

SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT SUBMISSION

1405-0101, Nonimmigrant Treaty Trader/Investor Application (Form DS-156E)

A. JUSTIFICATION

1. The Immigration and Nationality Act (“INA”), 8 U.S.C. 1101 *et seq.*, statutorily mandates the application and eligibility requirements for aliens seeking to obtain nonimmigrant visas. INA Section 221(a) [8 U.S.C. 1201] (Attachment 1) provides that a consular officer may issue a nonimmigrant visa to an alien who has made proper application therefor.

INA Section 222(c) [8 U.S.C. 1202] (Attachment 2) specifically requires that, “Every alien applying for a nonimmigrant visa and for alien registration shall make application therefor in such form and manner as shall be by regulations prescribed. In the application the alien shall state his full and true name, . . . and such additional information necessary to the identification of the applicant, the determination of his eligibility for a nonimmigrant visa, and the enforcement of the immigration and nationality laws as may be by regulations prescribed.”

22 CFR 41.103(b)(2) (Attachment 3) provides that the consular officer may require submission of additional necessary information on any relevant matter whenever the consular officer believes that the information provided in Form DS-156 (Nonimmigrant Visa Application) is inadequate to permit a determination of the alien’s eligibility to receive a nonimmigrant visa.

22 CFR 41.105(a)(1) (Attachment 4) authorizes the consular officer to require documents considered necessary to establish an alien’s eligibility to receive a nonimmigrant visa.

INA Section 101(a)(15)(E) [8 U.S.C. 1101] (Attachment 5) provides the definition of a nonimmigrant alien: “(E) an alien 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: (i) solely to carry on substantial trade, including trade in services or technology, principally between the United States and the foreign state of which he is a national, or (ii) 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.”

Department of State regulations pertaining to nonimmigrant visas under the INA are published at 22 CFR 41. The regulations pertaining in particular to treaty trader and treaty investor nonimmigrant visas (“E” visas) are specifically provided for in 22 CFR 41.51 (Attachment 6).

2. Department of State consular officers use Form DS-156E (Nonimmigrant Treaty Trader/Investor Application), in conjunction with Form DS-156, to fulfill the legal requirements for nonimmigrant visas. The information requested on the form is limited to that which is necessary for consular officers to determine the eligibility of an alien applicant for a nonimmigrant treaty trader/investor visa. Applicants provide information on the nature of the business or investment in the U.S., including percentage of trade with the United States, value of the assets, and their own qualifications to direct the enterprise. A consular officer is unable to approve a treaty trader/investor visa without collecting this information. Consular officers currently use the form as an indispensable part of adjudicating approximately 17,000 treaty trader/investor visa cases per year, most of which are approved.

3. The form is made available to download from the Internet. The Department is working to automate the entry of visa form data into consular systems and to provide forms on the Department of State and U.S. Embassy websites that afford an electronic option consistent with requirements of both homeland security and the Government Paperwork Elimination Act. The Department will begin testing a pilot program for electronic collection and submission of data sometime in 2007. Once testing is completed and system refined, the DS-156E will be converted into the electronic format.

4. The Form DS-156E is a supplement to the DS-156, which is required by regulation for all nonimmigrant visa applicants. Except for basic identifying biographic information collected by the DS-156, information collected by the DS-156E is not duplicative of information maintained elsewhere or otherwise available.

5. The information collection does not involve small businesses or other small entities.

6. This information collection is essential for determining whether an applicant is eligible for a nonimmigrant treaty trader/investor visa. An applicant fills out the form when seeking a Treaty Trader or Treaty Investor visa for the first time. Individuals seeking to renew Treaty Trader or Treaty Investor visas may occasionally be asked to complete all or part of the DS-156E so that consular officers have the most up to date information. It is not possible to collect the information less frequently since consular officers need up to date information to determine efficiently whether an applicant is eligible to receive a visa.

7. Not applicable; no such circumstances exist.

8 The Department of State (Office of Visa Services, Bureau of Consular Affairs) has solicited public comments on this collection via Public Notice published in the *Federal Register*. One comment was received. After reviewing the comment, Visa Services determined that the comment was unrelated to the information collection and instead addressed the underlying visa category which is a statutory program mandated by Congress. The DS-156E solicits information necessary to carry out the treaty trader/investor visa program. The Office of Visa Services also meets regularly with

immigration experts of the Department of Homeland Security to coordinate policy. The Office of Visa Services also meets with student groups, business groups, the American Immigration Lawyers Association and other interested groups to discuss their opinions and suggestions regarding visas procedures and operations.

9. No payment or gift is provided to respondents.

10. In accordance with Section 222(f) of the INA (Attachment 7), information obtained from applicants in the immigrant visa process is considered confidential and is to be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States.

11. The questions on the collection are designed to solicit the information necessary to determine whether an applicant is eligible for a visa under Section 101(a)(15)(E) of the INA. The collection does not ask any questions of a sensitive nature.

12. Approximately 17,000 aliens annually complete the form. Finding the necessary background information is estimated to require that an applicant spend four hours to fill out the entire form. Therefore the annual hour burden to respondents is estimated to be 68,000 hours (17,000 x 4 hours).

13. Many respondents employ attorneys to help complete the form and assemble the supporting documentation, or rely on their company's human resources staff to prepare the application package. Thus, the cost to prepare the form and assemble the supporting documentation varies widely. For applications prepared by a company's human resources office, the cost to photocopy and assemble relevant documentation is minimal. For those applications in which an immigration attorney is employed, the cost is significantly higher. Based on this analysis and input from the American Immigration Lawyers Association, the Department estimates the cost of completing a Form DS-156E is approximately \$1,000. We therefore estimate that the total cost burden for the collection is \$17,000,000 (17,000 applicants x \$1,000).

14. This collection is a supplement to the Form DS-156 (OMB # 1405-0018) and is processed with that application. It provides data that actually facilitates the processing of that application and, therefore, will impose no additional cost burden on the Federal Government beyond that which was reported in the justification for the Form DS-156. The cost of service study used to establish the cost burden of collecting and processing the DS-156 includes the costs associated with processing the DS-156E.

15. No program change or adjustment is associated with this renewal.

16. A quantitative summary of all Department of State visa activities is published in the annual Report of the Visa Office.

17. Not applicable. The Department will display the expiration date for OMB approval of the information collection.

18. The Department is not requesting any exception to the certification statement identified in item 19 of OMB Form 83-I.

B. STATISTICAL METHODS

This collection does not employ statistical methods.

Attachment 1

INA Section 221(a) [8 U.S.C. 1201]

(a) Under the conditions hereinafter prescribed and subject to the limitations prescribed in this Act or regulations issued thereunder, a consular officer may issue (1) to an immigrant who has made proper application therefor, an immigrant visa which shall consist of the application provided for in section 222, visaed by such consular officer, and shall specify the foreign state, if any, to which the immigrant is charged, the immigrant's particular status under such foreign state, the preference, immediate relative, or special immigrant classification to which the alien is charged, the date on which the validity of the visa shall expire, and such additional information as may be required; and (2) to a nonimmigrant who has made proper application therefor, a nonimmigrant visa, which shall specify the classification under section 101(a)(15) of the nonimmigrant, the period during which the nonimmigrant visa shall be valid, and such additional information as may be required.

Attachment 2

INA Section 222(c) [8 U.S.C. 1202]

(c) Every alien applying for a nonimmigrant visa and for alien registration shall make application therefor in such form and manner as shall be by regulations prescribed. In the application the alien shall state his full and true name, the date and place of birth, his nationality, the purpose and length of his intended stay in the United States; his marital status; and such additional information necessary to the identification of the applicant, the determination of his eligibility for a nonimmigrant visa, and the enforcement of the immigration and nationality laws as may be by regulations prescribed. At the discretion of the Secretary of State, application forms for the various classes of nonimmigrant admissions described in section 101(a)(15) may vary according to the class of visa being requested.

Attachment 3

22 CFR 41.103

(b)(2) Additional information as part of application. The consular officer may require the submission of additional necessary information or question an alien on any relevant matter whenever the consular officer believes that the information provided in Form OF-156 is inadequate to permit a determination of the alien's eligibility to receive a nonimmigrant visa. Additional statements made by the alien become a part of the visa application. All documents required by the consular officer under the authority of Sec. 41.105(a) are considered papers submitted with the alien's application within the meaning of INA 221(g)(1).

Attachment 4

22 CFR 41.105

(a) Supporting documents--(1) Authority to require documents. The consular officer is authorized to require documents considered necessary to establish the alien's eligibility to receive a nonimmigrant visa. All documents and other evidence presented by the alien, including briefs submitted by attorneys or other representatives, shall be considered by the consular officer.

Attachment 5

INA Section 101(a)(15)(E)

(a) As used in this Act –

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens

(E) an alien 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:

(i) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; or

(ii) 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;

Attachment 6

22 CFR 41.51

- (a) Treaty trader. An alien is classifiable as a nonimmigrant treaty trader (E-1) if the consular officer is satisfied that the alien qualifies under the provisions of INA 101(a)(15)(E)(i) and that the alien:
- (1) Will be in the United States solely to carry on trade of a substantial nature, which is international in scope, either on the alien's behalf or as an employee of a foreign person or organization engaged in trade, principally between the United States and the foreign state of which the alien is a national, (consideration being given to any conditions in the country of which the alien is a national which may affect the alien's ability to carry on such substantial trade); and
 - (2) Intends to depart from the United States upon the termination of E-1 status.
- (b) Treaty investor. An alien is classifiable as a nonimmigrant treaty investor (E-2) if the consular officer is satisfied that the alien qualifies under the provisions of INA 101(a)(15)(E)(ii) and that the alien:
- (1) Has invested or is actively in the process of investing a substantial amount of capital in bona fide enterprise in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living; and
 - (2) Is seeking entry solely to develop and direct the enterprise; and
 - (3) Intends to depart from the United States upon the termination of E-2 status.
- (c) Employee of treaty trader or treaty investor. An alien employee of a treaty trader may be classified E-1 and an alien employee of a treaty investor may be classified E-2 if the employee is in or is coming to the United States to engage in duties of an executive or supervisory character, or, if employed in a lesser capacity, the employee has special qualifications that make the services to be rendered essential to the efficient operation of the enterprise. The employer must be:
- (1) A person having the nationality of the treaty country, who is maintaining the status of treaty trader or treaty investor if in the United States or if not in the United States would be classifiable as a treaty trader or treaty investor; or
 - (2) An organization at least 50% owned by persons having the nationality of the treaty country who are maintaining nonimmigrant treaty trader or treaty investor status if residing in the United States or if not residing in the United States who would be classifiable as treaty traders or treaty investors.
- (d) Spouse and children of treaty trader or treaty investor. The spouse and children of a treaty trader or treaty investor accompanying or following to join the principal alien are entitled to the same classification as the principal alien. The nationality of a spouse or child of a treaty trader or treaty investor is not material to the classification of the spouse or child under the provisions of INA 101(a)(15)(E).
- (e) Representative of foreign information media. Representatives of foreign information media shall first be considered for possible classification as nonimmigrants under the provisions of INA 101(a)(15)(I), before consideration is given to their possible classification as nonimmigrants under the provisions of INA 101(a)(15)(E) and of this section.
- (f) Treaty country. A treaty country is for purposes of this section a foreign state with which a qualifying Treaty of Friendship, Commerce, and Navigation or its equivalent exists with the United States. A treaty country includes a foreign state that is accorded treaty visa privileges under INA 101(a)(15)(E) by specific legislation (other than the INA).
- (g) Nationality of the treaty country. The nationality of an individual treaty trader or treaty investor is determined by the authorities of the foreign state of which the alien claims nationality. In the case of an organization, ownership must be traced as best as is practicable to the individuals who ultimately own the organization.
- (h) Trade. The term "trade" as used in this section means the existing international exchange of items of trade for consideration between the United States and the treaty country. Existing trade includes successfully negotiated contracts binding upon the parties which call for the immediate exchange of items of trade. This exchange must be traceable and identifiable. Title to the trade item must pass from one treaty party to the other.
- (i) Item of trade. Items which qualify for trade within these provisions include but are not limited to goods, services, technology, monies, international banking, insurance, transportation, tourism, communications, and some news gathering activities.
- (j) Substantial trade. Substantial trade for the purposes of this section entails the quantum of trade sufficient to ensure a continuous flow of trade items between the United States and the treaty country. This continuous flow contemplates numerous exchanges over time rather than a single transaction, regardless of the monetary value. Although the monetary value of the trade item being exchanged is a relevant consideration, greater weight is given to more numerous exchanges of larger value. In the case of smaller businesses, an income derived from the value of numerous transactions which is sufficient to support the treaty trader and his or her family constitutes a favorable factor in assessing the existence of substantial trade.
- (k) Principal trade. Trade shall be considered to be principal trade between the United States and the treaty country when over 50% of the volume of international trade of the treaty trader is conducted between the United States and the treaty country of the treaty trader's nationality.
- (l) Investment. Investment means the treaty investor's placing of capital, including funds and other assets, at risk in the commercial sense with the objective of generating a profit. The treaty investor must be in possession of and have control over the capital invested or being invested. The capital must be subject to partial or total loss if investment fortunes reverse. Such investment capital must be the investor's unsecured personal business capital or capital secured by personal assets. Capital in the process of being invested or that has been invested must be irrevocably committed to the enterprise. The alien has the burden of establishing such irrevocable commitment given to the particular circumstances of each case. The alien may use any legal mechanism available, such as by placing invested funds in escrow pending visa issuance, that would not only irrevocably commit funds to the enterprise but that might also extend some personal liability protection to the treaty investor.
- (m) Bona fide enterprise. The enterprise must be a real and active commercial or entrepreneurial undertaking, producing some service or commodity for profit and must meet applicable legal requirements for doing business in the particular jurisdiction in the United States.
- (n) Substantial amount of capital. A substantial amount of capital constitutes that amount that is:
- (1)(i) Substantial in the proportional sense, i.e., in relationship to the total cost of either purchasing an established enterprise or creating the type of enterprise under consideration;
 - (ii) Sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and
 - (iii) Of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise.
- (2) Whether an amount of capital is substantial in the proportionality sense is understood in terms of an inverted sliding scale; i.e., the lower the total cost of the enterprise, the higher, proportionately, the investment must be to meet these criteria.

- (o) Marginal enterprise. 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 capacity should generally be realizable within five years from the date the alien commences normal business activity of the enterprise.
- (p) Solely to develop and direct. The business or individual treaty investor does or will develop and direct the enterprise by controlling the enterprise through ownership of at least 50% of the business, by possessing operational control through a managerial position or other corporate device, or by other means.
- (q) Executive or supervisory character. The executive or supervisory element of the employee's position must be a principal and primary function of the position and not an incidental or collateral function. Executive and/or supervisory duties grant the employee ultimate control and responsibility for the enterprise's overall operation or a major component thereof.
- (1) An executive position provides the employee great authority to determine policy of and direction for the enterprise.
- (2) A position primarily of supervisory character grants the employee supervisory responsibility for a significant proportion of an enterprise's operations and does not generally involve the direct supervision of low-level employees.
- (r) Special qualifications. Special qualifications are those skills and/or aptitudes that an employee in a lesser capacity brings to a position or role that are essential to the successful or efficient operation of the enterprise.
- (1) The essential nature of the alien's skills to the employing firm is determined by assessing the degree of proven expertise of the alien in the area of operations involved, the uniqueness of the specific skill or aptitude, the length of experience and/or training with the firm, the period of training or other experience necessary to perform effectively the projected duties, and the salary the special qualifications can command. The question of special skills and qualifications must be determined by assessing the circumstances on a case-by-case basis.
- (2) Whether the special qualifications are essential will be assessed in light of all circumstances at the time of each visa application on a case-by-case basis. A skill that is unique at one point may become commonplace at a later date. Skills required to start up an enterprise may no longer be essential after initial operations are complete and are running smoothly. Some skills are essential only in the short-term for the training of locally-hired employees. Long-term essentiality might, however, be established in connection with continuous activities in such areas as product improvement, quality control, or the provision of a service not generally available in the United States.
- (s) Labor disputes. Citizens of Canada or Mexico shall not be entitled to classification under this section if the Attorney General and the Secretary of Labor have certified that:
- (1) There is in progress a strike or lockout in the course of a labor dispute in the occupational classification at the place or intended place of employment; and
- (2) The alien has failed to establish that the alien's entry will not affect adversely the settlement of the strike or lockout or the employment of any person who is involved in the strike or lockout.

Attachment 7

INA Section 222(f)

(f) The records of the Department of State and of diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States shall be considered confidential and shall be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States, except that--

(1) in the discretion of the Secretary of State certified copies of such records may be made available to a court which certifies that the information contained in such records is needed by the court in the interest of the ends of justice in a case pending before the court.

(2) the Secretary of State, in the Secretary's discretion and on the basis of reciprocity, may provide to a foreign government information in the Department of State's computerized visa lookout database and, when necessary and appropriate, other records covered by this section related to information in the database--

(A) with regard to individual aliens, at any time on a case-by-case basis for the purpose of preventing, investigating, or punishing acts that would constitute a crime in the United States, including, but not limited to, terrorism or trafficking in controlled substances, persons, or illicit weapons; or

(B) with regard to any or all aliens in the database, pursuant to such conditions as the Secretary of State shall establish in an agreement with the foreign government in which that government agrees to use such information and records for the purposes described in subparagraph (A) or to deny visas to persons who would be inadmissible to the United States.