

Using E Visas—Sourcing Talent the E-sy Way

By Kimberly M. Bennett & James M. Stone

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Meet the Authors



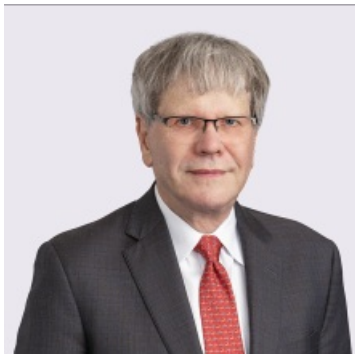
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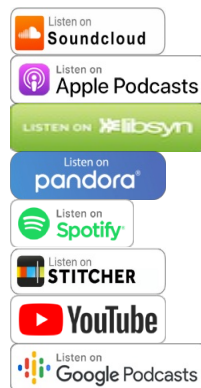
Immigration

Details

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Employers searching for skilled workers should not overlook the powerful, but somewhat obscure immigration tool—the E visa. While use of this visa is dependent on certain treaty laws, qualifying organizations may employ the E visa to hire employees which can provide needed options for companies to replace employees in the post-pandemic economic marketplace. On this episode of We get work™ we share the many benefits of the E visa—as well as who and how to qualify.

Jackson Lewis P.C. · Using E Visas—Sourcing Talent the E-sy Way



Transcript

Alitia: Welcome to Jackson Lewis's podcast, We Get Work, focused solely on workplace issues everywhere and under any circumstances. It is our job to help employers develop proactive strategies, strong policies, and business oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted?

Employers searching for skilled workers should not overlook the powerful but somewhat obscure immigration tool, the E visa. While use of this visa is dependent on certain treaty laws, qualifying organizations may employ the E visa to hire executives, managers or essential employees which can provided needed options for companies struggling to replace employees in the post pandemic economic marketplace. On this episode of We Get Work, we share the many benefits of the E visa, as well as who and how to qualify. Our host today are James Stone, principal in the Cleveland office of Jackson Lewis, and Kimberly Bennett, an associate in the DC region office.

With more than 30 years of experience in labor and employment law, Jim believes that clients should take a pragmatic approach to employment relations, combining the best practices from human resources, labor relations, and legal strategies. As co-leader of the firm's manufacturing group, Jim has particular knowledge of the manufacturing, construction automotive healthcare and steel industries. Kimberly provides immigration service for companies seeking increased global mobility for their employees. Kimberly's versatility in immigration matters is demonstrated through her work with both Fortune 500 companies and startup businesses in technology, finance, manufacturing, fashion, and healthcare. Jim and Kimberly, the questions on everyone's mind today are how can E visas help employers find skill workers, and if my organization qualifies, how does that impact my business?

James Stone: Well, Kimberly is the knowledgeable person on this issue. She's an attorney in our DC office in the immigration space, but I can speak as the co-chair of our manufacturing industry group, but of course this applies to lots of different businesses. Employers, as you said, are very, very eager and really require access to a pool of qualified skilled workers. Currently the labor supply in the United States, particularly in the more skilled areas, but really in many areas, is short of the mark in terms of what's needed. I think a lot of employers are familiar with L-1 visas for intercompany transfers. They're familiar with H-1 visas for professional hiring and labor certifications in certain situations, but there's a great program that's available that one or two of my clients have taken advantage of and that Kimberly is quite knowledgeable about and that's the treaty visa program. And we wanted to interview her so we could talk about this option that may be a suitable help to many of our clients. Kimberly, you want to tell us a little bit about that program and also who qualifies for it?

Kimberly Bennett...: Sure. Thanks Jim. So as Jim mentioned, there are other work visas that employers are often familiar with, but those visas have some downsides to them. For example, the H-1B visa, it's subject to a cap, so there are only a certain limited number of those available and it's limited to professional employees. So that's people with at least a bachelor's degree and they're coming to fill a position that requires at least a bachelor's degree. Jim mentioned the L-1 intracompany transferee visa. And while that's a great visa, the problem is you need to have employed that employee for at least one year outside of the US with a qualifying organization and in a qualifying capacity, it creates some limitations for employers. Where the E-1 and E-2 visas become particularly useful is that there are no such time restrictions, so you don't have to have employed this particular employee abroad.

You don't have to have employed them at all before. And additionally, the E-1 and E-2 visas allow for employees that are either coming in an executive managerial or essential capacity. And essential is really where these visas become super useful, flexible and allow for a greater number of employees to use that visa, because essential does not mean that the employee needs to be a professional level employee. But I think I'm getting ahead of myself. Let me start with the basics of what the E-1 and E-2 visas actually are and then we can talk a little bit more about those essential employees and what that means. First, as I mentioned, there's the E-1 and the E-2, so that's for individuals or entities from

countries with which the United States has a qualifying treaty of commerce and navigation. So qualifying treaties may include treaties of friendship, commerce and navigation, bilateral investment treaties.

The old NAFTA, or now the USMCA, is a really good example of one of those treaties. As long as the United States has a treaty with the country that is in question, then that country, now there's some other nuances here, but typically they would be able to qualify for the E-1 and the E-2 visa. There is a list of all of the countries that qualify for these visas. You can look it up online. There's a number of countries that qualify for these, so it is a pretty far reaching visa, but you do need to check and make sure that the treaty exists. If you are an investor and you would like to start a company in the United States, you may qualify for that E-2 visa, which is for treaty investors. The E-1 visa is for treaty traders.

Now, you don't have to necessarily be an individual, you could be a company that, let's say, is headquartered in France and is thinking about opening US operations. That company could open a US subsidiary and the French company would either be the treaty trader or the treaty investor. This visa can be used for an individual who wishes to start a business in the United States, or it can be utilized by corporations. So what do we mean by treaty trader and treaty investor? Trading needs to be principal trade with the United States. We'll use France again, let's say you are a French leather manufacturer and you'd like to open up your distribution operations in the United States. So you are shipping your leather to the United States and maybe in turn the United States is providing services to the French entity, as long as that trade is 50% or more, then that would establish the trade that is needed for the E-1 visa.

Now, I do want to go back to the French ownership of this company. The ownership does need to be majority. So if we're talking about a corporation, you do need to trace the ownership all the way to the top of the ownership. The ultimate owner of the corporation must be majority owned by the treaty country. If it's a publicly traded organization, typically you can look to the stock exchange to see if that would be considered, in this example, a French corporation. But if it's ultimately owned by individual owners, you do need to be able to trace that ownership and make sure that it is above 50%.

James Stone: Kimberly, let me ask you a follow up on that question, which some of our clients or friends may be interested in. If the ultimate parent corporation is foreign and is in one of these treaty countries and they have a significant North American facility, subsidiary, which is a common arrangement, assuming they meet the other criteria, would they be able to use this device to move people from a foreign country into the United States for qualifying types of jobs, which I know we're going to talk about a little more later?

Kimberly Bennett...: Yes. As long as the ultimate parent company of that corporation is owned by one of these qualifying countries, then yes. Sometimes the ownership can be really complex in these larger organizations, but as long as you're able to establish, trace and demonstrate the ownership, the ownership tree or structure, then hopefully you'll be able to qualify if the ultimate ownership is from a treaty country.

James Stone: Well, it sounds like this is a great advantage for certain companies, particularly you mentioned the essential employees beyond just the managerial and executive ranks, assuming they meet those criteria, they, with a foreign owned parent, might be able to satisfy some staff shortages by bringing in employees from other countries, from foreign country, with the treaty. Along those lines, and I don't mean to throw a curve ball here, but you mentioned as a model, a French company, we're just doing that hypothetically, but if the French company had a subsidiary in, let's say, Italy or in Turkey or in Singapore or wherever it was, and then they wanted to transfer to the US a essential employee from one of those locations, even though they're not in the, quote unquote, home country, because of the treaty would they be able to do that?

Kimberly Bennett...: This is one of the limitations of the E visa, whether it's E-1 or E-2, the employee, his or herself, also has to be the same nationality. An E-1 or an E-2 French company can only use the E-1 or E-2 visa for its French employees. So, that is something to keep in mind, that is one of the E visa's limitations, but it's still a very powerful visa. The other one that I wanted to just quickly discuss is the investor, the E-2, we talked a little bit about trade, now I want to talk about investment. A lot of people, when they hear investment, they get scared. They think, oh my goodness, how much money am I going to have to invest in the United States? And the truth is the E-2 visa is really very friendly to investors because the investment that's required to qualify as a treaty investor is proportional to the investment that's required to run the business. For example, if you're a large manufacturing company, that may require a very substantial investment to get operations up and running.

You may need to buy equipment, get a plant, have suppliers in place. So that's a larger undertaking than, say an IT consulting company. An IT consulting company, maybe you just need a couple computers, a small office, some administrative personnel, that becomes a much more manageable investment amount and the E-2 regulations contemplate that. One investor may be able to get away with only investing \$50,000, whereas another investor, depending on his or her operations, may need to be investing multi-millions of dollars. So it really does matter what kind of company you'll be establishing. And the officers at the department of state, when they're reviewing these applications, they will take into account how much money is actually needed to start operations. So this is a really friendly visa for individual investors who may want to start a business in the United States. They don't necessarily need to commit one, \$2 million. They may be able to get away with a smaller amount, assuming that their company can operate on a smaller amount or needs a smaller amount to get started. So that's the investor side of these visas.

James Stone: I wanted to ask you one other question before we get off that topic, which might be of interest to some of our clients and friends, which is if let's say I am an American company, American owned company, I'm not foreign owned, I'm not in one of these treaty countries, but I have a close working relationship with a foreign company, as many companies do. I know in the drug business, it's common to have partnerships and manufacturing, it's often common to have partnership. If I want to encourage my partner to set up shop here or to increase its operations, then as a subcontractor, they could, as long as they

otherwise qualify. They can't be my employees as the American company, but as long as they otherwise qualify, they might be able to fulfill my needs by using this treaty visa if in fact they otherwise qualify, is that right?

Kimberly Bennett...: Correct. That is a really great hypothetical that you've raised. So if you are a company that needs a particular service, a specific service, and you're usually using a subcontractor to provide that, then maybe you have a particular subcontractor that you'd like to use and you don't want to directly hire the workers that are needed for this service and you have no other way of getting someone to provide that service, maybe you do want to encourage your subcontractor to go ahead and set up shop in the US and they can bring their workers into the US, and then you can hire them. So that is a creative way to supplement any talent needs that you have. Always think that even if you yourself don't qualify for the E-1 or E-2 visa, maybe there's other aspects of your business that you can outsource to another company that would qualify.

James Stone: Sounds like in the right situation that could be a valuable tool to work around the labor shortages and supply chain challenges that a lot of our companies that we work with are facing. Now, you mentioned earlier, the types of people that this visa could qualify for. And I think managers and executives are probably fairly self explanatory, but you talked about essential employees as being one of the real advantages here, which exceeds what's allowed usually under L-1's or H-1's and the more well known visas, what is necessary to qualify as a essential employee?

Kimberly Bennett...: There's various factors that the officer at the embassy will look at to determine whether or not an employee is essential. These factors are not limited to just the factors that I'm about to list, but these are the things that the officer is going to be keeping in mind and looking at. A few of the factors are experience in training that are necessary to achieve the skills, the uniqueness of the skills, the availability of US workers with those skills, the salary that employee commands, the degree of that employee's expertise and the function of the job that is going to be filled. One important thing to think about is why is this employee essential now? Are you a startup that really needs your core employees to come to the United States and get operations started, to train new employees, local US employees, or do you have maybe a new project that is going to require additional workers and it's not going to be long term? Maybe you just need them for a year or a period of a few months.

Or maybe you've rolled out a new product in the United States that your employees in your home country are very familiar with, but the employees in the United States are not. So these are all things to think about when you are trying to determine whether or not your employee is in fact essential. These employees don't have to have previous employment experience with the company, however, if they do, that may be one of the reasons why the company believes that this employees is essential. Now, typically ordinary skilled workers don't qualify as essential employees, but in some cases, as I've just discussed for startup operations or training purposes, you may be able to qualify an ordinary skilled worker as an essential worker.

One example that I'd like to use to illustrate this is one of my clients was a ship building manufacturing company and they did certain services to the ship, HVAC and pipe fitting services, these are welders, pipe fitters, ordinary scaled workers without degrees. This company was in its startup phases in the United States, it was working on a contract with a shipyard so it only needed these workers for a limited period of time, really just to get their operations off the ground and to make sure that they were able to fulfill this contract. In that case, those welders and those pipe fitters did qualify as essential employees. Normally they would not, but as long as you're able to make the justification that these workers are essential at this time, then you may be able to qualify them.

James Stone: Well, it sounds like consultation with a qualified immigration council who is familiar in particular with the criteria for this program would be extremely useful for companies and various situations. Well, I know we're almost out of time. Let me leave one final practical question. Do you apply for these visas as you would in H-1 or is there a different process? Where do you get them? Where do you apply for them as a company?

Kimberly Bennett...: Because these visas are available because of treaties and trade agreements with the United States, this is a department of state program. So typically the application is done at the embassy in the person's home country. That being said, the application can be submitted with U.S. Citizenship and Immigration Services here in the United States, however, any time that the employee is making international travel and needs to return to the United States, they will need to undergo the Department of State adjudication because these visas are issued by the Department of State and the ultimate say in whether or not someone qualifies is the Department of State.

James Stone: Very good. Well, it sounds like a very helpful program in the right situation, probably not for everybody and every situation certainly, but some companies are going to be able to find help one way or the other using this program that might not be available under the more traditional visa programs that people are familiar with.

Kimberly Bennett...: If I can just close by saying don't forget about the E visas. I hope that this podcast episode was useful to whoever's listening and may be able to utilize these visas. Like we mentioned, it is such a powerful visa, it's such a flexible visa and the criteria for the investment, for the trade and for the employees themselves is so forgiving that it's definitely something to look into if you happen to be from one of those treaty countries.

James Stone: Well, Kimberly, that was really helpful, really educational. I really enjoyed this conversation and hearing more about these valuable programs. I've had a couple clients, as you know, use them and now I know a little more about how it works so thank you very much for sharing all that information.

Kimberly Bennett...: Thank you, Jim. And you know who to call if you ever need help.

James Stone: Absolutely.

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