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9 FAM 41.51 NOTES

(CT:VISA-1328; 09-30-2009)
(Office of Origin: CA/VO/L/R)

9 FAM 41.51 N1 TREATY TRADERS AND INVESTORS

(TL:VISA-404; 04-29-2002)

a. As the E visa is becoming ever more popular, consular officers should remember that the basis of this classification lies in treaties which were entered into, at least in part, to enhance or facilitate economic and commercial interaction between the United States and the treaty country. It is with this spirit in mind that cases under INA 101(a)(15)(E) should be adjudicated.

b. Although this classification mandates compliance with a lengthy list of requirements, many of these standards are subject to the exercise of a great amount of judgment and discretion. In view of the judgmental nature of this classification, consular officers should seek to be flexible, fair, and uniform in adjudicating E visa applications.

c. As in the case of any visa application, the burden of proof to establish status rests with the alien. If the alien's qualification for E-1 or E-2 classification is uncertain, the consular officer may request whatever documentation is needed to overcome that uncertainty.

9 FAM 41.51 N1.1 Requirements for (E-1) Treaty Trader

(TL:VISA-78; 05-07-1993)

In evaluating E-1 applications, consular officers must determine whether:

(1) The requisite treaty exists (see 9 FAM 41.51 N2 below);

(2) The individual and/or business possesses the nationality of the treaty country (see 9 FAM 41.51 N3 below);

(3) The activities constitute trade within the meaning of INA 101(a)(15)(E) (see 9 FAM 41.51 N4 below);

(4) Such trade is substantial (see 9 FAM 41.51 N6 below);

(5) Such trade is principally between the United States and the treaty country (see 9 FAM 41.51 N6 below);

(6) The applicant, if an employee, is destined to an executive / supervisory position or possesses skills essential to the firm's operations in the United States (see 9 FAM 41.51 N13 below); and

(7) The applicant intends to depart the United States when the E-1 status terminates (see 9 FAM 41.51 N14 below).

9 FAM 41.51 N1.2 Requirements for E-2 Treaty Investor

(TL:VISA-326; 10-15-2001)

In evaluating E-2 applications, consular officers must determine whether the:

(1) Requisite treaty exists;

(2) Individual and/or business possess the nationality of the treaty country;

(3) Applicant has invested or is actively in the process of investing;

(4) Enterprise is a real and operating commercial enterprise;

(5) Applicant's investment is substantial;

(6) Investment is more than a marginal one solely for earning a living;

(7) Applicant is in a position to "develop and direct" the enterprise;

(8) Applicant, if an employee, is destined to an executive/supervisory position or possesses skills essential to the firm's operations in the United States; and

(9) Applicant intends to depart the United States when the E-2 status terminates.

9 FAM 41.51 N2 NATIONALITY

(TL:VISA-322; 10-10-2001)

The treaty trader or investor must, whether an individual or business, possess the nationality of the treaty country. The nationality of the individual is determined by the authorities of the country of which the alien claims nationality. The nationality of a business is determined by the nationality of the individual owners of that business.

9 FAM 41.51 N3 QUALIFYING TREATIES OR EQUIVALENT

(CT: VISA-969; 06-12-2008)

The Immigration and Nationality Act in section 101(a)(15)(E) requires the existence of a qualifying treaty of commerce and navigation between the United States and another State in order for the E visa classification to be accorded to nationals of that State. Such qualifying treaties may include treaties of Friendship, Commerce and Navigation and Bilateral Investment Treaties. Countries whose nationals may be accorded nonimmigrant classification under INA 101(a)(15)(E) pursuant to a qualifying treaty, or pursuant to legislation enacted to extend that same privilege (for example, to give effect to commitments in certain Free Trade Agreements), are listed in section 9 FAM 41.51 Exhibit I.

9 FAM 41.51 N3.1 50 Percent Rule

(CT:VISA-1328; 09-30-2009)

Pursuant to 22 CFR 41.51(c)(2), nationals of the treaty country must own at least 50 percent of the business in question. In corporate structures one looks to the nationality of the owners of the stock. If a business in turn owns another business, then nationality of ownership must be traced to the point of reaching the 50 percent rule with respect to the parent organization. In most cases, this should pose no real problem but, in modern business structures and layered relationships, consular officers will have to rely heavily on the evidence presented to adjudicate whether the business entity in question possesses the requisite nationality.

9 FAM 41.51 N3.2 Place of Incorporation

(TL:VISA-404; 04-29-2002)

The country of incorporation is irrelevant to the nationality requirement for E visa purposes. In cases where a corporation is sold exclusively on a stock exchange in the country of incorporation, however, one can presume that the nationality of the corporation is that of the location of the exchange. The applicant should still, and may be requested to provide the best evidence available to support such a presumption. In the case of a multinational corporation whose stock is exchanged in more than one country, then the applicant must satisfy the consular officer by the best evidence available that the business meets the nationality requirement. In view of the complex corporate structures in these cases, posts should avail themselves of Departmental assistance by submitting an advisory opinion request to CA/VO/L/A when necessary.

9 FAM 41.51 N3.3 Dual Nationality of Trader or Investor

(TL:VISA-322; 10-10-2001)

Except in the case in which an enterprise is owned and controlled equally (50/50) by nationals of two treaty countries, a business for which E visa status is sought may have only one qualifying nationality. In the case of dual national owner(s), a choice must be made by the owner(s) as to which nationality shall be used. The owner and all E visa employees of the company must possess the nationality of the single E visa qualifying country, and hold themselves as nationals of that country for all E visa purposes involving that company, regardless of whether they also possess the nationality of another E visa country. When a company is equally owned and controlled by nationals of two different treaty countries, employees of either nationality may obtain E visas to work for that company.

9 FAM 41.51 N4 TRADE FOR E-1 PURPOSES

9 FAM 41.51 N4.1 Elements of Trade

(TL:VISA-78; 05-07-1993)

Trade for E-1 purposes consists of three ingredients, each of which must be present in all E-1 cases. The three requirements are:

(1) Trade must constitute an exchange;

(2) Trade must be international in scope; and

(3) Trade must involve qualifying activities.

9 FAM 41.51 N4.2 Trade Entails Exchange

(CT:VISA-1328; 09-30-2009)

There must be an actual exchange, in a meaningful sense, of qualifying commodities such as goods, moneys, or services to constitute transactions considered trade within the meaning of INA 101(a)(15)(E)(i). An exchange of a good or service for consideration must flow between the two treaty countries and must be traceable or identifiable. However, the fact that proceeds from services performed in the *United States* may be placed in a bank account in a treaty country does not necessarily indicate that meaningful exchange has occurred if the proceeds do not support any business activity in the treaty country. Title to the trade item must pass from one treaty party to the other.

9 FAM 41.51 N4.3 Trade Must be International

(TL:VISA-78; 05-07-1993)

The purpose of these treaties is to develop international commercial trade between the two countries. Development of the domestic market without international exchange does not constitute trade in the E-1 visa context. Thus, engaging in purely domestic trade is not contemplated under this classification. The traceable exchange in goods or services must be between the United States and the other treaty country.

9 FAM 41.51 N4.4 Trade Must be in Existence

(TL:VISA-78; 05-07-1993)

An alien cannot qualify for E-1 status for the purpose of searching for a trading relationship. Trade between the treaty country and the United States must already be in progress on behalf of the individual or firm to entitle one to treaty trader classification. Existing trade includes successfully integrated contracts binding upon the parties that call for the immediate exchange of qualifying items of trade.

9 FAM 41.51 N4.5 Activities Considered to Constitute Trade

(TL:VISA-322; 10-10-2001)

a. As noted above, trade for E-1 purposes involves the commercial exchange of goods or services in the international market place. In the rapidly changing business climate with an increasing trend toward service industries, many more services, whether listed below or not, might benefit from E-1 visa classification.

b. To constitute trade in a service for E-1 purposes, the provision of that service by an enterprise must be the purpose of that business and, most importantly, must itself be the saleable commodity which the enterprise sells to clients. The term "trade" as used in this statute has been interpreted to include international banking, insurance, transportation, tourism, communications, and newsgathering activities. (Aliens engaged in newsgathering activities, however, should usually be classified under INA 101(a)(15)(I).) These activities do not constitute an all inclusive list but are merely examples of the types of services found to fall within the E-1 meaning of trade. Essentially, any service item commonly traded in international commerce would qualify.

9 FAM 41.51 N5 TECRO EMPLOYEES

(CT:VISA-1328; 09-30-2009)

See 9 FAM 41.22 *PN1*, *9 FAM 41.22* PN1.1, and *9 FAM 41.22* PN2 also, see the Visa Reciprocity and Country Documents Finder, Taiwan.

9 FAM 41.51 N6 SUBSTANTIAL TRADE

(TL:VISA-404; 04-29-2002)

a. The word "substantial" is intended to describe the flow of the goods or services that are being exchanged between the treaty countries. That is, the trade must be a continuous flow that should involve numerous transactions over time. Consular officers should focus primarily on the volume of trade conducted but they should also consider the monetary value of the transactions as well. Although the number of transactions and the value of each transaction will vary, greater weight should be accorded to cases involving more numerous transactions of larger value.

b. The smaller businessman should not be excluded if demonstrating a pattern of transactions of value. Thus, proof of numerous transactions, although each may be relatively small in value, might establish the requisite continuing course of international trade. Income derived from the international trade which is sufficient to support the treaty trader and family should be considered as a favorable factor when assessing the substantiality of trade in a particular case.

9 FAM 41.51 N7 TRADE MUST BE PRINCIPALLY BETWEEN UNITED STATES AND COUNTRY OF ALIEN'S NATIONALITY

(TL:VISA-78; 05-07-1993)

The general rule requires that over 50 percent of the total volume of the international trade conducted by the treaty trader regardless of location must be between the United States and the treaty country of the alien's nationality. The remainder of the trade in which the alien is engaged may be international trade with other countries or domestic trade. The application of this rule requires a clear understanding of the distinctions in business entities described below.

9 FAM 41.51 N7.1 Measurement of Trade

(TL:VISA-404; 04-29-2002)

To measure the requisite trade one must look to the trade conducted by the legal "person" who is the treaty trader. Such trader might be an individual,

which was often the case many years ago, a partnership, a joint venture, a corporation (whether a parent or subsidiary corporation), etc. It is important to note that a branch is not considered to be a separate legal person or trader but part and parcel of another entity. In contrast, a subsidiary is a separate legal person/entity. Thus, to measure trade in the case of a branch, the consular officer shall look to the trade conducted by the entity of which it is a part, usually a foreign-based business (individual, corporation, etc.).

9 FAM 41.51 N7.2 Effect on Employee's Responsibilities in United States

(TL:VISA-322; 10-10-2001)

If the trader, whether foreign-based or U.S.-based, meets this percentile requirement, the duties of an employee need not be similarly apportioned to qualify for an E-1 visa. For an example, if a U.S. subsidiary of a foreign firm is engaged principally in trade between the United States and the treaty country, it is not material that the E-1 employee is also engaged in third-country or intra-U.S. trade or that the parent firm's headquarters abroad is engaged primarily in trade with other countries. As noted above, this would not be true in the case of a branch of a foreign firm.

9 FAM 41.51 N8 APPLICANT MUST HAVE INVESTED OR IN PROCESS OF INVESTING

9 FAM 41.51 N8.1 Concept of "Investment" and "In Process of Investing"

(TL:VISA-78; 05-07-1993)

The consular officer must assess the nature of the investment transaction to determine whether a particular financial arrangement may be considered an "investment" within the meaning of INA 101(a)(15)(E)(ii). The core factors relevant to a post's analysis of whether the applicant actually has invested, or is in the process of investing, in an enterprise are discussed below.

9 FAM 41.51 N8.1-1 Possession and Control of Funds

(TL:VISA-322; 10-10-2001)

The alien must demonstrate possession and control of the capital assets, including funds invested. If the investor has received the funds by legitimate means, e.g., savings, gift, inheritance, contest, etc. and has control and possession over the funds, the proper employment of the funds

may constitute an E-2 investment. (It should be noted, however, that inheritance of a business does not constitute an investment.) Furthermore, the statute does not require that the source of the funds be outside the United States.

9 FAM 41.51 N8.1-2 Investment Connotes Risk

(TL:VISA-404; 04-29-2002)

a. The concept of investment connotes the placing of funds or other capital assets at risk, in the commercial sense, in the hope of generating a financial return. (E-2 investor status shall not, therefore, be extended to non-profit organizations.) (See 9 FAM 41.51 N9.) If the funds are not subject to partial or total loss if business fortunes reverse, then it is not an "investment" in the sense intended by INA 101(a)(15)(E)(ii). If the funds' availability arises from indebtedness, these criteria must be followed:

   (1) Indebtedness such as mortgage debt or commercial loans secured by the assets of the enterprise cannot count toward the investment, as there is no requisite element of risk. For example, if the business in which the alien is investing is used as collateral, funds from the resulting loan or mortgage are NOT at risk, even if some personal assets are also used as collateral.

   (2) On the other hand, loans secured by the alien's own personal assets, such as a second mortgage on a home, or unsecured loans, such as a loan on the alien's personal signature, may be included, since the alien risks the funds in the event of business failure.

b. In short, at risk funds in the E-2 context would include only funds in which personal assets are involved, such as personal funds, other unencumbered assets, a mortgage with the alien's personal dwelling used as collateral, or some similar personal liability. A reasonable amount of cash, held in a business bank account or similar fund to be used for routine business operations, may be counted as investment funds. (See 9 FAM 41.51 N8.1-3 below for contrast with uncommitted funds.)

9 FAM 41.51 N8.1-3 Funds Must be Irrevocably Committed

(TL:VISA-404; 04-29-2002)

a. To be "in the process of investing" for E-2 purposes, the funds or assets to be invested must be committed to the investment, and the commitment must be real and irrevocable. As an example, a purchase or sale of a business which qualifies for E-2 status in every respect may be conditioned upon the issuance of the visa. Despite the condition, this would constitute a solid commitment if the assets to be used for the

purchase are held in escrow for release or transfer only on the condition being met. The point of the example is that to be in the process of investing the investor must have, and in this case would have, reached an irrevocable point to qualify.

b. Moreover, for the alien to be "in the process of investing", the alien must be close to the start of actual business operations, not simply in the stage of signing contracts (which may be broken) or scouting for suitable locations and property. Mere intent to invest, or possession of uncommitted funds in a bank account, or even prospective investment arrangements entailing no present commitment, will not suffice.

9 FAM 41.51 N8.2 Consideration of Other Financial Transactions, Property or Property Rights as "Investments"

9 FAM 41.51 N8.2-1 Payments for Leases or Rents as Investments

(TL:VISA-322; 10-10-2001)

Payments in the form of leases or rents for property or equipment may be calculated toward the investment in an amount limited to the funds devoted to that item in any one month. However, the market value of the leased equipment is not representative of the investment and neither is the annual rental cost (unless it has been paid in advance) as these rents are generally paid from the current earnings of the business.

9 FAM 41.51 N8.2-2 Value of Goods or Equipment as Investment

(TL:VISA-404; 04-29-2002)

The amount spent for purchase of equipment and for inventory on hand may be calculated in the investment total. The value of goods or equipment transferred to the United States (such as factory machinery shipped to the United States to start or enlarge a plant) may be considered an investment. The alien, however, must demonstrate that the goods or machinery will be put, or are being put, to use in an ongoing commercial enterprise. The applicant must establish that the purchased goods or equipment are for business, not personal purposes.

9 FAM 41.51 N8.2-3 Intangible Property

(TL:VISA-322; 10-10-2001)

Rights to intangible or intellectual property may also be considered capital assets to the extent to which their value can reasonably be determined. Where no market value is available for a copyright or patent, the value of current publishing or manufacturing contracts generated by the asset may be used. If none exist, the opinions of experts in the particular field in question may be submitted for consideration and acceptance.

9 FAM 41.51 N9 COMMERCIAL ENTERPRISE MUST BE REAL AND ACTIVE

(TL:VISA-404; 04-29-2002)

The enterprise must be a real and active commercial or entrepreneurial undertaking, producing some service or commodity. It cannot be a paper organization or an idle speculative investment held for potential appreciation in value, such as undeveloped land or stocks held by an investor without the intent to direct the enterprise. The investment must be a commercial enterprise, thus it must be for profit, eliminating non-profit organizations from consideration. (See 9 FAM 41.51 N8.1 above.)

9 FAM 41.51 N10 INVESTMENT MUST BE SUBSTANTIAL

9 FAM 41.51 N10.1 General

(TL:VISA-322; 10-10-2001)

The purpose of the requirement is to ensure to a reasonable extent that the business invested in is not speculative, but is, or soon will be a successful enterprise as the result of the exercise of sound business and financial judgment. The rules regarding the amount of funds committed to the commercial enterprise and the character of the funds, primarily personal or loans based on personal collateral, are intended to weed out risky undertakings and to ensure that the investor is unquestionably committed to the success of the business. Consequently, the consular officer must view the proportionate amount of funds invested, as evidenced by the proportionality test, in light of the nature of the business and the projected success of the business.

9 FAM 41.51 N10.2 Interpretations of "Substantial" Investment

(CT:VISA-1328; 09-30-2009)

a. A substantial amount of capital for E-2 visa purposes constitutes that amount that is:

   (1) Substantial in a proportional sense, (the application of the proportionality test): i.e., in relationship to the total cost of either purchasing an established enterprise, or creating the type of enterprise under consideration;

   (2) Sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and

   (3) Of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise. No set dollar figure constitutes a minimum amount of investment to be considered "substantial" for E-2 visa purposes.

b. This requirement is met by satisfying the “proportionality test”. The test is a comparison between two figures. The amount of qualifying funds invested, and the cost of an established business or, if a newly created business, the cost of establishing such a business.

   (1) The amount of the funds or assets actually invested must be from qualifying funds and assets as explained in 9 FAM 41.51 *N8* above.

   (2) The cost of an established business is, generally, its purchase price, which is normally considered to be the fair market value.

   (3) The cost of a newly created business is the actual cost needed to establish such a business to the point of being operational. The actual cost can usually be computed as the investor should have already purchased at least some of the necessary assets and, thus, be able to provide cost figures for additional assets needed to run the business. For example, an indication of the nature and extent of commitment to a business venture may be provided by invoices or contracts for substantial purchases of equipment and inventory; appraisals of the market value of land, buildings, equipment, and machinery; accounting audits; and records required by various governmental authorities.

c. If the consular officer questions these figures, he or she may seek additional evidence to help establish what would be a reasonable amount. Such evidence may include letters from chambers of commerce or statistics from trade associations. Unverified and unaudited financial statements based exclusively on information supplied by an applicant normally are insufficient to establish the nature and status of an enterprise.

9 FAM 41.51 N10.3 Value of Business Determined by Nature of Business

(TL:VISA-322; 10-10-2001)

The value (cost) of the business is clearly dependent on the nature of the enterprise. Any manufacturing business, such as an automobile manufacturer, might easily cost many millions of dollars to either purchase or establish and operate. At the extreme opposite pole, the cost to purchase an on-going commercial enterprise or to establish a service business, such as a consulting firm, may be relatively low. As long as all the other requirements for E-2 status are met, the cost of the business per se is not independently relevant or determinative of qualification for E-2 status.

9 FAM 41.51 N10.4 Proportionality Test

(CT:VISA-1328; 09-30-2009)

The amount invested in the enterprise should be compared to the cost (value) of the business by assessing the percentage of the investment in relation to the cost of the business. If the two figures are the same, then the investor has invested 100 *percent* of the needed funds in the business. Such an investment is substantial. The vast majority of cases involve lesser percentages. The proportionality test can best be understood as a sort of inverted sliding scale. The lower the cost of the business the higher a percentage of investment is required, whereas, a highly expensive business would require a lower percentage of qualifying investment. There are no bright line percentages that exist in order for an investment to be considered substantial. Yet, as stated above, the lower the cost of the business the higher the percentage of qualifying investment is anticipated. Thus, investments of 100 percent or a higher percentage would normally automatically qualify for a small business of $100,000 or less. Yet, a business of this size involving two equal partners or joint ventures may prove qualification for E-2 status. At the other extreme, an investment of $10 million in a $100 million business would likely qualify, based on the sheer magnitude if the business itself.

9 FAM 41.51 N10.5 Investor's Commitment

(TL:VISA-322; 10-10-2001)

An element of judgment to be factored into the requirement of substantial investment concerns an assessment of the extent of the investor's commitment to the successful operation of the project in view of the amount invested.

9 FAM 41.51 N11 ENTERPRISE MUST BE MORE THAN MARGINAL

(CT:VISA-1328; 09-30-2009)

A marginal enterprise is an enterprise that does not have the present or future capacity to generate more than enough income to provide a minimal living for the treaty investor and his or her family. An enterprise that does not have the capacity to generate such income but that has a present or future capacity to make a significant economic contribution is not a marginal enterprise. The projected future capacity should generally be realizable within five years from the date the alien commences normal business activity of the enterprise.

9 FAM 41.51 N12 CONTROLLING INTEREST

(TL:VISA-322; 10-10-2001)

An equal share of the investment in a joint venture or an equal partnership of two parties, generally does give controlling interest, if the joint venture and partner each retain full management rights and responsibilities.

This arrangement is often called "Negative Control". With each of the two parties possessing equal responsibilities, they each have the capacity of making decisions that are binding on the other party. The Department of State has determined that an equal partnership with more than two partners would not give any of the parties control based on ownership, as the element of control would be too remote even under the negative control theory.

9 FAM 41.51 N12.1 Requirements for Investor to Develop and Direct and Have Controlling Interest

(TL:VISA-322; 10-10-2001)

In all treaty investor cases, it must be shown that nationals of a treaty country own at least 50 percent of an enterprise. It must also be shown, in accordance with INA 101(a)(15)(E)(ii), that a national (or nationals) of the treaty country, through ownership or by other means, develops and directs the activities of the enterprise. The type of enterprise being sought will determine how this requirement is applied.

9 FAM 41.51 N12.2 Owner to Demonstrate Development and Direction of Enterprise

(TL:VISA-322; 10-10-2001)

In instances in which a sole proprietor or an individual who is a majority owner wishes to enter the United States as an "investor," or send an employee to the United States as his and/or her personal employee, or as an

employee of the U.S. enterprise, the owner must demonstrate that he or she personally develops and directs the enterprise. Likewise, if a foreign corporation owns at least 50 percent of a U.S. enterprise, and wishes its employee to enter the U.S. as an employee of the parent corporation, or as an employee of the U.S. business, the foreign corporation must demonstrate it develops and directs the U.S. enterprise.

9 FAM 41.51 N12.3 Visa Holder to be Employee of U.S. Enterprise

(TL:VISA-322; 10-10-2001)

a. In instances in which treaty country ownership may be too diffuse to permit one individual or company to demonstrate the ability to direct and develop the U.S. enterprise, the owners of treaty country nationality must:

   (1) Show that together they own 50 percent of the U.S. enterprise; and

   (2) Must demonstrate, that at least collectively, they have the ability to develop and direct the U.S. enterprise.

b. In these cases an owner may not receive an 'E' visa as the "investor", nor may an employee be considered to be an employee of an owner for 'E' visa purposes. Rather, all 'E' visa recipients must be shown to be an employee of the U.S. enterprise coming to the U.S. to fulfill the duties of an executive, supervisor, or essentially skilled employee.

9 FAM 41.51 N12.4 Control by Management

(TL:VISA-404; 04-29-2002)

As indicated, a joint venture or an equal partnership involving two parties, could constitute control for E-2 purposes. Modern business practices constantly introduce new business structures, however. Thus, it is difficult to list all the qualifying structures. If an investor (individual or business) has control of the business through managerial control, the requirement is met. The owner will have to satisfy the consular officer that the investor is developing and directing the business.

9 FAM 41.51 N13 THE WALSH/POLLARD CASE

(TL:VISA-404; 04-29-2002)

a. This precedent decision by the Board of Immigration Appeals warrants separate discussion not just because it emphasizes established rules, but,

because it has led to some confusion and misinterpretation.

b. The thrust of the fact pattern involved the contractual arrangement between a foreign entity and a U.S. business to provide services.

   (1) The foreign company promised to provide certain engineering design services which the U.S. business did not have the capacity to perform.

   (2) The design services were specific project-oriented services.

   (3) The employees of the foreign company furnished under the contract were demonstrably highly qualified to provide the needed service.

   (4) Pursuant to the contract, the foreign business created a subsidiary in the U.S. to ensure fulfillment of the contract and to service their employees. This subsidiary constituted their E-2 investment.

   (5) The employees who came to the U.S. entity to perform these services on site came to fulfill certain responsibilities pursuant to that very specific design project. They did not come to the United States to fill employee vacancies of the U.S. business. It is, therefore, irrelevant that the design activities could have been performed either at the facility of the foreign entity abroad or in the United States at the job site of the U.S. business.

c. This decision followed the Department of State's guidelines on E-2 visa classification. The prominent elements are:

   (1) When applying the substantiality test, one must focus on the nature of the business. Thus, as in this case, sometimes an investment of only a small amount of money might meet the requirement.

   (2) The test of "develop and direct" applies only to the investor(s), not to the individual employees.

   (3) The test of "essential skills" as set forth in 9 FAM 41.51 N12.3 won clear acceptance.

9 FAM 41.51 N13.1 Job Shop

(TL:VISA-404; 04-29-2002)

a. The greatest area of confusion surrounding Walsh/Pollard initially concerned the issue of the "job shop". A job shop usually involves the providing of workers needed by an employer to perform pre-designated duties. The employer often has position descriptions prepared for such workers. The positions to be filled by the workers are often positions which the employer cannot fill for a variety of reasons, such as unavailability of that type of worker, cost of locally hired workers, etc. For example, a manufacturer needs 100 tool and die workers to meet its

production schedule. If they have only 50 on the rolls, they might engage a job shopper to fill the other positions.

b. The fact pattern of this decision is not that of a job shop, nor does it in any way facilitate the creation of job shops under the E-2 visa classification. It is a pattern in direct contrast to a job shop, in which a business creating a new model required design-engineering services which the business neither had the capacity to perform nor had any positions to fill in that regard. It is expectable, in such circumstances, that the business might contract with another to provide the needed design for the model. The "contracted design" is a project-oriented commodity as contrasted to the filling of employment positions. The fact that the designing entity might prepare the design anywhere, even on the sites of contracting business, does not alter the nature of the transaction.

c. Since the distinction might be clouded in some circumstances, consular officers should exercise care in adjudicating such cases and not hesitate to submit any questionable cases for an advisory opinion.

9 FAM 41.51 N14 EMPLOYEE ENTITLED TO E-1 OR E-2 VISA

9 FAM 41.51 N14.1 Employer Qualifications

(CT:VISA-1328; 09-30-2009)

In order to qualify to bring an employee into the United States under INA 101(a)(15)(E), the prospective employer in the United States must be maintaining status under INA 101(a)(15)(E). In order to qualify to bring an employee into the United States under INA 101(a)(15)(E), several criteria must be met. The:

(1) Prospective employer must meet the nationality requirement, i.e., if an individual, the nationality of the treaty country or, if a corporation or other business organization, at least 50 *percent* of the ownership must have the nationality of the treaty country.

NOTE: A permanent resident alien does not qualify to bring in employees under INA 101(a)(15)(E). Moreover, shares of a corporation or other business organization owned by permanent resident aliens cannot be considered in determining majority ownership by nationals of the treaty country to qualify the company for bringing in alien employees under INA 101(a)(15)(E);

(2) Employer and the employee must have the same nationality; and,

(3) Employer, if not resident abroad, must be maintaining "E" status in

the United States.

9 FAM 41.51 N14.2 Executive and Supervisory Employee Responsibility

(TL:VISA-322; 10-10-2001)

In evaluating the executive and/or supervisory element, the consular officer should consider the following factors:

(1) The title of the position to which the applicant is destined, its place in the firm's organizational structure, the duties of the position, the degree to which the applicant will have ultimate control and responsibility for the firm's overall operations or a major component thereof, the number and skill levels of the employees the applicant will supervise, the level of pay, and whether the applicant possesses qualifying executive or supervisory experience;

(2) Whether the executive or supervisory element of the position is a principal and primary function and not an incidental or collateral function. For example, if the position principally requires management skills or entails key supervisory responsibility for a large portion of a firm's operations and only incidentally involves routine substantive staff work, an E classification would generally be appropriate. Conversely, if the position chiefly involves routine work and secondarily entails supervision of low-level employees, the position could not be termed executive or supervisory; and

(3) The weight to be accorded a given factor, which may vary from case to case. For example, the position title of "vice president" or "manager" might be of use in assessing the supervisory nature of a position if the applicant were coming to a major operation having numerous employees. However, if the applicant were coming to a small two-person office, such a title in and of itself would be of little significance.

9 FAM 41.51 N14.3 Essential Employees

(TL:VISA-78; 05-07-1993)

a. The regulations provide E visa classification for employees who have special qualifications that make the service to be rendered essential to the efficient operation of the enterprise. The employee must, therefore, possess specialized skills and, similarly, such skills must be needed by the enterprise. The burden of proof to establish that the applicant has special qualifications essential to the effectiveness of the firm's United States operations is on the company and the applicant.

b. The determination of whether an employee is an "essential employee" in this context requires the exercise of judgment. It can not be decided by the mechanical application of a bright-line text. By its very nature, essentiality must be assessed on the particular facts in each case.

9 FAM 41.51 N14.3-1 Duration of Essentiality

(TL:VISA-78; 05-07-1993)

a. The applicant bears the burden of establishing at the time of application not only the need for the skills that he or she offers but, also, the length of time that such skills will be needed. In general, the E classification is intended for specialists and not for ordinary skilled workers. There are, however, exceptions to this generalization. Some skills may be essential for as long as the business is operating. Others, however, may be necessary for a shorter time, such as in start-up cases.

b. Although there is a broad spectrum between the extremes set forth below, consular officers may draw some perspective on this issue from these examples:

   (1) Long-term need - The employer may show a need for the skill(s) on an on-going basis when the employee(s) will be engaged in functions such as continuous development of product improvement, quality control, or provision of a service otherwise unavailable (as in Walsh & Pollard).

   (2) Short-term need - The employer may need the skills for only a relatively short (e.g., one or two years) period of time when the purpose of the employee(s) relate to start-up operations (of either the business or a new activity by the business) or to training and supervision of technicians employed in manufacturing, maintenance and repair functions.

9 FAM 41.51 N14.3-2 General Factors To Be Considered

(TL:VISA-78; 05-07-1993)

a. Once the business has established the need for the specialized skills, the experience and training necessary to achieve such skill(s) must be analyzed to recognize the special qualities of the skills in question. The question of duration of need will cause variances among the kinds of skills involved. Not least, the visa applicant must prove that he or she possesses these skills, by demonstrating the requisite training and/or experience.

b. In assessing the specialized skills and their essentiality, the consular officer should consider such factors as the:

(1) Degree of proven expertise of the alien in the area of specialization;

(2) The uniqueness of the specific skills;

(3) The function of the job to which the alien is destined; and

(4) The salary such special expertise can command.

In assessing the claimed duration of essentiality, the consular officer should look to the period of training needed to perform the contemplated duties and, in some cases, the length of experience and training with the firm.

c. The availability of U.S. workers provides another factor in assessing the degree of specialization the applicant possesses and the essentiality of this skilled worker to the successful operation of the business. This consideration is not a labor certification test, but a measure of the degree of specialization of the skills in question and the need for such. For example, a TV technician coming to train U.S. workers in new TV technology not generally available in the U.S. market probably would qualify for a visa.

d. If the essential skills question cannot be resolved on the basis of initial documentation, the consular officer might ask the firm to provide statements from such sources as chambers of commerce, labor organizations, industry trade sources, or state employment services as to the unavailability of U.S. workers in the skill areas concerned.

e. Using the criteria above, the consul can then make a judgment as to whether the employee is essential for the efficient operation of enterprise for an indefinite period or for a shorter period. It might be determined that some skills are essential for as long as the business is operating. There may be little problem in assessing the need for the employee in the United States in the short term, such as start-up cases. Long-term employment presents a different issue, in that what is highly specialized and unique today might not be in a few years. It is anticipated that such changes would more likely occur in industries of rapid development, such as any computer-related industry. Although this may not be fully determinable at the time of initial application, the consular officer should monitor this at the time of any application for reissuance. The alien at that time will bear the burden of establishing that his or her specialized skills are still needed and that the applicant still possesses such skills.

9 FAM 41.51 N14.3-3 Concept of Training

(TL:VISA-404; 04-29-2002)

a. “Essential” employees possess skills which differentiate them from ordinarily skilled laborers. If an alien establishes that he or she has special qualifications and is essential for the efficient operation of the

treaty enterprise for the long term, the training of United States workers (for) (as) replacement workers is not required.

b. In some cases, ordinarily skilled workers can qualify as essential employees, and almost always this involves workers needed for start-up or training purposes. A new business or an established business expanding into a new field in the United States might need employees who are ordinarily skilled workers for a short period of time. Such employees derive their essentiality from their familiarity with the overseas operations rather than the nature of their skills. The specialization of skills lies in the knowledge of the peculiarities of the operation of the employer's enterprise rather than in the rote skill held by the applicant. To avoid problems with subsequent applications, consular officers might find, at the time of the original application, that it is best to set a time frame within which the business must replace such foreign workers with locally hired employees. Some of the factors used in the 9 FAM 41.51 N14.3-2 analysis would be drawn upon again to reach such an agreement.

9 FAM 41.51 N14.3-4 Previous Employment With E Visa Firm

(TL:VISA-78; 05-07-1993)

There is no requirement that an "essential" employee have any previous employment with the enterprise in question. The only time when such previous employment is a factor is when the needed skills can only be obtained by that employment. The focus of essentiality is on the business needs for the essential skills and of the alien's possession of such. Firms may need skills to operate their business, even though they don't have employees with such skills currently on their employment rolls.

9 FAM 41.51 N15 INTENT TO DEPART UPON TERMINATION OF STATUS

(TL:VISA-404; 04-29-2002)

An applicant for an E visa need not establish intent to proceed to the United States for a specific temporary period of time. Nor does an applicant for an E visa need to have a residence in a foreign country which the applicant does not intend to abandon. The alien may sell his or her residence and move all household effects to the U.S. The alien's expression of an unequivocal intent to return when the E status ends is normally sufficient, in the absence of specific indications of evidence that the alien's intent is to the contrary. If there are such objective indications, inquiry is justified to assess the applicant's true intent. As discussed in 9 FAM 41.54 N4, an applicant

might be a beneficiary of an immigrant visa petition filed on his or her behalf. However, the alien might satisfy the consular officer that his and/or her intent is to depart the United States upon termination of status, and not stay in the United States to adjust status or otherwise remain in the United States regardless of legality of status.

9 FAM 41.51 N16 E-3 REQUIREMENTS

9 FAM 41.51 N16.1 Background

(CT:VISA-1328; 09-30-2009)

a. The E-3 visa classification ("treaty alien in a specialty occupation") was the result of Public Law 109-13, entitled "The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005" (May 11, 2005). The new law added paragraph (iii) to INA 101(a)(15)(E), establishing a visa classification for *Australians* in specialty occupations.

b. The new law allows for the temporary entry of Australian professionals to perform services in a "specialty occupation" for a *United States* employer. The temporary entry of nonimmigrants in specialty occupations is provided for at Section 501 of Public Law 109-13. The law establishes a new category of temporary entry for nonimmigrant professionals, the E-3 category. Unlike the current E-1 and E-2 visas, the E-3 visa is not limited to employment that is directly related to international trade and investment. Subject to the requirements discussed herein, E-3 visa holders are eligible to work for any employer in the United States. Dependent spouses and children accompanying or following to join are also eligible for temporary entry.

c. To qualify for an E-3 visa, an *Australian* must:

(1) Present to you an approved Labor Condition Application (LCA) issued by the Department of Labor (DOL);

(2) Demonstrate to you that the prospective employment meets the standard of being "specialty occupation employment" (see 9 FAM N16.5 below);

(3) Show you that the necessary academic qualifications for the job have been met (see 9 FAM N16.7);

(4) Convince you that the proposed stay in the United States will be temporary (see 9 FAM N16.6); and

(5) Provide evidence of a license or other official permission to practice in the specialty occupation if required as a condition for the employment sought (see 9 FAM N16.7). In certain cases, where

such license or other official permission is not required immediately, an alien must demonstrate that he or she will obtain such licensure or permission within a reasonable period of time following admission to the United States.

d. A maximum of 10,500 E-3 visas can be issued annually.

9 FAM 41.51 N16.2 What is Needed to Qualify for a Specialty Occupation Visa

9 FAM 41.51 N16.2-1 Principals

(CT:VISA-1328; 09-30-2009)

A treaty alien in a specialty occupation must meet the general academic and occupational requirements for the position pursuant to INA 214(i)(1). In addition to the nonimmigrant visa (NIV) application, the following documentary evidence must be submitted in connection with an application for an E-3 visa:

(1) A completed Form ETA-9035, Labor Condition Application for Nonimmigrant Workers (formerly, Labor Condition Application for H-1B Nonimmigrants), certified by the Department of Labor (DOL). For a number of months following the initial enactment and implementation of the E-3 program, the pre-printed Form ETA-9035 did not include an option for the E-3 program. Therefore, DOL required employers filing for E-3 certification to clearly annotate the form as "E-3 - Australia - to be processed", and consular officers receiving certified Labor Condition Applications (LCA) for the E-3 program would have seen this handwritten designation at the top of the LCA page. However, since then, the pre-printed form has been updated to include an option for E-3. In addition, the name of Form ETA-9035 has been changed from Labor Condition Application for H-1B Nonimmigrants to Labor Condition Application for Nonimmigrant Workers. Further, DOL has integrated E-3 into its LCA on-line system, so E-3 LCAs may now be filed electronically. Consequently, you should expect to see a pre-printed form that:

(a) Includes an option for E-3; and

(b) Is likely to have been filed electronically.

The DOL official authorized to issue the certification is John R. Beverly, III, Administrator of the Office of National Programs within the Employment and Training Administration.

(2) Evidence of academic or other qualifying credentials as required under INA 214(i)(1), and a job offer letter or other documentation

from the employer establishing that upon entry into the United States the applicant will be engaged in qualifying work in a specialty occupation and that the alien will be paid the actual or prevailing wage referred to in INA 212(t)(1). A certified copy of the foreign degree and evidence that it is equivalent to the required U.S. degree could be used to satisfy the "qualifying credentials" requirement. Likewise, a certified copy of a U.S. baccalaureate or higher degree, as required by the specialty occupation, would meet the minimum evidentiary standard.

(3) In the absence of an academic or other qualifying credential(s), evidence of education and experience that is equivalent to the required U.S. degree.

(4) Evidence establishing that the applicant's stay in the United States will be temporary. (See 9 FAM 41.51 N16.6.)

(5) A certified copy of any required license or other official permission to practice the occupation in the state of intended employment if so required or, where licensure is not necessary to commence immediately the intended specialty occupation employment upon admission, evidence that the alien will be obtaining the required license within a reasonable time after admission.

(6) Evidence of payment of the Machine Readable Visa (MRV) fee or provide proof of payment.

9 FAM 41.51 N16.2-2 Spouses and Children

(CT:VISA-771; 10-03-2005)

To establish qualification for E-3 classification as the spouse or child of an E-3 alien, you may accept whatever reasonable evidence is persuasive to establish the required qualifying relationship. The presentation of a certified copy of a marriage or birth certificate is not mandatory if you are otherwise satisfied that the necessary relationship actually exists.

9 FAM 41.51 N16.3 Labor Condition Application (LCA) from the Department of Labor (DOL) Required

9 FAM 41.51 N16.3-1 Filing of Form ETA-9035, Labor Condition Application for Nonimmigrant Workers

(CT:VISA-1328; 09-30-2009)

a. For all prospective E-3 hires, employers must submit a Labor Condition

Application (LCA) to the Department of Labor (DOL) containing attestations relating to wages and working conditions.

b. DOL has two methods for submitting LCAs for approval. For H-1B, H-1B1, and E-3 cases, employers can file LCAs electronically or through the mail to DOL's National Office in Washington, DC. (Previously, there was an option to submit LCAs by fax. That option never applied to the E-3 program, and has now been eliminated.). The address for mailed-in E-3 applications is:

United States Department of Labor
Employment and Training Administration
Division of Foreign Labor Certification
Temporary Programs – Room C-4312
200 Constitution Avenue, N.W.
Washington, DC 20210

(See 70 FR 41430, page 41432, dated July 19, 2005). The Form ETA-9035 that is filed by mail to seek DOL certification under the E-3 program should not be confused with the Form ETA-9035-E, which is four pages long and is the electronic version of the LCA.

c. LCA's for E-3 status, when submitted by mail, are filed using Form ETA-9035, Labor Condition Application for Nonimmigrant Workers. The Form ETA-9035 is three pages long (see 9 FAM 41.51 Exhibit IV). There is an ETA case number at the bottom of each page. The "C" prefix on a case number designates that an LCA has been mailed to DOL. Since ALL, repeat ALL, mailed LCA applications (H-1b, H1-B1 and E-3 LCA applications) are issued case numbers beginning with a "C" prefix, consular officers will need to refer to the top of the first page of the application (Part A, Program Designation) to determine whether the LCA applies to either the H-1B, H-1B1, or E-3 program. Employers filing E-3 applications on line use Form ETA-9035-E and receive a case number beginning with an "I".

d. The "C" or "I" will be followed by a dash, five numbers, a dash and five numbers. On page three, section J, John R. Beverly, III will be listed in the signature block as the authorizing DOL official. For approved LCAs, no true "original" paper certification is produced. Upon E-3 certification by DOL, approval notification for mailed-in applications is faxed back to the employer. These approved LCAs, when presented to the consular officer, will therefore have the appearance of a facsimile. For applications filed on line, the electronic system provides immediate feedback if the LCA is approved and, in cases of approved applications, presents the employer with a .pdf version of the approved application that the employer can print off for its records and to provide to the alien who is

the subject of the nonimmigrant worker petition. Therefore, consular officers should expect that applications approved online will have the appearance of a .*pdf* document.

NOTE: Per the above, for purposes of the E-3 program, consular officers should only adjudicate cases that have a "C" or "I" case number prefix AND which show on the first page of the Form ETA-9035 that the LCA is E-3 related.

9 FAM 41.51 N16.3-2 Acceptance of Form ETA-9035, Labor Condition Application (LCA) for Nonimmigrant Workers by Posts

(CT:VISA-1328; 09-30-2009)

a. For mailed-in applications, DOL faxes the LCA back to the employer after approval. Applications approved on line are presented on-screen to the employer at the completion of the filing process in the form of a .pdf document. Consequently the applicant will be presenting either the initial faxed LCA, a printed .pdf document, or a copy of either of these; there will be no "original" document that will be presented. The bottom of page 3 contains the name and title of the authorizing DOL official, (John R. Beverly, III, Administrator, Office of National Programs), the ETA case number, the date of approval and a simulacrum of Mr. Beverly's signature. You should check to make sure the approval date of the LCA is later than September 2, 2005 (the effective date of the Department of State's E-3 regulatory publication).

b. Since DOL sends notification of E-3 LCA certification (approval) back to the prospective employer by fax, or during the on-line applications process in the form of a .pdf document, there is little to distinguish between an original, approved LCA and a copy of the approved form. If you have doubts about the veracity of a Form ETA-9035 or Form ETA-9035-E, you should request an advisory opinion *(AO)* from *CA/*VO/L/A.

9 FAM 41.51 N16.3-3 Verifying Authenticity of the E-3 LCA

(CT:VISA-790; 01-19-2006)

a. Acceptance by a consular officer of the LCA certification is discretionary. If you are not satisfied that the LCA being presented is authentic, you should suspend action on the case (INA 222(g) and verify the LCA with the Department of Labor (DOL).

b. DOL maintains a registry of approved LCAs. To verify the authenticity of a particular LCA, you should send an e-mail to Mr. Ben Orona at the Department of Labor. Mr. Orona will need the applicant's full name, place and date of birth (DPOB), the name of the prospective employer, and the

LCA case number. Your inquiry should be e-mailed to Mr. Orona at: orona.ben@dol.gov. Mr. Orona will check your inquiry against the registry and provide you with a determination of authenticity.

c. The Department is working with DOL to obtain access to the LCA registry. If we are successful in our efforts, we will be able to post it on the Department's intranet and consular officers abroad will then be able to query the applicant's LCA details directly. We will notify posts if this alterative becomes a practical reality.

9 FAM 41.51 N16.3-4 No Petition Filing with DHS Required

(CT:VISA-790; 01-19-2006)

An employer of an E-3 treaty alien in a specialty occupation is not required to file a petition with DHS. Instead, a prospective employee will present evidence for classification, including the approved Form ETA-9035, directly to the consular officer at the time of visa application.

9 FAM 41.51 N16.4 Definition of Specialty Occupation

(CT:VISA-1328; 09-30-2009)

The E-3 category provides for the issuance of visas solely to E-3 qualifying nationals performing employment within a "specialty occupation". The definition of "specialty occupation" is one that requires:

(1) A theoretical and practical application of a body of specialized knowledge;

(2) The attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States; and

(3) In determining whether an occupation qualifies as a "specialty occupation", follow the definition contained at INA 214(i)(1) for H-1B nonimmigrants and applicable standards and criteria determined by the Department of Homeland Security (DHS) and legacy Immigration and Naturalization Service (legacy INS).

9 FAM 41.51 N16.5 Determining "Specialty Occupation" Qualification

9 FAM 41.51 N16.5-1 Deciding if the Proposed Employment is a "Specialty Occupation"

(CT:VISA-1328; 09-30-2009)

Although the term "specialty occupation" is specifically defined at INA 214(i)(1), and further elaborated upon in DHS's regulations (8 CFR 214.2(h)(4)(iii)(A)), consular determinations of what qualifies as a "specialty occupation" will often come down to a judgment call by the adjudicating consular officer. You must examine the alien's qualifications, including his or her education and experience, and also determine whether the job itself falls within the definition of "specialty occupation." In this regard, you should consider the available offer of employment and the information obtained during the interview, and then on the basis of this information, *makes* a reasoned evaluation whether or not the offer of employment is for a "specialty occupation." Then you must be sure that the applicant has the required degree, or equivalency of experience and education, to adequately perform the stipulated job duties.

9 FAM 41.51 N16.5-2 Referring Questionable Cases to CA/VO/L/A and/or the Kentucky Consular Center (KCC)

(CT:VISA-1328; 09-30-2009)

a. Request additional assistance/guidance from *CA/*VO/L/A if significant doubt remains regarding the E-3 alien's work experience, or if the proposed employment does not appear to meet the requirements for "specialty occupation" as described above at 9 FAM 41.51 N16.6. The Department of Homeland Security's Bureau of U.S. Customs and Immigration Services (USCIS) has significant experience in adjudicating H-1B cases, so the advisory opinions division will work closely with USCIS on issues you send in for opinion.

b. If you have concerns about information regarding or provided by the employer (e.g., you doubt that the employer can pay the prevailing wage, or you do not believe the business is large enough to support additional employees), please e-mail KCC at FPMKCC@state.gov with your concerns, providing as much factual detail as possible. KCC will review the information, investigate, and attempt to provide you with information to address those concerns.

9 FAM 41.51 N16.6 Intent to Depart Upon Termination of Status

(CT:VISA-771; 10-03-2005)

a. Temporary entry for treaty aliens in specialty occupations is the same standard used for treaty traders/investors.

b. The alien's expression of an unequivocal intent to return when the E-3 status ends is normally sufficient, in the absence of specific evidence that

the alien's intent is to the contrary.

c. The applicant must satisfy you that he or she plans to depart the United States upon termination of status; however, he or she does not need to establish intent to proceed to the United States for a ***specific*** temporary period of time. Nor does an applicant for an E-3 visa need to have a residence in a foreign country that the applicant does not intend to abandon.

d. The alien may sell his or her residence and move all household effects to the United States.

e. An E-3 applicant may be a beneficiary of an immigrant visa (IV) petition filed on his or her behalf.

9 FAM 41.51 N16.7 E-3 Licensing Requirements

(CT:VISA-771; 10-03-2005)

a. An E-3 alien must meet academic and occupational requirements, including licensure where appropriate, for admission into the United States in a specialty occupation. If the job requires licensure or other official permission to perform the specialty occupation, the applicant must submit proof of the requisite license or permission before the E-3 visa may be granted. In certain cases, where such a license or other official permission is not immediately required to perform the duties described in the visa application, the alien must show that he or she will obtain such licensure within a reasonable period of time following admission to the United States. However, as illustrated in the example in paragraph (b)(4) below, in other instances, an alien will be required to present proof of actual licensure or permission to practice prior to visa issuance. In all cases, an alien must show that he or she meets the minimum eligibility requirements to obtain such licensure or sit for such licensure examination (e.g., he or she must have the requisite degree and/or experience). Even when not required to engage in the employment specified in the visa application, a visa applicant may provide proof of licensure to practice in a given profession in the United States together with a job offer letter, or other documentation, in support of an application for an E-3 visa.

b. The following examples are illustrative:

(1) An alien is seeking an E-3 visa in order to work as a law clerk at a U.S.-based law firm. The alien may, if otherwise eligible, be granted an E-3 visa if it can be shown that the position of unlicensed law clerk is a specialty occupation, even if he or she has not been admitted to the bar.

(2) An alien has a job offer from a law firm promising him or her a

position as an associate if the alien passes the bar exam. The application indicates that the position in question meets the definition of a specialty occupation. The alien may apply for an E-3 visa even if he or she will not be immediately employed in the position offered, but will be studying for the bar examination upon admission to the United States. You may issue the visa if you are satisfied that the alien will be taking steps to obtain bar admission within a reasonable period of time following admission to the United States. What constitutes a reasonable period of time will depend on the specific facts presented, such as licensure examination schedules and bar preparation course schedules.

(3) An alien does not have a job offer, but wishes to study for the bar upon admission to the United States with the hope of finding a position at a United States-based law firm. The alien would not be eligible for E-3 classification, since he or she would not be coming to work in a specialty occupation. This person would be required to obtain another type of visa, such as a B-1, in order to study for the bar in this country.

(4) An alien has an offer for employer with a law firm as a litigator, and is to begin working within two weeks of entry into the United States. The applicant must demonstrate that he or she has been admitted to the appropriate bar, or otherwise has obtained permission from the respective jurisdiction or jurisdictions where he or she intends to practice to make court appearances.

9 FAM 41.51 N16.8 Numerical Limitation on E-3 Visas

(CT:VISA-1328; 09-30-2009)

a. Only E-3 principals who are initially being issued E-3 visas, or who are otherwise initially obtaining E-3 status (in the United States), are subject to the 10,500 annual numerical limitation provisions of INA 214(g)(11)(B). Consequently, spouses and children of E-3 principals, as well as returning E-3 principals who are being issued new E-3 visas, are exempt from the annual numerical limit (see "b" and "c" immediately below).

b. An E-3 principal who is applying for a new visa following the expiration of the initial E-3 visa, or who is applying for a visa after initially obtaining E-3 status in the United States, is not subject to the annual E-3 numerical limit, provided it is established to the satisfaction of the consular officer that there has been uninterrupted continuity of employment. "Uninterrupted continuity of employment" means that the applicant has worked, and continues to work, for the U.S.-based employer who

submitted the original Labor Condition Application (LCA) and offer of employment. To ensure that such applicants are not counted against any subsequent numerical limit, returning E-3 principals will be identified by the visa code "E-3R" (with "R" representing the status of "returning").

c. To ensure that the spouse and children of E-3 principals are not counted against the numerical limit, they will be identified by the visa code "E-3D" (with "D" representing the status of "dependent").

d. At the end of each fiscal year, any unused E-3 numbers are forfeited; such visa numbers do not carry over to the next fiscal year.

e. The Department of State will keep count of the number of E-3 visas issued, and of changes of status to E-3 in the United States as reported by the Department of Homeland Security (DHS). If it appears that the 10,500 annual numerical *limits* will be reached in any fiscal year, the Department of State will instruct posts to cease E-3 issuances for that fiscal year.

9 FAM 41.51 N16.9 Validity of Issued Visa

(CT:VISA-771; 10-03-2005)

The validity of the visa should not exceed the validity period of the LCA. The Department of State and DHS have agreed to a 24-month maximum validity period for E-3 visas.

9 FAM 41.51 N16.10 Initial Authorized Period of Stay for E-3 Applicants

(CT:VISA-771; 10-03-2005)

E-3 applicants are admitted for a two-year period renewable indefinitely, provided the alien is able to demonstrate that he or she does not intend to remain or work permanently in the United States.

9 FAM 41.51 N16.11 E-3 Fees

(CT:VISA-771; 10-03-2005)

Other than the normal visa-related Machine Readable Visa (MRV) fees, there is no other fee associated with the issuance of an E-3 visa.

9 FAM 41.51 N16.12 Reports of Cancelled or Revoked E-3 Visas

(CT:VISA-1328; 09-30-2009)

In the event an E-3 visa is cancelled or revoked prior to the applicant's entry into the United States, a report should be sent to *CA/*VO/F/I explaining the circumstances attendant to the non-use of the E-3 number. In cases where the E-3 number has not *been* used, it will be added back into the remaining pool of unused E-3 visa numbers for that fiscal year.

9 FAM 41.51 N16.13 Annotation of E-3 Visas

(CT:VISA-771; 10-03-2005)

Annotate E-3 visas with the name of the employer, and the LCA's issuance date and ETA case number (appears on the signature line at the bottom of page 3 of the Form ETA-9035).

9 FAM 41.51 N16.14 Part-Time Employment by E-3 Applicants

(CT:VISA-790; 01-19-2006)

An E-3 worker may work full or part-time and remain in status based upon the attestations made on the LCA. Section C.4 on the LCA provides the option to request part time employment and DOL approves LCAs for part-time employment. Although there isn't anything specifically stated in the law/regulation about full-time employment for E-3s, you will need to evaluate the public charge ramifications for any E-3 applicant planning on coming to the United States as a part-time employee.

9 FAM 41.51 N17 SPOUSE AND CHILDREN OF E VISA ALIENS

9 FAM 41.51 N17.1 Spouse and Children of E Visa Aliens Entitled to Derivative Status

(CT:VISA-771; 10-03-2005)

The spouse and children of an E visa alien accompanying or following to join the principal alien are entitled to derivative status in the same classification as the principal alien.

9 FAM 41.51 N17.2 Spouse and Children of E-3 Aliens Not Subject to Numerical Limitation

(CT:VISA-771; 10-03-2005)

The spouse and children of E-3 principals are classifiable as E-3's, using the

visa code E-3D. They are not counted against the 10,500 annual numerical limitation described at INA 214(g)(11)(B).

9 FAM 41.51 N18 EMPLOYMENT BY SPOUSE OF E VISA ALIENS

(CT:VISA-771; 10-03-2005)

INA 214(e)(6) permits the spouse (but not other dependents) of a principal E nonimmigrant to engage in employment in the United States. The spouse of a qualified E nonimmigrant may, upon admission to the United States, apply with the DHS for an employment authorization document, which an employer could use to verify the spouse's employment eligibility. Such spousal employment may be in a position other than a specialty occupation.

9 FAM 41.51 N19 SPECIAL NOTE ABOUT H-1B PETITIONS

(CT:VISA-1328; 09-30-2009)

When the H-1B numerical cap is reached before the end of the fiscal year, it is likely that there will be numerous Australian H-1B applicants who will have approved Labor Condition Application's (LCA) but whose petitions for H-1B status inevitably will be returned unapproved by the DHS for lack of an available H-1B visa number. Currently, posts are not permitted to accept LCAs approved based upon H-1B-related offers of employment. Rather, the United States employer must submit a new LCA request to DOL and receive a separate E-3-based LCA approval for any employee possessing a previously approved H-1B-based LCA.