



Grenada, E-2 Visas and the Two-Step Immigration Strategy



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The visa backlog for EB-5 investors from China seems to have birthed the immigration version of an alternative fuels industry with the promotion of immigration solutions for just about any scenario. If the visa backlog extends in the future to Vietnam, then to India, without Congress intervening with more visa numbers, this alternatives industry is likely to keep growing. With the specious promotion of “EB-6 visas” and “red cards”, and the over-hyped touting of entrepreneur-like visas for the relatively passive investors who have filled most of the EB-5 quota, the immigrant investor industry has reason to be skeptical that these alternatives are sustainable. Skepticism should apply as well to the oft-promoted solution of investing to obtain a third country’s citizenship (for example, Grenada) and then pairing that new third-country passport with another investment in the United States to obtain the E-2 visa. To be sure, this two-step US immigration plan is perfectly suited to some of our immigrant entrepreneur clients who aim to be active in US business, and US businesses promoting certain well-structured investment opportunities may raise capital with this strategy. But the pool of legitimately-qualified applicants may be relatively small for the reasons explained here.

The E-2 visa is for investors who are in the process of making a substantial investment in a US business that the investor owns or controls. (This is not to be confused with the E-1 visa for individuals seeking to work in and oversee a US business engaged in substantial bilateral trade.) One essential to the discussion of the E visa is that it requires an investment treaty between the United States and the country of the investor or trader’s nationality. The United States does not have such treaties with all countries (see a listing of E-2 and E-1 treaty countries, [\[travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html\]\(https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html\). Notable non-treaty countries include the BRIC countries Brazil, Russia, India and China, as well as Vietnam and Indonesia.](https://</p></div><div data-bbox=)

Enter, therefore, for US immigration purposes the relevance of the supply of third-country citizenship-by-investment programs of countries that have a bilateral treaty with the United States, like Grenada. Many factors, such as the mobility of visa-free travel and insurance against political instability, are driving the increasing interest in these citizenship programs as the end objective, <https://www.cnn.com/travel/article/multiple-passports-citizenship/index.html>; <http://www.bbc.com/capital/story/20170530-why-citizenship-is-now-a-commodity>. But this comment is limited to those BRIC investors and other non-treaty investors who are motivated by the primary goal of residing in the United States and have opted for the two-step strategy enabled by third-country citizenship.

Grenada citizenship is just one example of a third-country citizenship that fits into a two-step strategy. It is appealing because the total costs and eligibility requirements are not formidable and the processing time is swift. The eligibility requirements are available at the Grenada government website -- <http://www.cbi.gov.gd>. To summarize, the Grenada Citizenship by Investment Program, launched in 2013, offers two options for acquiring citizenship. The first option requires a minimum donation of \$200,000 to the National Transformation Fund (NTF). The contribution is non-refundable. The second option involves acquiring real estate for a minimum \$350,000 from a government-coordinated real estate project. The real estate investment must be held for a minimum

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of three years. The applicant is expected to coordinate with an approved marketing agent, and thereafter, the applicant uses a local agent registered with the Grenada government to file the initial application. The combined application, due diligence and processing fees are \$8,000 per adult applicant, \$4,000 for dependents under 18, and just \$2,500 for applicants under 12 years old. The real estate option requires an additional filing fee of \$50,000 for the applicant and up to three dependents, and another \$25,000 for any other dependents.

The eligibility requirements are few. The applicant must be at least eighteen years old; must be in good health as represented in a medical exam certificate; must have no criminal record; and must prove the lawful source of the investment funds. Children under age 25 and parents over age 65 may be included as dependents.

Applications are processed within just a few months. The citizenship may be obtained without an interview and without ever stepping foot in Grenada. There is no requirement to demonstrate net worth. There is no requirement to prove education, work or management experience.

Among the many benefits of Grenada citizenship are the rights to reside or not reside in the island nation, and enhanced mobility with visa-free travel to more than 100 countries. For certain clients there also may be tax and estate planning benefits afforded by Grenada citizenship. In sum, Grenada citizenship and the application process have obvious appeal as a first step in the two-step US immigration strategy.

With the second step in this strategy, the investor would be preparing to file an application for E-2 visa. There are several substantive requirements. Apart from the applicant meeting the treaty requirement (which would be satisfied by the Grenada-United States treaty), the US business also must be considered a Grenada-owned entity, typically proven by evidence that at least 50% of the ownership of the US business is in the hands of citizens of Grenada. Foremost of the substantive investment and business requirements for the E-2 visa are – a substantial investment in the US business; the business cannot be a marginal one that provides only a minimal living for the investor and family; the applicant must control the

business; and the applicant must develop and direct the business. Since the ultimate success of the two-step strategy depends on obtaining and maintaining the E-2 visa, each of these requirements merits further scrutiny.

There is no prescribed minimum investment threshold. An investment is “substantial” if it is sufficient to ensure the applicant’s financial commitment to the success of the business. The lower the cost of establishing the business, the higher the investment by the investor should be as a percentage of the overall cost. Meaning, if the startup cost of the business is relatively low, the investor should be expected to invest 100% of that cost or close to 100%. Most of our E-2 visa clients over the decades have invested at least \$500,000 in their US businesses. But for certain industries such as tech startups, we have successful experience with investments lower than \$200,000 and even less than \$100,000. Even though the definition of “substantial” will depend entirely on the kind of business and typical startup costs, it is rational to advise clients that immigration risks increase as the investment amount decreases. Like with the eligibility requirements for the EB-5 investor category, the E-2 visa applicant may be “in the process of investing” or may be applying based on a completed investment, the funds must be at risk of at least partial loss, and the applicant must demonstrate the lawful source of capital.

The E-2 visa will not be issued for the applicant who seeks to operate a marginal business. The marginality definition has changed over the years, but its current iteration entails proving that the enterprise will generate more than enough income to provide a minimal living for the investor and family. The projected future capacity to do so must be realizable within five years. Our experience is that a credible financial pro forma typically is sufficient for the US consular officer. However, scrutiny of marginality is likely to be greater when the applicant applies anew for an extension of the E-2 visa.

The final requirements we highlight may prove to be the steepest for certain E-2 visa applicants. The applicant must control the US business. This is demonstrated either by ownership of at least 50% of the business or through operational control, which typically is revealed in company agreements or bylaws. Also, the investor must persuade the US consular officer that the E-2 visa should be issued so that the applicant may develop and direct the business. This requirement

also could be met with documentation, such as franchise agreements, contracts, and the like. The US business and its documentation are not the main challenge here; the possible investment targets that could serve as an E-2 visa vehicle for the applicant include many reputable US franchise operations for example, if the investment is properly structured to meet E-2 visa requirements. What makes the E-2 visa requirements particularly worrisome for the two-step immigration strategy is that notwithstanding the prepared documentation, the US consular officer could go beyond the prepared documentation to probe the credibility of the assertions that the applicant will be developing and directing the business. To this concern, while the 18-year old client may gain Grenada citizenship either as a dependent or as an independent investor, it is not immediately credible that the ordinary 18-year old without relevant training or prior experience will be developing and directing a US business. It is possible of course, but the applicant will be subject to intense scrutiny. Likewise, the middle-aged applicant with no relevant training or experience who may encounter no difficulty in satisfying the requirements for the EB-5 “immigrant entrepreneur” category, could face a credibility interrogation in qualifying for the E-2 visa. One plausible approach, for example, is the applicant’s plan involves hiring and overseeing an on-site manager for the business. But these business plan details must be in place to merit approval of an E-2 visa application. Granted, the purpose of bilateral investment treaties is to encourage investment (which presumes issuance of the visa that enables the foreign investor to preside over and manage the business), still the E-2 visa applicant must be thoroughly prepared to convince the US consular officer of the bona fides of the case.

One source of our caution about presenting E-2 visa applications on behalf of clients who are undertaking the two-step strategy is the paucity of experience that US consular officers have with Grenada applicants. According to US Department of State statistics, for the entire FY2017 only one E visa was issued to an investor who applied based on Grenada citizenship. <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY17NIVDetailTable.pdf>

Also, considering the statistics available as of the date of this writing (May 25, 2018), for FY2018 it appears that not a single E-2 visa had

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been issued to an investor applying based on Grenada citizenship – not until February, when two E visa issuances were recorded.

<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics/monthly-nonimmigrant-visa-issuances.html>

<https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/MonthlyNIVIssuances/FEBRUARY%202018%20-%20NIV%20Issuances%20by%20Nationality%20and%20Visa%20Class.pdf>

Consular officers are likely to be skeptical of these applications, particularly in terms of the investor's ability to "develop and direct" the US business. Note the US Consulate in Barbados is the presumptive locale for submitting the E-2 visa application by a Grenada citizen, although there may be other consulates worldwide that would accept a "third country" application. Many dozens or even hundreds of E-2 visas could be issued in the coming months for qualified applicants (we hope so!), but that is not yet the case.

Assuming the E-2 visa is issued to the investor, there are ongoing requirements. The business must be maintained, and the investor

must continue to develop and direct the enterprise. Unlike US permanent residence, the E-2 visa could be revoked at any time upon a determination that the investor is not maintaining compliance with E-2 visa requirements. The reciprocity schedule with Grenada provides that the E-2 visa for Grenada citizens is issued in increments of five years. Thereafter the E-2 visa holder must apply for a new visa, and establish E-2 visa eligibility all over again. Since the visa governs only the foreign national's entry to the United States, an investor lacking confidence about continued compliance may choose to sit tight and not travel abroad. However, the E-2 visa holder is authorized to remain in the United States at any one time for no more than two years. Applications for extensions may be granted upon demonstrating eligibility for the E-2 visa, and in increments of up to two years each time.

The E-2 visa is a flexible solution for many clients who maintain substantial US investments, desire the considerable freedom to enter and work in the United States with minimal constraints, and possibly minimize tax consequences that otherwise flow from a US tax residence. Other notable benefits of the E-2 visa include E-2 visas for qualified dependents of the E-2 investor (spouse and children under age 21). The E-2 visa

dependent children may attend K to 12th grade schools, as well as U.S. colleges and universities. Unlike the dependents of an EB-5 investor who have US permanent residence, upon turning age 21 the E-2 dependent must qualify for a visa independent of the E-2 visa principal. Dependent spouses of the E-2 principal may work without restriction in the United States upon obtaining valid work authorization after admission in E-2 status. Finally, the investment made to satisfy the E-2 visa requirements may also be used toward satisfying the minimum investment threshold of the EB-5 immigrant investor category if it is tangible property (not intellectual property) that is booked as equity investment capital (not a loan).

Considering all of the above, the two-step strategy for US immigration presents as a welcome opportunity for certain investor clients. Not all interested candidates should be encouraged to pursue this route. Assuming proper due diligence is undertaken for both the Grenada and US-based investment opportunities, and properly-drafted documentation for the US business, entrepreneurs from Vietnam, Indonesia, and BRIC countries could within about six months obtain and commence enjoying the substantial benefits of the E-2 visa. ■

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