The E-2 Treaty Investor NIV is a Very Narrow Bridge to an EB-5 Greencard

By Joseph P. Whalen (August 4, 2014)

I. *Introduction to the E-2 Nonimmigrant Visa*

The nonimmigrant visa (NIV) pathway to lawful permanent resident (LPR) status can be a clear possibility in ***some*** cases. It depends on what kind of NIV one possesses to determine which way to proceed, if at all possible. For an immediate relative (IR) of a United States citizen (USC), even a B-2 "Tourist Visa" can be a stepping stone. This is extremely well known to Consular Officers and that is why they may give some folks a **really** hard time or just flat out deny them over and over again. Certain NIVs carry with them a "dual intent" found in the statute which allows one to have a clear intent to become an LPR but that fact alone will not be used as a reason to deny the NIV. In particular and best know are the "H" specialty occupation worker and "L" intracompany transferee classifications, *and their family members*, which are very frequently stepping stones to employment-based (EB) immigrant visas. The "V" and "K" classifications are also express exceptions to immigrant intent being a "no-no" but in the realm of family-based (FB) visas which is beyond the reach of this essay.

The "E" NIV is defined in the statute as follows:

> (E) 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;
>
> > (i) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national;
> > (ii) 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; or
> > (iii) solely to perform services in a specialty occupation in the United States if the alien is a national of the Commonwealth of Australia and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1)[1] of this title … [8 U.S.C.]…; [Underlining added for emphasis]

INA § 101(a)(15)(E) [8 U.S.C. § 1101(a)(15)(E)].

In the present discussion, I am solely addressing the E-2, Treaty Investor NIV classification specifically defined in INA § 101(a)(15)(E)(ii) [8 U.S.C. § 1101(a)(15)

[1] 8 U.S.C. § 1182 is equivalent to INA § 212 General classes of aliens ineligible to receive visas and ineligible for admission; waivers of inadmissibility.

(E)(ii)] which is highlighted above. That classification is further addressed in the implementing regulations. Of particular note is the following:

> (e) *Treaty traders and investors*—
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> (2) *Treaty investor.* An alien, if otherwise admissible, may be classified as a nonimmigrant treaty investor (E-2) under the provision of section 101(a)(15)(E)(ii) of the Act if the alien:
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> > (i) Has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living;
> > (ii) Is seeking entry solely to develop and direct the enterprise; and
> > (iii) Intends to depart the United States upon the expiration or termination of treaty investor (E-2) status.
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> * * * * *
>
> (5) *Nonimmigrant intent.* An alien classified under section 101(a)(15)(E) of the Act shall maintain an intention to depart the United States upon the expiration or termination of E-1 or E-2 status. However, an application for initial admission, change of status, or extension of stay in E classification may not be denied solely on the basis of ……a filed or approved immigrant visa preference petition. [Emphasis added]

8 CFR § 214.2 Special requirements for admission, extension, and maintenance of status.

II. *Introduction to the EB-5 Immigrant Visa*

The journey to obtain an immigrant investor visa or the fifth-preference employment-based visa, better known as "EB-5", starts with the filing of an **immigrant visa preference petition**, specifically USCIS Form *I-526, Immigrant Petition by Alien Entrepreneur*. The goal in filing that I-526 is to obtain the acknowledgement from USCIS that the potential immigrant investor meets the bare minimum statutory requirements in order to be classified as an EB-5 immigrant investor. Such an approved petition does not provide any tangible immigration benefit. It merely provide a classification label and a priority date for later visa issuance or adjustment of status purposes, if otherwise eligible, and deemed admissible as an immigrant to the United States. The statute describes the **employment creation** immigrant as follows, at INA § 203(b)(5) [8 U.S.C. § 1153(b)(5)]:

> **(5) Employment creation** *[*Attorney General has been replaced by Secretary of DHS]*
>
> **(A) In general**
> Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including a limited partnership)—
> **(i)** in which such alien has invested (after November 29, 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
> **(ii)** which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

(B) Set-aside for targeted employment areas

(i) In general

Not less than 3,000 of the visas made available under this paragraph in each fiscal year shall be reserved for qualified immigrants who invest in a new commercial enterprise described in subparagraph (A) which will create employment in a targeted employment area.

(ii) "Targeted employment area" defined

In this paragraph, the term "targeted employment area" means, at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).

(iii) "Rural area" defined

In this paragraph, the term "rural area" means any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).

(C) Amount of capital required

(i) In general

Except as otherwise provided in this subparagraph, the amount of capital required under subparagraph (A) shall be $1,000,000. The **Attorney General*, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

(ii) Adjustment for targeted employment areas

The *Attorney General* may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than ½ of) the amount specified in clause (i).

(iii) Adjustment for high employment areas

In the case of an investment made in a part of a metropolitan statistical area that at the time of the investment—

(I) is not a targeted employment area, and

(II) is an area with an unemployment rate significantly below the national average unemployment rate, the *Attorney General* may specify an amount of capital required under subparagraph (A) that is greater than (but not greater than 3 times) the amount specified in clause (i).

(D) Full-time employment defined

In this paragraph, the term "full-time employment" means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

[Underlining added for emphasis]

From the statute we can see that the bare-bones minimum is to demonstrate having the required capital and showing that the minimum number of jobs has been created or the alien's efforts "will …. create full-time employment for not fewer than 10… [U.S. workers]…authorized to work in the United States…" If 10 jobs have not yet been created, then, out of simple necessity, a plan to create them is to be presented. That practical notion was made mandatory through regulations which were reinforced and explained in the 1998 AAO Precedent Decision: *Matter of Ho*, *infra*. In *Ho*, the AAO described the essential elements for an acceptable EB-5 business plan.

In the next portion of this essay, I will compare and contrast some of the common similar and differing elements and eligibility criteria between the **immigrant** *entrepreneur* **or** *investor* **visa** and **nonimmigrant** *investor* **visa**. Then the remainder of this essay will discuss how an E-2 treaty investor might need to proceed in order to eventually qualify to apply for the immigrant version of the entrepreneur or investor "employment creation" EB-5 visa. It may be interesting for the reader to also consider the differences between an investor and an entrepreneur. They are truly NOT synonymous in the normal, ordinary, everyday use and are clearly even more divergent when viewed through the "looking-glass" that is immigration law.

III. *Comparing and Contrasting Investor Eligibility Criteria*

Whether as an immigrant or nonimmigrant, all investments demand an infusion of "clean money"[2]. The E-2 investor is required to demonstrate that (s)he "*[h]as invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living…*" 8 CFR § 214.2(e)(2)(i). The EB-5 investor, on the other hand, is required to demonstrate that (s)he "*…has invested or is actively in the process of investing lawfully obtained capital in a new commercial enterprise in the United States which will create full-time positions for not fewer than 10 qualifying employees. ….*" 8 CFR § 204.6(j). Let's dissect those two basic statements. They are similar but distinct as you will see.

[2] Safeguards are in-place to prevent E-2 or EB-5 investments to be used to launder criminal proceeds or money associated with any kind of fraudulent and/or unsavory activity ("dirty money" or "tainted money").

E-2 Nonimmigrant Investor	**EB-5 Immigrant Investor**
Invest a "substantial" amount of capital…..	"Invest" a minimum prescribed amount of "lawfully obtained" "capital"
In a *bona fide* enterprise……	In a "new commercial enterprise" in the United States
Distinct from a *relatively* small amount in a *marginal* enterprise solely for the purpose of earning a living.	Which will create "full-time" positions for not fewer than 10 "qualifying employees".
Develop and direct the operations of an enterprise.	Engage in a "new commercial enterprise" (including a limited partnership).

The differences may or may not jump out at you as you read about ***those two*** *classifications* from the statutes and regulations shown above this table, but they are substantially different as will become clearer. This is especially true when it comes to **evidence** that must be produced. If the reader wishes to devote more time to the differences, I suggest seeking out the definitions to some of the terms used in the statutes, the implementing regulations, 9 FAM, EB-5 Precedents, or better yet--all of them, especially for the terms in quotation marks in the above table. There is only one *generally* "defined" term for the E-2 treaty investor but many more for the EB-5 classification and *what is shown here* is only the tip of this iceberg. I will not spend too much time on that aspect in this essay as it is meant only as a general introduction.

The E-2 investor most often deals initially and primarily with the U.S. Department of State (DOS or State Department) at a Consulate or Embassy in their home country and as such must provide evidence as laid out in the Foreign Affairs Manual (FAM), as opposed to the USCIS regulations, specifically 9 FAM 41.51[3] and its accompanying Notes[4] are what control the vast majority of E-2 processing. The State Department regulations are found at 22 CFR Subpart F—Business and Media Visas §

[3] SEE: http://www.state.gov/documents/organization/87219.pdf
[4] SEE: http://www.state.gov/documents/organization/87220.pdf

41.51, entitled "Treaty trader, treaty investor, or treaty alien in a specialty occupation".

The E-2 Treaty Investor is specifically addressed in 22 CFR § 41.51:

> (b) *Treaty investor*—
>
> (1) *Classification.* An alien is classifiable as a nonimmigrant treaty investor (E-2) if the consular officer is satisfied that the alien qualifies under the provisions of INA 101(a)(15)(E)(ii) and that the alien:
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> (i) Has invested or is actively in the process of investing a substantial amount of capital in bona fide enterprise in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living; and
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> (ii) Is seeking entry solely to develop and direct the enterprise; and
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> (iii) Intends to depart from the United States upon the termination of E'2 status.
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> (2) *Employee of treaty investor*. An alien employee of a treaty investor may be classified E-2 if the employee is in or is coming to the United States to engage in duties of an executive or supervisory character, or, if employed in a lesser capacity, the employee has special qualifications that make the services to be rendered essential to the efficient operation of the enterprise. The employer must be:
>
> (i) A person having the nationality of the treaty country, who is maintaining the status of treaty investor if in the United States or, if not in the United States, who would be classifiable as a treaty investor; or
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> (ii) An organization at least 50% owned by persons having the nationality of the treaty country who are maintaining nonimmigrant treaty investor status if residing in the United States or, if not residing in the United States, who would be classifiable as treaty investors.
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> (3) *Spouse and children of treaty investor.* The spouse and children of a treaty investor accompanying or following to join the principal alien are entitled to the same classification as the principal alien. The nationality of a spouse or child of a treaty investor is not material to the classification of the spouse or child under the provisions of INA 101(a)(15)(E).
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> (4) *Representative of foreign information media.* Representatives of foreign information media shall first be considered for possible classification as nonimmigrants under the provisions of INA 101(a)(15)(I), before consideration is given to their possible classification as nonimmigrants under the provisions of INA 101(a)(15)(E) and of this section.
>
> (5) *Treaty country.* A treaty country is for purposes of this section a foreign state with which a qualifying Treaty of Friendship, Commerce, and Navigation or its equivalent exists with the United States. A treaty country includes a foreign state that is accorded treaty visa privileges under INA 101(a)(15)(E) by specific legislation (other than the INA).
>
> (6) *Nationality of the treaty country.* The authorities of the foreign state of which the alien claims nationality determine the nationality of an individual treaty investor. In the case of an organization, ownership must be traced as best as is practicable to the individuals who ultimately own the organization.
>
> (7) *Investment*. Investment means the treaty investor's placing of capital, including funds and other assets, at risk in the commercial sense with the objective of generating a profit. The treaty investor must be in possession of and have control over the capital invested or being invested. The capital must be subject to partial or total loss if investment fortunes reverse. Such investment capital must be the investor's unsecured personal business capital or capital secured by personal assets. Capital in the process of being invested or that has been invested must be irrevocably committed to the enterprise. The alien has the burden of establishing such irrevocable commitment given to the particular circumstances of each case. The alien may use any legal mechanism available, such as by placing invested funds in **escrow**[5] pending visa issuance, that would not only **irrevocably**

[5] Legacy INS borrowed many concepts from the State Department's treatment of the *Treaty Investor* when writing the original EB-5 regulations*. The concept and use of escrow in EB-5 derives from here but was not specifically adopted in the EB-5 regulations. It does survive as a practical matter and is widely used in EB-5 investments.
See also: http://eb5info.com/system/documents/219/original/Original_INS_View_of_Employment_Creation_Immigrants.pdf?1334072298

commit funds to the enterprise but that might also extend some personal liability protection to the treaty investor.

(8) *Bona fide enterprise*. The enterprise must be a real and active commercial or entrepreneurial undertaking, producing some service or commodity for profit and must meet applicable legal requirements for doing business in the particular jurisdiction in the United States.

(9) *Substantial amount of capital*. A substantial amount of capital constitutes that amount that is:

(i)

(A) Substantial in the proportional sense, *i.e.*, in relationship to the total cost of either purchasing an established enterprise or creating the type of enterprise under consideration;

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

(C) Of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise.

(ii) Whether an amount of capital is substantial in the proportionality sense is understood in terms of an inverted sliding scale; *i.e.*, the lower the total cost of the enterprise, the higher, proportionately, the investment must be to meet these criteria.

(10) *Marginal enterprise*. 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.

(11) *Solely to develop and direct*. The business or individual treaty investor does or will develop and direct the enterprise by controlling the enterprise through ownership of at least 50% of the business, by possessing operational control through a managerial position or other corporate device, or by other means.

(12) *Executive or supervisory character*. The executive or supervisory element of the employee's position must be a principal and primary function of the position and not an incidental or collateral function. Executive and/or supervisory duties grant the employee ultimate control and responsibility for the enterprise's overall operation or a major component thereof.

(i) An executive position provides the employee great authority to determine policy of and direction for the enterprise.

(ii) A position primarily of supervisory character grants the employee supervisory responsibility for a significant proportion of an enterprise's operations and does not generally involve the direct supervision of low-level employees.

(13) *Special qualifications*. Special qualifications are those skills and/or aptitudes that an employee in a lesser capacity brings to a position or role that are essential to the successful or efficient operation of the enterprise.

(i) The essential nature of the alien's skills to the employing firm is determined by assessing the degree of proven expertise of the alien in the area of operations involved, the uniqueness of the specific skill or aptitude, the length of experience and/or training with the firm, the period of training or other experience necessary to perform effectively the projected duties, and the salary the special qualifications can command. The question of special skills and qualifications must be determined by assessing the circumstances on a case-by-case basis.

(ii) Whether the special qualifications are essential will be assessed in light of all circumstances at the time of each visa application on a case-by-case basis. A skill that is unique at one point may become commonplace at a later date. Skills required to start up an enterprise may no longer be essential after initial operations are complete and are running smoothly. Some skills are essential only in the short-term for the training of locally hired employees. Long-term essentiality might, however, be established in connection with continuous activities in such areas as product improvement, quality control, or the provision of a service not generally available in the United States.

(14) *Labor disputes*. Citizens of Canada or Mexico shall not be entitled to classification under this section if the Secretary of Homeland Security and the Secretary of Labor have certified that:

> (i) There is in progress a strike or lockout in the course of a labor dispute in the occupational classification at the place or intended place of employment; and
> (ii) The alien has failed to establish that the alien's entry will not affect adversely the settlement of the strike or lockout or the employment of any person who is involved in the strike or lockout.

INA § 101(a)(45) [8 U.S.C. § 1101(a)(45)] provides this vague statutory definition-

> The term "substantial" means, for purposes of paragraph (15)(E) with reference to trade or capital, such an amount of trade or capital as is established by the Secretary of State, after consultation with appropriate agencies of Government.

The "substantial amount" that must be invested; or "irrevocably committed" when one is still "actively in the process of investing", is a *relative amount* rather than a *specific amount*. There is no exact dollar amount stated as a minimum (or maximum) BUT the "relative" or "proportional" amount must be demonstrated to be realistic and appropriate to the business context involved in that particular case and above all else, be *reasonable*. *See also* 9 FAM 41.51 N10.1-N10.5.

In sharp contrast to the E-2 investor, the EB-5 investor has a mandated specific minimum investment amount. That amount is actually an amount first set by Congress in the Immigration Act of 1990 (IMMACT90). The minimum levels are stated at INA § 203(b)(5)(C)(i-ii) [8 U.S.C. § 1153(b)(5)(C)(i-iii)]. The statute gives the executive department in charge of implementing this program the authority to make adjustments to the minimum investment amount, through its regulations. INS and subsequently USCIS have not done so ***yet***. The EB-5 investment has a basic statutory (and a matching regulatory) one-million dollar threshold BUT in a specially defined "targeted employment area" (TEA) that amount is cut in half. While either type of investor (NIV or IV) is checked out as to the general lawfulness of funds invested, the EB-5 investor has more rigid standards. In other words, the immigrant investor's "hoops-to-jump-through" are more numerous and narrower (*so extremely narrow that sometimes those*

hoops may feel more like nooses). In addition to the tighter scrutiny, the immigrant investor must prove that all the funds are his or her own personal funds; no unsecured loan proceeds count; and retained earnings from the "new commercial enterprise" don't count either. Also, while "gifted" funds are allowed for nonimmigrant and immigrant investors, the burden to demonstrate the path and source of ***those "gifted" funds*** is shifted to the "gift-giver" for EB-5 visa purposes[6] but the FAM does not explicitly impose the same **stringent** restriction on the E-2 investor. The nonimmigrant investor may include ***unsecured loan proceeds*** as part of their initial investment and may use ***retained earnings*** to grow their business, it merely won't count for EB-5 immigrant visa classification purposes. These two points are probably the worst roadblocks encountered when an E-2 wants to pursue an EB-5 greencard. Even when there are no issues about the source of the E-2 investors funds, the paper trail may not have been sufficiently documented from day one. That situation might or might not be insurmountable for the E-2 seeking an EB-5 visa. It will be case specific as to which "evidence" can be gathered during the "*EB-5 paper chase*" along the "*E-2 paper trail*".

Another potential pitfall for the E-2 who later decides to try for an EB-5 greencard is the purchase of an existing business. This approach is allowed for the E-2 and is unfettered. Things are not at all "unfettered" for the EB-5 immigrant entrepreneur or investor in an existing business. The EB-5 visa has a cut-off date for the establishment of any existing business being purchased for it to meet the definition of a "new" "commercial enterprise". If the established business qualifies as a "troubled business" (as defined) then the existing jobs can be included in the required 10 jobs to be created as long as **all** the **existing jobs** are **preserved** and if that total is less than

[6] See 8 CFR § 204.6(e) for definitions of *Capital* and *Invest* and see *Matter of Soffici*, 22 I&N Dec. 158 (AAO 1998).

10 then additional positions must be added in order to bring the total up to 10 per EB-5 investor. If the pre-existing business is not "troubled" then, as long as it was established after the cut-off date, then it can be either **expanded** by 40 percent in total number of jobs, *Soffici, infra*, or in total net worth as calculated by *Generally Accepted Accounting Principles* (GAAP), or restructured. "A petitioner engaging in the *reorganization or restructuring of a pre-existing business* may not cause a net loss of employment." *See Hsiung, infra*. As per 8 CFR § 204.6(h)"The establishment of a new commercial enterprise may consist of … (2) [t]he purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results…" ***[Emphases added.]***

The AAO attempted to explain the concept of "restructuring" in one of the 1998 Precedent Decisions in this manner:

> "Although Ames Management was incorporated in 1997, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. The Howard Johnson's Motor Lodge purchased by Ames Management had been in operation for approximately 24 years and was an ongoing business at the time of purchase; Ames Management, doing business as Howard Johnson Hotel, has merely replaced the former owner.
>
> The petitioner has provided no documentation whatsoever to establish that the Howard Johnson's was a "troubled business," as defined above, prior to his purchase. He also does not claim that he will expand the hotel by 40 percent as provided in 8 C.F.R. § 204.6(h)(3). The petitioner has not shown the degree of restructuring and reorganization required by 8 C.F.R. § 204.6(h)(2); the hotel has always been a Howard Johnson and is still a Howard Johnson today. A few cosmetic changes to the decor and a new marketing strategy for success do not constitute the kind of restructuring contemplated by the regulations, nor does a simple change in ownership. Therefore, it cannot be concluded that the petitioner has created a new commercial enterprise." *Soffici* at 166.

The AAO EB-5 Precedent Decisions of 1998:
Matter of Ho, 22 I&N Dec.206 (AAO 1998)
Matter of Hsiung, 22 I&N Dec.201 (AAO 1998)
Matter of Izummi, 22 I&N Dec.169(AAO 1998)
Matter of Soffici, 22 I&N Dec.158 (AAO 1998)

Each of the above Administrative Precedent Decisions stands for certain key concepts and makes a valiant effort to explain them. Terrible mistakes were made in the investments discussed in these cases. Please study the past mistakes of others in order to avoid repeating them. While most people involved in EB-5 are new, EB-5 itself is not new. EB-5 has a history! Please read the above linked I&N Decisions. Use caution in EB-5.

IV. *Case Example of a Failed Conversion from E-2 to EB-5*

A recent AAO non-precedent found at: JUL022014_01B7203.pdf features an E-2 treaty investor who was unable to qualify for an EB-5 visa due to some issues relating to that alien investor's path and source of funds and an unlikely ability for the business to create sufficient jobs for EB-5 purposes. The **key document** for an EB-5 Direct Investment, *which incidentally, means herein that it is not in any way affiliated with an approved USCIS designated Regional Center*, is the ***Matter of Ho*-compliant business plan**. The "Direct" investor cannot count any indirect or induced jobs and must establish a true employer-employee relationship with ten (10) *qualified employees*. The fact that no indirect or induced jobs count for a "Direct Investment" means two things to me.

First, unless completed for some specific legitimate business reason, such as supporting investment in the venture in the first place or to draw in a partner, then **no economic impact report** is needed (USCIS probably won't even look at it because it is irrelevant to meeting the EB-5 job creation requirements).

Secondly, it would be **wise to use E-Verify** in the "new commercial enterprise" which is most likely also the "job-creating enterprise"[7] because USCIS runs E-Verify and will likely check all EB-5 direct employees anyway. It should be remembered that for the EB-5 classification, many more terms are specifically defined in both the statute and regulations and explained further via Precedents. Some of those very few defined terms used in the E-2 context are not defined the same as for EB-5 if defined at all for the E-2 nonimmigrant investors. The DOS regulations "discuss" rather than "define".

While common sense tells us that if one is investing in a business that they will have a plan for that business, the nonimmigrant investor does not have to have a formal written business plan and even if they do, there are no specific demands as to its format or content. DOS' 9 FAM 41.51 N11 only calls for the enterprise to "not" be ***marginal***. ***Marginal***, in this context, means that the business would only be enough for the investor to earn a minimal (or even "comfortable") living for self and family. That enterprise does not have to be a "goldmine" or an "overnight success" either. In general, the E-2 enterprise needs to show promise of success within five years (as a *rule of thumb*). EB-5 investors, conversely, get a two-year conditional period to create and then show the required job creation and proper expenditure of the full minimum required capital investment amount. The E-2 investor is allowed to have much more of their money sitting idle or rather "standing-by" in a bank account or even a certificate of deposit (CD). The idleness of funds in the EB-5 context was thoroughly addressed in the U.S. District Court case of *Al-Humaid v. Roark, et. al.*, No. 3:09-CV-982-L (N.D. TX (Dallas) January 26, 2010). I suggest reading that case closely.

[7] Some folks are touting the "Loan Model" in the EB-5 Direct Investment realm, however, I don't see it as a viable option; and even if someone could make it acceptable, I think it is impractical and too difficult to make it work.

The immigrant investor has another dimension to consider. The EB-5 visa is codified in the Immigration and Nationality Act (INA) as a preference visa category. That category or classification is defined in INA § 203(b)(5) [8 U.S.C. § 1153(b)(5)] which is entitled "Employment Creation". If the immigrant investor has not yet created a minimum of ten (10) permanent full-time jobs for qualifying work authorized U.S. workers at the time of filing their I-526 petition, then they must submit a *comprehensive, detailed*, and *credible* formal **Business Plan** that meets the requirements spelled out in the Administrative Precedent Decision: *Matter of Ho*, 22 I&N Dec. 206 (AAO 1998). Such an endeavor cannot be *barely above* "marginal" which is the minimum for an E-2 enterprise; because it simply will never be accepted as an EB-5 "new commercial enterprise" (NCE). USCIS knows that basic fact and would never approve any I-526 petition that relied on a substandard and/or highly speculative business plan to create a marginal commercial enterprise. These and other considerations that don't apply to the E-2 investor are difficult to remedy late in the game. That means that IF an E-2 nonimmigrant investor even has ***a thought*** *of ever seeking an EB-5 visa* ***in their head***; they will have to take special and/or corrective actions very early on. There are many service providers out there that will offer the E-2 investor help in planning for the EB-5 conversion. I am one of them, call me or e-mail a detailed message. In closing, please heed these words: **"E-2 Businesses do not "automatically" convert to EB-5 qualifying investments."** (That is a direct quote, of me, from me to you!). It takes much advance planning, data tracking, evidence collection, and some unorthodox actions in order to be prepared to seek an EB-5 visa in the future.

That's my two cents, for now!

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DISCLAIMER: *Work is performed by a non-attorney independent business consultant and de facto paralegal. It is the client's responsibility to have any and all non-attorney work products checked by an attorney.* I provide ***highly-individualized training*** based on consultation with my clients. I serve Regional Center Principals and their counsel, potential EB-5 investors, immigration attorneys, and project developers. I am not an attorney myself although I have trained numerous attorneys and INS/USCIS adjudicators in complex issues within immigration and nationality law when I was an adjudicator there for many years. I do not prepare forms, write business plans, or create economic analyses. **I do review them for clients prior to submission and suggest corrections and/or modifications to run by your attorney and investment advisor.**

NOTE: I have over a decade of experience as an adjudicator for INS and USCIS and direct EB-5 Regional Center Adjudications experience having been instrumental in reviving, greatly enhancing, and expanding the EB-5 Regional Center Program for USCIS.

NAICS Code: 611430 Professional and Management Development Training

2012 NAICS Definition

611430 Professional and Management Development Training

This industry comprises establishments primarily engaged in offering an array of short duration courses and seminars for management and professional development. Training for career development may be provided directly to individuals or through employers' training programs; and courses may be customized or modified to meet the special needs of customers. Instruction may be provided in diverse settings, such as the establishment's or client's training facilities, educational institutions, the workplace, or the home, and through diverse means, such as correspondence, television, the Internet, or other electronic and distance-learning methods. The training provided by these establishments may include the use of simulators and simulation methods.