42,955 (retaining the statutory language of "solely to direct and develop the operations").

170. See *supra* note 169 and accompanying text (comparing the DOS and INS

interpretation could be denying the treaty investor the right to engage in other necessary incidental activities.<sup>171</sup> On the other hand, the language in the State Department's proposal focuses on the exercise of authority and control, not necessarily the act of directing and developing.<sup>172</sup>

#### F. ROLE OF THE EMPLOYEE: EXECUTIVE AND SUPERVISORY/MANAGERIAL

The State Department and INS proposed rules agree with each other on the subject of the executive or supervisory/managerial employee.<sup>173</sup> The proposed rules maintain and expand on the current FAM notes on the executive employee by providing a favorable position description,<sup>174</sup> focusing on the employee's managerial function.<sup>175</sup> The INS version codifies the set of factors found in the FAM while the State Department incorporates only some of these factors into its position description.<sup>176</sup> The agencies' use of different terms of "supervisory" and "managerial" could unnecessarily create future inconsistent interpretations.<sup>177</sup>

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proposed requirement for the investor's directing and developing responsibility).

171. *Id.*

172. Klasko, *supra* note 23, at 1423.

173. INS Proposal, *supra* note 12, at 42,956 (discussing the importance of possessing managerial skills and experience); DOS Proposal, *supra* note 12, at 43,570 (discussing the importance of possessing executive or supervisory skills).

174. *See* INS Proposal, *supra* note 12, at 42,956 (stating that the primary responsibilities should be making decisions, setting policies, directing operations, and perhaps supervising higher level personnel); DOS Proposal, *supra* note 12, at 43,570 (stating that an executive should set policy and enterprise direction, while a supervisory employee oversees a company's major component).

175. *See* Klasko, *supra* note 23, at 1423 (explaining the similarity between the INS and the State Department definitions of executive or supervisory/managerial employee and the more liberal 1990 Act definitions in comparison to those of the L-1 regulations). *But see* Bastone, *supra* note 24, at 197 (noting functional equivalence of INS and L-1 definition of "executive"). Both proposed rules do not require supervision of any employees and would accept product or project managers as executive or supervisory/managerial employees. *Id.*

176. *See supra* note 175 and accompanying text (discussing the subject of supervisory/managerial employee); *see also* Yanni, *supra* note 1, at 16 (stating that the State Department rejected the proposal to replace its flexible standards with the restrictive definitions of managerial and executive capacity of the 1990 Act).

177. *See* Klasko, *supra* note 23, at 1423 n.28 (providing that the term "executive" when used in conjunction with the terms "supervisory" or "managerial" may or may not have the same meanings); *see also* Bastone, *supra* note 24, at 196-97 (stating that the INS uses the terms "executive" and "managerial" interchangeably, while the State Department distinguishes the terms "executive" and "supervisory" and uses them in a

## G. ROLE OF THE EMPLOYEE: ESSENTIAL

The provision on the role of the essential employee of the proposed rules stands as the main source of disputes between the two agencies.<sup>178</sup> The two sets of proposed regulations vary significantly in their assessment of "essential" and their specific requirements for the employers of the essential employees.<sup>179</sup> The State Department adopts the set of factors found in the FAM notes for evaluation of the specialized and essential qualities of the employee's skills.<sup>180</sup> The State Department omits the factor dealing with the availability of United States workers.<sup>181</sup> The INS not only codifies the same set of FAM factors, but also requires that the employee has specialized knowledge or unique skills,<sup>182</sup> a responsible position, and a high level of expertise or proprietary knowledge of the operations.<sup>183</sup> Unlike the State Department, the INS places a greater emphasis on the factor of availability of United States workers.<sup>184</sup>

Another conflict between the two sets of proposed regulations derives from the additional requirements both agencies impose upon the essential employees.<sup>185</sup> The INS and State Department both shift the focus from proof of the length of time that the employer needs the employee's essential skill, to proof of the employer's efforts to replace the employee.<sup>186</sup> For example, the State Department would issue the E-2

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broader sense).

178. See Klasko, *supra* note 23, at 1419 (stating that the agencies' proposed provisions on the "essential employee" present a major substantive conflict); Bastone, *supra* note 24, at 200 (stating that this proposed provision has probably stirred the most controversies).

179. See Klasko, *supra* note 23, at 1419-20 (analyzing the difference between the proposed rules on the aspect of essential employee); INS Proposal, *supra* note 12, at 42,956 (discussing the need for responsible capacity and independent judgment); DOS Proposal, *supra* note 12, at 43,570 (discussing the importance of unique skills and degree of proven expertise).

180. DOS Proposal, *supra* note 12, at 43,570.

181. *Id.*

182. See Ruthizer, *supra* note 125, at 8 (stating that the requirement of specialized knowledge or unique skills derives from L-1 visa); see also Bastone, *supra* note 24, at 198 (explaining the removal of L-1 factors: "proprietary knowledge," unique skills," and "readily available in the United States labor market," due to counter-productivity).

183. INS Proposal, *supra* note 12, at 42,956. Responsible capacity requires independent judgment, creativity, training or supervision of other workers. *Id.*

184. *Id.*

185. See *supra* note 179 and accompanying text (discussing the conflicting provisions of the proposed rules in regard to the term "essential employee").

186. DOS Proposal, *supra* note 12, at 43,570 (explaining the importance of dem-

visa if the treaty investor could show either that the "eventual replacement [of a long-term employee] by a United States worker is not feasible or that the [treaty] employer is making reasonable good faith efforts to recruit and/or train [the] United States workers [as short-term employees]."<sup>187</sup>

On the other hand, the INS inserted the strict labor certification test<sup>188</sup> into its treaty investor proposed rule. The proposed rule places an affirmative duty on the employer, at the time of the essential employee's visa application, to show the unavailability of qualified United States workers<sup>189</sup> and, at the time of application for a visa extension, to show efforts of in-house training.<sup>190</sup> Furthermore, it also presumes the transferability of all skills, which directly contradicts the State Department's view that some skills do not readily transfer and may remain essential indefinitely.<sup>191</sup> In essence, the INS improperly applies the stricter requirements for nonimmigrant H and L visas<sup>192</sup> to E-2 visas.<sup>193</sup>

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onstrating an effort to train United States workers for positions); INS Proposal, *supra* note 12, at 42,956 (explaining the lack of feasibility in replacing alien employees with United States workers).

187. DOS Proposal, *supra* note 12, at 43,570 (explaining the importance of dem-

~~onstrating an effort to train United States workers for positions); Ruthizer, *supra* note 1, at 7 (discussing the requirement of proving unavailability of United States workers); *supra* note 1, at 18 (explaining the approval of alien employees based on in-house training of United States workers).~~

~~See INA § 212(a)(5)(A)(i) (stating that an alien is not permitted to enter the United States for the purpose of performing skilled or unskilled labor unless the Department of Labor determines that no available qualified United States workers exist whose employment will not adversely affect wages or working conditions of United States workers).~~

~~INS Proposal, *supra* note 12, at 42,956 (discussing the consideration of United States workers with similar training and expertise); Yanni, *supra* note 1, at 18~~

~~that the treaty investor should prepare to initiate training programs to replace employees with essential skills); see Ruthizer, *supra* note 125, at 7 (stating that the INS has dramatically changed the current law on the "essential employee" test); INS Proposes E Visa Regulations, *supra* note 23, at 1115 (illustrating the point with regards to the INS treatment of "essential employees"); see also INS Proposes E Visa Revisions, *supra* note 161, at 1152 (stating that the INS rule applies the test under the L-1 intra-company transferee classification to the "essential employee" classification).~~

~~See *supra* note 189 and accompanying text (discussing the stringent INS requirements for essential employees).~~

~~INS Proposal, *supra* note 12, at 42,956 (stating that "[a]ll skills are considered transferable except in unusual circumstances").~~

~~INA § 101(a)(15)(H),(L).~~

~~See INS Proposes E Visa Regulations, *supra* note 23, at 1115 (explaining the~~

## IV. RECOMMENDATIONS FOR THE FINAL REGULATIONS

In providing recommendations for the final regulations on the E-2 classification, it is imperative to remember that Congress designed the BIT to encourage foreign investments of *all sizes* in the United States<sup>194</sup> and to protect and ensure equal treatment of United States investors abroad. One should also remember that the E-2 classification aims to stimulate the United States economy through successful investment operations.<sup>195</sup> In view of these principles and the traditionally independent nature of the consular's work,<sup>196</sup> consular officers, as the primary adjudicators of E-2 visa applications, should retain the flexible approach by the exercise of sound judgment on a case-by-case basis.<sup>197</sup>

The need for rigid bright-line tests and stringent requirements may be explained by the administrative need to have consistency in the adjudication of E-2 visas;<sup>198</sup> by the goal of protecting United States workers;<sup>199</sup> and by its duty to ensure that the applicant has met the statutory requirements and is not avoiding the immigrant visa numerical limitations.<sup>200</sup> The creation of these strict requirements, however, could easi-

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similarities between the INS requirements for an E-2 employee and the requirements for an intra-company transferee); *State Dept. Proposes E Visa Revisions*, *supra* note 161, at 1153 (quoting Paul Schmidt, former Acting INS General Counsel, explaining the more restrictive nature of the INS rules, particularly with respect to the essential employee requirement, as compared to the State Department's proposed rules); *see also* Klasko, *supra* note 23, at 1420 (noting INS misguided attempt to apply H or L visa requirements to an E-2 visa created potential confusion).

194. *See supra* note 28 and accompanying text (discussing the origin of the BIT).

195. *See supra* note 20 and accompanying text (noting beneficial purpose of the E visa on United States economy by attracting foreign investments); DOS Proposal, *supra* note 12, at 43,568 (stating that Congress drafted the BIT with a degree of flexibility to allow the participation of enterprises of all sizes and that the proposed rule will adhere to the purpose of the BIT); FAM, *supra* note 6, at 1, note 1 (reminding consulars that the purpose of the BIT is to encourage commercial interaction between the United States and the treaty nation).

196. *See* Yanni, *supra* note 1, at 1-2 (explaining that the consular's historical need for independence in visa adjudication stems from the distance and poor communications between the consulate offices and the State Department).

197. *See* Interview with Cornelius D. Scully and H. Edward Odom, *supra* note 11 (stating that the final regulations will retain the flexible approach, particularly on the substantiality requirement).

198. *See id.* (stating that the potential review of INS adjudications requires that the INS use easily defensible, bright-line rules for possible litigation).

199. *See* INS Proposal, *supra* note 12, at 42,954 (stating when the INS determines the qualifications of essential employees, the agency places great weight on the factor of employment opportunities for United States workers).

200. *See* Myers and Thompson, *supra* note 21, at 3-4 (discussing the INA numeri-

ly discourage foreign investments in the United States and ultimately defeat the purpose of the treaty and E-2 visa classification. The small to medium-sized enterprises, which constitute the majority of E-2 investments,<sup>201</sup> probably would not have ample resources to meet the rigid requirements.<sup>202</sup> Moreover, the treaty nations could, in turn, impose similarly stringent requirements upon United States investors abroad, presenting obstacles to the expansion of United States investment.<sup>203</sup>

In order to achieve its objective successfully, the E-2 visa requirements must accommodate the needs of foreign investors,<sup>204</sup> correspond to modern business realities,<sup>205</sup> and treat foreign investors the same way as the treaty countries are treating the United States investors abroad.<sup>206</sup> Otherwise, like the immigrant investor visa, the E-2 visa could fail to accomplish its stated purpose because of the unrealistically difficult requirements.<sup>207</sup>

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cal limits).

201. See Goldstein, *supra* note 20, at 128 (stating relatively small size of most E-2 investments, such as grocery stores and restaurants); Grunblatt et al., *supra* note 3, at 85 (recognizing the relatively small size of many E-2 enterprises); see also DOS Proposal, *supra* note 12, at 43,568 (noting the modern increase in service-oriented businesses often established with less than \$100,000); Yanni, *supra* note 1, at 7 (stating that unlike past investments in manufacturing, most new investors make E-2 investments in service enterprises).

202. See Klasko, *supra* note 23, at 1424 (stating that small enterprises will not be able to meet the new employee training/replacement requirement under the proposed rule).

203. Interview with Michael Maggio, Immigration Law Practitioner and Adjunct Professor for Immigration Law at the American University, Washington College of Law, in Washington, D.C. (Sept. 11, 1995) [hereinafter Interview with Michael Maggio].

204. See *supra* note 203 and accompanying text (stating that the majority of E-2 businesses lack the capital to meet the new restrictive requirements).

205. See *supra* notes 141-42 and accompanying text (discussing the significance of the term "irrevocably committed"). One example of modern business reality is the investor's consideration of the chance of obtaining an E-2 visa when deciding whether to make the investment. The risk of a visa rejection discourages an investor from engaging in the operations. Therefore, the regulations should permit investments conditioned upon the issuance of an E-2 visa.

206. See Interview with Michael Maggio, *supra* note 203 (stating that the possibility of retaliatory action by treaty nations to counteract the stringent United States requirement will impede United States investments abroad).

207. See generally Fertik, *supra* note 1, at 661-64 (concluding that the immigrant investor program failed because Congress "overpriced" the visa and imposed burdensome visa requirements, such as the required minimum number of jobs created, detailed investment and disclosure requirements).

To remain true to the objectives of the E-2 visa, the following recommendations are suggested with regard to format and definitions, active and substantial investment, and the roles of the employer and employee.

#### A. FORMAT AND DEFINITIONS

In the interest of uniformity and consistency in the interpretation of E-2 requirements and the adjudication of E-2 visas, the two agencies' final regulations should attempt to employ the same language if the provisions are conceptually similar.<sup>208</sup> Although a minor issue, the agencies should organize the final regulations by statutory requirements, with agency requirements and tests as subheadings. For example, the regulations should list each of the statutory requirements discussed in this Comment. Under the active investment requirement, for instance, the regulations should discuss the elements of possession and control, irrevocably committed funds, and risk. Such organization will allow easier and speedier interpretation of the rules.

#### B. ACTIVE INVESTMENT

The final regulations should define the term "irrevocably committed" by codifying the current FAM notes, specifically the provision allowing investments conditioned upon the issuance of an E-2 visa<sup>209</sup> and investments made close to the start of operations.<sup>210</sup> The failure of the proposed rules to explain this term may lead to a restrictive interpretation of this requirement, thus limiting the E-2 visa to well-qualified investors.<sup>211</sup>

With the same considerations, the INS should also remove research facilities and market research as examples of idle speculative invest-

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208. See Klasko, *supra* note 23, at 1419 (illustrating that the language difference between the two sets of proposed regulations will create conflicts in rule interpretation and visa adjudication).

209. See *id.* at 1421 (stating that the proposed regulations' failure to provide security to the investor, will discourage E-2 applications).

210. See Yanni, *supra* note 1, at 5 (suggesting incorporation of the language "in the process of investing" to clarify that the business does not necessarily have to be in actual operation, but merely close to the start of operation).

211. See *supra* notes 141-42 and accompanying text (raising and explaining the issue of the proposed regulations' failure to define the term "irrevocably committed"). As previously discussed, this omission may require the applicant to engage in the actual operations at the time of application thereby excluding those investors who are close to the start of business.

ments because these enterprises can be active and profitable.<sup>212</sup> In fact, such enterprises would benefit the United States through the infusion of profitable knowledge and information.<sup>213</sup>

### C. SUBSTANTIAL INVESTMENT

The proposed rules do not state bright-line tests for substantial investment but rather provide examples demonstrating what presumptively constitutes substantial investment.<sup>214</sup> The agencies' choice of words, however, which are more restrictive than those used in the current FAM notes,<sup>215</sup> could easily mislead the consulars into interpreting the examples as rigid minimum requirements.<sup>216</sup> Thus, the final regulations should adopt the FAM language that stresses "[n]o set dollar figure constitutes a minimum amount of investment to be considered 'substantial'""<sup>217</sup> in order to emphasize the use of flexible standards.

The elimination of the inverted sliding scale examples<sup>218</sup> would be the ideal flexible approach. In order to reach a compromise between the State Department and INS, however, the final regulations will probably retain the inverted sliding scale.<sup>219</sup> The final rules, therefore, should

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212. See Klasko, *supra* note 23, at 1420 (stating that eliminating the problematic examples added by the INS would be helpful). The author suggests that the INS change its restrictive language from "speculative or idle investment" to "idle speculative investment." *Id.*

213. Interview with Michael Maggio, *supra* note 203.

214. See DOS Proposal, *supra* note 12, at 43,570 (noting that meeting the percentage requirements in the examples merely creates a presumption of substantiality). The State Department emphasizes its adherence to the intent of the treaties in order to maintain the flexibility to adapt to all business sizes. *Id.* at 43,567-68; see INS Proposal, *supra* note 12, at 42,953, 42,955 (stating that the examples are not intended to be a rigid bright-line test).

215. See *supra* notes 153, 156-57 and accompanying text (commenting on the language used to determine substantiality).

216. See Yanni, *supra* note 1, at 7 (arguing that the proposed regulations' inverted sliding scale may end up creating a bright-line test with very high minimum investment requirements); see also Klasko, *supra* note 23, at 1421 (warning that in application, the examples could potentially become a bright-line test).

217. FAM, *supra* note 6, at 85, note 9.1.

218. See *id.* at 85, note 9.3 (discussing the inverted sliding scale and providing examples).

219. Interview with Cornelius D. Scully and H. Edward Odom, *supra* note 11. There is a slight possibility that the State Department may not incorporate the inverted sliding scale examples into its final regulations, but merely place them in the preamble. *Id.* State Department officials also expressed the possibility that the exam-



further divide the categories in the proposed regulations' examples,<sup>220</sup> perhaps setting the percentage level as follows:

1. 90% for investments \$100,000 and under;<sup>221</sup>
2. 75% for investments over \$100,000 and under \$300,000;<sup>222</sup>
3. 60% for investments over \$300,000 and under \$500,000;<sup>223</sup>
4. 45% for investments over \$500,000 and under \$750,000;<sup>224</sup>
5. 30% for investments over \$750,000 and under \$1,000,000;<sup>225</sup>
6. 15% for investments above \$1,000,000.<sup>226</sup>

This classification would maintain the goals of the E-2 visa and the BIT by encouraging investments, and at the same time, by ensuring the substantiality of such investments to stimulate the United States economy successfully.

For the marginality test, because immigration practitioners suggest that the proposed regulations require proof of capacity to generate in-

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ples would more closely follow the examples in the FAM notes and not those in the proposed regulations. *Id.*

220. See Yanni, *supra* note 1, at 7 (criticizing the proposed regulations' inverted sliding scale for setting high percentage figures which contradicts the preamble's stated goal of maintaining flexibility); see also Ruthizer, *supra* note 125, at 3 (discussing the example's unusually harsh percentage requirements).

221. Compare this author's suggestion with INS Proposal, *supra* note 12, at 42,055 (requiring a minimum 75% investment in a business valued under \$500,000) and DOS Proposal, *supra* note 12, at 43,567 (requiring at least a 60% investment for firms costing \$500,000).

222. Compare this author's suggestion with INS Proposal, *supra* note 12, at 42,055 (requiring a minimum 75% investment in a business valued under \$500,000) and DOS Proposal, *supra* note 12, at 43,567 (requiring at least a 60% investment for firms costing \$500,000).

223. Compare this author's suggestion with INS Proposal, *supra* note 12, at 42,055 (requiring a minimum 75% investment in a business valued under \$500,000) and DOS Proposal, *supra* note 12, at 43,567 (requiring at least a 60% investment for firms costing \$500,000).

224. Compare this author's suggestion with INS Proposal, *supra* note 12, at 42,955 (requiring a 50% investment in businesses costing between \$500,000 and \$3,000,000) and DOS proposal, *supra* note 12, at 43,567 (requiring an investment of 50-60% for a \$1,000,000 business).

225. Compare this author's suggestion with INS Proposal, *supra* note 12, at 42,955 (requiring a 50% investment in businesses costing between \$500,000 and \$3,000,000) and DOS proposal, *supra* note 12, at 43,567 (requiring an investment of 50-60% for a \$1,000,000 business).

226. Compare this author's suggestion with INS proposal, *supra* note 12, at 42,955 and DOS Proposal, *supra* note 12, at 43,567 (requiring a 30% investment in businesses valued at more than \$3,000,000).

come,<sup>227</sup> the final regulations should also change the requirement of proof of present economic impact to proof of capacity to make a positive economic impact.<sup>228</sup> The likely inability of a newly established treaty enterprise to prove a present economic impact clearly necessitates this change.<sup>229</sup>

In addition, the final rules should continue to allow evidence of other income or assets as proof to preclude a finding of marginality.<sup>230</sup> Hence, an applicant who demonstrates that the treaty enterprise may generate a positive economic impact or additional income, would satisfy the marginality test.

Lastly, the final regulations should provide a definition for, or a test to determine, "normal living cost."<sup>231</sup> In order to remain consistent with the flexible approach, the final regulations should use a subjective reasonableness standard to evaluate a treaty investor's individual family living expenses.<sup>232</sup> This author suggests that a treaty enterprise passes the marginality test as long as a treaty investor can demonstrate that his or her family lives above the United States poverty line,<sup>233</sup> that the earned income is sufficient to support the family,<sup>234</sup> and that he or she will return to the treaty country in the event of a business failure.<sup>235</sup>

#### D. ROLE OF THE EMPLOYER: TO DEVELOP AND DIRECT

In order to accomplish the goal of the visa classification and in the interest of uniformity, the final regulations should require a minimum of fifty percent ownership and not fifty-one percent.<sup>236</sup> Furthermore, the

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227. See Klasko, *supra* note 23, at 1422 n.21 (recommending a revision of the proposed rules to allow proof of capacity to produce a positive economic impact because a newly formed enterprise will not initially be able to show such an impact).

228. *Id.*

229. *Id.*

230. See *supra* notes 84 and 164 and accompanying text (defining and discussing other income or assets).

231. See Goldstein, *supra* note 24, at 174 (anticipating a proposed rule provision that will address the level of income that exceeds subsistence).

232. See FAM, *supra* note 6, at 86, note 10 (stating that the FAM allows proof that the return from the enterprise exceeds normal living costs to pass the marginality test but fails to provide standards or definition for the term "normal living cost").

233. But see FAM, *supra* note 6, at 86, note 10 (discussing the marginality test and providing examples that demonstrate levels of subsistence).

234. *Id.*

235. *Id.*

236. See *supra* note 169 and accompanying text (contrasting the control require-

final regulations should not require an applicant to "solely" develop and direct, as this would limit other activities in which the treaty investor could necessarily or rightfully engage.<sup>237</sup> It would eliminate a unique benefit that treaty investors enjoy and provide a disincentive to applicants.<sup>238</sup>

#### E. ROLE OF THE EMPLOYEE: EXECUTIVE AND SUPERVISORY/MANAGERIAL

In order to avoid an inconsistent interpretation of the rules, as a result of differing interpretations of the terms "supervisory" and "managerial,"<sup>239</sup> agencies should adopt the same word or include both words, because they appear to be conceptually the same.<sup>240</sup>

#### F. ROLE OF THE EMPLOYEE: ESSENTIAL

The INS proposed rule unrealistically expects that foreign investors will be able to fulfill all of the current requirements, as well as satisfy the stringent L-1 visa requirements.<sup>241</sup> As previously stated, most investments are for small to medium-sized businesses, which would not

ment in the State Department and INS proposals). The current FAM note only requires ownership of at least 50%. FAM, *supra* note 6, at 86, note 11.1.

237. Interview with Cornelius D. Scully and H. Edward Odom, *supra* note 11. Although the amount of ownership interest proves the element of "direct and develop," an alien should show that he or she "calls the shots" or has primary control. *Id.*

238. Cf. Klasko, *supra* note 23, at 1423 (regarding as immaterial the language distinction because the INS proposal seems to require actual directing of the business and the State Department proposal merely focuses on control); see also Yanni, *supra* note 1, at 5 (questioning whether the INS proposed regulation may place restrictions on an investor's incidental activities by requiring sole purpose to direct and develop).

239. See Yanni, *supra* note 1, at 16-17 (discussing the ambiguity of the INS use of the term "managerial" because it requires possession of managerial skills (restrictive) and at the same time, does not require supervision of high-level personnel (relaxed)); see also Klasko, *supra* note 23, at 1423 n.28 (preferring the term "managerial" because it does not require actual supervision).

240. The State Department describes "supervisory" as "granting the employer supervisory responsibility for a large proportion of an enterprises' operations and . . . not involving the supervision of low-level employees." DOS proposal, *supra* note 12, at 43,570. The INS definition of a "managerial or executive" employee is one "directing and managing business operations, and perhaps supervising other professional, supervisory or managerial personnel." INS Proposal, *supra* note 12, at 42,956.

241. See Bastone, *supra* note 24, at 200 (arguing that the proposed changes to the essential employee requirement impose an inappropriate cost and inconvenience on the treaty employers, who are "invited" by the treaties to benefit the United States).

have adequate resources to meet both the substantiality requirement and the proposed essential employee training requirement.<sup>242</sup> The United States should not require treaty investors, who are here pursuant to a bilateral treaty to promote the United States national interest through their substantial investment operations and creation of jobs, to provide training for all essential employees who are assisting them in the operations of the enterprise.<sup>243</sup> Other treaty countries do not impose similar burdens upon United States investors abroad, who could easily qualify United States employees.<sup>244</sup>

The State Department's proposed rule on this requirement presents an appropriate compromise—to stimulate the economy through job creation and protection and to encourage investments. Although this version is not as optimally flexible as the current FAM notes,<sup>245</sup> it ensures the active recruitment of United States workers without imposing extra burdens on employer treaty investors.

#### G. ADJUSTMENT OF STATUS

The treaty investor and the immigrant investor programs share the common goal of promoting the United States economy through investment operations.<sup>246</sup> With the exception of the immigrant investor

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242. See Klasko, *supra* note 23, at 1424 (stating that the majority of the E-2 businesses would face financial difficulties in meeting the new rigid requirements).

243. See Klasko, *supra* note 23, at 1420 (arguing that treaty investors should be able to qualify responsible employees who help their investment operations, because unlike H or L visaholders, E-2 visaholders have to satisfy the treaty and the substantial investment requirements); see also Yanni, *supra* note 1, at 18 (suggesting that E and L visaholders should be treated differently because the purposes of these classifications are very different).

244. See Interview with Michael Maggio, *supra* note 203.

245. As discussed, FAM requires that the treaty employer train replacement United States workers within a reasonable time frame applies only to short-term, essential employees. See *supra* note 111 and accompanying text (discussing the current FAM replacement United States workers training requirement).

246. See Robert C. Groven, Note, *Setting Our Sights: The United States and the Canadian Investor Visa Programs*, 4 MINN. J. GLOBAL TRADE 271, (1995) (specifying the promotion of economic progress and the alleviation of poverty and unemployment as the purposes of the Investor Visa Program); Fertik, *supra* note 1, at 650 (explaining that Congress expected the Immigrant Investor Program to generate economic growth); Lawrence C. Lee, Comment, *The "Immigrant Entrepreneur" Provision of the Immigration Act of 1990: Is a Single Entrepreneur Category Sufficient?*, 12 J.L. & COM. 147 (1992) (indicating that proponents of the "immigrant entrepreneur provision expected the measure to create jobs and contribute capital"); DOS Proposal, *supra*

program's capital amount and job creation requirements,<sup>247</sup> these two programs also have very similar eligibility criteria.<sup>248</sup>

Critics contend that the immigrant investor program's capital amount and job creation requirements contributed to the program's failure.<sup>249</sup>

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note 12, at 43,567-68 (declaring that the purposes of E-2 visa classifications are to stimulate the economy through investment operations and improve United States commercial relationship).

247. See Fertik *supra* note 1, at 649 (discussing the investment amount requirements).

248. See *supra* notes 46-47 and accompanying text (listing the statutory requirements for treaty investors); Groven, *supra* note 246, at 271 (citing INA § 203(5), 8 U.S.C. § 1153(b)(5)(1990)) (classifying the immigrant investor statutory requirements to include qualified, engaging, new commercial enterprise, capital amount, job creation, and at risk).

In addition, the two investor programs have similar requirement with respect to the role of the investor. See Yanni, *supra* note 1, at 20 (stating that the active/at risk investment requirement is similar for immigrant and nonimmigrant investors in that there must be lawful possession and control of irrevocably committed funds that are placed at the investor's personal risk). The treaty investment, however, can be conditional upon the issuance of an E-2 visa, whereas there is no such provision in the at risk requirement for the immigrant investor. *Id.* Compare FAM, *supra* note 6, at 84, note 7.1-3 (discussing the "irrevocably committed" element of the at risk requirement) with Groven, *supra* note 246, at 280 n.75 (noting that an immigrant investor cannot condition their enterprise contracts upon acceptance of their visa application).

In addition, the two investor programs are also similar with respect to the role of the investor. See *supra* note 89 and accompanying text (stating that the treaty investor must be primarily engaged in the direction and development of the enterprise); Groven, *supra* note 246, at 285 (noting that the immigrant investor must be responsible for the daily operations of, and the decisions related to, the enterprise); Lee, *supra* note 246, at 148 (stating that the immigrant investor must maintain an active managerial role in the enterprise).

Both programs also exclude passive or nonprofit investment enterprises. See *supra* notes 67-69 and accompanying text (discussing the treaty investor requirement of an active investment in a qualifying enterprise); Yanni, *supra* note 1, at 20 (stating that the immigrant investor's enterprise must be commercial and for profit).

Finally, the programs have similar definitions for "capital." See *supra* note 74 and accompanying text (stating that the treaty investor's qualifying funds are the investor's assets in the enterprise that are placed at risk, including cash, equipment and lease payments); Fertik, *supra* note 1, at 657 (stating that the immigrant investor's capital includes cash, equipment, inventory, tangible and intangible property, leases, and indebtedness secured by the alien's assets).

249. Cf. Fertik, *supra* note 1, at 661 (comparing the United States program with its Canadian equivalent that has lower capital and job creation requirements); Groven, *supra* note 246, at 274 (asserting that the price of the United States immigrant visa remains unnecessarily high); Lee, *supra* note 246, at 149 (claiming that the high capital requirement may exclude many skilled entrepreneurs who could otherwise

Consequently, they recommend loosening the unrealistically high capital and job creation requirements, and restructuring the program by separating the entrepreneur and investor aspects of the program.<sup>250</sup> Because the high "risk" requirement often discourages potential applicants, others recommend that the program should have an escape clause that permits investment based upon the issuance of the permanent residency visa.<sup>251</sup>

The treaty investor program could be the model of a successfully reformed immigrant investor program.<sup>252</sup> Congress or the authorized agencies should provide the option to adjust status to permanent residency for the treaty investor who can demonstrate the fulfillment of the goal of the program: continuous and substantial contribution to the United States economy.<sup>253</sup> They should, however, limit the provision to principal individual treaty investors and not to treaty companies or employees.<sup>254</sup> To meet the element of substantial continuation, treaty investors could show a cumulative investment of a large sum of capital (e.g., \$250,000)<sup>255</sup> and/or the direct or indirect creation of a number of

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contribute to the United States economy).

250. See Groven, *supra* note 246, at 275 (recommending that the immigrant investor program could be reformed by expanding investment options, reducing at-risk and capital requirements, and informing investors of tax policies). The author also advocates creating two types of investor visas with distinct requirements to attract both investors and entrepreneurs. *Id.*; see also Fertik, *supra* note 1, at 671 (proposing a lowering of the capital threshold amount and job creation requirement, and creating two investment options; investment and entrepreneurship); Lee, *supra* note 246, at 149 (arguing for the separation of the program into two categories, investors and entrepreneurs, in order to achieve the two distinct goals of the program).

251. See Groven, *supra* note 246, at 274 (proposing that the program permit immigrant investors to insert escape clauses into their contracts).

252. *Id.* Because only nationals of the treaty nations and not every foreign investor, can avail themselves of the E-2 visa, the E-2 visa should not solve the defects of the immigrant investor program because it would restrict the number of qualifying foreign investors who could satisfy the economic goal of the program. *Id.* at 148-49. The program however, should provide treaty investors with the option to adjust status to permanent residency if they achieve the goal of the immigrant investor program. *Id.*

253. See *supra* note 246 and accompanying text (citing economic growth as a primary purpose of the immigrant investor program).

254. Groven, *supra* note 246, at 149. Clearly, companies cannot obtain permanent residency status and treaty employees lack the required capital to make a substantial contribution to the United States economy. *Id.*

255. See *id.* at 150 (suggesting lowering the capital requirement to \$100,000 in the entrepreneur category, and to \$250,000 in the investment category, amounts which approximate those in the Canadian immigrant investor program).

full-time jobs (e.g., five), regardless of the invested amount.<sup>256</sup> To satisfy the element of commitment for continuous contribution, a treaty investor must maintain E-2 status in the United States for a certain number of years (e.g., two).<sup>257</sup>

This suggested option for adjustment of status for treaty investors would remedy the inadequacy and the failure of the immigrant investor program.<sup>258</sup> The adjustment of status provision would provide a mechanism for converting status to permanent residency for the many treaty investors who obtained E-2 status prior to the enactment of the immigrant investor visa, and who currently satisfy the immigrant investor criteria.<sup>259</sup> Furthermore, the option of adjustment of status would retain many treaty investors who would otherwise be forced to terminate their investments and move back to their home countries because their spouse or children became ineligible for derivative E-2 status in the United States.<sup>260</sup>

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256. See *id.* (stating that this test appears lenient when compared to current eligibility criteria, which requires both parts of the test with higher thresholds). It would be illogical, however, to impose stricter requirements on the treaty investors for obtaining permanent residency when they could reside in the United States indefinitely for a small investment of \$50,000, depending on the nature of the business and the number of jobs it creates. *Id.*

257. Lee, *supra* note 246, at 151 (claiming that the current immigrant investor program conditions permanent residency status for two years in order to "deter immigration-related entrepreneurship fraud"); INA § 216A, 8 U.S.C. § 1186b (1988 & Supp. IV (1992)).

258. See *supra* notes 248-251 and accompanying text (discussing the possible causes for the failure of the immigrant investor program).

259. See Fertik, *supra* note 1, at 662 (claiming that a remaining flaw with the program is the misapplication of the current immigrant investor program to E visaholders who satisfy its requirements but remain ineligible because they invested prior to its enactment).

260. See William J. Flynn III & Richard A. Jacobson, *Foreign Investors: Immigration and Nonimmigration Considerations*, FLA. BUS. J., May 1992, at 68, 70 (discussing the problems associated with the children of treaty investors); Yanni, *supra* note 1, at 9 (stating that problems often arise for children who reach 21 years of age and must depart from the United States if change or status adjustment proves impossible). The grown child will often have difficulty becoming adjusted to the way of life abroad. *Id.* Moreover, he or she may have difficulty finding a suitable career, having resided in the United States under derivative E-2 status for a number of years. *Id.*

Because the Visa Office does not consider the trust between a treaty parent and his or her child as an "essential skill," grown children rarely qualify as essential treaty employees. Yanni, *supra* note 1, at 10. Although special family relationships may explain executive and supervisory positions, most children fail to qualify as co-

In this author's opinion, because treaty investors bring tremendous benefits to the United States economy,<sup>261</sup> the 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. American investors abroad would also receive advantages because the treaty countries may grant them beneficial status in light of this new residency provision.<sup>262</sup>

### CONCLUSION

The stringent requirements of the proposed regulations on E-2 classification will close the American door to many well-qualified foreign investors whose investments would substantially benefit the United States, and will hinder United States economic expansion abroad.

If the United States wants to compete with other nations to attract foreign investment that generates revenue and jobs, and at the same time encourage and protect United States investors abroad, it should maintain the flexible approach and refrain from imposing unnecessary costs and inconveniences upon treaty investors. Therefore, the proposed regulations which impose such burdens ought to be changed to reflect these ultimate goals. The creation of the option to adjust status will help achieve these goals and will serve as one of the solutions to the failure of the immigrant investor program.

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investors with their parents. *Id.*; Flynn & Jacobson, *supra*, at 70. Without having a relative who has either United States citizenship or a permanent residency status, a former derivative E-2 visaholder has little opportunity to obtain a green card. *Id.*

261. See Interview with Cornelius D. Scully and H. Edward Odom, *supra* note 11 (stating that the treaty investors, whether individual or corporate, have made "very significant and major contributions to the local employment and to the United States economy").

262. See *supra* note 203 and accompanying text (recognizing that in response to the United States action on E-2 requirements, treaty nations may take reciprocal action on their E-2 requirements).