DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 214

[INS 1427–93]

RIN 1115–AC51

Nonimmigrant Classes; Treaty Aliens; E Classification

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This rule amends the Immigration and Naturalization Service (''the Service'') regulations by codifying existing policy guidelines related to the ''E'' nonimmigrant treaty trader and treaty investor visa classification. This rule closely tracks a rule being published simultaneously by the Department of State (''State'') and is intended to ensure consistent adjudication of applications for ''E'' nonimmigrant visa classification by the Service and State. It also furthers Congress' intent to facilitate trade and investment between the United States and countries with whom the United States has treaties and agreements.

DATES: This final rule is effective November 12, 1997.

FOR FURTHER INFORMATION CONTACT: Katharine Auchincloss-Lorr, Senior Adjudications Officer, Immigration and Naturalization Service, 425 I Street, NW, Room 7215, Washington, DC 20536, telephone (202) 514–5014.

SUPPLEMENTARY INFORMATION:

Background.

The Service and State share responsibility for implementing section 101(a)(15(E) of the Act. That section of the Act provides authority for the ''E'' nonimmigrant treaty trader and treaty investor visa classification. On August 30, 1991, the Service published a proposed rule and request for comments (due October 15, 1991) by parties interested in this subject in the **Federal Register**. See 56 FR 42952–57. On September 3, 1991, State published a proposed rule and request for comments (due November 4, 1991) on the same subject matter. State is publishing its final rule on ''E'' nonimmigrant visa classification, 22 CFR 41.51, simultaneously with this rule.

In response to the proposed rule, the Service received and reviewed 15 detailed comments, many covering extremely varied issues. In addition, the Service reviewed 11 comments to State's proposed rule, some identical or similar to those it received. Many of these commenters noted that discrepancies in language between the two proposed rules might lead to inconsistent adjudication and deviation from established law and policy. These comments are well-taken. The final rules of the Service and State have been drafted to be as uniform in form and substance as possible.

In this regard, both agencies have harmonized their information and documentation requirements for determining eligibility for E nonimmigrant visa classification. The Service will in the future issue a revised Form I–129, which will incorporate State's Form, the E Visa Supplemental application Form, OF–156E, for determining eligibility for E nonimmigrnat visa classification. Until that action occurs, this rule implements use of the existing Form I–129 with E Supplement by nonimmigrants seeking to change to or extend E classification in the United States.

General Changes From the Proposed Rule

The Service has revised the format of its proposed rule to conform with State's final rule. In addition, in response to comments, the Service has modified the substance and language of its proposed rule where appropriate. Substantive differences between the Service's proposed rule and this final rule are explained in the discussion of the comments.

Jurisdictional Issues

Some commenters argued that differences in Service and State regulatory language and terminology could lead to substantial discrepancies in interpretation and inconsistent adjudication, thereby inhibiting trade and investment in contravention of the United States' treaty obligations. These commenters urged the Service to defer to State on treaty alien issues, noting that eligibility for E nonimmigrant visa classification is based on treaties negotiated by State, raising foreign policy concerns more appropriately addressed by that agency. On the other hand, some commenters encouraged State consular officers to facilitate the international travel and entry of E nonimmigrnat visa holders by accepting automatically a Service-approved change of status to E classification.

Under section 104 of the Act, State has exclusive jurisdiction over visa issuance and, therefore, is not bound by Service determinations of eligibility for E nonimmigrant classification. As State noted in its proposed rule, it may not, under this provision, automatically approve an application for an E nonimmigrant visa based on the Service's approval of an application for change of nonimmigrant status to, or an extension of stay in, E nonimmigrnat classification. Rather, State must examine anew the alien's eligibility for E nonimmigrnat visa classification, in accordance with current law and procedure, which is applicable to other nonimmigrnat classifications, as well. For example, an alien admitted into the United States in B–2 (visitor) status, who subsequently applies for and is granted a change of nonimmigrant status to F–1 (student) status, cannot depart and seek reentry as an F–1 unless a United States consular officer has determined the alien's eligibility for an F–1 visa.

Conversely, under section 103 of the Act, the service has exclusive jurisdiction to adjudicate applications for admission to this country, as well as applications for change of nonimmigrant status to, or extensions of stay in, E nonimmigrant classification. In this regard, it should be noted that, unlike other employment-driven classifications, E nonimmigrant visa classification is not conferred by means of a petition, but instead by an application. Upon receipt of such applications, the Service is required to recheck independently an E nonimmigrnat visa-holder's qualifications for admission into the E nonimmigrant visa classification. Moreover, consistent with section 103 of the Act, the Service may, but is not required to, consult with State in adjudicating applications for E nonimmigrnat classification made following entry to the United States.

Some commenters also inferred from the language of section 101(a)(45) of the Act, which delegates to State responsibility for establishing what constitutes a ''substantial'' amount of trade or capital, that congress intended to recognize State's ''primary'' jurisdiction over E nonimmigrant visa status eligibility. As previously indicated, the Service does not share such a view of the Act. Section 101(a)(45) of the Act reflects congress' understanding that, because of State's central role in negotiating, executing, and interpreting Bilateral Investment Treaties, it is the appropriate agency for interpreting this statutory term. Section 101(a)(45) is not intended, however, to limit the Service's authority under section 103 of the Act to adjudicate and determine requests for E nonimmigrant classification in cases within its jurisdiction.

Table Comparing the Service's and State's Final E Rules

The following table provides a comparison of State's and the Service's final E nonimmigrant treaty trader and investor visa classification rules. An asterisk next to a State heading indicates that it is different from the Service's heading. State's headings that treat the same matter as those of the Service are marked ''SAME.'' An asterisk next to a Service heading indicates there is no parallel State heading.

Service rule— 8 CFR 214.2(e)	State rule— 22 CFR 41.51
(1) Treaty trader (TT)	(a) SAME
(2) Treaty investor (TI)	(b) SAME
(3) Employee of TT or TI	(c) SAME
(4) Spouse/Children of TT and TI	(d) SAME
(5) Nonimmigrant intent	(e) Representative of Foreign Information Media*
(6) Treaty country (TC)	(f) SAME
(7) Nationality of the TC	(g) SAME
(8) Terms and conditions of E status*	(h) Trade*
(9) Trade—definitions	(i) Item of Trade*
(10) Substantial trade	(j) SAME
(11) Principal trade	(k) SAME
(12) Investment	(l) SAME
(13) Bona fide enterprise	(m) SAME
(14) Substantial amount of capital	(n) SAME
(15) Marginal enterprise	(o) SAME
(16) Solely to direct and develop	(p) SAME
(17) Executive or supervisory character	(q) SAME
(18) Special qualifications	(r) SAME
(19) Period of admission*	
(20) Extensions of stay*	
(21) Change of status*	
(22) Denial of treaty trade or investor status to citizens of Canada or Mexico in the case of certain labor disputes*.	

Definitions

Unlike the proposed rule, this final rule does not contain a separate paragraph on definitions. Instead, terms are defined throughout the regulations.

Treaty Trader and Treaty Investor, 8 CFR 214.2(e) (1) and (2) (Corresponds With 22 CFR 41.51 (a) and (b))

The proposed rule's definition of ''primary treaty alien'' at § 214.2(e)(2)(i), has now been broken into separate definitions of ''treaty trader'' and ''treaty investor'' in this final rule at § 214.2(e) (1) and (2). In response to commenters' concerns, the term ''primary,'' used in the proposed rule, has been replaced in the final rule by the term ''principal'' for purposes of clarifying the treaty alien's relationship to his or her spouse or children.

In determining whether an applicant is a treaty trader, commenters urged the Service to consider conditions in the treaty alien's home country which affect the alien's ability to carry on trade in accordance with State's proposed rule. The final rule incorporates this consideration as a factor in determining what constitutes substantial trade, although obviously at some point country conditions, in and of themselves, can become restrictive to trade that treaty eligibility must be denied. The portion of this paragraph concerning consideration of country conditions is adopted from State's definition of treaty trader at 22 CFR 41.51(a)(1).

Employee of Treaty Trader and Treaty Investor, 8 CFR 214.2(e)(3) (Corresponds With 22 CFR 41.51(c))

The terms ''manager'' and ''managerial'' used in the proposed rule at 8 CFR 214.2(e) (2)(ii) and (6)(ii) are replaced in the final rule by ''supervisor'' and ''supervisory'' in response to comments indicating confusion with the term ''managerial'' as it is used in the context of section 101(a)(15)(L) of the Act.

Although the term ''treaty company'' was defined in the proposed rule to describe entities capable of employing an alien in E–1 or E–2 nonimmigrant visa status, State's regulation contains no such definition. In the interests of clarity, this final rule adopts State's use of the term ''organization,'' as well as the statutory word ''enterprise,'' to refer to such entities. This change reflects the fact that such an organization or enterprise derives the ability to employ aliens in E nonimmigrant visa classification directly and exclusively from its treaty trader or treaty investor owner.

Because employees derive E nonimmigrant visa status solely by virtue of their employment for an E–1 or E–2 nonimmigrant visa employer, or for an organization or enterprise qualified by reason of its ownership, it is the Service's position that an employee cannot be classified under section 101(a)(15)(E) of the Act if the employer is lawfully classified under another nonimmigrant status at the time E nonimmigrant visa classification is requested. For this reason, as provided in the proposed regulation, a permanent resident may not be the employer of a treaty alien, and the treaty alien status of an employee terminates when the E nonimmigrant visa employer becomes a permanent resident. It follows that the Service cannot adopt one commenter's suggestion that individual owners of an enterprise should be able to change to another nonimmigrant category without jeopardizing the employee's eligibility for E treaty status.

Spouse and Children of Treaty Trader and Treaty Investor, 8 CFR 214.2(e)(4) (Corresponds With 22 CFR 41.51(d))

The definition of spouse and dependent children, in the proposed rule at § 214.2(e)(2)(iii), is now contained in this final rule at

§ 214.2(e)(4). Nonimmigrant Intent, 8 CFR 214.2(e)(5)

Note: This does not corresponds with 22 CFR 41.51(3), Representatives of Foreign Information Media

The concept of dual intent found in the proposed rule at § 214.2(e)(10) (i)

and (ii) has been moved to § 214.2(e)(5) and retitled ''Nonimmigrant intent.'' This provision reflects the agencies' understanding that, under section 101(a)(15) of the Act, aliens in E nonimmigrant visa classification need not maintain a foreign residence but must indicate a clear intent to depart upon termination of status.

Although not specifically part of this final rule, the Service shares State's position that representatives of foreign information media should be considered for classification as nonimmigrants under the provisions of section 101(a)(15)(I) of the Act before consideration will be given to classifying such persons as nonimmigrants under the provisions of section 101(a)(15)(E) of the Act. See 22 CFR 41.51(e).

Treaty Country, 8 CFR 214.2(e)(6) (Corresponds With 22 CFR 41.51(f))

The definition in the proposed rule at § 214.2(e)(1) has been moved to this paragraph.

Treaty Country Nationality, 8 CFR 214.2(e)(7) (Corresponds With 22 CFR 41.51(g))

The Service's final rule incorporates the substance of its proposed rule. The proposed rule at 8 CFR 214.2(e)(6)(i), in turn, was based on State's Notes to its Foreign Affairs Manual (FAM) at 9 FAM 41.51. Some commenters urged the Service to consider the following major departures from existing policy. As discussed below, the Service is unable to adopt these suggestions.

One commenter indicated that the definition of corporate nationality contained in the proposed rule was both unworkable and in conflict with the law. The commenter argued that, by basing corporate nationality on whether nationals of a particular country own 50 percent of a corporation's shares, the proposed definition failed to account for difficulties in proving foreign corporate ownership which arise due to corporate ownership of shares, transfer of shares, and corporate shareholder lists of identity which do not always disclose shareholder's nationality. The commenter argued that requiring full search and disclosure would encourage dishonesty regarding the true owners of a company. Other commenters expressed their belief that a corporation's nationality should be determined by location of incorporation. In support of this argument, they cited certain International Court of Justice rulings, in which large multi-national corporations unable to trace nationality were permitted to look to their country of incorporation to determine nationality. They expressed the opinion that a definition based on control and ownership rather than location of incorporation could discriminate against corporations of treaty countries controlled by nationals of a third country. For these reasons, the commenters argued that a test focusing on the corporation's location would provide a more simple and enforceable guideline.

It is the Service's position that, in the great majority of cases, nationality based on ownership is the only appropriate way to determine the nationality of an organization or enterprise. Section 101(a)(15)(E) of the Act focuses on the efforts of individual nonimmigrants, as opposed to organizations, to further treaty-sanctioned activity. Consequently, simple registration in a jurisdiction to engage in business activities, rather than stock ownership, is normally not an acceptable standard for determining corporate nationality. Similarly, the country of incorporation is, in most cases, irrelevant for purposes of determining corporate nationality. On the other hand, because ownership, and not corporate location, is critical, the Service agrees with commenters who argued that domestically incorporated, but foreign-owned, corporations can be deemed eligible for E nonimmigrant visa classification. Accordingly, the reference to ''foreign'' corporations in the proposed rule has been removed.

The Service recognizes a limited exception to the nationality-by-ownership rule in the case of large, multi-national corporations that are unable to determine ownership by stock ownership. See current 9 FAM 22 CFR 41.51, N3.2. Under this exception, corporations whose stock is sold exclusively in the country of incorporation may be presumed to have the nationality of the location of the exchange. Because the burden, in all cases, remains on the applicant to demonstrate an enterprise's treaty nationality, this presumption must be supported by the best evidence available. In determining corporate nationality, the Service will consider all the circumstances in each case.

Several commenters recommended an expanded definition of ''nationality'' so that individual owners or shareholders in immigrant status, or in a nonimmigrant visa classification other than E, could be counted toward meeting the 50 percent nationality requirement set forth in 8 CFR 214.2(e)(3)(ii). The Service cannot adopt this suggestion. As noted earlier, nonimmigrant employees in E classification in an organization or enterprise derive their status directly from the employing E nonimmigrant's ownership and treaty-based nationality. Such classification, therefore, cannot be afforded to these employees if less than 50 percent of the owners are persons who are in E nonimmigrant visa classification if in the United States (or, if not in the United States, would be classifiable as E treaty traders and investors).

Terms and Conditions of E Treaty Status, 8 CFR 214.2(e)(8) (There is no Corresponding State Rule)

The Service and State will determine the terms and conditions of E treaty status, including any employment activity, at the time classification under section 101(a)(15)(E) of the Act is granted. For this reason, this paragraph incorporates proposed 8 CFR 214.2(e)(13). Among other issues, procedures and responsibilities related to transfers of employees among subsidiaries have been clarified in the paragraph of the final rule. While the final rule allows an employee in E nonimmigrant visa classification, under certain circumstances, to move among subsidiaries, the rule does not relieve the employer from compliance with all relevant regulations. Thus, in the case of such a transfer, the alien's employer is responsible for compliance with the employment eligibility verification requirements specified at 8 CFR part 274a.

It has long been the policy of the Service that a treaty trader or treaty investor, under certain circumstances, may engage in compensable activities which are incidental to the terms and conditions of the alien's E nonimmigrant visa classification. Acceptable incidental activities are those which are reasonably related to and a necessary outgrowth of the treaty employment forming the basis of the alien's E nonimmigrant visa classification. For example, it would be reasonable to expect that, during an emergency, a manager might be required to perform temporarily the duties of those persons he or she supervises as an incident to his or her managerial functions. To facilitate a determination of what constitutes incidental activity, State has agreed to request that consular officers overseas annotate E visas in a manner sufficient to inform the Service and the alien of the terms and limitations of the authorized employment activity.

An E nonimmigrant who wishes to change the terms of his or her E status, for example, to change employers or work on terms substantively different than those for which he or she was accorded entry, must obtain prior

Service approval by filing Form I–129 with the E Supplement in accordance with the instructions on, or attached to, that form. In the alternative, an E nonimmigrant may obtain a new E visa from State reflecting the new employment. Where the alien obtains Service approval of the change in status, the treaty alien must obtain a new E visa from State reflecting this change in order to return from travel abroad. The only exceptions to this new visa requirement are where the alien is applying for readmission to engage in the new treaty activity after an absence not exceeding 30 days solely in contiguous territory, pursuant to 22 CFR 41.112(d), or where an alien seeking admission presents a Form I–797, Approval Notice, indicating prior Service approval of the change in E treaty employment, together with his or her E visa.

Prior Service approval is not required if there is no fundamental change that affects the underlying terms of the treaty status forming the basis of initial E nonimmigrant visa classification. A non-substantive change may occur when there is a mere change in name of the treaty company, where one treaty national owner is replaced by another, or in some mergers and acquisitions where there is no effect on the alien's employment or relationship to the approved treaty activity. What constitutes a non-substantive change necessarily will depend on the specific facts of each case. To facilitate admission after such a non-substantive change, the Service has provided the options set forth at 8 CFR 214.2(e)(8)(iv). To determine if the change is non-substantive, the Service has provided its customers with a process for seeking advice at 8 CFR 214.2(e)(8)(v). Accordingly, an alien may file with the Service Center Form I–129, with fee, and a complete description of the change, to request a new Form I–797, Approval Notice, reflecting the non-substantive change, or appropriate advice.

As noted previously, the Service plans to publish a revised Form I–129, with the E Visa Supplemental Application Form. Until the revised Form I–129 is approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act, and issued, applicants will continue to use the existing Form I–129 and E Supplement. The revised form will provide for the derivative spouse and minor children of the trader and investor and eliminate the need for separate requests when the trader or investor seeks to change the terms and conditions of classification, extend status in, or change to E nonimmigrant classification. The option of filing the Form I–539, with a copy of the principal E visa-holder's Form I–94, will remain available, if the family member will be seeking an extension of status at a time other than the principal E nonimmigrant.

Trade—Definitions, 8 CFR 214.2(e)(9) (Corresponds With 22 CFR 41.51 (h) and (i))

The final rule modifies the proposed definition of trade by eliminating the separate definitions of ''goods'' and ''services'' and includes them as ''items of trade.'' This modification is not intended to be substantive in nature, but is meant to bring the regulation into conformity with that of State. The Service intends that the term ''service'' continue to be interpreted in an expansive fashion. In addition, in response to the concerns of commenters, the final rules of both the Service and State incorporate language recognizing trade where binding contracts ''call for the immediate exchange of items of trade.'' In response to comments that the definition of ''trade'' failed to include ''news gathering,'' an activity not precluded under section 101(a)(15)(E) of the Act but inadvertently omitted from the proposed rule, the Service has included this activity in the final regulation. As discussed earlier, representatives of foreign information media should first, however, be considered for classification pursuant to section 101(a)(15)(I) of the Act before consideration is given to possible classification under section 101(a)(15)(E) of the Act.

Substantial Trade, 8 CFR 214.2(e)(10) (Corresponds With 22 CFR 41.51(j))

Section 101(a)(15)(E) of the Act requires that, in order to qualify for E–1 nonimmigrant visa classification, the underlying business must be engaged in ''substantial trade.'' Several commenters felt strongly that the proposed requirement of continued and frequent business transactions, including business commitments scheduled for a future time, was too restrictive and inconsistent with Congressional intent and current guidelines. Section 101(a)(45) of the Act requires the Service to defer to State's definition of substantial trade. Accordingly, the Service incorporates in full State's position, as set forth in its final rule and the preamble thereto, with respect to what constitutes substantial trade for purposes of the E nonimmigrant visa classification.

It bears emphasizing that E nonimmigrant visa classification cannot be granted on the basis of a single transaction, even if that transaction is of considerable value. Trade between partners foresees long-term benefits and dedicated, ongoing activity, and is contrary to the notion of a single transaction (however protracted or complex) and the expiration of commercial activity.

In accordance with current practice, substantial trade may be demonstrated by evidence from many sources including, but not limited to, bills of lading, customs receipts, letters of credit, insurance papers documenting commodities imported, purchase orders, carrier inventories, trade brochures, and sales contracts, insurance papers documenting commodities imported, purchase orders, carrier inventories, trade brochures, and sales contracts.

Principal Trade, 8 CFR 214.2(e)(11) (Corresponds With 22 CFR 41.51(k))

With respect to what, for purposes of section 101(a)(15)(E) of the Act, constitutes trade ''principally between the United States and the foreign state'' of which the treaty trader is a national, several commenters urged the Service to adopt State's proposed phraseology ''that over 50% of the volume of *international* trade of the trader must be conducted between the United States and the treaty country of the treaty trader's nationality.'' (Emphasis added). See proposed rule § 41.51(k), 56 FR 43569 (September 3, 1991). The Service has adopted this language at 8 CFR 214.2(e)(11). Thus, for purposes of the principal trade requirement, the Service will look only at the volume of the enterprise's international, as opposed to total, trade.

Investment, 8 CFR 214.2(e)(12) (Corresponds With 22 CFR 41.51(l))

Investments are for-profit commercial efforts to generate funds. This final regulation is consistent with the proposed rule and State's regulation. On the question of risk, commenters questioned the requirement that funds dedicated for the investment business be irrevocably committed. They suggested that, by failing to protect the investor in the event a visa was not issued, the regulation discouraged alien investors unwilling to take such risk. investment was irrevocable upon visa issuance. The final rule, like State's, explicitly permits the use of mechanisms such as escrow to protect the investor if a visa is not issued. In addition, the Service will apply FAM guidelines for E–2 nonimmigrant visa classification when enterprises are still in the pre-operational activity stage.

It is clear that investment funds may not have been obtained, either directly or indirectly, from activities which are, under United States law, criminal in nature. A clear example of this would be funds obtained either directly through the trafficking of narcotics, or through the laundering or funds received through the sale of such controlled substance. On the other hand, it must be emphasized that this rule is not meant to penalize certain activities which would be recognized as lawful in the United States, but are deemed by a foreign jurisdiction to be criminal in nature. For example, a foreign jurisdiction may deem it to be illegal to transfer currency abroad, while the same activity might be deemed to be perfectly legal in the United States. Depending on the specific facts of such a case, an examiner may be required to apply United States standards, and not those of the foreign jurisdiction. In short, a determination of whether funds were obtained by criminal means must always be made on a case-by-case basis.

A number of commenters expressed the belief that the proposed regulation's failure to count towards the ''substantial investment'' requirement loans that are secured with the assets of the investment enterprise is inconsistent with modern financing practices. Commenters stated that such loans should be counted toward the ''substantial investment'' requirement if there is ultimate recourse to the investor in the event of failure, and recommended that the final rule contain the following language: ''Loans secured exclusively by the assets of the investment enterprise itself, without ultimate recourse to the investor, may not be counted toward the actual amount of capital invested.''

The final rule reflects the positions of the Service and State that assets of the treaty enterprise may not be used as collateral to secure loans and, therefore, does not contain this suggested language. The purpose of the risk provision is to place the risk of the investment exclusively on the shoulders of the investor. Such risk would be diluted if the assets of the business itself could be used as collateral, since an investor lacking adequate capital to fully repay a debt could simply ''walk away'' from a failure. The final rule, therefore, adopts State's proposed definition of ''investment'' and provides that only investments funded by capital for which the investor is personally liable may be counted as investment funds. Loans secured by the assets of the investment enterprise, such as mortgage debt or commercial loans, may not be used to meet the investment requirement. On the other hand, acceptable investment funds include such personal assets as a second mortgage on a home, unsecured or unencumbered loans or assets, and loans on the alien's personal signature.

State and the Service will determine the value of the investment capital by the same means. The FAM notes continue to provide guidance in this regard. See current 9 FAM N7.2–1 and N7.2–2. Accordingly, such value may include payments in the form of leases or rents for property or equipment in an amount limited to the funds devoted to that item in any 1 month. Such value may also include payments for the purchase of equipment and inventory on hand, provided that the alien can demonstrate that the goods or equipment are being, or will be, put to use in the investment enterprise and are for commercial, not personal, use.

Bona Fide Enterprise, 8 CFR 214.2(e)(13) (Corresponds With 22 CFR 41.51(m))

Under this final rule, to be deemed a ''bona fide enterprise,'' the enterprise may not be a paper organization or an idle, speculative investment held for potential appreciation in value, such as undeveloped land for stocks. Neither can the investment be in a nonprofit enterprise or constitute merely an intent to invest at a future time.

Some commenters argued that the effect of proposed 8 CFR 214.2(e)(5)(i)(A) was to improperly deem research facilities, market research facilities and non-profit organization to be idle and speculative investments. The commenters argued that such facilities are viable, active, profitable, and growing, albeit at a slower pace than other industries. They further argued that many multi-million-dollar research laboratories add to marketing and product knowledge and indirectly generate goods and services. The commenters concluded that Congress intended to bring such research, which is vital to larger enterprises, within the scope of the statute.

The Service recognizes the legitimacy of these arguments in the final regulation as they relate to for-profit market and research facilities. However, nonprofit institutions, such as colleges and associations, are, and have been, historically ineligible for E nonimmigrant visa status. The Service does not question the value of such nonprofit institutions but, because the focus of the E nonimmigrant visa classification is on commercial, for-profit institutions that trade or invest, nonprofit institutions are not included.

Substantial Amount of Capital, 8 CFR 214.2(e)(14) (Corresponds With 22 CFR 41.51(n))

Twelve commenters raised objections to the proportionality scale set forth in the proposed rule. They were concerned that use of a ''bright line test etched in stone'' would preclude a case-by-case analysis of whether the business was properly capitalized at a level of funds appropriate for the particular industry and type of enterprise. They further argued for elimination of the proportionality scale with respect to small investors since, under the scale, very profitable small businesses, particularly those where the investment was below $500,000, might fail to meet the high minimum-investment requirements, thereby rendering previously qualified investors ineligible for E nonimmigrant visa classification.

Some of these commenters further noted that, under the proposed rule, some joint ventures and large scale investors would not qualify under the requirement that the investment be at least 75 percent of a business valued at under $500,000. They urged the Service to consider expanding eligibility for E nonimmigrant visa status to large companies involved in sizeable joint ventures and major investments in United States business operations

As previously noted, in enacting section 101(a)(45) of the Act, Congress assigned State responsibility for determining, after consultation with the Service and other appropriate agencies, what constitutes ''substantial'' investment for purposes of E nonimmigrant visa classification. For this reason, the Service is bound by State's interpretation of ''substantiality'' as set forth in its final rule and the preamble thereto. Consistent with section 101(a)(45) of the Act, the Service, therefore adopts the guidelines set forth by State in its preamble to its final regulation. The Service wishes to emphasize that, under this interpretation, no minimum dollar figures can or should be established for meeting the substantiality requirement. Instead, the regulation requires a flexible, case-by-case assessment and provides a very straightforward 3-part test for determining substantiality.

One commenter commended the Service for exempting large corporations from the application of the ''inverted sliding scale,'' which is simply another way of describing the proportionality test that was described in the proposed rule at 8 CFR 214.2(e)(5)(iii). However, large corporations are not exempt from that analysis. Under such a determination, the percentage of an

investment (in relation to total cost) necessary to meet the substantiality requirement decreases gradually as the cost of start-up or operating the business increases, to a point where the sheer magnitude of an investment is considered substantial. Multi-million-dollar investments by large corporations, therefore, would usually be substantial even where the dollar amount invested is a relatively small percentage of the total cost of starting up or developing the enterprise.

In determining whether an investment is substantial, the Service may consider all financial and other documents of the sort presented to investors, banks, lenders, or financial analysts to assess an investment. In weighing the probative value of such documents, the Service will consider size and commercial value of the business and the circumstances of each case. For instance, the originator of a document may be relevant to an evaluation of the sufficiency of the proof. An audit conducted by a relative may be of less value than one conducted by a recognized, independent accounting firm and/or may need to be scrutinized for accuracy and to determine if generally accepted accounting principles were utilized.

Marginal Enterprise, 8 CFR 214.2(e)(15) (Corresponds With 22 CFR 41.51(o))

A number of commenters criticized the marginality test historically used by State and the Service because it inhibits small business investors, whose investments are the most likely to have been made solely to provide a living, from investing in this country. The commenters reasoned that, as a result of this policy, the nonimmigrant investor visa classification has effectively been limited to wealthy aliens with other major sources of income and foreign business interests.

The purpose of the marginality requirement is to weed out commercial enterprises, regardless of size, which will fail to become viable, that is to grow and become profitable. Of relevance to this question is the enterprise's prior commercial track record. Investors who allow an investment to subside into marginality have not maintained a fundamental condition of the investor's E–2 nonimmigrant visa classification. The final rule provides adjudicatory guidelines for evaluating what is a marginal enterprise. The determination of whether an investment is marginal depends, in all cases, on the specific circumstances and facts involved.

The proposed rule provided that ''a business may generate a minimal income and still meet the marginality test if it offers employment opportunities for United States workers and if the investor is not and will not be primarily self-employed as a skilled or unskilled worker.'' See proposed rule at 8 CFR 214.2(e)(5). One commenter argued that the question of whether an investor is or is not primarily employed as a skilled or unskilled laborer bears no relationship to the question of an enterprise's marginality. Instead, the marginality question, it was argued, relates merely to whether the investment has an impact on potential job-creation or the economy as a whole. The Service agrees with this comment. Accordingly, the final rule deletes references to skilled and unskilled labor, and provides that the capacity of an enterprise to make a significant economic contribution is an appropriate consideration in a marginality determination.

Both State's and the Service's proposed regulations were criticized for defining as marginal those enterprises which lack the capacity ''to generate more than enough income to provide a minimal living for the alien and family,'' since such enterprises may employ American workers and may involve a significant investment of capital. Although this definition is retained, the final rule precludes a finding of marginality where an enterprise demonstrates a present or future capacity to make a significant economic contribution, such as providing substantial employment.

Consistent with Congress' focus on the commercial nature of the investment, the final rule requires that an applicant demonstrate that an investment will generate a positive income within a reasonable period of time. The burden is on the alien to demonstrate the enterprise's capacity to become a viable commercial entity by presenting a business plan showing that the business will provide more than a subsistence living for the investor, within 5 years from the onset date of normal business activities. This business plan will assist the Service in determining whether the alien's intention in making the investment is to establish a viable enterprise

The 5-year business plan enables the Service to gauge progress toward tangible goals after the enterprise is in place. It recognizes the business reality that often, in situations involving start-up, change of ownership/management, or acquisitions, businesses may show little actual initial profit, but with proper planning, development, and direction, the business should generate more than enough income to provide a minimal living for the investor and his or her family. The Service must continue to assess whether the investor's enterprise is marginal at every E adjudication, even after the initial 5-year period is completed.

Solely to Develop and Direct, 8 CFR 214.2(e)(16) (Corresponds With 22 CFR 41.51(p))

Two commenters preferred State's language that an alien can meet the ''develop and direct'' requirement of section 101(a)(15)(E) of the Act by: (a) Controlling the enterprise through ownership of at least 50 percent, rather than more than 50 percent, of the business; (b) possessing operational control through a managerial position or other corporate device, or; (c) being in a position to control the enterprise by other means. The final rule adopts this reasonable interpretation.

Some commenters stated that demanding a demonstration of actual control would undermine United States treaty obligations to further trade and investment by imposing the ''unworkable'' requirement that the applicant present copies of stock certificates, rather than permitting him or her to submit for review corporate records and stock ledgers. These commenters argued that an investor who operates that company alone and does all ''routine work'' without other employees should be recognized for purposes of meeting the control requirement, and that the form of the business organization should not be determinative.

The requirement that an investor's entry be ''solely to develop and direct the operations of an enterprise'' is statutory and cannot be waived. Accordingly, the final rule permits an alien to demonstrate that he or she (or his or her employer, in the case of an essential employee) controls or will control the enterprise within a reasonable period of time. In cases where the individual is in the process of investing, at the time the investment attaches (e.g., the investment funds are released from escrow) the individual must be in control of the investment. In the final rule, the Service defines control broadly to include operational control, ownership, management responsibility, or use of other corporate devices for controlling the enterprise. The Service recognizes that what constitutes control may vary depending on factors such as the structure of the enterprise involved.

Given the control requirement, the Service cannot adopt the suggestion that E nonimmigrant visa classification be accorded automatically to large

companies involved in joint ventures since, often, no company ''controls'' the venture. E nonimmigrant visa classification for joint-venture participants is inappropriate unless the applicant can demonstrate operational control. Such operational control may be demonstrated through ''negative control.'' See current 9 FAM 41.51, N11.1. In all cases, the Service will adjudicate applications involving joint ventures in a manner consistent with State.

Finally, it should be noted that, because of the requirement that a treaty investor be entering ''solely to develop and direct'' the operations of an enterprise, an alien who is seeking admission in order to engage primarily in skilled or unskilled labor will be ineligible for E nonimmigrant visa classification. Such an investor may, however, perform ''hands on'' duties, provided they are purely incidental to his or her developing and directing the operations of the enterprise.

Executive and Supervisory Character, 8 CFR 214.2(e)(17) (Corresponds With 22 CFR 41.51(q)

With the exception of the change noted in the discussion of final 8 CFR 214.2(e)(3), there were no other comments on, or substantive changes, to this paragraph.

Special Qualifications, 8 CFR 214.2(e)(18) (Corresponds With 22 CFR 41.51(r)

Thirteen commenters expressed an array of opinions on the proposed requirements for establishing an employee's essentiality for purposes of E nonimmigrant visa classification. Some commenters stated that requiring specialized knowledge, unique skills, and a high level of expertise or proprietary knowledge of the business operations was overly stringent and included outmoded or discredited concepts. These commenters noted that the term ''unique,'' previously used with respect to the L nonimmigrant visa classification, was subsequently rejected by both Congress and the Service.

It should be emphasized that there is no relationship between the E and L nonimmigrant visa classifications. For this reason, the statutory term ''specialized knowledge,'' found at section 101(a)(15)(L) of the Act, is inappropriate in describing whether an alien employee is ''essential'' for purposes of E nonimmigrant visa classification. Although section 101(a)(15)(E) of the Act is silent on whether employees may be admitted in E nonimmigrant visa classification, the Service has historically deemed appropriate the admission of non-executive or supervisory employees having special qualifications which make their skills essential, i.e., indispensable to the success of the investment. The overriding consideration in the context of E nonimmigrant visa classification is an employee's essentiality to the enterprise.

The final rule does not require an essential employee's skills to be ''unique'' or ''one of a kind.'' The possession of unique skills, however, can usually be considered essential and, therefore, can be a positive factor in determining whether the applicant is essential for purposes of section 101(a)(15)(E) of the Act.

Some commenters expressed the opinion that the proposed essentiality requirement would hinder the ability of international companies to transfer personnel to critical projects in the United States. These commenters argued that knowledge of foreign language, culture, and country conditions should be considered in determining an alien's essentiality. They also argued that requiring prior employment or experience with the company abroad (i.e., ''transferred from an overseas office'') violated treaty obligations which require only that the employee be essential.

The Service adopts in full State's criteria, as set forth in its final rule and the preamble thereto, for determining whether an applicant is ''essential.'' There is no bright-line test for determining whether an alien is essential to an enterprise. What constitutes essentiality must be determined on the basis of the particular facts of each case. Accordingly, skills such as knowledge of a foreign language and culture, knowledge of conditions in the foreign country that are unique to his or her nationality, and previous employment with the enterprise in question, must be analyzed for their essentiality to the investment enterprise and would not, by themselves, meet the essential skills requirement.

Much comment was received regarding the requirement in the proposed rule that a treaty trader or investor seeking an essential employee demonstrate that qualified United States workers are unavailable to do the job. Some commenters urged that the Service require treaty traders or investors to provide statements from relevant public or private sources or otherwise adopt a process of assessing United States worker availability and obtaining input from labor organizations. Such public or private sources may include, among others, chambers of commerce, labor organizations, industry trade sources, or state employment agencies.

Other commenters opposed requiring such a labor market test, arguing that such a requirement was outside the scope of section 101(a)(15)E) of the Act, inconsistent with prior policy, and contrary to United States treaty obligations. The commenters also argued that a labor market test would have no application to cases where treaty aliens create jobs. These commenters expressed concern that, in actual practice, the Service would condition a finding of essentiality on the existence of a labor shortage and/or an employer's commitment to train United States workers to fill the position. These commenters noted that the employing enterprise is in a better position than the Government to determine the essentiality of particular employees.

The Service agrees that a labor shortage clearance requirement would be tantamount to a labor certification process and there is no legal authority for such a change. The final rule adopts a more flexible process by requiring the adjudicator to consider whether the needed skills are ''commonplace'' or readily available. This requirement does not constitute a veiled labor certification test. Rather, consideration of whether United States workers are available to perform the duties in question is relevant to determining how essential or indispensable the employee is to the enterprise. Although not required, documentation from outside sources may prove helpful in establishing the alien's essentiality.

As State has noted in its final rule at 22 CFR 41.51(r)(2), a skill that is unique or essential at one point may become commonplace at a later date. Consequently, while an applicant may be able to demonstrate in a particular instance that his or her skills are essential for an unspecified period of time, the alien is required to demonstrate his or her essentiality in any subsequent application for E nonimmigrant visa classification.

The proposed rule required that businesses develop training and education programs for United States workers in areas where such United States workers lack the requisite skill to fill the position offered. The proposed rule further provided that businesses must, in the alternative, demonstrate that the transfer of such skills is not feasible. These proposals were the subject of 11 comments. Some commenters suggested that such training regulations departed from prior law and were beyond the scope of the Service's statutory authority. The

commenters also argued the proposed training requirement was economically irresponsible, since many businesses can more easily and cost effectively transfer an employee possessing such skills from abroad. In addition, they noted that training would not be feasible if a skill was needed only temporarily and the need for the skill disappeared prior to completion of United States worker training. Some commenters suggested that training requirements should be applied only to companies which repeatedly request foreign technicians and, that even in such cases, the absence of a training program should merely be looked at as a negative, but not a determinative, factor in considering future applications.

The Service has decided not to impose a training requirement for E nomimmigrant visa classification exept in cases where the purpose of the E nonimmigrant visa employee's entry is to train United States workers. The question of the trainability of Untied States workers, however, goes directly to whether the alien employee is essential to the enterprise. If the skills are readily transferable to Untied States workers, it is reasonable to conclude that the enterprise could use a United States worker instead of the alien and skill function without significant disruption.

It is the position of the Service that an alien's possession of otherwise easily transferable skills typically can be deemed essential only in certain cases involving a start-up or a new enterprise, or an established enterprise which is undergoing expansion. An adjudicating officer, therefore, may request traders or investors employing essential start-up employees to set up a reasonable time frame within which the enterprise must replace such alien workers with locally hired United States employees. In this way, the Service can be assured that the employer will not artificially prolong the essentiality of employees by failing to plan for their replacement by locally hired United States employes. The above procedure remains consistent with current policy, as expressed in State's FAM notes.

The Service will monitor industry changes as necessary to determine essentiality and ensure that employees have the skills essential to the efficient operation of their ongoing investment enterprises. State and the Service will continue to work together to ensure that applications within given industries receive similar treatment.

Period of Admission, Extensions of Stay, Change of Status, 8 CFR 214.2(e)(19), (20), and (21) (There Are No Corresponding State Regulations)

The final rule incorporates numerous changes from the proposed regulation with regard to period of admission, extensions of stay, and change of status.

The final regulation creates a 2-year period for an initial admission and an unlimited number of 2-year extensions of status in E nonimmigrant visa classification. This change is intended to alleviate the confusion due to the different periods of time authorized for initial admissions and extensions under the previous policy.

Procedures for requesting extensions of stay are clarified at 8 CFR 214.2(e)(20). The revised Form I–129, when published, will simplify the procedures for requesting extensions of stay and, in this way, will assist traders and investors in the United States.

The paragraph on change of status at 8 CFR 214.2(e)(21) is consistent with the proposed rule.

Denial of Treaty Trader or Investor Status to Citizens of Canada or Mexico in the Case of Certain Labor Disputes, 8 CFR 214.2(e)(22) (There is no Corresponding State Regulation)

This paragraph has been added to clarify that the strike provisions of the North American Free Trade Agreement (''NAFTA'') are applicable to citizens of Canada and Mexico who seek nonimmigrant treaty trader or treaty investor visa status. Since these work stoppage and labor dispute provisions have the effect of law, see NAFTA Implementation Act, Pub. L. 103–182, December 8, 1993, there is no need for pre-publication notice and comment. However, the presence of these provisions in this regulation promotes awareness of their applicability to NAFTA visa holders in E nonimmigrant visa classification.

The Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service has reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities for the following reasons: This rule amends Service regulations by codifying existing policy guidelines related to the ''E'' nonimmigrant treaty trader and treaty investor visa classification. The economic impact of this rule, and its affect on small entities, will not be significantly different from that of the current regulation. This rule clarifies existing policy guidelines and ensures consistency with the similar rule of the Department of State, and will not, by itself, significantly increase or decrease the number of aliens in this classification, or their economic impact on the United States.

Executive Order 12866

This rule is considered by the Department of Justice, Immigration and Naturalization Service, to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. accordingly, this regulation has been reviewed by the Office of Management and Budget.

Executive Order 12612

The regulation herein will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, ''Civil Justice Reform''.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more. In addition, this rule will not result in a major increase in costs or prices or in significant adverse effects on competition, employment, investment, productivity, or innovation. This rule will not have significant adverse effects on the ability of United States-based companies to compete with foreign-based companies in domestic

and export markets. Moreover, this rule allows citizens of countries with which the United States has treaties and agreements (such as NAFTA) to enter this country in E classification to engage in trade and investment. Such treaties and agreements permit the smooth and efficient entry of traders and investors, in accordance with reasonable standards provided by the Service and the Department of State as set forth in this regulation, so that United States citizens are accorded reciprocal rights to trade and invest in the country of the treaty or agreement partner.

Paperwork Reduction Act

This final rule does not impose any new reporting or recordkeeping requirements. The information collection requirements contained in this rule have been cleared by the Office of Management and Budget under the provisions of the Paperwork Reduction Act. Clearance numbers for these collections are contained in 8 CFR 299.5, Display of control numbers.

List of Subjects in 8 CFR Part 214

Administrative practice and procedure, Aliens, Authority delegation (Government agencies), Employment.

Accordingly, part 214 of chapter I of title 8 of the Code of Federal Regulations is amended as follows.

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282; 8 CFR part 2.

2. Section 214.2 is amended by revising paragraph (e) to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(e) *Treaty traders and investors*—(1) *Treaty trader.* An alien, if otherwise admissible, may be classified as a nonimmigrant treaty trader (E–1) under the provisions of section 101(a)(15)(E)(i) of the Act if the alien:

(i) 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 treaty country of which the alien is a national, taking into consideration 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

(ii) Intends to depart the United States upon the expiration or termination of treaty trader (E–1) status.

(2) *Treaty investor.* An alien, if otherwise admissible, may be classified as a nonimmigrant treaty investor (E–2) under the provision of section 101(a)(15)(E)(ii) of the Act if the alien:

(i) Has invested or is actively in the process of investing a substantial amount of capital in a 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;

(ii) Is seeking entry solely to develop and direct the enterprise; and

(iii) Intends to depart the United States upon the expiration or termination of treaty investor (E–2) status.

(3) *Employee of treaty trader or treaty investor.* An alien employee of a treaty trader, if otherwise admissible, may be classified as E–1, and an alien employee of a treaty investor, if otherwise admissible, may be classified as 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 alien's services essential to the efficient operation of the enterprise. The employee must have the same nationality as the principal alien employer. In addition, the employee must intend to depart the United States upon the expiration or termination of E–1 or E–2 status. The principal alien employer must be:

(i) A person in the United States having the nationality of the treaty country and maintaining nonimmigrant treaty trader or treaty investor status or, if not in the United States, would be classifiable as a treaty trader or treaty investor; or

(ii) An enterprise or organization at least 50 percent owned by persons in the United States having the nationality of the treaty country and maintaining nonimmigrant treaty trader or treaty investor status or who, if not in the United States, would be classifiable as treaty traders or treaty investors.

(4) *Spouse and children of treaty trader or treaty investor.* The spouse and child of a treaty trader or treaty investor accompanying or following to join the principal alien, if otherwise admissible, may receive 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 section 101(a)(15)(e) of the Act.

(5) *Nonimmigrant intent.* An alien classified under section 101(a)(15)(E) of the Act shall maintain an intention to depart the United States upon the expiration or termination of E–1 or E–2 status. However, an application for initial admission, change of status, or extension of stay in E classification may not be denied solely on the basis of an approved request for permanent labor certification or a filed or approved immigrant visa preference petition.

(6) *Treaty country.* A treaty country is, for purposes of this section, a foreign state with which a qualifying Treaty of Friendship, Commerce, or Navigation or its equivalent exists with the United States. A treaty country includes a foreign state that is accorded treaty visa privileges under section 101(a)(15)(E) of the Act by specific legislation.

(7) *Treaty country nationality.* The nationality of an individual treaty trader or treaty investor is determined by the authorities of the foreign state of which the alien is a national. In the case of an enterprise or organization, ownership must be traced as best as is practicable to the individuals who are ultimately its owners.

8. *Terms and conditions of E treaty status*—(i) *Limitations on employment.* The Service determines the terms and conditions of E treaty status at the time of admission or approval of a request to change nonimmigrant status to E classification. A treaty trader, treaty investor, or treaty employee may engage only in employment which is consistent with the terms and conditions of his or her status and the activity forming the basis for the E treaty status.

(ii) *Subsidiary employment.* Treaty employees may perform work for the parent treaty organization or enterprise, or any subsidiary of the parent organization or enterprise. Performing work for subsidiaries of a common parent enterprise or organization will not be deemed to constitute a substantive change in the terms and conditions of the underlying E treaty employment if, at the time the E treaty status was determined, the applicant presented evidence establishing:

(A) The enterprise or organization, and any subsidiaries thereof, where the work will be performed; the requisite parent-subsidiary relationship; and that the subsidiary independently qualifies as a treaty organization or enterprise under this paragraph;

(B) In the case of an employee of a treaty trader or treaty investor, the work to be performed requires executive, supervisory, or essential skills; and

(C) The work is consistent with the terms and conditions of the activity forming the basis of the classification.

(iii) *Substantive changes.* Prior Service approval must be obtained where there will be a substantive change in the terms or conditions of E status. In such cases, a treaty alien must file a new application on Form I–129 and E supplement, in accordance with the instructions on that form, requesting extension of stay in the United States. In support of an alien's Form I–129 application, the treaty alien must submit evidence of continued eligibility for E classification in the new capacity. Alternatively, the alien must obtain from a consular officer a visa reflecting the new terms and conditions and subsequently apply for admission at a port-of-entry. The Service will deem there to have been a substantive change necessitating the filing of a new Form I–129 application in cases where there has been a fundamental change in the employing entity's basic characteristics, such as a merger, acquisition, or sale of the division where the alien is employed.

(iv) *Non-substantive changes.* Prior approval is not required, and there is no need to file a new Form I–129, if there is no substantive, or fundamental, change in the terms or conditions of the alien's employment which would affect the alien's eligibility for E classification. Further, prior approval is not required if corporate changes occur which do not affect the previously approved employment relationship, or are otherwise non-substantive. To facilitate admission, the alien may:

(A) Present a letter from the treaty-qualifying company through which the alien attained E classification explaining the nature of the change;

(B) Request a new Form I–797, Approval Notice, reflecting the non-substantive change by filing with the appropriate Service Center Form I–129, with fee, and a complete description of the change, or;

(C) Apply directly to State for a new E visa reflecting the change. An alien who does not elect one of the three options contained in paragraph (e)(8)(iv)(A) through (C) of this section, is not precluded from demonstrating to the satisfaction of the immigration officer at the port-of-entry in some other manner, his or her admissibility under section 101(a)(15)(E) of the Act.

(v) *Advice.* To ascertain whether a change is substantive, an alien may file with the Service Center Form I–129, with fee, and a complete description of the change, to request appropriate advice. In cases involving multiple employees, an alien may request that a Service Center determine if a merger or other corporate restructuring requires the filing of separate applications by filing a single Form I–129, with fee, and attaching a list of the related receipt numbers for the employees involved and an explanation of the change or changes. Where employees are located within multiple jurisdictions, such a request for advice must be filed with the Service Center in Lincoln, Nebraska.

(vi) *Approval.* If an application to change the terms and conditions of E status or employment is approved, the Service shall notify the applicant on Form I–797. An extension of stay in nonimmigrant E classification may be granted for the validity of the approved application. The alien is not authorized to begin the new employment until the application is approved. Employment is authorized only for the period of time the alien remains in the United States. If the alien subsequently departs from the United States, readmission in E classification may be authorized where the alien presents his or her unexpired E visa together with the Form I–797, Approval Notice, indicating Service approval of a change of employer or of a change in the substantive terms or conditions of treaty status or employment in E classification, or, in accordance with 22 CFR 41.112(d), where the alien is applying for readmission after an absence not exceeding 30 days solely in contiguous territory.

(vii) An unauthorized change of employment to a new employer will constitute a failure to maintain status within the meaning of section 237(a)(1)(C)(i) of the Act. In all cases where the treaty employee will be providing services to a subsidiary under this paragraph, the subsidiary is required to comply with the terms of 8 CFR part 274a.

(9) *Trade—definitions.* For purposes of this paragraph: *Items of trade* include but are not limited to goods, services, international banking, insurance, monies, transportation, communications, data processing, advertising, accounting, design and engineering, management consulting, tourism, technology and its transfer, and some news-gathering activities. For purposes of this paragraph, goods are tangible commodities or merchandise having extrinsic value. Further, as used in this paragraph, services are legitimate economic activities which provide other than tangible goods.

Trade is 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. Domestic trade or the development of domestic markets without international exchange does not constitute trade for purposes of section 101(a)(15)(E) of the Act. This exchange must be traceable and identifiable. Title to the trade item must pass from one treaty party to the other.

(10) *Substantial trade.* Substantial trade is an amount of trade sufficient to ensure a continuous flow of international trade items between the United States and the treaty country. This continuous flow contemplates numerous transactions over time. Treaty trader status may not be established or maintained on the basis of a single transaction, regardless of how protracted or monetarily valuable the transaction. Although the monetary value of the trade item being exchanged is a relevant consideration, greater weight will be given to more numerous exchanges of larger value. There is no minimum requirement with respect to the monetary value or volume of each individual transaction. 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.

(11) *Principal trade.* Principal trade between the United States and the treaty country exists when over 50 percent 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.

(12) *Investment.* An investment is the treaty investor's placing of capital, including funds and other assets (which have not been obtained, directly or indirectly, through criminal activity), 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. The alien may use any legal mechanism available, such as the placement of invested funds in escrow pending admission in, or approval of, E classification, that would not only irrevocably commit funds to the enterprise, but might also extend personal liability protection to the treaty investor in the event the application for E classification is denied.

(13) *Bona fide enterprise.* The enterprise must be a real, active, and operating commercial or entrepreneurial undertaking which produces services or goods for profit. The enterprise must meet applicable legal requirements for doing business in the particular jurisdiction in the United States.

(14) *Substantial amount of capital.* A substantial amount of capital constitutes an amount which is:

(i) Substantial 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. Generally, the lower the cost of the enterprise, the higher, proportionately, the investment must be to be considered a substantial amount of capital.

(15) *Marginal enterprise.* 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.

(16) *Solely to develop and direct.* An alien seeking classification as a treaty investor (or, in the case of an employee of a treaty investor, the owner of the treaty enterprise) must demonstrate that he or she does or will develop and direct the investment enterprise. Such an applicant must establish that he or she controls the enterprise by demonstrating ownership of at least 50 percent of the enterprise, by possessing operational control through a managerial position or other corporate device, or by other means.

(17) *Executive and supervisory character.* The applicant's position must be principally and primarily, as opposed to incidentally or collaterally, executive or supervisory in nature. Executive and supervisory duties are those which provide the employee ultimate control and responsibility for the enterprise's overall operation or a major component thereof. In determining whether the applicant has established possession of the requisite control and responsibility, a Service officer shall consider, where applicable:

(i) That an executive position is one which provides the employee with great authority to determine the policy of, and the direction for, the enterprise;

(ii) That a position primarily of supervisory character provides 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, and;

(iii) Whether the applicant possesses executive and supervisory skills and experience; a salary and position title commensurate with executive or supervisory employment; recognition or indicia of the position as one of authority and responsibility in the overall organizational structure; responsibility for making discretionary decisions, setting policies, directing and managing business operations, supervising other professional and supervisory personnel; and that, if the position requires some routine work usually performed by a staff employee, such functions may only be of an incidental nature.

(18) *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 treaty enterprise. In determining whether the skills possessed by the alien are essential to the operation of the employing treaty enterprise, a Service officer must consider, where applicable:

(i) The degree of proven expertise of the alien in the area of operations involved; whether others possess the applicant's specific skill or aptitude; the length of the applicant's experience and/or training with the treaty enterprise; the period of training or other experience necessary to perform effectively the projected duties; the relationship of the skill or knowledge to the enterprise's specific processes or applications, and the salary the special qualifications can command; that knowledge of a foreign language and culture does not, by itself, meet the special qualifications requirement, and;

(ii) Whether the skills and qualifications are readily available in the United States. In all cases, in determining whether the applicant possesses special qualifications which are essential to the treaty enterprise, a Service officer must take into account all the particular facts presented. A skill that is essential at one point in time may become commonplace at a later date. Skills that are needed to start up an enterprise may no longer be essential after initial operations are complete and running smoothly. Some skills are essential only in the short-term for the training of locally hired employees. Under certain circumstances, an applicant may be able to establish his or her essentiality to the treaty enterprise for a longer period of time, such as, in connection with activities in the areas of product improvement, quality control, or the provision of a service not yet generally available in the United States. Where the treaty enterprise's need for the applicant's special qualifications, and therefore, the applicant's essentiality, is time-limited, Service officers may request that the applicant provide evidence of the period for which skills will be needed and a reasonable projected date for completion of start-up or replacement of the essential skilled workers.

(19) *Period of admission.* Periods of admission are as follows:

(i) A treaty trader or treaty investor may be admitted for an initial period of not more than 2 years.

(ii) The spouse and minor children accompanying or following to join a treaty trader or treaty investor shall be admitted for the period during which the principal alien is in valid treaty trader or investor status. The temporary departure from the United States of the principal trader or investor shall not affect the derivative status of the dependent spouse and minor unmarried children, provided the familial relationship continues to exist and the principal remains eligible for admission as an E nonimmigrant to perform the activity.

(iii) Unless otherwise provided for in this chapter, an alien shall not be admitted in E classification for a period of time extending more than 6 months beyond the expiration date of the alien's passport.

(20) *Extensions of stay.* Requests for extensions of stay may be granted in increments of not more than 2 years. A treaty trader or treaty investor in valid E status may apply for an extension of stay by filing an application for extension of stay on Form I–129 and E Supplement, with required accompanying documents, in accordance with § 214.1 and the instructions on that form.

(i) For purposes of eligibility for an extension of stay, the alien must prove that he or she:

(A) Has at all times maintained the terms and conditions of his or her E nonimmigrant classification;

(B) Was physically present in the United States at the time of filing the application for extension of stay; and

(C) Has not abandoned his or her extension request.

(ii) With limited exceptions, it is presumed that employees of treaty enterprises with special qualifications who are responsible for start-up operations should be able to complete their objectives within 2 years. Absent special circumstances, therefore, such employees will not be eligible to obtain an extension of stay.

(iii) Subject to paragraph (e)(5) of this section and the presumption noted in paragraph (e)(22)(ii) of this section, there is no specified number of extensions of stay that a treaty trader or treaty investor may be granted.

(21) *Change of nonimigrant status.* (i) An alien in another valid nonimmigrant status may apply for change of status to E classification by filing an application for change of status on Form I–129 and E Supplement, with required accompanying documents establishing eligibility for a change of status and E classification, in accordance with 8 CFR part 248 and the instructions on Form I–129 and E Supplement.

(ii) The spouse or minor children of an applicant seeking a change of status to that of treaty trader or treaty investor alien shall file concurrent applications for change of status to derivative treaty classification on the appropriate Service form. Applications for derivative treaty status shall:

(A) Be approved only if the principal treaty alien is granted treaty alien status and continues to maintain that status;

(B) Be approved for the period of admission authorized in paragraph (e)(20) of this section.

(22) *Denial of treaty trader or treaty investor status to citizens of Canada or Mexico in the case of certain labor disputes.* (i) A citizen of Canada or Mexico may be denied E treaty trader or treaty investor status as described in section 101(a)(15)(E) of the Act and section B of Annex 1603 of the NAFTA if:

(A) The Secretary of Labor certifies to, or otherwise informs, the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress at the place where the alien is or intends to be employed; and

(B) Temporary entry of that alien may adversely affect either:

(*1*) The settlement of any labor dispute that is in progress at the place or intended place of employment, or

(*2*) The employment of any person who is involved in such dispute.

(ii) If the alien has already commenced employment in the United States and is participating in a strike or other labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Department of Labor, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers, but is subject to the following terms and conditions:

(A) The alien shall remain subject to all applicable provisions of the Act and regulations applicable to all other E nomimmigrants; and

(B) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving a work stoppage of workers.

(iii) Although participation by an E nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for deportation, any alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to deportation.

* * * * *

Dated: March 17, 1997.

Doris Meissner,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 97–22314 Filed 9–11–97; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF STATE

Bureau of Consular Affairs

22 CFR Part 41

[Public Notice 2594]

Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended; Business and Media Visas; Treaty Trader and Treaty Investors

AGENCY: Bureau of Consular Affairs, State Department.

ACTION: Final rule.

SUMMARY: This rule amends the nonimmigrant visa regulations, by adding a definition of the term ''substantial'' to section 41.51 in order to implement the provisions of section 204(c) of Pub. L. 101–649. This rule adds a new section 101(a)(45) to the Immigration and Nationality Act (INA) for purposes of defining this term as used in section 101(a)(15)(E) of the INA. Furthermore, this rule incorporates into regulation the underlying principles of the treaty trader/treaty investor visa classification which have been published in the form of interpretive note material in Volume 9 of the State Department's Foreign Affairs Manual.

EFFECTIVE DATE: November 12, 1997.

FOR FURTHER INFORMATION CONTACT: Stephen K. Fischel, Director, Legislation, Regulations and Advisory Assistance, 202–663–1184.

SUPPLEMENTARY INFORMATION: Public Notice 1468 at 56 FR 43565, September 3, 1991, proposed adding regulations to title 22, part 41, Code of the Federal Regulations. The proposed regulations were required to implement the provisions of section 204(c) of the Immigration Act of 1990, Pub. L. 104–649 which requires the Secretary of State to promulgate a regulatory definition of the term ''substantial'' after consultation with the appropriate agencies of the United States Government. The proposal was discussed in detail in Notice 1468, as were the Department's reasons for the regulations. The Department received 14 timely comments in responds to the Notice of Proposed Rulemaking.

Analysis of Comments

General Comment

The Department's proposed rule and the Immigration and Naturalization Service's proposed rule on the treaty visa classification were published within a few days of each other. Although the rules were intended to be identical in substance, each agency selected different language to articulate its rules. This difference in language led readers to reach the unintended conclusion that the rules were substantively different if not at odds with each other in a few critical ways.

Many commenters expressed their concern about the apparent differences in two ways. First, commenters requested that the agencies work together to publish rules that were clearly identical in substance. The agencies certainly recognize the need for one set of principles to administer the law and have worked together to achieve that goal. Furthermore, commenters suggested that, since the Department of State has the greatest amount of experience in administering treaty trader/investors visa rules, and since INS has been deferring to the Department of State's regulations and interpretations, the INS should continue to defer to the Department and to apply the Department's regulations. Such deference, it was suggested, could involve the specific reference, in the Immigration and Naturalization Service (Service) regulations, to the Department of State's regulations, or the publication of the Department's entire treaty visa