CARLTON FIELDS

The E-2 Visa: A Potentially Useful Tool in Cross-Border M&As

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Changes to corporate structure, including mergers and acquisitions, can have enormous implications for the U.S. immigration status of key workers and potential new hires. When a U.S. company is acquired or formed because of a merger, and is majority-owned by a foreign entity or foreign national from an E-2 country, the E-2 Investor Visa may be available. In addition, the E-2 visa provides protections to cross-border investment between the two countries and the option to resolve investment disputes through international arbitration.

Who Can Use the E-2 Visa?

Typically, the E-2 visa is available to the principal investor as well as managerial, executive, or essential-skilled employees with the same nationality as the E-2 country, and the nationality of the majority owners of the E-2 company. To qualify, E-2 applicants must show they are actively investing or have invested a substantial amount of capital in a bona fide enterprise. An E-2 visa, issued for five years at the U.S. consulate overseas, allows an E-2 spouse to work and any E-2 children under 21 to study in the United States.

What Must the E-2 Visa Applicant Show?

The E-2 applicant, who submits the application directly to the E-2 visa offices at the pertinent U.S. consulate overseas, must include evidence of: 1) ownership; 2) nationality; 3) the substantial investment at risk explaining the path of the E-2 investment funds; 4) the corporate documentation of the E-2 company — in the cross border M&A transaction, this includes the purchase of the acquisition or the formation of the newly merged company, evidencing 50 percent or more ownership by treaty national or nationals; 5) the applicant's qualifications to direct and operate the E-2 company; 6) a detailed and complete business plan if the newly formed U.S. company has existed for less than a year; and any other evidence the U.S. consulate requires.

How Does the U.S. Government Determine an Investment Is 'At Risk'?

General E-2 visa processing considerations for founders, principal investors, or employees (those to be transferred from overseas or new hires) are to ensure that the substantial investment be one that is "at risk." This means the capital must be subject to partial or total loss if investment fortunes reverse. Further, the E-2 applicant must show irrevocable commitment of funds to the U.S. E-2 company. The U.S. immigration rules allow the placement of funds in escrow pending approval of the E-2 visa with a legal mechanism that irrevocably commits funds but also protects investors if the E-2 application is denied. Commercial investments must be active (not passive), entrepreneurial, and cannot be made in nonprofit institutions.

What Constitutes a 'Substantial' Investment?

To establish that an investment is substantial, the U.S. Department of State uses a relative proportionality test that considers the amount of qualifying capital invested weighed against the total cost of purchasing or creating the E-2 company; the amount of capital normally considered sufficient to ensure the investor's financial commitment to the success of the E-2 company; and the magnitude of investment to support the likelihood that the investor will successfully develop and/or direct the E-2 company. Thus, the lower the cost of the E-2 company, the higher, proportionally, the investment must be to be considered "substantial." The E-2 investment cannot be marginal to only support the E-2 principal. The January 2017 Buy American, Hire American executive order is now an oft-cited requirement in E-2 investment applications. The E-2 investment must show the potential for hiring Americans and inducing economic growth in the area of the E-2 investment.

Conclusion

The U.S. government is more closely vetting immigration applications, and work visas like the E-2 in particular. To determine whether the E-2 visa may be the right option in light of a cross-border M&A, it is critical that foreign nationals consult with their immigration counsel.

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