masuda funai

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E-1 Treaty Trader vs. E-2 Treaty Investor in the Age of Tariffs and Trade Wars

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By: Bryan Y. Funai

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On March 23, 2018, in accordance with the March 8, 2018 Presidential Proclamation, the US will assess a 25% tariff on imported steel and a 10% tariff on imported aluminum. Imports from Canada and Mexico are, for the time being, exempted from this tariff, and countries may apply for an exemption from the tariffs with the US Department of Commerce. Needless to say, other countries have stated their intention to impose their own tariffs, which, in the worst case, could lead to a trade war.

For multi-national companies doing business in the US, the imposition of these tariffs, and any possible retaliatory measures taken by other countries could have a definite impact on international trading activities. In some cases, companies may commence production in the US, or may shift to importing goods from related company factories in countries not affected by the tariffs. While these companies may consider the myriad of countermeasures to be taken to ensure the continued flow of business, many will overlook the impact of shifting imports on the visa status of their expatriates, especially those in the US pursuant to E-1 Treaty Trader status.

Briefly and simply stated, E-1 status requires (i) a Treaty of Friendship, Commerce and Navigation between the US and the country of origin of multinational company doing business in the US; (ii) substantial trading activity between the US and the Treaty country (being defined as more than 50% of the total international trading activities) and (iii) that the visa holder be of the same nationality as the Treaty country (naturally, the visa holder must meet certain personal criteria).

If a multinational corporation decides, for example, to shift imports from the Treaty country subject to a tariff to a facility located in a country not subject to the tariff, the trading activities from the non-Treaty country will not count as "trade" for E-1 purposes, even if the company in the non-Treaty country is wholly owned by the same company. In such a case, there is a risk that the international trading activities will fall below the threshold and the company, and its expatriates, could lose E-1 status. It should be noted that, unlike other visa categories, there is no "grace" period, and loss of status is, in theory, immediate.

A tariff or trade war is not the only time that a company may shift imports. Issues such as manufacturing costs, exchange rates and the like could also affect from where a multinational corporation imports products.

The E-2 Treaty Investor classification, on the other hand, does not relay on international trade, but requires that a "substantial investment" be made in the US. All other requirements of the treaty visa remain the same (that is, the Treaty, nationality of the visa applicant, etc.). There is no stated investment amount that is considered to be "substantial" although there are different tests and criteria to establish a substantial investment. However, in most cases, the establishment of a business entity, maintenance of facilities and fixed asset (including inventory) can be used to establish the investment.

Because the E-2 visa does not require international trade, it offers more flexibility than the E-1 in that the company may import products from any country, or source products from the US, without being in danger of losing status.

Therefore, companies, as they mature in the US, should always consider utilizing the E-2 visa as opposed to the E-1 visa, and especially in the current business climate, an analysis of qualifications for the E-2 visa should be explored.