

## UNDERSTANDING THE CONCEPT OF “MARGINALITY” FOR E-2 VISA PURPOSES



by

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### PART 1 OF A 2-PART SERIES

A foreign national seeking E-2 investor visa status must show, among other things, that the business being invested in is not “marginal” or solely to provide a living to the E-2 investor and his family.

The concept of “marginality” is often overlooked for potential E-2 investors who typically are concerned about the amount of money that needs to be invested and the type of business in which the investment will be made. While these are valid concerns, the concept of marginality must not be overlooked.

The E-2 Regulations (which govern a request for change of status to E-2 or an extension of E-2 status made while the investor is already in the United States) discuss marginality at 8 CFR Section 214.2(e)(15). That regulation states: *“For purposes of this section, an enterprise may not be marginal. A marginal enterprise is an enterprise that does not have the present or future capacity to generate more than enough income to provide a minimal living for the treaty investor and his or her family. An enterprise that does not have the capacity to generate such income, but that has a present or future capacity to make a significant economic contribution is not a marginal enterprise. The projected future income-generating capacity should generally be realizable within 5 years from the date the alien commences the normal business activity of the enterprise.”*

The Foreign Affairs Manual (which governs a request for an E-2 Visa at a U.S. Consulate or Embassy outside the United States) discusses marginality at 9 FAM 41.51 N 11. That regulation states: *“The alien must not be investing in a marginal enterprise solely for the purpose of earning a living. An applicant is not entitled to E-2 classification if the investment, even if substantial, will return only enough income to provide a living for the applicant and family. There are various ways to help in determining whether an investment is marginal, in the sense of only providing a livelihood for the applicant. (1) First, look to the alien’s income from the investment. If the income derived from the business exceeds what is necessary to support self and family, then this, too, meets the test. (2) If the first test is not met, and it becomes necessary to consider other factors, one can look to the economic impact of the business. The business must have the capacity,*

*present or future, to make a significant economic contribution. The projected future capacity should generally be realizable within five years from the date the alien commences normal business articulates. It is recommended that applicant's submit a reliable business plan to verify the capacity to realize a profit within a maximum five years."*

Based on the foregoing, there are two main ways of showing that a business is not marginal: (1) demonstrating that the business has the capacity to generate more than just a living to the E-2 investor and his or her family, and (2) demonstrating that the business has the capacity to produce a significant economic impact to the community.

### **Demonstrating that the Business Has the Capacity to Generate More Than Just a Living to the Investor and His Family**

First, the E-2 investor can show that the business being purchased or invested in is not marginal by demonstrating that the business currently (or within five (5) years of normal business operations) has the capacity to produce more than just a living to the potential E-2 investor. This means that the E-2 investor must submit evidence that the business currently is capable of providing an income to the E-2 investor that is more than enough for him and his family. Typically, if the business is currently in operation, this will require evidence of the prior business owner's tax returns to see if the business has already been providing a significant income to the current business owner. Generally speaking, the immigration officer or consular officer examining the case will examine the net profits of business and the amount of income paid out to the previous business owner in the form of wages, salary or other compensation. The greater the profits or compensation paid to the prior business owner, the greater the likelihood that the business will not be considered marginal for E-2 purposes.

For this very reason, it is extremely important to obtain the prior business owner's tax returns prior to filing for E-2 investor visa status. Only then will a prospective E-2 investor have an idea as to whether the business will be considered marginal or not. At our office, where we assist clients throughout the E-2 process, we typically include a contractual provision which provides that the Seller of the business must provide at least the past three (3) years of the business's federal income tax returns. The prospective E-2 investor can then view the tax returns and determine if the business is profitable and whether its profits (or losses) are increasing or decreasing.

In the event the current tax returns are not strong and thus cannot overcome the marginality issue, then both the E-2 regulations and the Foreign Affairs Manual will look at evidence that the business has the capacity within the next 5 years to generate enough income to provide more than just a living to the E-2 investor and his family. A strong business plan based on realistic financial projections can thus be used to demonstrate that the business is not marginal.

In next month's issue, we will further examine the E-2 concept of marginality and, in particular, how the business can demonstrate the capacity to produce a significant economic impact to the community.

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