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Immigration Attorneys

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This Month's Featured Article

Six Myths Regarding E-2 Visa Status

In recent months, our office has seen a dramatic increase in the number of immigrants interested in the E-2 Visa category. With the problems in employment-based immigration with retrogression or visa unavailability and the unavailability of any new H-1B visa numbers, the E-2 Visa category has grown in popularity. In speaking with immigrants over the years about the E-2 Visa category, several myths have emerged. This article will address these myths and provide correct information with respect to each of them.

Background of the E-2 Visa

Section 101(a)(15)(e)(ii) of the Immigration and Nationality Act provides that E-2 non-immigrant status may be granted certain foreign nationals who are "entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him: solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital.

Commonly known as E-2, this non-immigrant visa category allows foreign national of certain treaty counties to enter the United States in order to direct and develop a business enterprise in which the foreign national has invested a substantial amount

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E-2 Myths (Continued from Page 1)

of capital. The immigration regulations require that several criteria relating to the business and the investor be met before E-2 status can be granted.

The E-2 status allows the principal E-2 applicant to direct a business investment. His or her spouse and unmarried children under age 21 are also entitled to E-2 status. The E-2 spouse is also entitled to work so long as he or she first obtains an employment authorization document from the United States Citizenship and Immigration Services (USCIS).

6 Common Myths

Myth #1: "I need to invest $1 million in an E-2 business"

The E-2 regulations do not specify any set dollar amount which must be invested in order to qualify for E-2 visa status. The United States Citizenship and Immigration Services) (which processes E-2 petitions for foreign nationals already in the United States) and the Department of State (which governs the E-2 visa request for foreign nationals outside the United States) do not specify any bright line dollar amount that is required to be invested in the business.

The key requirement is that the amount of investment must be "substantial" in terms of the total cost of purchasing an existing business or starting a new business an investment that will allow the successful operation of the business. While the term "substantial" is not precisely defined, the general rule is that, the lower the cost of the business, the higher the amount of investment which must be made.

Many people confuse the EB-5 category (immigrant visa or "green card" category based on a $1 million investment) with the E-2 category. The EB-5 category is an immigrant visa category which results in a "green card" status. The EB-5 category requires a much higher financial investment (generally $1 million). In contrast, the E-2 category is a non-immigrant visa category which does not, by itself, lead to a "green card" or permanent residence. As such, the E-2 category does not require a specific amount of financial investment.

Myth #2: "Only certain types of business can qualify for E-2 purposes"

There is no specific type of business that is required to be invested in for E-2 purposes. The key is that the business must be a real, active, for-profit business. Some of the more popular small businesses that have been used for E-2 purposes are convenience stores, dry cleaners and restaurants.

Myth #3: "I need to hire 10 or more employees for an E-2 business."

The E-2 category does not require that a specified number of employees be hired in the E-2 business. Many people confuse the EB-5 category (immigrant visa or "green card" category based on a $1 million investment) with the E-2 category. The EB-5 category is an immigrant visa category which results in a "green card" status. The EB-5 category requires a specific financial investment (typically $1 million) and the creation of a certain number of jobs (typically at least 10). The E-2 category has no such requirement.

Having employees does, however, factor into E-2 cases. The immigration officials look to see whether the business is "marginal" – meaning it only has the capacity to generate a living for the E-2 investor and his family. If that is the case, then the E-2 visa will likely be denied. The E-2 business will not be considered marginal if the business either already has employees or has the capacity to hire employees within 5 years of making the investment. For that reason, our office will often request payroll records and tax returns from the prior business owner. Individuals interested in

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purchasing a business should insist that this information be provided to them prior to buying the business.

Myth #4: "The E-2 Visa gives me permanent resident status."

As explained above, the E-2 visa category is a non-immigrant (i.e., temporary) visa status. It does not lead to permanent resident status. An E-2 visa holder can, however, stay in the United States for 2 years at a time and the E-2 status can be renewed indefinitely so long as the E-2 holder continues to direct and develop the business and the business continues to meet the E-2 requirements. If the E-2 business is sold or goes out of business, then E-2 status ends.

Myth #5: "It takes too long to get E-2 status."

The processing times for E-2 cases depends on where the individual seeking E-2 status is applying from. If the individual is in the United States and is seeking a change of status, then premium processing is available. Premium processing means that USCIS will approve, deny or request more information on the E-2 case within 15 days of filing.

If the individual seeking E-2 status is outside the United States, then the application for an E-2 visa must be made at the U.S. Consulate. Each U.S. Consulate has a different processing time. For Korea, the current processing time is about 6 weeks from the time the application package is submitted.

In either case, what often takes the time is finding the desired E-2 business and negotiating the terms of sale.

Myth #6: "I can't get E-2 status in the United States."

As noted above, E-2 status can be obtained both in the United States and outside the United States. If filing in the United States, the change of status request is made on a petition filed with the USCIS. If filed outside the United States, no prior petition needs to be approved by USCIS. The individual applicant can apply directly at the U.S. Consulate.

If the E-2 status is obtained in the United States through a change of status and that individual subsequently departs the United States, he must first obtain a valid E-2 visa outside the United States before returning. This means that the individual will have to apply all over again at the U.S. Consulate. Even if E-2 status is granted by USCIS in the United States, that does not mean that an E-2 visa will automatically be obtained if the E-2 applicant goes abroad. As noted above, the U.S. Consulate often requires a higher financial investment than the USCIS.

For more information on E-2 Visas, visit our website at **www.longchangonline.com**, or contact our office by phone at (336) 855-5700 or by email at **info@longchangonline.com**.

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Ten Tips for Dealing with Employment-Based Immigrant Visa Retrogression and Visa Unavailability

TIP #1: An I-485 application that was already filed (in process) at a USCIS Service Center when visa retrogression or visa unavailability set in for your employment-based immigrant visa category will remain pending (in process), unless the underlying labor certification is revoked due to fraud or the previously-approved

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140 petition is withdrawn by the employer or revoked by the United States Citizenship and Immigration Services (USCIS).

TIP #2: If your Form I-485 Application is pending (in process), then you are entitled to an Employment Authorization Document (known as an "EAD" or "work permit"). Most employment authorization documents are valid for only one (1) year, so you likely will have to renew the EAD multiple times in order to maintain valid employment authorization during the lengthy delay waiting for approval of your green card application.

TIP #3: If your Form I-485 Application is pending (in process), then you may be able to file for an Advance Parole Document (commonly referred to as a "travel document"). The advance parole document should not be used by I-485 applicants who have already accrued 180 days of "unlawful presence". Individuals who depart the United States after accruing 180 days or more of unlawful presence are barred from re-entering the United States for either 3 year or 10 years, even if they have an advance parole document.

TIP #4: If a labor certification has been approved for you but the I-485 application for permanent residence cannot be filed due to visa unavailability or visa retrogression, consider having the employer file the I-140 petition for you. The I-140 petition serves to "lock in" your priority date. In addition, in adjudicating the I-140 Petition, the USCIS is making a determination that: (a) you (the I-140 beneficiary) meet the minimum requirements for the job (as indicated in the labor certification); and (b) the employer has the ability to pay the wage (Note: the employer must maintain the ability to pay the wage from the date the labor certification was filed to the date the I-485 application is approved granting permanent resident status). In addition, the Approval Notice for the I-140 Petition will specify whether the case falls under the EB-2 or EB-3 visa category. That classification determines how long you will have to wait for visa availability.

TIP #5: Determine if the concept of "cross-chargeability" can be used to shorten the amount of time you need to wait for an immigrant visa. "Cross-chargeability" can benefit a primary beneficiary if his or her spouse was born in a country with a shorter wait under the Visa Bulletin. The lengthy waits for immigrant visas depends on two factors: (1) the employment-based immigrant visa category e.g., EB-1, EB-2, EB-3, etc.); and (2) the beneficiary's country of birth. If the beneficiary's country is backlogged, "cross-chargeability" may allow an individual to apply for an immigrant visa using the country of birth of his or her spouse.

TIP #6: Determine if you can use an earlier priority date from a previous labor certification. Priority dates are transferable in employment-based immigration cases. If a beneficiary has a prior priority date for a previous EB-1, EB-2 or EB-3 case, the earlier priority date can be used, unless the prior case was revoked due to fraud.

TIP #7: Make sure the employer can demonstrate the "ability to pay" your wage throughout the entire delay. On the labor certification application, the employer specifies the wage being offered to the proposed employee. The employer must demonstrate that it has the ability to pay that wage from the time the labor certification case is filed to the time the I-485 green card application is approved. Since many EB visa categories now will experience delays of several years, it is important to remember that the employer (petitioner) must be able to document the ability to pay the specified wage during each of those years. The immigration officials will require proof of the ability to pay the specified wage in the form of audited financial statements or federal income tax returns for each of those years. There are several ways to prove the ability to pay the wage based on this documentation, but one bad year for the employer can ruin the entire case (even after the labor certification has been approved). Keep in mind that even large employers will report losses on tax returns in certain years.

TIP #8: The Child Status Protection Act (CSPA) likely will not protect your children from "aging out". Many individuals currently going through the labor certification

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process or who have already obtained an approved labor certification are under the impression that their children who are getting closer to turning 21 years old will not age out. Unfortunately, this is often not the case. The Child Status Protection Act ("CSPA") provides that a child's age will be "locked in" for immigration purposes based on a complicated formula. Essentially, in employment-based immigration cases, the child's age will be calculated as follows: The child's age on the date that a visa number becomes available will be reduced by the number of days that the I-140 Petition was pending. Note that the starting point for calculating the child's age (for immigration purposes) cannot be determined until a visa number becomes available (based on the Department of State's Visa Bulletin). That date could be several years from now due to the lengthy backlog described in the Visa Bulletin. Assuming a child is 19 years old now and it takes 3 years for a visa number to become available, the starting point for determining the child's immigration age would be 22 years old (19 years old plus 3 more years). That age (22) is then reduced by the number of days that the I-140 Petition was pending. Currently, the processing time for I-140 Petitions at the Texas Service Center is approximately 2 months. As result, in this scenario, the child's age would be reduced by only 2 months. The "child" would still be over 21 years of age for immigration purposes and, thus, would no longer be entitled to derivative status as a child.

TIP #9: Determine how "portability" may affect your case. With lengthy delays expected for EB-3 cases for the foreseeable future, there is an increasing likelihood that an approved I-140 beneficiary will change jobs. "Portability" is an immigration law which allows certain beneficiaries of approved I-140 petitions to ultimately obtain the green card based on a different employer. Portability requires that the I-140 Petition be approved and that the I-485 application be pending for at least 180 days. The new job must be in the same or similar occupational classification. This is a highly technical area of the law. Any beneficiary seeking to take advantage of "portability" should contact an experienced immigration attorney.

TIP #10: Keep track of your case and monitor the Visa Bulletin. It is important to know whether your labor certification case has been filed and where it is in terms of being processed. Additionally, you can determine the employment-based visa category (e.g., EB-1, EB-2, EB-3, etc.) based on the information contained in the labor certification application. The Department of State's Visa Bulletin can be found online at www.longchangonline.com A new Visa Bulletin is published each month. Before you can determine how long of a wait you should expect, you need to determine this key information with respect to your case.

Stay tuned to www.longchangonline.com and next month's newsletter for any developments regarding employment-based visa numbers.

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About Us

Long, Chang & Associates, L.L.P. is a full-service immigration law firm concentrating in the areas of employment-based and family-based immigration law. Our law firm has successfully represented individuals and employers through the immigration process with the Immigration and Naturalization Service (INS), Bureau of Citizenship and Immigration Services (BCIS), United States Citizenship and Immigration Service (USCIS) and at U.S. consulates and embassies in order to obtain both non-immigrant (temporary) visas and immigrant (permanent) visas on behalf of individuals or employees.

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Kristen Aekyung Chang *is a founding partner of Long, Chang & Associates, L.L.P. She practices exclusively in immigration law and is a member of the American Immigration Lawyers Association (AILA) and the North Carolina State Bar.*

Born in Seoul, South Korea, Ms. Chang attended the University of North Carolina at Chapel Hill where she received a Bachelor of Arts degree in Psychology. While achieving academic success at the undergraduate level, Ms. Chang devoted much of her time to volunteerism. She served as the Chairperson on the Planning Committee for the University's Bicentennial Class celebration and served as a Research Assistant in the University's Psychology Department where she performed valuable research in the area of cognitive memory. Ms. Chang also volunteered in the school's International Department as an English language assistant for international students and faculty members and at a local psychiatric hospital. In addition to her numerous public-service efforts during her undergraduate career at the University of North Carolina at Chapel Hill, Ms. Chang studied abroad at the prestigious London School of Economics where she achieved the top academic ranking in International Business Strategy and Human Resource Management.

Ms. Chang received her J.D. (law) degree from the Wake Forest University School of Law. During law school, Ms. Chang was selected as a member of the Law School's Moot Court Board based on her performance in the school's trial court competition. She was one of three members on the school's nationally-recognized and award-winning National Moot Court Evidence Team. During law school, Ms. Chang studied Labor and Employment Law at the law school's summer program in Italy.

Following law school, Ms. Chang opened her own immigration law practice in Greensboro, North Carolina, and subsequently joined Mr. Long in founding Long, Chang & Associates. As a naturalized citizen of the United States, Ms. Chang understands the immigration practice not just as an immigration lawyer but as an immigrant herself who has gone through the immigration process. Based on her personal experiences, Ms. Chang has a remarkable way of relating with her clients and perceiving their anxieties and concerns.

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David J. Long *founded Long, Chang & Associates, L.L.P. in 1998. He has been recognized by the North Carolina State Bar as a Board-Certified Specialist in Immigration Law. Mr. Long is a member of the American Immigration Lawyers Association (AILA) and the North Carolina State Bar. Mr. Long serves as a Mentor for other immigration attorneys through AILA.*

Prior to founding Long, Chang & Associates, L.L.P., Mr. Long worked as an attorney with the law firm of Kilpatrick Stockton in Winston-Salem, North Carolina. Mr. Long practices in the areas of immigration law, corporate law and real estate.

Born in Philadelphia, Pennsylvania, Mr. Long attended the University of North Carolina at Chapel Hill where he studied in the Honors Program and received a Bachelor of Arts degree in Political Science. In addition, Mr. Long studied the Korean Language at Duke University for a semester while attending UNC-CH. Mr. Long graduated magna cum laude and in the top 1% of his class.

Mr. Long graduated with highest honors and received his J.D. (law) degree from the Wake Forest University School of Law. During law school, Mr. Long was selected as a member of the Law Review based on his academic standing. He was one of three members on the school's nationally-recognized Gabrielli Family Law Moot Court Team. Mr. Long also studied Labor and Employment Law at the law school's summer program in Italy.

Following law school, Mr. Long worked as an attorney in the commercial real estate department of Kilpatrick Stockton LLP in Winston-Salem, NC, one of largest law firms in the United States. After two years of working at a large law firm, Mr. Long desired the opportunity to assist clients on a more personal basis. As a result, he joined Ms. Chang in forming Long, Chang & Associates, L.L.P. Most recently, Mr. Long served as an adjunct faculty member at Handong International Law School in Pohang, South Korea where he taught U.S. Immigration and Naturalization Law.

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