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E Visas: An Analysis of the Legislative History and Proposed Governing Regulations

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E VISAS: AN ANALYSIS OF THE LEGISLATIVE HISTORY AND PROPOSED GOVERNING REGULATIONS

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I. INTRODUCTION

Nationals of countries that have either a Friendship, Commerce, and Navigation [hereinafter FCN] treaty or a Bilateral Investment Treaty [hereinafter BIT] with the United States may enter the United States as nonimmigrant treaty aliens.[1] Treaty aliens are categorized as either treaty-traders (E-1 visa) or treaty-

1. GITTEL GORDON & CHARLES GORDON, IMMIGRATION LAW AND PROCEDURE § 116.02(2)(b) (1993).

investors (E-2 visa), and may also include employees of firms that are owned by nationals of a treaty country. This article describes the eligibility for an E-1 or E-2 visa and the circumstances under which such visas are granted. It also explains the pertinent language and legislative history of the Immigration and Nationality Act of 1952 [hereinafter INA][2] and the amendments in the Immigration Act of 1990 [hereinafter IMMACT 90].[3]

In response to the foregoing amendments, the Department of State [hereinafter Department] and Immigration and Naturalization Service [hereinafter Service] have proposed new regulations. Significant differences in the proposed regulations revolve around definitions of the terms "essential skill employee" and "substantial investment." This article analyzes, compares, and contrasts these regulations.

II. GENERAL BACKGROUND

The nonimmigrant status most similar to the classification given an immigrant is the status associated with an E visa. If an investor or person is interested in trading with his home country, and for some reason, including the immigration quota system,[4] cannot obtain a "green card," an E visa may be his or her best option,[5] since it allows an alien to engage in trade or qualified investment. Also, an E visa's duration may be indefinite, so long as the alien intends to leave the United States once the visa's status

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2. Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 (1952).

3. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

4. The quota system imposes annual ceilings on the number of visas issued in a given visa category. *See generally* 2 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 31.01(1) (1993).

5. *Cf.* Kim v. District Director, 586 F.2d 713, 717 (9th Cir. 1978). The interest of the United States, when nonimmigrant treaty investor status is claimed, is in seeing that quota restrictions are not being circumvented.

has terminated. Thus, the treaty alien, unlike most nonimmigrant visa holders, is not required to maintain a residence abroad.[6] The E visa also allows a treaty alien's spouse and children (unmarried and under the age of 21) to join the alien in the United States and to work without the likelihood of any penalty.[7]

E-Visa status can be obtained in either of two ways: 1) by applying to the U.S. consulate abroad or 2) by requesting that the Service grant either a change or a renewal of status. The State Department and the Service both refer to Volume 9 of the Department's FOREIGN AFFAIRS MANUAL [hereinafter FAM], a sourcebook for the interpretation of the regulations relating to E visas. Although the Service has hinted that it may publish its own treaty alien regulations,[8] to date, it continues to defer to the FAM when adjudicating applications regarding E visas.[9]

III. LEGISLATIVE HISTORY

The legislative history of the E visa can be traced to the first federal measure to impose immigration controls, i.e., the infamous 1875 Chinese Exclusion Act. This Act, which was followed by several others, reflected the nation's opposition to the immigration

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6. Lauvik v. INS, 910 F.2d 658, 661 (9th Cir. 1990).

7. *See generally* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK, A COMPREHENSIVE OUTLINE AND REFERENCE TOOL 413-24 (5th ed. 1995) (a comprehensive reference to E visas).

8. Because the Service's policy on treaty aliens is not clearly described in its current regulations, field officers must seek guidance from FAM when adjudicating applications for treaty alien status. Many field offices have requested that the Service publish its own treaty alien regulations." 8 C.F.R. § 214 (1991). [hereinafter Service Proposed Regulations].

9. *See also* Matter of Walsh and Pollard, Nos. A26491503, A26491504, 1988 BIA LEXIS 55 (B.I.A. 1988) (holding that the Court "cannot give weight to these alleged policies of the Service in the face of the [Department] regulations and the Service's history of acquiescence with them").

of Orientals, particularly Chinese immigrants. The 1880 Treaty between the United States and China[10] allowed the United Sates to regulate and limit Chinese immigration and eventually led to the earliest use of visa requirements for entry into the United States.

Chinese merchants were considered nonimmigrants and were one of the few groups exempted under the terms of the 1880 treaty. The term "treaty merchant" owes its name and some of its unique characteristics to the historical developments of the Chinese merchants' status. Under the 1880 treaty, Chinese merchants obtained merchant status in China, not after entry into the United States.[11]

The 1924 Immigration Act codified the treaty merchant category. The treaty merchant section was renamed "treaty trader" and codified into INA virtually intact. The INA also added the treaty investor status.[12]

The INA, in pertinent part, states:

> [A]n 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 [may enter] (i) solely to carry on substantial trade, 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

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10. Immigration Treaty, Nov. 17, 1880, China-US, *reprinted in* 1 WILLIAM MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS 1776-1909, at 237 (1910).

11. *Id.*

12. *See generally* GORDON & MAILMAN, *supra* note 4, at § 17.02(2), which presents a concise and informative discussion on the development of early immigration law.

> he is actively in the process of investing, a substantial amount of capital.[13]

Section 204(a) of IMMACT 90 amended the aforementioned section by adding, after "substantial trade" in subsection (i), "including trade in services or trade in technology." Section 204(C)(45) states: "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." In response to these amendments, the Service and Department published their regulations in September 1991.[14] The current regulation regarding eligibility for an E-1 visa also requires that substantial trade already exists between the United States and the alien investor's home country. To date, however, no final regulation has been decided upon.

IV. TREATY

A. *The treaty alien classification is based on bilateral, reciprocal obligations, and is designed to promote U.S. global economic interests.*

The most important feature of the treaty alien classification is that it is based on bilateral relationships. The INA legislative history states: "The trade treaties which have been concluded provide generally for the reciprocal entry, travel, and residence of nationals of the contracting nations to carry on commerce and trade, and that the nationals of each nation be given the same privileges as

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

14. 8 C.F.R. § 214.2(e) (1995).

nationals of the most favored nations."[15] There is an exclusive and reciprocal relationship between signatory nations. Only citizens of the treaty nations, their spouses, and their children under 21 years of age are eligible for the E-1 or E-2 visas.[16]

Over the years, these treaties have been extremely helpful to U.S. diplomacy and international trade, and "since the eighteenth century a significant component of U.S. foreign economic policy has been the conclusion of [FCN treaties]. Those treaties established favorable terms for mutual travel, trade, shipping, and investment with other countries."[17] E visa status is, therefore, the type of privilege that the United States offers to expand its own foreign trade and investment policy.

Article 7 of the 1953 U.S.-Japan FCN Treaty illustrates a typical provision:

> Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing,

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15. S. REP. NO. 1515, 81st Cong., 2nd Sess. 7 (1950), *reprinted in* 1 OSCAR M. TRELLES, II & JAMES F. BAILEY, III, IMMIGRATION AND NATIONALITY ACTS: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 562 (1979).

16. There seems to be a significant change in the Service's proposed regulation regarding the employment of E visa family members. "The spouse and dependent child of an E-1/E-2 treaty alien are not authorized to work in the U.S. [U]nauthorized employment is in violation of his or her nonimmigrant treaty alien status . . . ." Service Proposed Regulations, *supra* note 8, at 42,957. The Department, however, has given the spouse and dependent child the same status as the treaty alien.

17. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 81 (1991).

> a substantial amount of capital; and (c) for other purposes subject to the laws relating to the entry and sojourn of aliens.[18]

A paramount feature of FCN and BIT treaties is the issue of reciprocity. When an issue such as "substantial investment or trade" has been discussed in legislation or regulation, one of the factors that is either explicitly or implicitly mentioned is that the treaty has created or will impose certain obligations on the signatory nations through reciprocity provisions. For example, during Senate hearings on the then proposed INA, a statement by the National Foreign Trade Council [hereinafter NFTC] stated, in relevant part, that:

> [t]he NFTC believes that granting the right of entry into this country of these nonimmigrant aliens is unobjectionable, and that securing this right of entry for American nationals of this type into foreign countries will be consistent with participation by American private industry . . . and definitely advantageous generally to the expansion of American commercial interests abroad.[19]

In light of the foregoing, a flexible regulatory approach not only would allow treaty signatories greater latitude, but also would be closer to the legislative intent of INA and IMMACT 90.

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18. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, art. VII, 4 U.S.T. 2063, 2069.

19. *Revision of Immigration, Naturalization, and Nationality Laws: Hearings on S.970-3 Before the Senate Comm. on the Judiciary,* 82nd Cong., 1st Sess. 317 (1952) (Statement of Charles R. Carroll, on Behalf of the National Foreign Trade Council, NFTC [hereinafter NFTC]).

B. *When Congress delegated the role of interpreting the term "substantial" to the Department of State, it acknowledged that the Department of State's regulations should be the primary source of interpreting the Immigration and Nationality Act of 1952 and the Immigration Act of 1990.*

The United States entered into FCN treaties to foster better relations with nations all over the world.[20] During the late 1980's, the United States signed eight BIT treaties,[21] and, consistent with the Department's past role, namely, taking the lead in interpreting INA and IMMACT 90, Congress explicitly charged the Department with defining the terms "substantial trade and investment," thus directly acknowledging the Department's role in defining the E visas. Consequently, the Department's proposed regulation, not the Service's, should be considered the primary source of the interpretation and implementation of IMMACT 90.

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20. A treaty, under international law, creates international obligations with corresponding duties of compliance and remedies, including rights of retaliation, in the event of a breach. Under U.S. domestic laws, treaties are those agreements that are concluded by the President with the advice and consent, or approval of, two-thirds of the Senate. U.S. CONST. art. II, § 2, cl. 2. The President may also conclude international agreements (Executive agreements) on the basis of an authorization by the Congress or on the basis of his independent constitutional authority, *e.g.*, his commander-in-chief power. Domestically, treaties approved by two-thirds of the Senate are the "law of the land." U.S. CONST. art. VI. They are directly enforceable in the courts. *See, e.g.*, Asakura v. City of Seattle, 265 U.S. 332 (1924). Moreover, the 1972 Case Act, 1 U.S.C. § 112(b), requires the Secretary of State to transmit to Congress, within sixty days, a copy of all international negotiations, including oral agreements.

21. For the most current list of BIT nations including Russia (not yet in effect), Slovakia, and Poland, see GORDON & GORDON, *supra* note 1, at § 116-6 - 116-8. The nationals of these countries are only eligible for E-2 visas. Also, when the Senate amended INA, it implicitly extended reciprocal treaty trader status to Australia and Sweden; *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

V. TREATY TRADER

A "treaty trader" is defined as an alien who is entitled to enter the United States solely to carry on trade under an existing FCN treaty. The trade itself must be international in nature, and goods and services must cross the borders of the treaty nations. Purchasing the treaty nation's goods from an importer and reselling them in the U.S. market does not qualify an individual as a treaty trader. A treaty trader must already be in the process of trading goods; mere intent to establish trade is insufficient. IMMACT 90 expanded the term "trade" to include services and the transfer of technology.

The term "substantial trade" is not exact. The Department, in its proposed regulation, "set[s] the parameters of its meaning rather than using a specific dollar amount or a number of trade actions to create a set standard for substantiality."[22] This position is very close to the Congressional intent. The INA legislative history states:

> [T]he word 'substantial' does not necessarily have reference to the monetary value of the transactions but to the volume of the trade. [P]roof of numerous transactions, although each is of small value, would establish the requisite continued course of international trade. Consequently, the money value of the transactions involved is only one of the indicia of bona fide treaty merchant status, to be taken in conjunction with other factors.[23]

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22. 56 Fed. Reg. 43565 (1991) (to be codified at 22 C.F.R. § 41.51) (proposed Sept. 3, 1991) [hereinafter Dep't proposals].

23. *Id.* at 45,365.

In proposing these factors, the Department incorporated the FAM guidelines on substantiality.[24] The elements include: 1) the continuous flow of goods or services; 2) involving a certain number of transactions (the Immigration Service's proposed regulation states at least 3 or more transactions); and 3) with the monetary value of the trade being a factor even though a "bright-line" test is not proposed.[25] Trade that generates enough income to support a treaty trader and his family would be considered substantial trade. This standard, however, will not satisfy the substantiality test for the treaty investor's investment income requirement.

A. *The Immigration and Naturalization Service's position mandating in-house job training for U.S. citizens for all minor skilled employee positions is too stringent; the Department of State's more flexible position is more in line with legislative intent.*

The E-1 or E-2 status is also available to employees of qualified firms engaged in substantial trade or investment in the United States. INA regulations provide a broad statement on the issue, in concluding that, "an alien entering the U.S. as a member or agent of a commercial concern in his own country . . . is entitled to treaty status."[26] During Senate hearings, the NFTC proposed an amendment which would have extended the treaty trader/investor status to persons who "perform administrative, confidential, or technical functions for an enterprise for the foreign state of which he is a national or for a domestic enterprise controlled by nationals of that foreign state."[27] Even though this proposed amendment,

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24. *Id.* at 43,568.

25. *Id.* at 43,567.

26. TRELLES & BAILEY, *supra* note 15, at 563.

27. NFTC, *supra* note 19, at 317.

which also sought to create an E-3 visa for employees, was not ratified, the current regulations adopted some of the essential ideas from that proposal.

The reasons given in favor of the adoption of that amendment provide insight into why the Department adopted parts of the defeated amendment in its regulation. Their reasons include: 1) U.S. companies' need to have essential U.S. citizens efficiently carry on their business abroad; 2) the availability of U.S. citizens to perform the needed tasks for the foreign trader or investor and the small risk of losing U.S. jobs; and 3) to allow U.S. treaty negotiators to secure employment for Americans at U.S. firms abroad.

The proposed regulations require that the employee's duties must be executive, supervisory, or managerial in nature, or, if of a minor capacity, have special qualifications that make the service to be rendered essential to the efficient operation of the enterprise.[28] Even though the regulation on managerial employees states that there are no "bright-line" tests, the treaty alien must nevertheless prove that the position has elements of supervisory functions with "ultimate control and responsibility for the firm's overall operations or a major component thereof."[29] The position must either be related to the management of personnel or products, or to policy. Factors considered by the Consular Officer or the Service Officer include: 1) job title; 2) location of position in the firm's organizational structure; 3) job duties; 4) degree of control over the company's overall operations or a major part of its operation; 5) number and skill of employees to be supervised; 6) salary and other compensation; and 7) experience as commensurate to position and salary.[30] Department regulations and Service regulations are

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28. Dep't proposals, *supra* note 22, at 43,568.

29. *Id.*

30. KURZBAN, *supra* note 7, at 338.

consistent on this issue; however, they differ on the issue of minor employees with an "essential skill."

A minor employee who is needed for the efficient operation of an enterprise must possess essential skills as determined by the following factors: proven expertise and experience; uniqueness of the skill; amount of experience and training with the company; period of training needed to qualify to perform such work; and salary.[31]

The Department's proposed regulation divides the minor employee with essential skills into two distinct categories. An alien whose unique skills are essential to the efficient operation of the business may stay in the United States indefinitely, because such skills are likely to remain unique and continue to be needed. An alien whose unique skills may be important to start a business, but which later become ordinary skills, may not stay indefinitely. Under proposed regulations, the alien employer is explicitly required to train U.S. workers to fill those positions.

There is no legislative history on this issue to determine Congressional intent. Treaty trader/investor visas, however, are dependent on the treaties' reciprocity clauses. As these types of treaties are renegotiated and/or reinterpreted according to the needs and goals of the contracting countries, the regulations related to these treaties evolve. While the Department has resisted bright-line tests in order to preserve flexibility in dealing with the treaty nations, proposed regulations expressly require employee training. A legitimate conclusion is that signatory nations may have demanded a similar request in their dealings with U.S. negotiators. Since the Department has a legal obligation to keep the Senate informed of treaty negotiations, and its decisions require Congressional approval, it follows that Congress has at least implicitly approved the Department's position on employee training.

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31. *Id.*

On the other hand, the Service's proposed regulations provide:

> [W]here a shortage of skilled U.S. workers has been verified . . . the employer has the responsibility to provide effective training to the U.S. workers in the relevant skills area. Applicants for extension of stay or change of status by an essential employee with special qualifications will be approved only if the employer is making an effort to train U.S. workers. The treaty company should provide in-house operational training . . . so that U.S. workers can replace the foreign employees within a reasonable time.[32]

This is a much broader and more demanding standard for a treaty applicant to satisfy. Essentially, the Service is requiring near guarantees of job training employment programs from treaty aliens.

INA and IMMACT 90 are silent about employment and job training programs. Instead, treaty aliens in the United States have been encouraged to foster international trade and stimulate local economies. The in-house job training requirement may, however, discourage treaty aliens' investment. Such a result violates the intent of FCN and BIT treaties, and cannot be in accord with Congressional intent. Moreover, since these treaties are based on reciprocity, U.S. companies abroad would be forced to reciprocate, making it more difficult for U.S. citizens to work abroad. The Department's regulation appears to be more in accord with the legislative intent and increasingly in line with the rest of the Act on issues such as "substantial investment."

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32. Service Proposed Regulations, *supra* note 8, at 42,956.

VI. INVESTMENT

In the treaty investor category (E-2), an alien must have either invested or be in the process of investing in the United States. The investment must be at risk, that is, in case of failure, the investor should stand to lose most or all of his or her money. If her or she has irrevocably invested capital in a business activity, that person is considered in the process of investing. While a personal loan is considered investment capital, a loan secured by a business is not. Finally, capital goods, already purchased inventory, lease deposits, etc. are all considered investments.[33]

The Department states that the purpose behind FCN and BIT treaties is to promote trade and investment and to stimulate the economies of the contracting nations. The treaty investor must therefore show that the investment has the potential to return an amount significantly greater than that necessary to earn a living. Thus, these types of investments must be for profit. Moreover, the alien must not be investing in a marginal enterprise.

A. *One of the goals of the Friendship, Commerce, and Navigation and/or Bilateral Investment Treaty is to stimulate local economies. Although the Department of State and the Immigration and Naturalization Service have similar rules against marginal investment, the Immigration and Naturalization Service's ban against self-employment by the treaty investor goes beyond the flexible standard embodied in the legislative intent of the Act.*

While it is true that many service industries can be established for much less than $100,000, an investor must not invest in a marginal enterprise solely to earn a living.[34] The factors considered in adjudicating a treaty investor's application include the

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33. KURZBAN, *supra* note 7, at 338-339.

34. Kim v. District Director, 586 F.2d 713 (9th Cir. 1978).

amount of income generated by the investment; the relation between the investment and the business's total value of the business; employment opportunities for U.S. workers; potential for growth of business; and the presence of significant income from other sources, which the alien may rely on for a living.[35] Yet the Service has stated that if an investment is deemed marginal, not even the potential for employing the low-waged, unskilled U.S. citizen will be enough to categorize the investment as substantial.[36]

The Department's and Service's proposed regulations generally agree on this issue, although the Service's standard is more stringent. The Service states that even if the investor shows that the business will employ U.S. citizens, the investor must show that he or she is not, and will not be, self-employed as a skilled or unskilled laborer.[37] This requirement seems to be contrary to the holding in *Lauvik v. INS*.[38] In *Lauvik*, an owner of a motel-trailer park listed his income as only $212 per week and was also performing some manual labor. The court held that the treaty investor was "primarily act[ing] to direct, manage, and protect his investment."[39] Moreover, the alien investor was not competing with unskilled U.S. workers in the market but with other similarly situated entrepreneurs. The court explained that a business owner might deliberately decide to take out a small sum of money in order to reinvest most of the profits back into the business for long-term purposes.[40]

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35. KURZBAN, *supra* note 7, at 341.

36. Service Proposed Regulations, *supra* note 8, at 42,955-56.

37. *Id.*

38. Lauvik v. INS, 910 F.2d 658 (9th Cir. 1990).

39. *Id.* at 661.

40. *Id.* at 662.

Considering the holding in *Lauvik*, the Service's additional requirements make it difficult to distinguish between "directing and developing" and merely "working" in the enterprise. The Department has tried to get around this problem by shifting the focus of the marginality test from the investor to the enterprise: "as the objective of this visa classification is to stimulate the economy, this requirement seeks to disqualify [the alien] who . . . merely ekes out a living."[41] However, "[i]f . . . the applicant cannot establish the capacity of the enterprise to generate such a return, then the alien must satisfy the consular officer that the business will have a significant positive economic impact, such as by generating employment."[42]

The treaty investor, by definition, must be coming to the United States solely to develop and direct a particular enterprise. This is a matter of nationality as well as control of the enterprise. Otherwise, others who are partners or shareholders will be in a position to dictate how the enterprise will be directed. According to the Department, this does not mean the applicant must always have a majority interest, since substantial interest and control can be achieved through holding stock proxies, possessing certain managerial responsibilities, or a combination of the above.[43]

Recent BIT treaties provide that a treaty investor may come to the United States not only to "develop and direct" an investment, but also to "establish," "administer," and "advise" investments.[44] Considering these additional factors, the Service's proposed regulation barring the treaty investor from self-employment is too restrictive.

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41. Dep't proposals, *supra* note 22, at 43,568.

42. *Id.*

43. *Id.*

44. KURZBAN, *supra* note 7, at 345.

B. ***Congress delegated the task of defining the term "substantial investment" to the Department of State, and, unlike the Immigration and Naturalization Service, the Department of State chose a flexible standard and a lower amount of investment. This enabled the United States to continue its strong position in treaty negotiations.***

The Department's proposed regulation states:

> The purpose and intent . . . of these treaties is to create and enhance a commercial relationship between the United States and the treaty partner. It is intended to be sufficiently flexible to encourage all entrepreneurs regardless of the size of the investment. To remain true to this spirit, the Department believes that the current definition should be retained with some modification.[45]

The size of an alien's investment is usually a sign of his or her commitment to the success of the business. Since the amount invested, however, will vary with the size of the enterprise, the Department has opted for a method involving relativity. This method, known as the "proportionality test," is also used by the Service's regulation in comparing two figures: first, the amount of qualified funds invested, and, second, the cost of an established business or, if a newly created business, the cost of its being established. An alien's investment percentage in a smaller business must be very high, while for a large business, "as if by use of an inverted sliding scale, the percentage [is] much less."[46]

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45. Dep't proposals, *supra* note 22, at 43,568.

46. *Id.* at 43,567.

	Total value of business or cost to start[47]	Minimum % of money required
DEP'T	$50,000 to $100,000	90 - 100%
	$500,000	65 - 75%
	$1,000,000	50 - 60%
	$10,000,000	30%
SERV	Less than $500,000	75%
	$500,000 to $3,000,000	50%
	More than $3,000,000	30%

The Department's regulation emphasizes flexibility and warns that a rigid test would not sufficiently allow adaptability to the particulars of the business. The Service's regulation also states that "[w]hile this inverted sliding scale provides guidelines on how to determine the necessary amount of investment, it is not intended to be a rigid, bright-line test."[48] The Service suggests a minimum

47. The Department's table is based on four different amounts used to "demonstrate the relative nature of the test." Dep't proposals, *supra* note 22, at 43,567. However, the Department's proposed amended regulation and the examples contained therein are identical to the Service's table as shown above. *Id.* at 43,570; *See also* Service Proposed Regulations, *supra* note 8, at 42,955.

48. Service Proposed Regulations, *supra* note 8, at 42,955.

threshold amount substantially higher than the minimum amount used by the Department. Furthermore, the suggested amounts considered adequate for the successful application of an E-2 visa are $250,000 or more, $100,000 to $250,000, and $250,000 or more.[49]

Finally, *Matter of Walsh & Pollard*[50] illustrates how complicated and confusing the investment requirement can be. There, the Board of Immigration Appeals (BIA) granted treaty investor employee status to two automotive design engineers whose British employer had been contracted by General Motors to redesign the U.S. manufacturer's line. The British corporation set up a U.S. subsidiary by opening an office and a bank account of $15,000. Using the proportionality test, the Board of Immigration Appeals held the corporation's action were a sufficient investment.[51]

The Department, after "seriously consider[ing] establishing a floor of $100,000 [minimum] with a 100% investment of qualifying capital," decided against this policy because: (1) Congress did not set a fixed sum; (2) the growth of service industries has made it possible to establish an enterprise for much less than $100,000; and (3) after consulting with the Department's treaty negotiators and considering the purposes of FCN and BIT treaties, a flexible standard was deemed imperative.[52]

The Department intends to balance competing interests by developing a standard to retain the flexibility of the present test and be practical in its administration. The Department has been aiming for a lower threshold, while the service is aiming to make E visa status more exclusive. The Service's position is understandable as a policy goal, since an E visa can be used as a way around quota limits. First, the United States has treaty obligations which must be

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49. See GORDON & GORDON, *supra* note 1 at 116-26.

50. Matter of Walsh & Pollard, 1988 BIA LEXIS 55.

51. *Id.*

52. Dep't proposals, *supra* note 22, at 43,567.

met. Second, raising the minimum so high that only the very affluent can afford to invest would have reciprocal ramifications. Finally, the issue of "substantial investment" might be confused with that of "marginal investment."

VII. CONCLUSION

The E visa category includes a mixture of important foreign and domestic policy concerns. These concerns are the focus of two governmental agencies whose authority overlaps under different Congressional mandates. Accordingly, the agencies' interpretations of the legislation differ. The proposed regulations are in accord with each other and are indicative of years of coordination and cooperation between the Department and the Service. Nevertheless, the differences discussed in this analysis are significant and may have major ramifications on the future of E visas.

The overall goal and tone of the Department's regulation has focused on flexibility and lower stringent standards. The result is that treaty aliens would continue to be admitted into the United States. The Service's regulation imposes much higher standards and more stringent levels of compliance. Its overall thrust is to keep the treaty aliens out of the United States. Judging from the language of the legislation and its legislative history, the Department's regulation is clearly closer to the Congressional intent.