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The Foreign Investor: Current Approaches toward United States Immigration Law

Austin T. Fragomen, Jr.

THE FOREIGN INVESTOR: CURRENT APPROACHES TOWARD UNITED STATES IMMIGRATION LAW

*Austin T. Fragomen, Jr.**

*Gwendolyn M. Robosson***

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I. INTRODUCTION

The topic of representing the foreign investor under the Immigration and Nationality Act is one of growing significance. In-

* Partner, Fragomen, Del Rey & Bernsen, P.C., New York City; J.D., Case Western Reserve University, 1968; B.S., Georgetown University, 1965.

** Associate, Fragomen, Del Rey & Bernsen, P.C., Stamford, Conn.; LL.M., New York University, 1983; J.D., Duquesne University School of Law, 1981; B.A., University of Rochester, 1978.

creases in the inflow of foreign funds have been substantial, with net foreign investment in the United States rising to an annual rate of more than eighty billion dollars in the second quarter of 1984, compared to thirty-four billion dollars in 1983. The foreign investor seeking entry into the United States to oversee an investment enterprise faces, however, a dearth of directly relevant provisions in the Immigration and Nationality Act. This article addresses the salient features of United States immigration law relating to entry by foreign investors to engage in investment related activities.

II. NONIMMIGRANT STRATEGIES FOR THE FOREIGN INVESTOR

A. B-1 Visitors for Business

The foreign investor who comes to the United States with an intention to either purchase an existing business or commence one of his own is most appropriately assigned the B-1 "visitor for business" category[1] of nonimmigrant classification. The provisions of section 101(a)(15)(B) of the Immigration and Nationality Act ensure foreign businessmen that they can enter the United States with relative ease in order to explore the United States market and to look at business opportunities. The application process for a B-1 visa is not time consuming, nor is prior approval from the Immigration and Naturalization Service (INS) required. The prospective visitor for business need only apply for a B-1 visa to a United States consular post abroad.[2] Often the application

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1. Section 101(a)(15)(B) of the Immigration and Nationality Act, PUB. L. No. 82-144, 82d Cong., 2d Sess. (June 27, 1952) (codified as amended at 8 U.S.C. § 1101 (1982)) [hereinafter cited as the "Act"]. This section provides for nonimmigrant admission to the United States of:

> [an] alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure. . . .

8 U.S.C. § 1101(a)(15)(B) (1982).

2. The policy of the United States with regard to the admission of such visitors is set forth in the Department of State's Foreign Affairs Manual:

> The U.S. government has emphasized its interest in the facilitation of international travel both for its cultural and social advantages to the world and for its economic significance. The handling of visitor visa applications should be expedited insofar as it is consistent with the requirements of the

and visa issuance will occur on the same day.[3] The United States Consulate may grant an indefinite visa to permit multiple entries into the United States,[4] and, upon issuance of the B-1 visa, the INS may admit the alien to the United States at the United States port of entry for a maximum period of one year.[5] This period of admission may be extended by increments of up to six months.[6] Because the alien's visit must be temporary, requests for one year admissions may raise certain questions about the bona fide nature of the alien's sojourn in the United States.[7]

To establish eligibility for a B-1 visa, the alien must be able to demonstrate to the consular official: (1) that he has a residence in a foreign country which he does not intend to abandon, (2) that he intends to enter the United States for a period of specifically limited duration and (3) that while in the United States he will be "engaged solely in legitimate activities relating to business."[8] An additional requirement is that "the [alien's] principal place of business and the actual accrual of profits [are] predominantly in the foreign country."[9] The Foreign Affairs Manual states that

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law and regulations.

DEPARTMENT OF STATE, 9 FOREIGN AFFAIRS MANUAL § 41.25 n.1 [hereinafter cited as FOREIGN AFFAIRS MANUAL].

3. Consular officers have the discretion to waive the requirement that an applicant for a B-1 visa apply in person before a consular officer. 22 C.F.R. § 41.114 (1985).

4. Limitations on the number of entries and the period of validity of the B-1 and other nonimmigrant visas depend upon reciprocity between the United States and the alien's country. These limitations are set forth in the FOREIGN AFFAIRS MANUAL, *supra* note 2, apps. B, C, and E.

5. 8 C.F.R. § 214.2(b)(1) (1985). The period of validity of the B-1 visa relates to the period during which the alien may use it to make application for admission into the United States.

6. *Id.*

7. The INS exercises independent judgment to determine whether an alien has a valid claim to temporary visitor status. Under the internal guidelines of the INS, a "fair and reasonable" period of admission will be assigned to every B-1 alien once a determination of admissibility has been made. IMMIGRATION AND NATURALIZATION SERVICE OPERATIONS INSTRUCTIONS § 214.2(b) [hereinafter cited as OPERATIONS INSTRUCTIONS].

8. 9 FOREIGN AFFAIRS MANUAL, *supra* note 2, § 41.25 n.2.1. Consular officers not satisfied of the alien's intent to return abroad or abide by the terms of nonimmigrant status are legally compelled to refuse the visa. *Id.* n.2.2.

9. The question of the place of accrual of profits is crucial to eligibility for B-1 status. A foreign national is eligible for B-1 classification if the actual accrual of profits remains in the foreign country. *See Matter of* M, 6 I. & N. 533 (B.I.A.

"aliens coming to engage in commercial transactions which do not involve gainful employment in the United States . . . to negotiate contracts, to consult with business associates, to litigate, to participate in scientific, educational, professional or business conventions or conferences, or to undertake independent research" are classifiable as B-1 nonimmigrants.[10] An alien entering the United States to investigate business opportunities clearly falls within this category.

Other types of nonimmigrant visas are not available to foreign investors who want to explore the United States investment market. For instance, to obtain an L-1 visa,[11] the petitioner must establish that he has leased his business premises to prove an intention to do business in the United States.[12] Eligibility for the E-2 treaty investor visa[13] is difficult to establish unless the alien is actively in the process of investing substantial capital in the United States and has made significant efforts in this direction. From a practical standpoint, an alien must first target either a business or specific investment in the United States. When the alien will be the principal of the business entity established in the United States, it usually is advisable for the alien to create a separate legal entity which then can act as the petitioner or the employer of the alien.[14] Thus, B-1 status provides the time necessary for the principal to establish a corporation or other legal entity and to engage other employees. When an alien makes an application for an L, E or other type of nonimmigrant visa, he can establish easily the bona fide nature of his case.

In situations involving corporate principals or independent business professionals, a significant problem exists where the business visitor arguably is extending professional practice or services into the United States. In *Matter of Neill,*[15] a professional engineer, who was travelling to the United States to meet with existing clients and to solicit new business, applied for a B-1 visa. The Board of Immigration Appeals held that the engineer was not performing services in the United States as an incident to in-

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1955).

10. 9 FOREIGN AFFAIRS MANUAL, *supra* note 2, § 41.25, n.4.2(a).
11. *See infra* notes 61-78 and accompanying text.
12. *See infra* notes 39-40 and accompanying text.
13. *See infra* notes 19-48 and accompanying text.
14. *See infra* notes 61-64 and accompanying text.
15. 15 I. & N. 331 (B.I.A. 1975).

ternational commercial activity; rather he was in the process of extending his professional engineering practice into the United States. In addressing the issue of whether the alien was rendering professional services the Board stated, "[A]lthough we would hesitate to call the applicant's services 'ordinary labor for hire,' he is regularly performing personal services in the United States independent of any other commercial activity. . . . The applicant, however, may not establish a regular and continuing professional engineering practice in the United States as a temporary visitor for business."[16] The Board's language suggests that an alien who comes to the United States frequently as a visitor for business cannot use the visit to engage in any professional activity on behalf of his foreign-based employer or his foreign-based sole proprietorship. Thus, as a B-1 visitor for business, the individual investor is ineligible to manage the daily operations of an active long-term investment and must either resort to third-party employees or seek another type of nonimmigrant visa.

B. E Treaty Aliens

The E-1 treaty trader visa and the E-2 treaty investor visa comprise the most directly applicable nonimmigrant visa categories available to foreign investors under the Immigration and Nationality Act. Under section 101(a)(15)(E) of the Act, an alien who is a national of a foreign country that is a signatory to a treaty of commerce and navigation with the United States[17] may enter the United States for an indefinite period of time for one of two reasons. He may enter either (1) to carry out substantial trade principally between the United States and the foreign country of which he is a national, or (2) to develop and direct the operations of an enterprise in which he has invested or an enterprise in which he is actively in the process of investing a substan-

16. *Id.* at 334.

17. *See* 9 FOREIGN AFFAIRS MANUAL § 41.40, ex. I.

Treaties of commerce and navigation which would entitle applicants to both E-1 and E-2 status exist with the following countries: Argentina, Austria, Belgium, China, Columbia, Costa Rica, Ethiopia, France, Germany, Honduras, Iran, Italy, Japan, Korea, Liberia, Luxembourg, the Netherlands, Nicaragua, Norway, Oman, Pakistan, Paraguay, the Philippines, Spain, Suriname, Switzerland, Thailand, Togo, the United Kingdom, Vietnam and Yugoslavia. In addition, E-1 treaty trader status provisions exist with Bolivia, Brunei, Denmark, Estonia, Finland, Greece, Ireland, Israel, Latvia and Turkey.

tial amount of capital.[18] The INS grants E-1 status to aliens entering the United States to engage in trade while it grants E-2 status to aliens entering to invest a substantial amount of capital.

1. *E-2 Treaty Investors*

For the foreign investor, the E-2 visa is the most obvious nonimmigrant visa category. As the only visa category under United States law based directly upon investment, it avoids "working around" the issue. The E visa is issued for an extended duration, usually four to five years, depending upon reciprocity with the treaty country.[19] Each time the alien enters the United States, he is admitted for a period of one year. Because most E-2 aliens travel frequently and do not remain within the United States longer than one year, they may never need to apply for an extension of stay in the United States. This inherent renewing aspect is a great advantage of the E-2 category. For individuals who do not depart from the United States, however, the INS grants extensions of stay in two year increments.

Unlike the L or H categories, the alien does not have to file a petition with the INS for an E-2 visa. The alien can present evidence of eligibility for E status directly to a United States consular post abroad thereby avoiding the lengthy delays typically associated with filing nonimmigrant visa petitions with the INS.[20] Although no special application form exists, the alien must submit substantial supporting documentation to establish that he has satisfied all of the criteria for qualification as a treaty investor.[21] Thus, a treaty investor's only contact with the INS may be when he seeks admission at the border.

The E-2 visa category does not require the alien to maintain a residence abroad,[22] and allows the alien to stay in the United States for extended duration. The E visa permits the spouse and

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18. 8 U.S.C. § 1101(a)(15)(E).

19. *See supra* note 4.

20. Filing to change status to E status while in the United States can be complicated since no set form or format for the application exists.

21. Several consular posts have designed a questionnaire that the applicant must complete for treaty alien status.

22. The alien must prove to the consular officer that he intends to depart from the United States upon termination of his status as a treaty investor. *See* 9 FOREIGN AFFAIRS MANUAL, *supra* note 2, § 41.40 n.3. The L-1 visa for intracompany transferees similarly has no statutory requirement to maintain a residence abroad. *See* 9 FOREIGN AFFAIRS MANUAL, *supra* note 2, § 41.67 n.6.

minor unmarried children of the alien both to enter in the same nonimmigrant classification and to engage in employment while in the United States.[23] However, when the E visa holder applies for adjustment of his status to permanent residency,[24] the INS will deem the employment of dependent family members a violation of the prohibition against unauthorized employment set forth in section 245(c) of the Act,[25] as a bar to adjustment of status.[26] Most importantly, the E visa affords the investor the opportunity to enter the United States, manage his investment, compensate himself with any salary he deems appropriate, and avoid United States taxation on worldwide income by remaining outside the United States for enough days not to qualify as a resident for tax purposes.[27]

The requirement of a treaty of commerce and navigation between the United States and the alien's home country has received several unusual interpretations. For instance, the treaty with China only applies to the Republic of China and not to the People's Republic. Although the treaty with Vietnam has been abrogated, the treaty with Iran has not. The United Kingdom treaty excludes all dependencies except Gilbralter. Also, the United States is negotiating new treaties with certain treaty investor language. Finally, a possible interpretation of treaties with other countries may be tantamount to the typical language grant-

23. The INS' Operations Instructions state, with regard to employment by the principal E nonimmigrant's spouse and children: "While the Service is not in a position to authorize the nonimmigrant E spouse and children of a treaty trader or treaty investor to accept employment, they shall not be deemed to have violated status if they do so; and so long as the principal E nonimmigrant is maintaining status, no action will be taken to require their departure." OPERATIONS INSTRUCTIONS, *supra* note 7, § 214.2(e).

24. *See infra* notes 111 and 112 and accompanying text.

25. 8 U.S.C. § 1255(c)(2) (1982).

26. Pursuant to section 245(c) of the Act, aliens who were employed on or after January 1, 1977 in the United States without authorization are ineligible to apply for adjustment of status to permanent residence. *See infra* note 111 and accompanying text. An exception to this prohibition exists for immediate relatives and special immigrants.

27. Essentially, resident aliens are taxed on their world-wide income the same as United States citizens at the United States income tax rates. An alien who is not a resident of the United States will be taxed on income derived from sources within the United States. Whether an alien is regarded as a resident for tax purposes depends upon whether he meets the "substantial presence" test set forth in the Tax Reform Act of 1984.

ing E-2 status.

In order to qualify for E-2 status, both the foreign national and the business entity must be nationals of the treaty country.[28] In determining whether the individual is a national of the country with whom the United States has a treaty, the statute uses the term "nationality", not the term "citizenship".[29] Under United States law a clear distinction exists between a national and a citizen. The INS does not consider permanent resident aliens and dual nationals who are United States citizens as foreign nationals in determining majority ownership of the investment enterprise. The exclusion of permanent resident aliens is an unjustifiable interpretation, and such exclusion should be limited to citizens of the United States. In many other countries citizenship or nationality is easily obtainable in certain circumstances. For instance, persons of Chinese ancestry can acquire citizenship in the Republic of China (Taiwan) with relative ease. Thus, these persons can manipulate nationality in order to qualify for E-2 status.[30]

The requirement that the trading entity be of the same nationality as the treaty country typically arises in two situations: (1) where the individual owner/entrepreneur is the applicant for the E-2 visa and (2) where the majority of shareholders are citizens of the treaty country, but the applicant is either a shareholder owning a minority interest or an employee who owns no more than a minor interest in the entity in which he works. In both situations, majority ownership of the company must reside with nationals of the treaty country.[31] The inference that shareholders of a publicly held company are nationals of the place of incorporation or the

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28. The requirement derives from the explicit language of the statute and is set forth in State Department and INS policy.

29. The statute defines a person who is qualified for E nonimmigrant status as "an alien entitled to enter the United States under and pursuant to the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national." 8 U.S.C. § 1101(a)(15)(E) (1982).

30. The nationality of the spouse or children of the principal alien is immaterial to their eligibility for treaty status as long as the principal alien qualifies as a national of the treaty country. 22 C.F.R. § 41.41(b) (1985).

31. 22 C.F.R. § 41.41(a) (1985). The Department of State has issued a Notice of Proposed Rulemaking that would change the present language of this regulation, that an organization must be principally owned by a national or nationals of the same treaty country to read "at least fifty percent owned" by a national or nationals of the same treaty country. The proposed regulation would allow E visas to be issued to nationals employed by 50-50 joint ventures. 50 Fed. Reg. 49,705 (1985).

place where the main facility is located no longer exists.[32] To determine ownership of the trading entity, one must trace the actual beneficial ownership through various layers of holding companies, trusts, and other established vehicles. The ownership interests of the actual individuals also must be traced to calculate a company's nationality. Determining ownership of an entity can be difficult, however, since foreign based corporate entities frequently devise schemes to camouflage the nature of actual ownership. The nationality of the majority owner determines the nationality of the legal entity, regardless of the place of incorporation.[33]

An investment or a commitment of capital assets at risk also is required for E-2 status.[34] Uncommitted bank funds are not at risk and, therefore, do not constitute capital assets.[35] Moreover, the Government distinguishes between loans secured by the enterprise and arms-length loans to the individual investors. The Government's position is that loans or promissory notes secured by

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32. The FOREIGN AFFAIRS MANUAL sets forth the standard with regard to nationality of a firm as follows: "The nationality of a firm is determined for the purpose of section 101(a)(15)(E) by the nationality of the individual or those corporate "persons" who own the principal amount (i.e., more than 50%) of the stock of that corporation regardless of the place of incorporation. . . ." 9 FOREIGN AFFAIRS MANUAL, *supra* note 2, § 41.40 n.7; *see also Matter of* N.S., 7 I. & N. 426 (D.D. 1957) (the place of incorporation, including whether the firm was incorporated in the United States, is not determinative of nationality as long as persons who are nationals of the treaty country own 51% or more of the stock of the employing corporation). *But see supra* note 31.

33. 9 FOREIGN AFFAIRS MANUAL, *supra* note 2, § 41.40 n.8 and § 41.41 n.5.

34. A State Department Cable of March 13, 1982 [hereinafter cited as State Department Cable], advises consular officers of the following guidelines in determining whether an investment has actually been made or is in the process of formation:

> [A] useful point to bear in mind is that 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 return on the funds thus risked. If the funds have not been risked, that is committed to the investment enterprise, and subject to potential or total loss if investment fortunes reversed, then the alien has not yet "invested" in the sense intended by § 101(a)(15)(E)(ii); nor, in situations where the alien is "in the process" will wholly perspective investment arrangements entailing no present commitment suffice. Mere intent to invest does not meet the requirements of the INA.

35. State Department Cable, *supra* note 34, at ¶ 7. *See also Matter of* Heitland, 14 I. & N. 563 (B.I.A. 1974) (speculative investment in undeveloped land could not result in the qualification of the alien for treaty investor status).

the enterprise or made by the enterprise are not at risk,[36] while loans from a third party are at risk. This distinction seems to permit third parties to hold a loan that is secured by a mortgage on the premises.

To qualify for E-2 status, the foreign entity's at-risk investment must be active. Active investments are those that produce a service or commodity. The statute uses the terms "has invested" or "is actively in the process of investing." Active investments do not include the mere purchase of real estate, securities, equities, or other investment vehicles.[37] Establishing that the individual is actively in the process of investing can be difficult when the business is in the process of formation, since a mere intent to invest has been held to be insufficient.[38] The commitment to the project must be sufficient to constitute an investment and clearly indicate the nature of the investor's plans. The investor should prepare a detailed business plan to prove that the investment is bona fide and carefully constructed.[39] The safest course of action for the alien investor is to form a corporation or other legal entity, rent premises, employ, contingently employ or show plans to employ persons from the domestic labor force, and place the capital in an account under the name of the corporation.[40]

The statute and the regulations also require that the investment be substantial. Substantial investment means that, relative

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36. *See* State Department Cable, *supra* note 34, at¶ 7; *Matter of* Ko, 14 I. & N. 349 (B.I.A. 1973); FOREIGN AFFAIRS MANUAL, *supra* note 2, at § 42.91(a)(14), n.1.41(e).

37. The alien investor's investment must be an active, ongoing business enterprise representing a substantial investment in the United States, as measured in part by the creation of job opportunities for United States workers. *See* State Department Cable (Mar. 13, 1982); *supra* note 35.

38. *See, e.g., Matter of* Chung, 15 I. & N. 681 (B.I.A. 1976).

39. The burden is upon the foreign national to demonstrate that the enterprise is in existence or in the process of formation. *See Matter of* Shaw, 15 I. & N. 794, 796 (B.I.A. 1976), wherein the Board of Immigration Appeals stated that "[i]n the United States it is difficult to establish an operative business of any significant size without generating some documentation reflecting the affairs of the enterprise."

40. While uncommitted funds in a bank account do not qualify as an investment, a reasonable amount of cash held in what is clearly a business bank account or similar funds used for the "routine operations of the business may be included as part of the investment." *See Matter of* Kahn, 16 I. & N. 138, 139 (B.I.A. 1977).

to businesses of its nature,[41] the enterprise must be sufficiently capitalized. For small businesses, the State Department has established the arbitrary criterion that the investor must invest at least one-half of the business' value.[42] A State Department Cable indicates that small businesses are those with a capital investment of less than one million dollars. The statute, which only requires that the individual demonstrate that he has made a substantial investment and is going to be actively engaged in the business, appears inconsistent with this interpretation. The relation between the investment and the return is also relevant to the substantiality of the investment. The rate of return, whether gross or net profit in relation to the volume of the business, necessarily differs according to the nature of the business. Thus, import-export businesses that do a large monetary value of trade comprised of "low mark-up" items may not be able to justify a finding of substantial investment. Accordingly, both the relative or the proportionality test and the relation between the investment and the return must be considered in determining substantiality.[43] While some very small investments have been approved,[44] the investment cannot be marginal or designed solely to provide self-employment for the applicant. Again, the return on the investment, rather than the amount invested, and the likelihood that the investment will tend to expand job opportunities in the domestic labor market are indicia of the substantiality of the investment.

An alien investor must show either that he is the principal in-

41. The relative or proportionality test, traditionally used to determine substantiality consists of the following: The amount invested should be weighed against either (1) the total value of the particular enterprise in question, or (2) the amount normally considered necessary to establish a viable enterprise of the nature contemplated. The former will most often be used where the alien is investing in a new business. The alien need only satisfy either one of the tests, not both, for investment to be seen as substantial. State Department Cable (Mar. 13, 1982).

42. *Id.*

43. *See supra* note 41.

44. *See Matter of* Kung, 17 I. & N. 260 (Commissioner 1980). In *Kung*, an applicant for treaty investor status invested $53,000 in a restaurant and demonstrated that he had available an additional $46,000 in reserve funds. The Commissioner opined that the amount of the investment must be viewed in the context of the nature of the business enterprise, and overturned the Regional Commissioner's decision that the investment was in a marginal enterprise solely to earn a living.

vestor responsible for the development and direction of the enterprise or that he is an employee of the enterprise. Principal investors who also are visa applicants must own a majority interest or demonstrate effective control of the enterprise.[45] Applicants who are mere employees must show that they will be serving either in a managerial capacity or in a capacity that is essential to the enterprise's operation.[46]

These criteria originally were thought to be identical to the L visa category requirement that the individual serve in an executive, managerial capacity or in one requiring specialized knowledge. However, the standard that consular posts actually apply for E-2 employees appears substantially higher than the standard applicable to qualification for an L visa. The October 1983 amendments to the nonimmigrant visa regulations of the INS render unjustifiable the higher E-2 standard. These amendments define specialized knowledge as requiring a knowledge of some aspect of the proprietary product or some other highly specialized or technical facet endemic to the particular organization.[47] Meeting this definition apparently requires the alien to demonstrate active service in a capacity essential to the operation of the enterprise, which is the same demonstration that is required for E-2 status.[48] Where the principal alien is the majority owner and is

45. *Matter of* Lee, 15 I. & N. 187 (B.I.A. 1975). In *Lee*, the E-2 principal had invested $10,000 in a partnership owned by partners of a different nationality and allegedly valued at six to nine times that amount. Despite the applicant's claim that he would eventually gain 51% ownership, his E-2 application was denied on the ground that he did not have the controlling interest required to "develop and direct" the partnership, nor the financial ability to make the additional investment.

46. The regulations at 22 C.F.R. § 41.40(a) (1985) require the employee to demonstrate that he will be engaged in duties of a supervisory or executive character, or, if he will be employed in a minor capacity, that he has qualifications that will make his services essential to the efficient operation of the employer's enterprise.

47. *See* 8 C.F.R. § 214.2(l)(1)(ii)(C) (1985) for the definition of "specialized knowledge" which, under the express language of the regulations, "must be relevant to the organization itself and directly concerned with the expansion of commerce or it must allow the business to become competitive in the market place." *Id.*

48. An employee whose services are "essential to the enterprise" usually is employed in a technical capacity requiring special training and qualifications needed to establish the enterprise, train or supervise persons serving in technical positions, or continuously monitor and develop product improvement or quality control.

attempting to qualify under the developed and directed criteria, he may find it useful, and in many consular posts necessary, to present evidence of his past background that indicates an actual ability to direct the enterprise. Where the facts suggest that the principal alien does not possess this ability, a question of credibility could prevent the visa's issuance.

Where several minority investors, none of whom would qualify under the developed and directed criteria, pool their money to start a business, those investors theoretically must qualify as managerial or essential employees. Obviously, their position as principal investors will receive great weight in making this determination. Nevertheless, the investors still must convince the INS or consular officer that they actually will be actively engaged in the organization.

Consular officers are aware that applicants for E-2 visas may attempt to acquire E-2 visas as insurance policies against political or economic turmoil in their home countries. Consequently, the consular officer will want proof that the applicant will spend a significant portion of time in the United States and derive income, either directly as salary or indirectly as participation in profits or dividends, from his activity in the United States. To obtain an E visa, the alien should affirmatively assert that he will receive a percentage or fixed stipend for his work related to the direction of the enterprise leaving him ineligible to engage in employment in the United States on a B-1 visa.

2. *E-1 Treaty Traders*

The E-1 treaty trader visa is an alternative to the E-2 visa. The E-1 visa is limited to situations involving a particularized trade between the United States and the foreign country.[49] As it does with the E-2 visa, the consular post issues the E-1 visa for an extended duration, usually four to five years, and may extend the visa in four to five year increments indefinitely. The applicant qualifies for the E-1 visa by showing that he intends to depart from the United States upon completion of his purpose, which could be no more than to engage in trade until retirement. No petition is necessary, and the statute does not require maintenance of a residence abroad.[50] Each time the alien enters the

49. *See infra* notes 56 and 57 and accompanying text.
50. *See supra* note 22 and accompanying text.

United States within the period of the visa validity he is readmitted for one year. Thus, as long as the alien departs and enters the United States at least once a year the visa is "automatically extendable." The alien can apply for an E-1 visa directly to a consular officer abroad.

Aliens within the United States filing for a change in nonimmigrant status can apply to the INS. INS officers, however, tend to prolong the adjudication of E visa applications that involve changes in immigration status. Moreover, the INS grants the alien a change of status and if the alien thereafter proceeds abroad, the consulate would need to issue the alien a visa for the alien to return to the United States. Like the E-2 visa, the E-1 visa gives dependents preferred status in terms of employment.[51] Unlike the E-2 visa, the E-1 visa does not require an investment of a substantial sum of money.

The E-2 visa's basic requirements concerning the nationality of the individual, the existence of a treaty between the United States and the alien's home country and the majority ownership of the entity by foreign nationals of the same nationality are equally applicable to the E-1 visa. The three principal words of art set forth in the statute are "substantial", "trade", and "principally". The E-1 category requires the individual to show that he is engaged in *substantial trade* that is *principally* between the United States and the treaty country.[52] It also requires that the alien serve the trading company in either a managerial capacity or a capacity involving "essential skills."

To satisfy the statute, the alien must be involved in trade that is international. The definition of trade that the Foreign Affairs Manual sets forth includes international banking, insurance, transportation and many other activities.[53] In essence, trade involves an actual exchange of goods or monies.[54] The exchange of technology generally has been deemed not to constitute trade. Professional services such as law, accounting and management consulting also have been deemed to lack the necessary requisites of trade.

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51. Employment by dependent family members of the E-1 nonimmigrant will be deemed unauthorized for purposes of adjustment of status to permanent residency. *See supra* note 26 and accompanying text.

52. 8 U.S.C. § 1101(a)(15)(E)(i) (1982).

53. 9 FOREIGN AFFAIRS MANUAL, *supra* note 2, § 41.40 n.5.

54. *Id.*

The factors that determine whether the E-1 visa holder's trade is substantial include the volume of trade, the number of transactions, and the continued course of trade. The monetary value of the trade is irrelevant.[55] Moreover, the alien must show that the volume of trade is sufficiently profitable to provide him with a potentially reasonable livelihood. Substantial trade is a relative concept. It depends upon the type of business involved and the potential for profits. These considerations determine the probability that the business actually could support the applicant as well as other workers in the domestic labor force.

The term "principally" refers to trade in excess of fifty percent between the United States and the treaty country.[56] Where trade involves three countries, the ownership of the goods and the location of the manufacture or alteration of the basic product are key factors. The threshold issue is whether trade is actually taking place between the United States and the treaty country. In determining the substantiality of this trade, the adjusted cost of the goods after manufacture, alteration or whatever other processing, may be analytically significant. As long as the international trade exceeds the fifty percent requirement, the balance of the trade may be strictly domestic.[57]

Special considerations prevail with foreign-based companies that initially import and distribute goods, particularly sophisticated manufactured goods, in the United States and later acquire manufacturing operations in the United States which produce goods for the domestic market or for distribution to nontreaty countries. When this situation arises, the E-1 company frequently becomes an E-2 company. Another complication arises where a company involved in trade establishes a wholly-owned subsidiary, which engages in strictly domestic operations. The Government frequently denies applications for the treaty-trader visa to individuals who are or will be employed by the entities that are involved in strictly domestic operations. The establishment of separate entities can be used offensively to allow the primary entity to derive greater than fifty percent of its revenue from trade.

The final requirement for obtaining an E-1 visa is that the applicant be an employee, whose responsibilities are supervisory, ex-

55. *Id.*, n.9. Essentially, trade of a relatively small dollar amount can represent substantial trade when the governing criteria are met.

56. *Id.*, n.6.

57. *Id.*

ecutive, or essential to the efficient operation of the enterprise.[58] As with the E-2 visa category,[59] consular officers apply a much stricter standard in the issuance of E-1 visas than in the issuance of L visas. Frequently the consular officer will inform the applicant that he is not entitled to an E-1 visa and that the company should petition for L status through the INS.

Unlike the E-2 visa category, the E-1 visa category does not include the "develop and direct" requirement.[60] Therefore, the entrepreneur receives no special consideration, but is considered an employee who must demonstrate both that he will derive income from United States sources and that he needs the E-1 visa in order to work in the United States. Like the E-2 visa applicant, the E-1 visa applicant should be able to sequester or identify the portion of his total compensation, whether in the form of salary, bonuses, or dividends, that he will receive as remuneration for the services he performs in the United States. Arguably, individuals who are not in the employ of the United States company, but are coming to the United States solely to oversee its operation, would not need to obtain either an E-2 or an E-1 visa.

C. L-1 Intracompany Transferees

After the E-2 category, the next most popular vehicle for the foreign investor is the L-1 visa for intracompany transferees.[61] Essentially, the L-1 visa permits a corporation to transfer to the United States an individual whom it has employed for at least one year abroad in one of its branches, subsidiaries or affiliates. The employee that the corporation transfers must come to the United States to serve in a managerial or executive capacity, or in a capacity that necessitates specialized knowledge. Thus, the L-1 visa may be used to transfer to the United States the entrepreneur who has established foreign and United States companies, which are affiliated through the entrepreneur's common ownership.

The first consideration of the L-1 visa status is the status of the petitioner. The L-1 employee cannot be self-employed. Sole proprietors abroad, therefore, cannot establish themselves as sole

58. Another commonly used term is a "key employee," or one who is key to the operation of the organization.

59. *See supra* note 47 and accompanying text.

60. 8 U.S.C. § 1101(a)(15)(L) (1982).

61. *Id.*

proprietors in the United States and qualify for L-1 visas. Similarly, a foreign partnership that established a branch in the United States could not petition successfully for an L-1 visa for one of its partners because the Government would consider the partner as petitioning for himself.[62] Of course, this treatment loses its efficacy in the case of a vast international partnership, such as an accounting firm or management consulting firm in which the individual partner owns only a miniscule percentage of the entire partnership and has no effective control over the course of the partnership. Where the partner has no effective control over the partnership, the Act's legislative history suggests that the partnership should be treated as a separate legal entity. This history strongly supports an expansive interproduction of business relationships to benefit international organizations. To avoid this discrepancy, the principal or sole owner of a business abroad can establish a corporation in the United States to petition for an L visa on his behalf.[63] Because both corporations are affiliated through common ownership, the corporation could file an L petition on behalf of the principal owner as long as it meets the other requirements for L-1 status.[64]

L-1 status requires that the applicant work with the same or affiliated enterprise abroad for at least one year prior to the transfer. The individual can spend a portion of the year in the United States on a B-1 or other bona fide nonimmigrant visa as long as he can demonstrate both that he was in the United States as a bona fide employee of the foreign-based corporation and that the services he rendered in the United States inured solely to the benefit of the foreign-based entity.[65] Problems frequently arise concerning the bona fide nature of extended tenure in the United States during the one year qualifying period because a general suspicion or presumption exists that the alien employees will use

62. *See Matter of* Hughes, 18 I. & N. 289 (Commissioner 1982). *Cf.* Johnson-Laird, Inc. v. INS, 537 F. Supp. 52 (D. Or. 1981) (sole proprietorship can qualify for an intracompany transfer in L-1 setting).

63. This situation creates difficulties on three issues: (1) the legitimacy of the corporate structure as a separate entity from the shareholders and officers; (2) the status of shareholders or directors as employees of the transferor organization; and (3) the alien's intent to stay in the United States only temporarily. *See Matter of* Isovic, 18 I. & N. 361 (Commissioner 1982).

64. The alien can qualify as long as the business entities are legally separate from the shareholders.

65. *See supra* notes 15-16 and accompanying text.

B-1 status as a subterfuge to avoid the year's employment abroad. Activities deemed "local services for hire," although professional or highly sophisticated services, may constitute employment in the United States. Therefore, the time that a principal spends engaged in these activities may not count toward the requirement of one year's qualifying experience.[66] In *Matter of Continental Grain*,[67] however, an applicant present in the United States for only a portion of the one year qualifying period was able to gain L-1 status. The foreign corporation paid his salary from abroad, and the training he received inured to the corporation's benefit exclusively. The short period of time that the applicant spent in the United States did not defeat the accumulation of his year of employment abroad.

To qualify for L-1 status, the individual must have been an employee of the foreign-based company for a period of one year. The employee's salary alone is not dispositive of this issue. The INS examines the functions and duties that the individual performs as well as the potential for substantial profits and dividends. An analogy between employment for immigration purposes and employment under the Fair Labor Standards Act[68] and under other labor oriented laws is appropriate. When the individual has taken a leave of absence or modified a traditional employment circumstance, the INS will consider the totality of events in order to make a determination about the status of that employee throughout the requisite one year period.

Fairly frequently an individual is in the United States for a year, for instance, on an F-1 student visa prior to filing an L visa. If the individual was employed abroad and would have qualified for an L-1 visa at the time he came to the United States, the Operating Instructions of the INS permit the petitioner to disregard the period of time spent in the United States under student status. The relevant factors in this case are the capacity in which the alien served prior to coming to the United States and the function he will perform in the United States. Thus, an alien can maintain an L visa notwithstanding a period of schooling in the

66. *Matter of* Neill, 15 I. & N. 331 (B.I.A. 1975).

67. 14 I. & N. 140 (Dist. Dir. 1972) (an employee may spend time in the United States for short training periods, conferences, and similar activities, but substantial time in the United States will defeat the accumulation of the one year requisite employment abroad for L-1 purposes).

68. 29 U.S.C. §§ 201-219 (1982).

United States, as long as the company continues to employ the individual while he attends school.

Whether the foreign national qualifies for L-1 status depends upon the level of his position within the organization or the job duties that he will perform. As noted previously, the individual must serve in a capacity that is executive, managerial or requires specialized knowledge. A change in the individual's employment from one of these three capacities abroad to a different capacity in the United States is irrelevant to his application for L-1 status. For instance, an individual who performed duties requiring specialized knowledge while abroad may serve in a capacity involving the exercise of managerial functions after transferring to the United States.

The statutory definition of a managerial capacity is an assignment in which the employee (1) "directs the organization or a customarily recognized department or subdivision of the organization," (2) "controls the work of other employees," (3) "has the authority to hire or fire or recommend those actions as well as other personnel actions (promotion, leave authorization, etc.)," and (4) "exercises discretionary authority over day-to-day operations."[69] The statute defines an executive as a person who (1) "directs the management of an organization and establishes organizational goals and policies," (2) "exercises a wide latitude of discretionary decision-making," and (3) "receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the business."[70] Because managerial duties customarily require the supervision of other people,[71] the foreign national may choose to demonstrate that he performs executive duties. The executive can perform a broad and important discretionary function without actually having to manage employees. Most entrepreneurs who are principals or significant owners of an enterprise would qualify easily as either managers or executives.

If knowledge of the proprietary products or operations of a company is essential to the functioning of the company, then that

69. 8 C.F.R. § 214.2(l)(1)(ii)(A) (1985).

70. *Id.* § 214.2(l)(1)(ii)(B) (1985).

71. The regulations specify that managerial capacity "does not include the first-line level of supervision unless the employees supervised are managerial or professional." 8 C.F.R. § 214.2(l)(1)(ii)(A) (1985).

knowledge is specialized knowledge.[72] The knowledge must be "directly concerned with the expansion of commerce or it must allow the business to become competitive in an overseas market."[73] The likelihood that an applicant for an L petition eventually may wish to apply for permanent resident alien status is an important consideration. The exemption from labor department clearance or, more properly, blanket certification, applies only to individuals who have served abroad and will be serving the United States as managers or executives.[74] The exemption is unavailable to individuals who either have served or will be serving in a capacity involving specialized knowledge.

The statute requires that the employer in the United States be the same as, or a subsidiary or an affiliate of, the employer abroad. A branch office is the simplest and most straightforward example of these three relationships. It basically requires only that the foreign-based organization or United States-based organization have an unincorporated branch abroad. The subsidiary and affiliate relationships between the United States employers and their overseas counterparts are considerably more complicated concepts. The most common situation involves the wholly-owned or majority-owned subsidiary. The idea of affiliation essentially requires that C, an individual or an entity, has majority ownership of entities A and B. The analysis becomes sophisticated where one entity exercises de facto control over the operations of another entity, even though it might not have majority ownership of that entity. Frequently, foreign exchange control regulations forbid a foreign corporation from establishing a branch or subsidiary abroad, thus necessitating that a person,

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72. *See Matter of* Colley, 18 I. & N. 117 (Commissioner 1981) (person qualifying for L-1 classification must be a key person in the company, possessing essential knowledge of the company's product or service, management operations, decision-making process or a similar element of company operations).

73. *See Matter of* Penner, 18 I. & N. 49 (Commissioner 1982) (specialized knowledge of the workers cannot depend on the uniqueness of their skills vis-à-vis the availability of those skills in the general labor market, but rather the possession of knowledge which is unique to, and even the property of, the company).

74. The United States Department of Labor regulations set forth a schedule of occupations deemed to be noncompetitive with the domestic labor force in the United States. Thus, the employer need not demonstrate through the labor certification process that United States workers are unavailable for the position offered. 20 C.F.R. § 656.10 (1985). *See infra* text accompanying notes 103-07.

family or group of people individually own both the foreign and domestic corporations and thereby establish majority overlapping ownership. For instance, in *Matter of Tessel, Inc.*,[75] an individual South African national, beneficiary and primary entrepreneur, owned ninety-three percent of a foreign corporation and sixty percent of a domestic corporation. Because each company was legally separate from the individual, he was considered an employee of each. Also, the two companies were considered affiliated because the individual had effective managerial control of both companies through his majority ownership.

Joint ventures pose special problems that are resolved most readily by juggling or adjusting ownership. Where this is not possible, one of the parties of the joint venture may have to transfer the individual to its operations in the United States and then transfer that individual to the joint venture. In this situation, the petitioning entity, rather than the joint venture, should pay the employee's salary.

De facto control can be shown even without majority ownership where one of the investors controls the day-to-day aspects of the business. The two most frequently encountered situations occur where: (1) the company enters into a joint venture and one party actually controls the operations of the joint venture on a day-to-day basis either through the control of technology or administration, and the other party to the joint venture is essentially a passive investor; and (2) a number of parties are involved in an investment with no party having fifty percent or more of the ownership, but with one of the parties having the predominant ownership interest and, as the largest shareholder, actually controlling the organization.[76]

Another common problem exists where the business abroad is closed. The question then arises whether this closing affects eligibility for an L-1 visa. *Matter of Chartier*[77] and *Matter of Thomp-*

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75. 17 I. & N. 631 (Acting Assoc. Commissioner 1981).

76. *Matter of* Hughes, 18 I. & N. 289 (Commissioner 1982), addresses this situation. In *Hughes*, the United States parent owned exactly 50% of a South African joint venture. Management of the company, however, was in the hands of the United States parent. The Commissioner opined that "[i]n order to be deemed affiliates, companies should be bound to one another by substantial, but not necessarily majority ownership of shares. . . . More importantly, affiliation requires that the financial link between two entities include control by one over the management of another. . . ." *Id.* at 292-93.

77. 16 I. & N. 284 (B.I.A. 1977).

son[78] hold that even where the business abroad will be closed, and the individual's transfer to the United States will result in a cessation of activities of the business outside the United States, L status may still be appropriate. If, however, the individual later applies for permanent resident alien status, the individual may be unable to obtain Schedule A Group IV blanket labor certification. Moreover, the closing of the business abroad highlights the issue of nonimmigrant intent. The L-1 visa applicant must show an intention to depart from the United States upon completion of his activities. A very strong presumption exists that an owner or beneficiary will not depart from the United States and that he intends to utilize the L visa to short cut the normal process of filing for an immigrant visa. The regulations place upon the investor a high standard for demonstrating that he intends to leave the United States upon the completion of the temporary purpose for which he is entering. Individuals who invest their life savings in the Untied States, close their operations abroad, and attempt to transfer to the United States, place an almost impossible burden on themselves to show an actual intent to depart from the United States at a later date.

Unlike the E visa category, the L-1 visa category does not require a treaty of commerce and navigation to exist between the United States and the alien's home country. The L-1 visa enables an entrepreneur, who has established foreign and United States companies that are affiliated through his common ownership, to transfer to the United States.

III. Qualifying for Permanent Residence

The foreign investor who seeks permanent residence in the United States must operate within the context of the present immigration selection system, which provides a limited number of options. Congress created a "preference system" for establishing permanent residence that prioritizes different groups of aliens.[79]

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78. 18 I. & N. 169 (Commissioner 1981).

79. With the exception of a few narrowly defined classes of persons, aliens who seek permanent residence must qualify through a close family relationship to a United States citizen or permanent resident or through an offer of permanent employment in the United States in a position in which a certifiable shortage of United States workers exists. The "preference system" limits to 270,000 the number of aliens who can enter the United States each year as permanent residents. It categorizes different groups of aliens, in descending order of

Under the immigration selection system, the foreign investor can immigrate only if he can establish that an enterprise can employ him without displacing a United States worker. Two of the six preference categories are for persons with offers of permanent employment. The third preference category is for foreign nationals with job offers requiring a member of the professions or a person with exceptional scientific or artistic ability. The alien has the burden of demonstrating that he has these credentials. The sixth preference category is available to all other skilled or unskilled workers with a job offer. Visas are backlogged in the third or the sixth preference categories because they are in high worldwide demand. A waiting list currently exists for immigration under these categories. As a result, the ability of foreign investors to qualify for entry into the United States is limited. Under current projec-

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preference, as follows:

(1) The unmarried sons and daughters of United States citizens are allocated 20% of the worldwide limit of 270,000 visas.

(2) Spouses and unmarried sons and daughters of aliens lawfully admitted for permanent residence are allocated 26% of the worldwide limit of 270,000 visas in addition to any visas unused by the first preference category.

(3) Members of the professions and persons who because of their exceptional ability in the sciences or arts will substantially benefit the economy, cultural interest, or welfare of the United States and whose services in the professions, sciences, or arts are sought by an employer in the United States are allocated 10% of the worldwide limit of 270,000 visas. This category does not receive excess visas left over from the first two categories.

(4) The married sons and daughters of United States citizens are allocated 10% of the worldwide limit of 270,000 visas in addition to any visa left over from the first three preference categories.

(5) The brothers and sisters of United States citizens, provided the United States citizens are 21 years of age or older, are allocated 24% of the worldwide limit of 270,000 visas in addition to any visa left over from the first four preference categories.

(6) Persons capable of performing specified skilled or unskilled labor, not of temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States are allocated 10% of the worldwide limit of 270,000 visas. This category does not receive any excess visas left over from the other preference categories.

(7) Any visas left over from these six preference categories are available to aliens who meet the requirements for eligibility in the nonpreference category. Visas in this category have been unavailable to foreign nationals since 1978 because of a change in the immigration selection system that resulted in the use of all available immigrant visas in the six preference categories.

tions, foreign investors filing the first required papers for the immigration process in the third preference category would have to wait about seven months to receive a visa. In the sixth preference category the wait is projected at almost two years. Current projections can change unexpectedly, however, and several months ago, for example, visas immediately became available in the third preference category.

Any visas not used in the six preference categories are assigned in a nonpreference category to "other qualified immigrants." Aliens who invest at least $40,000 in an enterprise in the United States which will employ them as principal managers and which will employ at least one United States worker[80] comprise one group of "qualified immigrants" exempt from the usual requirement of a labor certification. This valuable provision has been unavailable to foreign nationals since 1978 because a change in the immigration selection system resulted in the use of all available immigrant visas by aliens in the six preference categories. The explosive demand for visas in the preference categories will cause nonpreference visas to remain unavailable in the future, unless Congress amends the immigration selection system.

Immigration backlogs highlight one of the central problems encountered by investors seeking to immigrate on the basis of an offer of permanent employment from the investment enterprise. Often, immediate immigration is impossible, and the investor's only option is to seek temporary entry into the United States in a nonimmigrant category. This process merely delays a final decision on permanent residence.

A. Establishing Eligibility for Approval of a Third or Sixth Preference Category Petition

Before an alien can make an application for permanent residence on the basis of an offer of employment, he must establish eligibility for a third or sixth preference category petition. The alien can establish eligibility through individual labor certification or through precertification pursuant to Schedule A of the De-

80. The Department of State has issued a Notice of Proposed Rulemaking that would increase from $40,000 to $100,000, the minimum monetary investment an alien is required to invest under this exemption from the labor certification requirement. 50 Fed. Reg. 46,085 (1985). For the purposes of the preference categories, United States workers include lawful permanent resident aliens.

partment of Labor regulations.[81] The requirements and process for establishing permanent residence through labor certification can shape, to some extent, the organization of the investment enterprise in the United States. The Department of Labor must certify that no United States worker is available to fill the position that the investment enterprise offered to the foreign investor. The Department of Labor has developed a complex procedure through which it makes this determination. It also has provided, however, "blanket" certification for certain occupational categories. For these categories, included on Schedule A of the Department of Labor regulations, the employer does not have to conduct a recruitment campaign to demonstrate a shortage of qualified United States workers. Because special problems arise in recruiting United States workers in the investment setting,[82] one first should explore whether the foreign investor qualifies for blanket certification under Schedule A. Schedule A is divided into four groups, to which Groups II and IV might be relevant to the investment setting.

1. *Precertification Under Schedule A, Group IV*

Of the four groups in Schedule A, a foreign investor is most likely to qualify for blanket certification under Group IV. The requirements for Group IV precertification are closely analogous to the requirements for L-1 classification,[83] and many aliens who have entered the United States in the L-1 category can qualify for Group IV blanket certification. Like the L-1 category, Group IV applies to foreign nationals whose offer of employment is in a managerial or executive capacity with a United States company that is an affiliate, parent or subsidiary of a foreign-based company. The foreign-based company must have employed the foreign national abroad for one year immediately preceding the employee's entry into the United States. The problems that exist in establishing eligibility for Group IV blanket certification include the following: (1) because Group IV does not contain the L-1 classification criterion of specialized knowledge,[84] aliens who entered the United States on the basis of this credential do not qualify under Group IV; and (2) the alien must demonstrate that before

81. 20 C.F.R. § 656.10 (1985). *See supra* note 74.
82. *See infra* notes 104 & 107 and accompanying text.
83. *See supra* notes 65-75 and accompanying text.
84. *See supra* notes 72-73 and accompanying text.

coming to the United States to work in an executive or managerial capacity he served abroad in one of these capacities. Although some transferees encounter the latter problem, most foreign investors worked abroad as executives or managers.

Foreign investors, however, do face some obstacles in attempting to qualify for Group IV classification. First, the investor must be an "employee." The requirement of the L-1 classification that the two entities involved in the transfer of an alien must be incorporated also applies to Group IV transfers.[85] A corporation is separate from its shareholders and, therefore, can serve as the employer of one of its shareholders.[86] Without the corporate entity, an owner is self-employed and does not meet the definition of "employee" used by the INS and the Department of Labor. Under the rule in *Matter of Tessel, Inc.*,[87] as interpreted by INS internal policy memoranda, business structures, that do not include a "corporate veil" that legally separates the business from its owners, are unlikely to qualify as "employers" capable of transferring owners of the business. Thus, partnerships probably cannot transfer partners, and sole proprietorships cannot transfer their owners.[88] Certain types of foreign "corporations" or "stock companies," however, may receive different legal treatment than United States corporations.

The corollary to the need for a separate corporate entity is the requirement that the investor clearly be an employee of both companies. Although *Tessel* considered members of the board of directors actively involved in the management of the company to be employees, employees do not include shareholders taking an active interest in the company. Ideally, the investor will be a corporate officer or manager. Using the title of corporate officer or manager as a label, however, may not be sufficient to demonstrate employment in one of these capacities. The investor should secure a detailed letter both from the company abroad and the company in the United States outlining his prior and future duties. The investor's prior experience should indicate his ability to fill the

85. *See supra* notes 62-64 and accompanying text.

86. *Matter of* Tessel, Inc., 17 I. & N. 631 (Acting Assoc. Commissioner 1981). *See also Matter of* Alan Gee, Inc., 17 I. & N. 296 (Acting Reg. Commissioner 1979) (after sole stockholder and beneficiary changed his status to L-1, the corporation's Sixth Preference Category petition was granted under Group IV).

87. 17 I. & N. 631 (Acting Assoc. Commissioner 1981).

88. *Cf.* Johnson-Laird, Inc. v. INS, 537 F. Supp. 52 (D.Or. 1981) (sole proprietorship can qualify for an intracompany transfer in L-1 setting).

position in the United States.

The subject matter of the United States and the foreign companies' business is an issue likely to arise during the analysis of the alien's qualifications. Although the subject matter of each company's business does not have to be identical, problems often occur when the companies are engaged in substantially different businesses. These problems include: (1) the qualification of the alien to run the United States operation; (2) the possibility that the alien will not run the business, but will use it to obtain a United States visa; and (3) the likelihood that the companies can be considered a part of the same international organization. When the subject matter of the businesses is not related, consular officers and the INS will more closely scrutinize whether the businesses are making a bona fide transfer of an actual employee under Schedule A or as a nonimmigrant in the L-1 classification. In the context of permanent residence, this issue focuses on whether the alien actually intends to reside permanently in the United States or whether he is merely seeking permanent residence status either to make occasional trips to the United States or as security against unpredictable world crises.[89]

In addition to the previously discussed requirements, the corporate entities that the investor has established in the United States and abroad must be related in an acceptable manner. In most cases this relationship will be in one of the following forms: (1) parent-subsidiary, with the foreign company owning a controlling interest in the United States company; (2) subsidiary-subsidiary, with a third company, including a holding company, owning a controlling interest in both subsidiaries; or (3) affiliate-affiliate, with one shareholder or a group of shareholders owning a controlling interest in both companies.[90]

The "effective control" standard[91] determines whether companies are affiliated or in a parent-subsidiary relationship. As long as the party or parties through which the companies are connected have actual managerial control of the companies, this standard permits less than majority ownership. As the INS

89. A prospective immigrant must intend to reside permanently in the United States, and consular officers are sensitive to aliens who do not have this intention.

90. *Matter of* Tessel, Inc., 17 I. & N. 631 (Acting Assoc. Commissioner 1981).

91. *See supra* text accompanying notes 45 and 74.

pointed out in *Matter of Hughes*,[92] ownership of as little as ten percent of a company's stock can constitute effective control of that company in some cases. The INS will not accept less than majority control. Thus, if three shareholders own sixty percent of a foreign company, but only forty percent of the United States company, then unless the remaining sixty percent of the United States company's stock is widely dispersed, effective control is probably lacking. No rule defines how wide the dispersal must be, but certainly a small number of shareholders, for example, three, holding the other sixty percent of the United States company's stock could assert easily their control over the corporate entity and deprive the common investors of control. More shareholders might be unlikely to unite consistently against the three common shareholders. The INS probably contemplates a situation in which hundreds or thousands of shareholders hold and trade the remaining shares.

One final requirement exists for Group IV qualification. This requirement highlights some of the problems investors face when seeking this classification. The United States investment enterprise must have been established and doing business for at least one year prior to submission of the Group IV application.[93] Because the investor's presence probably will be required during the start-up of United States operation, this requirement increases the likelihood that the investor will need to enter the United States during the first year of operation in a nonimmigrant category and raises the issue of the investor's intent. The investor may find the L nonimmigrant category useful because it allows the transfer of a person to the United States to develop a United States affiliate or subsidiary of a foreign company. If the investor later seeks Group IV blanket certification, the requirement is slightly different: the alien must have worked abroad in a managerial or executive capacity for one year prior to *admission* to the United States as a nonimmigrant rather than for one year prior to *submission* of the Group IV application.

Because in most cases the United States enterprise must operate for at least one year before Group IV becomes a viable option, the problem of maintaining both the United States and the foreign enterprise will confront many investors.[94] For example,

92. 18 I. & N. 289 (Commissioner 1982).
93. 20 C.F.R. § 656.10(d)(2) (1985).
94. *See supra* notes 77-78 and accompanying text.

smaller investors coming to the United States permanently to oversee an investment may not be interested in continuing the foreign company, particularly if that company needs the investor's oversight to remain in operation. Investors who enter the United States as L-1 nonimmigrants may encounter difficulty attaining Group IV status if they close their foreign businesses prior to their transfer. Although the termination of overseas operations is not a per se bar to nonimmigrant status, significant problems could result from closing the foreign company.

The use of Group IV in these circumstances can cause difficulty. The rationale underlying Group IV is that international companies should be permitted to move personnel at the managerial or executive level throughout their organizations without having to recruit outside the company. This rationale views the company as a single entity transcending international boundaries, the internal structure of which would only be hindered by requiring local recruitment of high-level employees. For a small investment enterprise whose foreign operation will close upon the investor's relocation in the United States, this rationale has little applicability. As a result, use of Group IV may subvert the intent of the statute. Nevertheless, this argument was advanced in an attempt to bar investors from using the L-1 category. The INS rejected the argument on the basis that investors who qualify under the express language of the statute cannot be denied the statute's benefits solely because the drafters of the statute did not contemplate their situation. While no unambiguous precedent exists on the issue, the closing of the foreign operation upon the investor's admission to permanent residence may be regarded as fraudulent and could lead to the institution of proceedings to rescind resident alien status.

If the foreign business closes before the investor's United States company has been in operation for a year, the INS may argue that no international organization or foreign company is transferring the alien. Unlike the L-1 situation which specifically contemplates the transfer of an individual between two corporate entities, Group IV merely requires the alien to have worked abroad for the same international corporation or organization. Whether the specific affiliate still is in existence arguably has no bearing on whether the investor, currently in the United States in L-1 status, has met the requirement of a prior year abroad. One question raised by these facts is that of the alien's intent when the alien originally enters the United States. The alien's intent

can impact upon whether the INS approves an application for adjustment of status to permanent residence.[95]

The one year requirement presents other important issues for the investor. The Department of Labor regulations have defined "doing business" for the purposes of Group IV. This definition contemplates a regular, systematic, continuous course of business conduct. The employer's offer of and provision of goods and services is an important component of this definition.[96] The definition does not include the incorporation of a United States business entity or the positioning of an agent in an office in the United States without actually conducting business. The investor can demonstrate that the United States company has conducted business through profit and loss statements and tax returns. While most businesses require a certain period to establish operations, the company's financial reports must indicate significant progress toward a viable business entity. A minimum requirement for proving the existence of a business in the United States is the purchase or rental of business premises. Although this requirement is explicit for companies commencing operations in the L nonimmigrant category,[97] it should be considered a minimum requirement for Group IV qualification as well.

Although the elements of Group IV closely parallel those of the L-1 visa, Group IV is available to any qualified person. Hence, the investor with a B-1 or an E visa could qualify for Schedule A, Group IV if he held a managerial or executive position abroad with the same or an affiliated corporation during the year prior to his application for Schedule A, Group IV.

2. *Precertification Under Schedule A, Group II*

A limited number of investors might find useful precertification under Group II of Schedule A in seeking permanent residence. Group II covers the precertification of aliens who possess, and are sought for positions requiring, exceptional ability in the sciences or arts. Although the statutory language concerning this group is almost identical to the language of the third preference category,[98] the differences are significant. First, Group II does not include members of the learned professions unless they also are

95. *See infra* notes 111-12 and accompanying text.
96. 20 C.F.R. § 656.10(d)(3) (1985).
97. 8 C.F.R. § 214.2(l)(1)(iii)(A) (1985).
98. *See infra* notes 108-10 and accompanying text.

persons of "exceptional ability."[99] Second, Group II excludes performing artists. Third, the Department of Labor internal instructions suggest that a person qualified under Group II must be preeminent in his field and internationally recognized and renowned.[100] While cases indicate that persons of lesser caliber qualify under Group II, the instructions suggest that the standard for qualification for Group II is higher than that for the third preference category.[101]

The following example illustrates the use of Group II in the investment setting. A world-renowned inventor or scientist could establish a United States company through which he produces a patented process or researches and markets new technologies or products, and qualify under Group II while remaining the principal owner and investor in the company. The alien, however, must have the ability to direct the company and to oversee research and product development.

If a foreign investor can qualify for Schedule A, under either Group II or Group IV, he can substantially shorten the permanent resident process while also avoiding the problems that can occur in obtaining individual labor certification. These problems stem from the Department of Labor's concept of "employment" for determining whether a bona fide offer of employment is open to United States workers. For labor certification purposes, the Department of Labor defines employment as "permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee."[102] The creation of corporate entities distinct from the investor resolves the issue of employment for the INS, but not for the Department of Labor.

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99. The Act does not define the term "exceptional ability in the sciences or arts." Administrative case law has defined "exceptional ability" as "something more than what is usual, ordinary or common, and requires some rare or unusual talent, or unique or extraordinary ability in a calling which, of itself, requires talent or skill." *Matter of* Frank, 11 I. & N. 657, (D.D. 1966).

100. The Department of Labor internal instructions cite Einstein as an example of a person of international reknown eligible for Group II blanket labor certification.

101. *See supra* notes 97-100 and accompanying text for a discussion of the procedures the INS uses in determining eligibility for Group II precertification.

102. 20 C.F.R. § 656.50 (1985).

B. Individual Labor Certification

While the establishment of a corporate entity distinct from the investing shareholder satisfies the INS' requirements for intracompany transfers in the L-1 category[103] and in permanent residence cases, the Department of Labor will look beyond the corporate entity to decide whether the job opportunity is actually self-employment by an investor. Because a job opportunity must be available to United States workers for the Department of Labor to issue a labor certification, the Department wants to ensure that the foreign investor would replace himself if a qualified United States worker is willing to fill the position. The owner-employee has the burden of satisfying the Department of Labor that a job opportunity is available.

The labor certification application involves compliance with various federal regulations including a bona fide recruitment campaign designed to seek qualified United States workers. The Department of Labor's local delegated agency, the employment service of the state in which the job opportunity is located, supervises the conducting of this campaign. The labor certification application, which sets forth the requirements of the job opportunity, provides the Department of Labor with the opportunity to decide whether the job offer involves self-employment by an investor. For example, if the foreign investor is the only officer of the corporation and signs the application on the corporation's behalf, the Department of Labor generally will not approve the application.[104] To avoid this problem, the employing enterprise should have other employees, beyond the owner-employee, as well as someone with authority to sign the application on behalf of the corporation. Moreover, the person signing the form should be on a level equivalent to that of the owner-employee. This step negates concerns that the alien, by virtue of his position in the hierarchy, will control the recruitment process.[105] Ideally, the corpo-

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103. *See supra* notes 63-64 & 75 and accompanying text.

104. Few other ways exist in which the Department of Labor can ascertain that the alien owns the enterprise. The Department does not require information on corporate ownership, the size of the enterprise, the total number of employees or the identity of the officers.

105. If the alien controls the recruitment process, the Department of Labor will have serious doubts about whether the corporation will make the job opportunity available to someone other than the alien.

rate agent signing the forms[106] will be an officer of the company, and the alien will hold a managerial position. Even when the alien is the corporate president, the corporation can seek labor certification for the alien's functional position as general manager. This approach is sound because the alien will remain as president even if he can find someone to replace him in the daily management of the enterprise.

The Department of Labor has discerned other common factual patterns tending to indicate a situation involving an investor and raising the suspicion of self-employment. For example, when the company is named after the alien, or the company representative has the same last name as the alien or one indicating common nationality, the Department of Labor may be alerted to the possibility of self-employment. In addition, the labor certification application asks the number of persons the alien will supervise and the title of the alien's immediate supervisor. This information assists in the assessment of the size of the company.

If the alien's job title denotes managerial functions, greater difficulty arises concerning the number of employees the alien supervises. To minimize the significance of managerial duties in a new enterprise with few employees, the alien should emphasize his highly technical or professional duties, rather than those related to management, because skilled technicians or professionals often have little supervisory responsibility.

When the alien must confront the investor-employee issue, he must provide assurances that the job he seeks is open to qualified United States workers and that the owner-employee does not control the employer's efforts to recruit these workers. One safeguard built into the recruitment process is that the owner-employee can neither interview job applicants nor pass judgment on their qualifications for the position offered.[107] The employer must have at least one responsible officer or employee who is capable of interviewing job applicants and making employment decisions. If the person the company designates to conduct the recruitment campaign must answer to the alien, the Department of Labor may

106. The Department of Labor has taken the position that the person signing on behalf of the company must be a United States citizen or resident alien. Although this position is arguable because of the lack of a requirement that the company itself be a United States corporation, the rule should be followed to minimize difficulties with the Department of Labor.

107. 20 C.F.R. § 656.20(b)(3)(i) (1985).

not credit the independence of this employee in making employment decisions. In this situation, the employer should give an outside consulting firm full authority to interview and hire for the position.

In the interview process, the employer must take care to give only lawful, job-related reasons for disqualifying job applicants. The employer cannot disqualify job applicants for subjective reasons like the applicant's failure to fit into the company's business environment or incompatibility with other employees. Many job applicants, however, disqualify themselves from the recruitment process where the position in question is entrepreneurial.

C. Preference Petitions

Following approval of the labor certification, foreign investors must file a preference petition with the INS in either the third or sixth preference categories. The third and sixth preferences permanently admit professionals or persons of exceptional ability in the sciences or arts and needed skilled or unskilled labor, respectively. An approved preference petition classifies the alien as being qualified for immigration to the United States.

Because the standard for qualification in the third preference category is more restrictive than the sixth preference category, visas are more readily available for the fewer number of third preference category qualifiers. Hence, qualifying in the third preference category often is less time consuming, an important advantage to foreign investors already in the United States in a nonimmigrant category. Not only can the total length of stay be restricted in a nonimmigrant category, but investors may have difficulty obtaining renewals of nonimmigrant stay when permanent resident papers are pending.

An inventor establishing a company to produce or market a patented product, or an entertainer establishing his own production company, can submit evidence of his renown to qualify for third preference classification. If an alien cannot establish qualification for the third preference category on the basis of his renown, he may be considered a member of the professions. In determining whether a position is professional, the INS adheres to the occupational title that the Department of Labor assigns to the position during the labor certification process. This position requires, at minimum, a baccalaureate degree. Therefore, even if the Department of Labor regards the field as a profession, the alien may not possess the qualifications of a professional.

For investors with experience or expertise in business-related fields, the INS' standards may pose difficulties in their attempt to qualify for third preference category classification. Not all business fields are professional,[108] and positions at the managerial level may not be professional positions. Thus, while it is helpful in the labor certification process to refer to the alien's position as managerial rather than executive, it can hurt the alien with truly professional qualifications to do so. Aliens with professional qualifications must emphasize their professional job duties in their labor certification application to improve the chance that the Department of Labor will categorize the job in a field more narrow and professional than business manager.

A common problem arises for persons in high level managerial or executive positions who attempt to qualify under the third preference category. The INS requires the business executive to have, and the job to require, a university education. The INS has permitted third preference classification for some aliens without degrees when those aliens have had many years of experience in their field and have completed a substantial portion of the course work necessary for degree conferral.[109] In a recent decision, the INS took a restrictive view of these cases, raising the possibility that experience alone, or in combination with a minimal amount of education in the field, may be insufficient to attain classification as a professional.[110] In these cases, the employer should file

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108. *Matter of* Ling, 13 I. & N. 35 (Reg. Commissioner 1968) (mere possession of a degree in business administration was not sufficient to qualify an alien for H-1 status when the alien made no showing either that the particular area of business administration in which he would work required a baccalaureate degree or that he specialized in that area when obtaining his degree).

109. *Matter of* Asuncion, 11 I. & N. 660 (Reg. Commissioner 1966).

110. *Matter of* Portugues do Atlantico Information Bureau, Inc., Int. 2982 (Commissioner 1984). In *Portugues do Atlantico,* the Commissioner of the Immigration and Naturalization Service addressed the issue whether an alien can attain the equivalent of a bachelor's degree and thereby possess professional qualifications through work experience. The Commissioner reached the following conclusion:

> Case law. . .accommodates those rare instances where individuals attain professional standing through directed experience and specialized noninstitutional instruction, as in "reading" law, where such a program is recognized by appropriate professional bodies as a form of preparation for practice of that profession. *Matter of* Shin, 11 I. & N. 686 (D.D. 1966). The cited case law and its statutory and regulatory foundation do not stand for the proposition that longevity in a particular nonprofessional occupation

both a third and sixth preference category petition. This course of action avoids the loss in processing time that occurs when the INS must relate a subsequently filed sixth preference category petition to the previously filed third preference category petition and supporting labor certification.

D. Adjustment of Status and Visa Processing

Following approval of the preference petition the alien investor is qualified for immigration, but is not a permanent resident alien. In order to obtain residence, the alien must apply either for adjustment of status or for an immigrant visa at a United States consulate abroad. Adjustment of status is available to aliens who have been legally admitted into the United States and have not worked without authorization. Aliens who either are located outside of the United States or are ineligible for adjustment of status must finish the permanent resident process by applying for an immigrant visa at a United States consulate.

The major difficulty with the adjustment of status application process is the possibility that the alien may have worked without authorization.[111] Aliens who come to the United States as business visitors in the B-1 nonimmigrant category can engage in some activities leading to the initiation of a business in the United States. Once the alien has established a business, he can neither oversee its daily operation nor receive compensation from the business until he changes to a different nonimmigrant category. An Immigration Service examiner may scrutinize closely both the date that the business commenced operations and the date that the alien changed status to determine whether the alien has engaged in unauthorized employment.

Employment authorization is not a problem during visa processing at a United States consulate, because United States consulates do not consider working without authorization in the United States to be a basis for the subsequent denial of an immigrant visa. The consular officer may deny a visa, however, if the consular officer is not convinced that the investor intends to move

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demonstrates a professional level of ability or merit on the part of the incumbent.

At present, Immigration Service officials are routinely citing this case as justification to deny H-1 classification to professionals who do not hold degrees.

111. *See supra* note 26.

to, and reside in, the United States.[112] The alien may establish this intention through objective factors such as the purchase of a house in the United States, the sale of a residence in his home country, the transfer of substantial amounts of capital to the United States, the closing of local business interests, the relocation of family, the enrollment of children in United States schools, and the commencement of social and cultural ties in the United States. Because foreign investors seeking residence are likely to have been in the United States for some period of time as nonimmigrants prior to the conferral of resident status, they may have met many of these criteria. Those factors relating to the alien's severing of ties with his home country can conflict directly with other requirements of permanent residence as would an overseas affiliate that serves as a capital resource for a new business in the United States. In any event, the Immigration Service should not require the investor to curtail international business operations if he can establish sufficient ties to the United States.

The investor must be careful to run his international business interests without jeopardizing permanent resident status once it has been conferred. The investor must maintain his intent to reside permanently in the United States. The Immigration Service can measure this intent from objective circumstances, such as the length of time the resident spends outside of the United States, the resident's principal sources of income, and the location of the resident's family members. Failure to maintain sufficient ties to the United States, including a place of abode, can result in a determination that the investor has abandoned permanently his residence. Under current regulations, a permanent resident may present the alien registration receipt card in lieu of an immigrant visa if the alien is returning to an unrelinquished, lawful permanent residence after a temporary absence abroad not exceeding one year. Therefore, investors who need to remain outside of the United States for up to two years should consider applying for a reentry permit, which authorizes stays abroad in furtherance of business interests.

IV. CONCLUSION

Simple and persuasive policy reasons exist for allowing the foreign investor to seek entry into the United States. The influx of

112. *See supra* note 89 and accompanying text.

new capital into this country both ensures job opportunities for a number of Americans and asserts a balancing effect on the large negative balance of trade. The United States immigration selection system presently provides foreign investors with a limited number of options for immigration to the United States. In essence, investors can immigrate only if they establish that an enterprise can offer them employment that will not displace a United States worker.

The Simpson-Mazzoli Bill no longer proposes provisions that establish a numerically limited category of immigration for investors. One provision, adopted in the original bill submitted to Congress in 1981, establishes a numerically limited category of immigration for aliens who invest at least $250,000 in an enterprise creating employment for at least ten United States workers. The enterprise must have been established in a "high unemployment area" to qualify. The Senate of the 97th Congress passed a provision that reduced the number of United States workers to four and did not require that the enterprise be established in a high unemployment area. This provision was deleted in House action, however, along with other reforms to legal immigration that the Senate had approved. In the 98th Congress the investor provision reached the Senate floor, but was deleted in a last minute amendment. The House continued to exclude the investor provision from its version of the bill. Therefore, the provision would not have been part of the legislation if the bill had passed through the conference committee during the last days of the 98th Congress. Congress probably will never enact the general investment provision included in the original Simpson-Mazzoli proposal because a significant segment of Congress remains opposed to the reform of the immigration selection system and particularly to an elitist provision that would permit wealthy foreign nationals to "buy" their way into the United States.

Thus, the crucial question remains whether the provisions of United States law are consistent with the significant national interest in facilitating the entry into the United States of foreign investors. The preceding discussion represents the array of approaches, criteria, and analyses that form the bases for representing the foreign investor in the context of Unites States immigration law. Because the influx of foreign capital benefits the United States economy beyond the creation of jobs in one enterprise, Congress should give extensive consideration to passing legisla-

tion that establishes additional provisions in the Immigration and Nationality Act that are directly relevant to the foreign investor.