

**The Crucial Difference Between An E-2 Visa And E-2 Status:**  
**What You May Not Know Can Hurt You!**



by

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One of the most misunderstood concepts in immigration law is the difference between a non-immigrant visa and non-immigrant visa status. Briefly, a non-immigrant visa is a document that gets placed in a foreign national's passport and which must be presented to an immigration officer from the U.S. Customs and Border Protection agency at a port of entry (typically at a U.S. airport inspection). The foreign national will only be admitted to the United States if the stated purpose of his trip is consistent with the non-immigrant visa in his passport. For example, in order to enter the United States to direct and develop a business in which a foreign national has invested, the foreign national must have a valid E-2 visa in his passport and must be entering the United States for that purpose.

Once admitted to the United States based on a particular non-immigrant visa, that person is considered to be in that particular non-immigrant visa **status**. As evidence of that status, the foreign national is given a Form I-94 Arrival/Departure Record. The Form I-94 is essentially a small white card which gets stapled into the foreign national's passport. The I-94 lists the foreign national's non-immigrant visa status (in the example above, a notation of "E-2" would be handwritten by the immigration officer who inspected the foreign national as well as the date of admission and the date that status will expire. Typically, for an E-2 non-immigrant, the authorized period stay listed on the Form I-94 will be a period of two (2) years.

While the foreign national is in the United States, the controlling document is the Form I-94, not the visa. The Form I-94 dictates how long the foreign national can stay in the United States and in what status he is allowed to remain. The visa essentially has no effect on the foreign national's authorized period stay in the United States or what the foreign national can do once admitted to the United States.

Take, for example, the E-2 investor who is coming to the United States to direct and develop a business in which he has invested a substantial amount of money. If applying outside the United States for a visa at the U.S. Embassy in Seoul, the U.S. government typically (although not always) will issue a 5-year E-2 visa. This means that, at any time during the validity period of the visa (usually 5 years, but not always), the E-2 investor can seek to be admitted to the U.S. in order to direct and develop the particular E-2 business listed on the E-2 Visa. At the U.S. border, prior to being admitted in E-2 status,

an immigration officer from the U.S. Customs & Border Protection will question the E-2 investor as to the type of business that he is involved with to make sure that it is the same business listed on the E-2 Visa. If the immigration officer determines that the E-2 investor's stated purpose is consistent with the E-2 Visa in his passport, then the E-2 investor will be admitted for a period of two (2) years (as long as his passport is valid for at least two (2) years). This is true regardless of the validity period of the E-2 Visa. If the E-2 Visa is valid for 5 years, the E-2 Visa holder will only be admitted for two (2) years. If the E-2 Visa will expire in six (6) months, the E-2 Visa holder will be admitted for two (2) years (again, as long as the passport is valid for at least two (2) years).

It is crucial, therefore, for the E-2 Visa holder to have a passport valid for at least two (2) years when he is seeking admission to the United States based on a valid E-2 Visa. If the E-2 Visa holder's passport is valid for less than two (2) years, then his entry in E-2 status will be limited to match the expiration date on his passport.

Understanding this crucial difference between "visa" and status" is extremely important for a number of reasons. I will highlight three of the most important reasons below:

First, an E-2 visa holder who remains in the United States beyond his authorized period of admission (as stated on his Form I-94) can accrue "unlawful presence". Unlawful presence is an immigration term which refers to a foreign national's presence in the United States which is not authorized by the U.S. government. One of the most common situations in which a foreign national accumulates "unlawful presence" is when he stays in the United States beyond the time period listed on his Form I-94 without having filed an extension of status, change of status or adjustment of status prior to the expiration of the Form I-94. Once the foreign national's Form I-94 expires without filing for an extension of status, change of status or adjustment of status, his visa is automatically void under Section 222(g) of the Immigration and Nationality Act. This means that, even if the E-2 Visa itself has not yet expired, it is automatically voided and must be replaced with a new visa upon departure from the United States.

Second, if the E-2 visa holder accumulates 6 months or more of "unlawful presence" then he may be barred from re-entering the United States for either three (3) years or ten (10) years from the date he actually departs the United States. I have heard many stories of foreign nationals who did not pay attention to the validity period of their Form I-94 and instead thought that since their visa was valid for 5 years that they could remain in the United States for 5 years without having to filing any other paperwork. For example, assume an E-2 visa holder gets a 5-year E-2 visa and is admitted for a period of 2 years (as noted on his Form I-94) and does not filing any extensions or any other papers with USCIS. If that person departs the United States four (4) years after entering, then he will be barred from re-entering for 10 years (unless he can obtain a waiver). This example highlights a crucial difference between the E-2 Visa and E-2 Status.

Third, the difference between the E-2 Visa and E-2 Status is important when considering how to extend an E-2 investor's status once his 2-year E-2 status is about to expire. Prior to the expiration of his Form I-94, he must decide whether to: (a) extend the E-2 Status

from within the United States by filing the necessary paperwork with USCIS prior to the expiration of his Form I-94, or (b) depart the United States and re-enter the United States based on a valid E-2 Visa. By departing and re-entering the United States on a valid E-2 Visa, then he can effectively obtain an additional two (2) years in E-2 Status. To do so, the person must be sure that he has a valid E-2 Visa and his passport is valid for at least two (2) years. The decision-making process becomes more complicated when there are various members of one family in E-2 status and they have different I-94 expiration dates. It is important to remember that all members of the family in E-2 status must effectively extend or maintain their E-2 status, and that the fact that the principal E-2 investor has extended his E-2 status does not mean that his spouse's or children's status has been extended as well.

Fourth, if a foreign national first entered the United States on some other type of visa (not an E-2 Visa) and then changes his status to E-2, then he obviously will not have an E-2 Visa in his passport. This means that, if he departs the United States for any reason, before he could re-enter the United States, he would have to obtain an E-2 Visa from the Department of State at the U.S. Embassy or Consulate outside the United States. The fact that USCIS previously has granted a person's request to change status to E-2 has absolutely no bearing on the consular officer's decision on whether or not to approve a person's application for an E-2 Visa.

With this understanding in mind, E-2 nonimmigrants should carefully keep the expiration dates of their Form I-94, their E-2 Visas (if any) and their passports. They also need to clearly understand the difference between E-2 Visa and E-2 Status.

Failing to pay attention to the important dates on their Form I-94, visa or passport, and to understand the difference between an E-2 Visa and E-2 Status can cause serious immigration problems for E-2 investors and their family members.

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