

Adjudicator's Field Manual

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Chapter 34 Other Employment Authorized Nonimmigrants (E, I & R Classifications).

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34.4 Representatives of Information Media has been superseded by Volume 2, Part K: Media Representatives as of November 10, 2015.

34.5 Nonimmigrant Aliens Employed in Religious Occupations has been superseded by USCIS Policy Manual, Volume 2: Nonimmigrants as of May 15, 2020.

34.6 E-3 Specialty Occupation Workers

34.1 Background. [Chapter 34.1, revised 12/22/2005]

Other nonimmigrant workers are discussed in **Chapter 31** (H-classes), **Chapter 32** (L-class), and **Chapter 33** (O- and P-classes). This chapter is a catch-all for the remaining nonimmigrant classes of aliens who are entering the U.S. principally to engage in employment. This chapter includes treaty traders and investors, representatives of the information media, various religious workers and E-3 Specialty Occupation Workers. These classes are considered collectively within this chapter because, unlike the H, L, O and P classes, they do not require pre-approval of a petition by USCIS, unless there has been a substantial change in the terms or conditions of E status (see **8 CFR 214.2(e)(8)**). Initial application for a visa to enter in any of these classes may be made at a consular office overseas. For applicants already in the U.S. in another nonimmigrant category, application may be made using Form I-129 (except for the I class, which is filed on Form I-539). Among these classes, only the E-1 and E-2 classes, treaty traders and investors, have any significant amount of policy guidance in the form of regulations or precedent decisions. The I category has existed for many years. The R category, added in 1990 by **Section 209 of Pub. L. 101-649**, was created to permit the temporary admission of religious workers as defined in paragraphs (I), (II) or (III) of section **101(a)(27)(C)(ii)** of the Act. The E-3 category, added in 2005 by **section 501 of Division B of Pub. L. 109-13**, was created to permit the temporary admission of nationals of the Commonwealth of Australia who are entering the U.S. to perform services in a “specialty occupation.”

34.2 Treaty Traders.

(a) Eligibility Requirements.

(1) The Business.

The enterprise (company, corporation, etc.) must be engaged principally and substantially in trade between the U.S. and the treaty country.

(2) The Alien.

An E-1 alien may be the actual owner of a qualifying enterprise or an employee of such enterprise working in an executive or supervisory capacity or in a capacity which requires special qualifications essential to the operation of the enterprise. Such employees must have the same nationality as the principal employer. An E-1 alien may perform services for the parent treaty organization or any of its subsidiaries.

(3) Nationality.

The principal employer must be either a person in the U.S. having the nationality of the treaty country (or, if not in the U.S., otherwise entitled to treaty trader status) or an enterprise at least 50% owned by persons in the U.S. of such nationality. The list of treaty countries is contained in the Department of State's *Foreign Affairs Manual*, chapter 41.51, Exhibit 1. The nationality list for treaty traders is different than the list for treaty investors.

Note 1:

The nationality of the spouse or child of a treaty trader is irrelevant to their classification. (See **8 CFR 214.2(e)(4)**.)

Note 2:

The spouse of an E nonimmigrant may apply for work authorization.

(b) Application Process.

Because a treaty trader does not require a separate petition, E-1 status may be obtained either directly through the Department of State (by applying for an E-1 visa) or, in the case of an alien already in the U.S., by applying to the appropriate service center (the center having jurisdiction over the business) for a change of status on Form I-129, including the E supplement. Supporting documents to be submitted with an E-1 application include documents to establish the nature of the employment and the ownership of the enterprise, as described in paragraph (a), above.

(c) Approval.

If, from the evidence submitted, the petition appears approvable, endorse the approval block and issue Form I-797 (through CLAIMS), showing the period of validity and the alien beneficiary's name and classification. An E-1 application may be approved for a period of up to two years and extended in two-year increments.

(d) Denial.

If the evidence does not clearly establish the beneficiary's eligibility for E-1 status and a request for additional evidence does not appear warranted, prepare a denial notice setting forth the specific reasons why the application cannot be approved. There is no appeal from a denial of E-1 classification. However, if the facts of the case are novel, complex or potentially of value as a precedent, the decision of the director may be certified to the Administrative Appeals Office pursuant to **8 CFR 103.4**.

(e) Advisory Letters.

An E-1 may seek advice from USCIS concerning any change in employment (e.g. capacity of employment, company restructuring, etc.) which might affect his or her status. The adjudicator reviewing the advisory request must either recommend the filing of another application, or prepare a new I-797 reflecting the non-substantive changes.

(f) Technical Issues.

(1) Trade.

See **8 CFR 214.2(e)(9)** discussion of the broad definition of trade, including goods, services, technology, tourism and other intangible items with intrinsic value. The trade must be substantial as defined in 8 CFR 214.2(e)(10) and occur principally between the U.S. and the treaty country, as discussed in **8 CFR 214.2(e)(11)**.

(2) Nature of Employment.

The E-1 applicant may be an owner of the company or an employee of the company. The employment must be in a managerial capacity or one which requires special technical knowledge. This employment is not unlike the type of employment which would qualify for an L-1 visa. Discussions found in various precedent decisions pertaining to L-1 classification are helpful in deciding E-1 cases as well.

A qualified technician (somewhat lower than the L-1 "specialized knowledge" qualifications) may also be classified as a treaty trader if he or she has special qualifications essential to the efficient operation of the business. For example, if he or she will be engaged in performing warranty repairs on intricate and complex products sold in the course of trade between the U.S. and that country, and it appears the firm is otherwise unable to obtain the services of technicians in the U.S. to perform such repairs. When granting an extension of stay to such a technician, or a change of status to that of a treaty trader, the employing firm shall be advised that the action has been taken with the understanding that the employer will utilize U.S. citizens or permanent resident aliens, as such persons become available to make the repairs or to be trained. When the employing firm has been so notified, the alien's Form I-539 should be annotated to so indicate. If the alien should subsequently apply for a further extension of stay, the adjudicator shall determine what steps the firm has taken to train or employ resident U.S. workers to perform the specialty work. The extension should not be granted if it appears the firm has failed to make serious efforts to comply with the notification.

(3) Ownership of an E-1 Company.

An alien employed by a foreign person may not be classified as an E-1 nonimmigrant unless the foreign employer is also classified as an E-1 nonimmigrant, or, if abroad, the employer must be eligible for admission to the U.S. as E-2 nonimmigrant. If the employer is a corporation or other business organization, the majority ownership (at least 50 percent) of the business must be by aliens who are of the same nationality as the employee and who, if not resident abroad, are maintaining status under section 101(a)(15)(E) of the Act. An alien who is a lawful permanent resident of the U.S. does not qualify to bring employees into the U.S. under section 101(a)(15)(E). Shares of a business owned by lawful permanent resident aliens cannot be considered in making determinations of majority ownership by nationals of the treaty country.

(g) Precedent Decisions Involving Treaty Traders.

· **Matter of Konishi** , 11 I&N Dec. 815 (Regional Commissioner 1966) . Section 248 change of status denied in that the duties of an executive assistant to an assistant vice president of a Japanese owned import/export company have not been established to be supervisory or executive in nature. No documentary evidence was presented to evidence applicant's education and employment background and ability to perform executive/supervisory duties.

· **Matter of Seto** , 11 I&N Dec. 290 (Regional Commissioner 1965) . Section 248 application denied, as the applicant has presented no evidence of substantial international trade. Japanese company had authorized sale of business machines but the alien had no office or inventories in the U.S. No sales contract had been negotiated, and he presented no documents such bills of lading, invoices to indicate current existence of international trade.

· **Matter of N---S----** , 7 I&N Dec. 426 (District Director 1957; Central Office 1957). The requirement that the applicant be employed by a foreign person or corporation having his nationality is satisfied when it is shown that 51% or more of the stock of the employer corporation is owned by persons of applicant's nationality. Such a firm is a "foreign corporation" within the meaning of the regulations without regard to whether it was incorporated abroad or in the U.S.

Note:

See **22 CFR 41.51(c)** which requires at least 50% ownership by persons of applicant's nationality.

· **Matter of Damioli** , 17 I&N Dec. 303 (Commissioner 1980) . USC is ineligible to confer treaty trader status on an alien beneficiary.

34.3 Treaty Investors.

(a) Eligibility Requirements.

(1) The Business.

The E-2 enterprise (company, corporation, etc.) must involve the investment of a substantial amount of capital, rather than a marginal investment solely for the purpose of earning a living for the investor.

(2) The Alien.

An E-2 alien may be the actual owner of a qualifying enterprise or an employee of such enterprise working in an executive or supervisory capacity or in a capacity which requires special qualifications essential to the operation of the enterprise. Such employees must have the same nationality as the principal employer. An E-2 alien may perform services for the parent treaty organization or any of its subsidiaries

(3) Nationality.

The E-2 principal must be either a person in the U.S. having the nationality of the treaty country (or, if not in the U.S., otherwise entitled to treaty investor status), or be a qualifying employee of an enterprise at least 50% owned by persons of such nationality. The list of treaty countries is contained in the Department of State's *Foreign Affairs Manual*, chapter 41.51, Exhibit 1. Note that the list for treaty investors is different than the list for treaty traders.

Note 1:

The nationality of dependents is irrelevant to their classification.

Note 2:

The spouse of an E nonimmigrant is may apply for work authorization.

(b) Application Process .

Because a treaty investor does not require a separate petition, E-2 status may be obtained either directly through the Department of State (by applying for an E-2 visa), or in the case of an alien already in the U.S., by applying to the appropriate service center for a change of status on Form I-129 , including the E supplement. Supporting documents to be submitted with an E-2 application include documents to establish the nature of the employment and the ownership of the enterprise, as described in paragraph (a), above.

(c) Approval .

If, from the evidence submitted, the application appears approvable endorse the approval block and issue Form I-797 (through CLAIMS) showing the period of validity and the alien beneficiary's name and classification.

(d) Denial .

If the evidence does not clearly establish the beneficiary's eligibility for E-2 status and a request for additional evidence does not appear warranted, prepare a denial notice setting forth the specific reasons why the application cannot be approved. There is no appeal from a denial of E-1 classification. However, if the facts of the case are novel, complex or potentially of value as a precedent, the decision of the director may be certified to the Administrative Appeals Office pursuant to **8 CFR 103.4** .

(e) Advisory Letters .

An E-2 may seek advice from USCIS concerning any change in employment (e.g., capacity of employment, company restructuring, etc.) which might affect his or her status. The adjudicator reviewing the advisory request must either recommend the filing of another application, or prepare a new I-797 reflecting the non-substantive changes.

(f) Technical Issues.

(1) Ownership of an E-2 Company.

An alien employed by a foreign person may not be classified as an E-2 nonimmigrant unless the foreign employer is also classified as an E-1 nonimmigrant, or if abroad, the employer must be eligible for admission to the U.S. as an E-2 nonimmigrant. If the employer is a corporation or other business organization, the majority ownership (at least 50 percent) of the business must be by aliens who are of the same nationality as the employee and who, if not residing abroad, are maintaining status under section 101(a)(15)(E) of the Act. An alien who is a lawful permanent resident of the U.S. does not qualify to bring employees into the U.S. under section 101(a)(15)(E). Shares of a business owned by lawful permanent resident aliens cannot be considered in making determinations of majority ownership by nationals of the treaty country.

(g) Precedent Decisions Involving Treaty Investors

· **Matter of Kobayashi and Doi**, 10 I&N Dec. 425 (District Director 1963; Regional Commissioner 1963; Deputy Associate Commissioner 1963). Managerial employees charged with the training or instruction and supervision of entertainers and waiters in a theater restaurant are not employed in the "responsible capacity" as required by 22 CFR 41. They are not properly classifiable as nonimmigrant employees of a treaty investor.

· **Matter of Udagawa**, 14 I&N Dec. 578 (BIA 1974). Applicant for admission who will supervise and train American workers as tempura cooks at a Japanese restaurant and assist in the preparation of meals during the training period is inadmissible as an employee of a treaty investor because he will not be employed in a "responsible capacity" with the meaning of 22 CFR 41.51.

· *Matter of Laijo*, 15 I&N Dec. 65 (BIA 1974). A treaty investor is precluded from engaging in unauthorized employment by the provisions of both 8 CFR 214.1(e) and 8 CFR 214.2(e). Unauthorized employment constitutes a failure to maintain status.

· **Matter of Lee**, 15 I&N Dec. 187 (Regional Commissioner 1975). E-2 status denied where the total value of the enterprise was \$64,000 and the applicant has invested only \$10,000, but alleges that at some

unspecified future time he will increase his investment to more than 51% of the enterprise. The applicant has failed to establish that his investment does not represent a "small amount of capital in a marginal enterprise solely for the purpose of earning a living" contrary to the provisions of 22 CFR 41.51.

- **Matter of Chung** , 15 I&N Dec. 681 (Regional Commissioner 1976) . An application filed under section 248 of the Act for change of nonimmigrant classification from visitor to treaty investor is denied where the applicant's only showing was that he intended to invest \$10,400 on deposit in a savings account in a shoe manufacturing business. The mere intent to invest does not meet the requirements of the Act.

- **Matter of Nago** , 16 I&N Dec. 446 (BIA 1978) . Where the applicant for admission is a highly trained chef who is engaged in a specialized form of Japanese cooking (Nabemono) and has been brought to the U.S. to impart his knowledge, the BIA concluded that the applicant is employed by a treaty investor in a responsible capacity and therefore qualifies as an E-2 nonimmigrant.

- **Matter of Khan** , 16 I&N Dec. 138 (BIA 1977) . The respondent had at best a subjective intention to invest in the future. Although he may have invested funds in the past, that does not establish that he will invest funds in the future. More is required for such a showing.

- **Matter of Csonka** , 17 I&N Dec. 254 (Regional Commissioner 1978) . The alien who had not invested his own funds did not qualify as a treaty investor. He had acquired loans which had been guaranteed by another party.

34.4 Representatives of Information Media has been superseded by Volume 2, Part K: Media Representatives as of November 10, 2015.

34.5, Nonimmigrant Aliens Employed in Religious Occupations, has been superseded by USCIS Policy Manual, Volume 2: Nonimmigrants as of May 15, 2020.

34.6 E-3 Specialty Occupation Workers [Chapter 34.6, added 12/22/2005]

(a) Eligibility Requirements.

(1) The Alien.

An E-3 alien must be a national of the Commonwealth of Australia coming to the U.S. to perform services in a specialty occupation.

(2) Specialty Occupation.

A specialty occupation for an E-3 alien is defined in the Act in the same manner as in the H-1B context. In particular, pursuant to **section 214(i)(1)** of the Immigration and Nationality Act, “specialty occupation” means an occupation that requires the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. As such, in order to be eligible for an E-3 classification, an alien must be able to show he or she will be employed in a specialty occupation in the U.S. and he or she possesses the required U.S. bachelor’s or higher degree (or its equivalent) in the specific specialty to meet the minimum requirement for entry into the occupation in the U.S.

(A) Change of Status.

An alien is also expected to meet any other occupational requirements specified by the jurisdiction in which the alien will be employed, such as licensure or other official permission to practice in the occupation in question. An alien seeking to change status to E-3 must submit a certified copy of any license or other official permission to practice the specialty occupation in the jurisdiction of intended employment, if such licensure or other official permission is required in order to commence the duties of the specialty occupation. If licensure is unnecessary to start employment immediately in the intended specialty occupation, the alien must submit evidence that he or she otherwise meets the requirements for obtaining the license or taking the relevant jurisdiction’s licensure examination, as well as evidence that he or she will, upon passage of the examination, be obtaining the required license within a reasonable period of time after being granted E-3 classification.

(B) Extension of Stay.

For E-3 aliens applying to extend their stay in the U.S. in a specialty occupation that requires a license or other official permission to practice in the specialty occupation, the alien must submit, together with his or her extension application, a copy of the license or proof of other official permission to practice the occupation in the jurisdiction of intended employment .

(3) Length of Stay.

E-3 Specialty Occupation Workers may be admitted initially for a period not to exceed the validity period of the accompanying E-3 labor attestation (i.e., for a maximum of two years), and extensions of stay may be granted indefinitely in increments not to exceed the validity period of the accompanying E-3 labor attestation (i.e., for increments of up to two years each). As there is no limit on the total length of stay for an E-3 alien in the legislation, there is no specified number of extensions a qualify ing E-3 Specialty Occupation Worker may be granted. Under the current E regulation, **8 CFR 214.2(e)(5)** , an alien classified under section **101(a)(15)(E)** as an E-3 nonimmigrant shall maintain an intention to depart the United States upon the expiration of termination of E status. An application for initial admission, change of status or extension of stay in E-3 classification, however, may not be denied solely on the basis of an approved request for permanent labor certification or a filed or approved immigrant visa preference petition.

(4) Educational Requirements.

An E-3 alien must be able to show that he or she possess the required U.S. bachelor's or higher degree (or its equivalent) in the specific specialty.

(5) Labor Attestation.

A certified labor attestation must have been issued on behalf of the E-3 Specialty Occupation Worker (in the form specified by the Department of Labor.)

Note 1:

The dependent spouse and children of an E-3 principal, if otherwise admissible, may be granted E-3 classification notwithstanding the spouse or children's nationality.

Note 2:

Notwithstanding AFM Chapter 55.2(d)(2) , the dependent spouse of an E-3 nonimmigrant may apply for work authorization. **Public Law 107-124** added a new subsection to section **214(e)(6)** of the INA which states that in the case of the spouse admitted under section **101(a)(15)(E)** of the INA who is accompanying or following to join a principal alien admitted under this section, the Secretary of Homeland Security "shall authorize the alien spouse to engage in employment in the United States and provide the spouse with an 'employment authorized' endorsement or other appropriate work permit." As such, spouses of the principal E-3 aliens are eligible for work authorization. Specifically, in order to obtain an employment authorization document, the E-3 nonimmigrant dependent spouse must file Form I-765, Application for Employment Authorization, and provide evidence that he or she qualifies as an E-3 spouse and that the nonimmigrant principal is in E-3 principal status. Except as noted below with respect to where to file, requests for work authorization filed by such persons will be processed in a similar manner to the requests from spouses of E-1 and E-2 aliens as outlined in the February 22, 2002 memo entitled " Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determinations on the Requisite Employment Abroad for L Blanket Petitions."

The Form I-765 must be submitted to the Service Center with jurisdiction over the dependent spouse's place of residence. However, applications for employment authorization concurrently filed with Form I-129 for E-3 principal aliens can only be filed at the Vermont Service Center.

Note 3:

There is an annual cap of 10,500 initial E-3 applications for each fiscal year that applies to principal E-3 aliens. This cap applies to all initial E-3 applications made abroad and to all change of status to E-3 applications made through USCIS. The cap does not apply to extensions of E-3 provided that the E-3 alien continues to be employed by the same employer named in the application for change of status to E-3 classification or, in the case where an alien first obtained E-3 classification by applying for an E-3 visa abroad, in the alien's original E-3 visa application. In cases where an E-3 alien seeks to change employers either by applying for an extension of nonimmigrant stay within the United States or by applying for a new E-3 visa at a U.S. consulate abroad, the E-3 alien will be counted against the cap again. The dependent spouse and children of an E-3 principal alien will not be counted against the annual cap.

(b) Application Process.

Because an E-3 Specialty Occupation Worker does not require a separate petition, E-3 status may be obtained either directly through the Department of State (by applying for an E-1 visa) or, in the case of an alien already in the U.S., by applying to the Vermont Service Center for a change of status or extension of status on Form I-129 . As the current Form I-129 E Supplement refers only to the E-1 and E-2 visa categories, the E Supplement is not currently required for E-3 aliens. Supporting documents to be submitted with an E-3 application include: (1) proof that the alien is a national of the Commonwealth of Australia; and (2) a letter from the U.S. employer describing the specialty occupation to be engaged in, the anticipated length of stay, and the arrangements for remuneration, evidence the alien meets the educational requirement for the specialty occupation, which must be a U.S. bachelor's degree or higher (or its equivalent) in the specific specialty, evidence the alien meets any other licensure or occupational requirements and an U.S. Department of Labor (DOL) issued certified labor condition application (LCA) for E-3 Specialty Occupation Worker (in the form specified by DOL).

NOTE:

DOL has informed USCIS that applicants may not submit, as part of their E-3 application, an LCA that was filed in conjunction with a separate petition for H-1B classification in lieu of the required E-3 Specialty Occupation Worker LCA. Until DOL develops a separate LCA Form for the E-3 classification, prospective E-3 applicants may submit Form ETA-9035 to a special address to be provided by the DOL, together with a request that the form be annotated as an E-3 LCA. These annotated Forms ETA-9035 should be distinguished from H-1B Lucas (which are also submitted on Form ETA-9035) that bear no such DOL-approved "E-3" annotation.

(c) Approval.

If, from the evidence submitted, the application appears approvable, endorse the approval block and issue Form I-797 (through CLAIMS), showing the period of validity and the alien beneficiary's name and classification. An E-3 application may be approved for a period not to exceed the validity period of the accompanying E-3 labor attestation (i.e. for a maximum of two years) and extended in increments not to exceed the validity period of the accompanying E-3 labor attestation (i.e., for increments of up to two years each).

(d) Denial.

If the evidence does not clearly establish the beneficiary's eligibility for E-3 status and a request for additional evidence does not appear warranted, prepare a denial notice setting forth the specific reasons why the application cannot be approved. If a request for evidence is warranted, issue accordingly.

Appendix 34-1, Nonimmigrant Religious Worker Attestation and Denomination Certification, has been superseded by USCIS Policy Manual, Volume 2: Nonimmigrants as of May 15, 2020.