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Presents for Immigration Laws

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STATELESS CORPORATIONS:
CHALLENGES THE SOCIETAS EUROPAEA PRESENTS FOR IMMIGRATION LAWS

PETER A. LE PIANE*

INTRODUCTION

Since the 1882 Chinese Exclusion Act, the United States has instituted complex and systematic controls on immigration. Under the current system of immigration, an alien who intends to enter the United States is inadmissible unless he or she fits into one of the narrowly defined exceptions embodied by the "alphabet soup" of visa categories and is not inadmissible on any other grounds. When a European company wishes to transfer an employee to the United States, the plethora of visa categories is essentially restricted to three. The E visa category is one of the most utilized of these visa categories.

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1 Although the 1882 and 1884 Chinese Exclusion Laws are not the United States first foray into the area of regulating immigration, they do represent the first major step in the creation of a uniform immigration system that has evolved into the current system. The primary importance of this step was the establishment of what would later become the plethora of nonimmigrant visa categories. See Palma R. Yanni, Business Investors: E-2 Non Immigrants and EB-5 Immigrants, 92-08 IMMIGR. BRIEFINGS 1 (1992). Before this exception, entry into the United States was primarily governed by provisions regulating immigration and future nationalization. Legislation concerning the regulation of immigration predates the Constitution. Under the Articles of Confederation, the Congress had passed legislation to encourage the colonies to enact legislation restricting or regulating immigration. See E.P. Hutchinson, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY: 1798-1965 11 (Univ. Pa. Press 1981). Because a uniform system to deal with immigration and naturalization was required, the Constitution granted the Congress the power to "establish an uniform Rule of Naturalization." See U.S. CONST. art. I, § 8, cl. 4. The initial actions of Congress were intended to set residency requirements for naturalization of citizens. See Hutchinson, supra at 11.

The E visa category is one of the oldest visa categories, stemming from an 1880 treaty with China and the 1882 Act itself. It requires that the individual be employed in the United States. See generally Judy Wurtzel, First Amendment Limitation on the Exclusion of Aliens, 62 N.Y.U. L. REV. 149, 152-61 (1987) (elucidating the grounds of inadmissibility and their limitations).


See 8 U.S.C. § 1182 (2003) (providing other grounds for inadmissibility such as health related grounds, criminal grounds, security grounds or any of the other grounds enumerated in the provision); see also Alaka v. Elwood, 225 F.Supp.2d 547, 559 n.61 (E.D.Pa. 2002) (noting which immigrants seeking admission will be eligible for parole). See generally Wurtzel, supra note 2 at 152-61 (illustrating various grounds of inadmissibility and their limitations).

The transfer of employees normally utilizes the one of the three major visa categories. They are the H-1B1, the L-1 and the E-1 or E-2. See Stephen M. Hader & Scott D. Syfert, The Immigration Consequences of Mergers, Acquisitions, and Other Corporate Restructuring: A Practitioner’s Guide, 24 N.C. J. INT’L L. & COM. REG. 547, 559 (1999).

The L visa category allows for the transfer of executive, managerial and specialized knowledge employees within a multinational organization. See 8 U.S.C. § 1101(a)(15)(L). The H visa category allows for the employment of an alien in a “specialty occupation” which requires a particularized theoretical and practical knowledge normally associated with a baccalaureate degree or its equivalent. See 8 U.S.C. § 1101(a)(15)(H). The E visa category requires that the national of a country with a qualifying treaty is entering the United States to carry on substantial trade or to direct a substantial investment. See 8 U.S.C. § 1101(a)(15)(E).


The original exception to the Chinese immigration is contained in the Act of May 6, 1882, 22 Stat. 58 (repealed 1943). The Act of May 6, 1882 provides the exceptions to the general exclusion of Chinese laborers. See id. The original language of the exception provided that individuals who were granted the right to enter the United States under specific provisions of the treaty between the United States and China. See id. Although this original provision did not provide specific reference to the treaty provisions regarding trade, this was one of the main purposes of the exemption from the general rule of exclusion. The Act of July 5, 1884 made the terms of the exception more explicit.
States possess the same nationality as the company,\(^8\) that there be a trade treaty between the United States and the employer's country,\(^9\) and that the employee is entering the United States in an effort to perform "substantial trade" between the United States and the other country or make a substantial investment.\(^10\)

As corporations have begun to globalize along with the current trend of international commerce, this immigration category has become more flexible.\(^11\)

With the formation of the European Company, the so called Societas Europaea (SE), on October 8, 2001, the flexibility of the current E visa category is flexed to its breaking point.\(^12\) The regulations authorizing the implementation of an SE will become effective on October 8, 2004 and will allow for the formation of an

\(^8\) See 8 U.S.C. § 1101(a)(15)(E) (indicating that the nationality of the investor, the treaty trader or an employee thereof must have the same nationality as the corporation that qualifies for the treaty); see also Maggio et al., supra note 3, at 881 (elucidating the confluence of nationality required to qualify for the E visa category). See generally MacNamara v. Korean Air Lines, 863 F.2d 1135, 1142 n.4 (3d Cir. 1988) (quoting the Immigration and Nationality Act of 1952 and the regulations of the State Department).

\(^9\) See 8 U.S.C. § 1101(a)(15)(E) (embodying the requirement substantial portion of the trade occur between the United States and the treaty country); see also Tokyo Sansei (New York), Inc. v. P.A. Esperdy, 298 F. Supp. 945, 946-48 (S.D.N.Y. 1969) (discussing regulations and requirements governing treaty traders and the treaty requirement in particular). See generally Garavito v. INS, 901 F.2d 173, 174 (1st Cir. 1990) (stating that a category E-2 visa is available to an alien so long as "he comes from a country with an appropriate treaty").


\(^11\) An example of the increasing flexibility is the revision of the ownership regulations embodied in 22 C.F.R. § 41.51(c) (2003), which changes the ownership percentage from 51 to 50 percent to establish nationality, thus allowing a company to have dual nationality in an equal joint venture. See CHARLES GORDON ET AL., IMMIGRATION LAW & PROCEDURE § 17.03[3][b] (2002). Furthermore, the formal treaty requirements have become more lax with the recognition that diplomatic agreements and historic reciprocity may qualify a country's citizens for admission under the E visa category. See Australians Can Receive E Visas, State Dept Says, INTERPRETER RELEASES, Jan. 6, 1992, at 7 [hereinafter Australians Can Receive E Visas].

SE through various means.\textsuperscript{13} The corporation formed within the regulation will be incorporated within the European Union\textsuperscript{14} and will merely register under the Member State where its head office is located.\textsuperscript{15} Through the process outlined in the regulations, the SE becomes a pan-European company and not a company of one of the particular Member States.\textsuperscript{16} The major benefit of the SE is the ability to operate throughout the European Union without the necessity of forming separate entities within each country.\textsuperscript{17}

Although this corporate form was intended to allow corporations to operate fluidly throughout the European Union, it presents potential immigration problems when these same corporations wish to transfer employees to a newly formed or pre-existing company in the United States. Traditionally, companies that establish subsidiaries in the United States have utilized the E visa category to transfer foreign employees to the United States.\textsuperscript{18} In order to take advantage of this visa category there must be a confluence of a treaty between the country and the

\textsuperscript{13} See EUROPEAN COMPANY FAQ, supra note 12, at ¶ 2 (providing the various means of forming an SE). See generally COUNCIL REGULATION (EC), supra note 12, at art. 2 (providing the regulations governing the formation of an SE); EU To Create New Kind Of PLC, FIN. DIR., May 26, 2001, at 22 (explaining the availability of the SE).

\textsuperscript{14} See COUNCIL REGULATION (EC), supra note 12, at art. 2 (elucidating the importance of the incorporation of an SE under the EU for the accomplishment of market integration); see also EUROPEAN COMPANY FAQ, supra note 12, at ¶ 3 (indicating EU incorporation as the primary advantage of the SE).

\textsuperscript{15} See COUNCIL REGULATION (EC), supra note 12, at art. 2 (providing the regulations governing registration); see also EUROPEAN COMPANY FAQ, supra note 12, at ¶ 6 (stating that the "European Company must be registered in the Member State where it has its administrative head office").

\textsuperscript{16} For an indication of the importance of the pan-European nature of the SE, refer to the COUNCIL REGULATION (EC), supra note 12, at art. 2 and EUROPEAN COMPANY FAQ, supra note 12, at ¶ 3.

\textsuperscript{17} See EUROPEAN COMPANY FAQ, supra note 12, at ¶ 3 (elucidating this as a key function of the SE); see also Terence L. Blackburn, The Societas Europaea: The Evolving European Corporation Statute, 61 FORDHAM L. REV. 695, 713 (1993) (noting the importance of this factor); Andreas Kellerhals & Dirk Trüten, The Creation of the European Company, 17 TUL. EUR. & CIV. L.F. 71, 75 (2002) (explaining the importance of the seamless European operations). See generally COUNCIL REGULATION (EC), supra note 12, at ¶ 1 (indicating this ability as one of the key purposes for the formation of the SE).

\textsuperscript{18} See Brian John Halliday, In Order To Hire The Best Person For The Job, We Have To Do What?: A Look At The H-1B Visa Program: The Short Term Solution For Continued American Competitiveness in the Global-High Technology Marketplace, 11 U. FLA. J.L. & PUB. POL'y 33, 69 (1999) (discussing the E-1 treaty trader and E-2 treaty investor visas as an alternative to the H-1B program); 2001 STATISTICAL YEARBOOK, supra note 6 (providing statistics concerning the use of E visas); see also Hader & Syfert, supra note 5, at 567-570 (explaining the subcategories of the E visa).
United States, corporate ownership and nationality of the employee.\textsuperscript{19} The nationality requirement presents a major impediment to the expatriation of employees of an SE because an SE requires diversity of nationality in formation and obtains a supranational identity after incorporation.\textsuperscript{20} This directly conflicts with the singular or dual nationality requirement of the E visa category, even in its current, more flexible incarnation.

In Part I, I will briefly discuss the history of the treaty trader and treaty investor nonimmigrant visa categories, but I will primarily focus on the treaty and nationality requirements of the category. In Part II, I will discuss the historical development and the recently enacted regulations that will govern the formation and operation of the SE. In Part III, I will elucidate the treaty and nationality complications facing an SE wishing to expatriate an employee to the United States utilizing the E visa category. In Part IV, I will propose various administrative and legislative solutions to the problems such transfers pose.

\textbf{PART I: TREATY TRADER (E-1) AND TREATY INVESTOR (E-2) VISA CATEGORY}

The treaty trader visa category can be traced to the "treaty merchant" exception to Chinese immigration in the 1882 Chinese Exclusion Act.\textsuperscript{21} The Act suspended all immigration of Chinese laborers for ten years and forbade any court to admit Chinese people for citizenship.\textsuperscript{22} Based on the previous treaty between the

\textsuperscript{19} See Austin T. Fragomen, Jr. et al., Immigration Procedures Handbook, §§3.2(a)-(c) (2001) (illustrating that the nationality of the company, the nationality of the employee and the nation with the qualifying trade treaty must all be the same); see also Maggio et al., supra note 3, at 857 (stating the "E-visa comes into play only in certain countries where we have treaties of reciprocity"). See generally Halliday, supra note 18, at 71 (informing that "E-1 and E-2 nonimmigrants must bear the same nationality as the employing company in the U.S., and the company must be a proper E visa entity registered with the consulate or embassy if the company's nationality").

\textsuperscript{20} See infra text accompanying notes 127-181.

\textsuperscript{21} See Act of May 6, 1882, 22 Stat. 58 (repealed 1943) (executing treaty stipulations relating to the Chinese); see also Gordon, supra note 11, § 17.02[1] (elucidating the origins of the current category in this exemption of Chinese nationals from immigration). See generally Yanni, supra note 1, at 2 (indicating the exclusion of treaty merchants from Chinese exclusion as the foundation of the contemporary E visa category).

\textsuperscript{22} See Act of May 6, 1882, 22 Stat. 58 (repealed 1943) (providing the initial ten year ban which was extended by later legislation); see also John Hayakawa Torok, Reconstruction And Racial Nativism: Chinese Immigrants and The Debates On The Thirteenth, Fourteenth, And Fifteenth Amendments and Civil Rights Laws, 3 Asian L.J.
United States and China, merchants were among the few exempt classes who were not subject to this widespread ban on immigration. Congress deemed international trade, specifically with China, to be of such importance that it provided an exception. This initial exception of merchants from restrictions


23 See Treaty Between the United States and China, Concerning Immigration, Nov. 17, 1880, U.S.-China, 22 Stat. 826, 827. (stating in Art. II that “Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity . . . shall be allowed to go and come of their own free will”); see also GORDON supra note 11, § 17.02[2] (explaining that in agreeing to the 1880 treaty, China ceded certain immigration rights previously established through earlier treaties and discussing provisions of the 1880 treaty); Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs, 81 TEX. L. REV. 1, 116-17 (2002) (discussing the 1880 treaty, the political context that produced it, and the legislation that followed it).

24 See GORDON, supra note 11, §17.02[1]. Article I of the 1880 treaty provided that the “Government of China agrees that the Government of the United States may regulate, limit, or suspend” the “coming of Chinese laborers to the United States.” See Treaty Between the United States and China, Art. I. While Article I explicitly states that this discretionary power to suspend immigration “shall only apply to . . . laborers,” the treaty takes the extra step in Article II of listing the specific non-laborer classes—teachers, students, merchants, tourists—that would not be subject to any such restrictions. See id. at Art. II. The 1882 Act differs slightly in structure in that it does not explicitly name or create any exempt classes except, in Section 3, for Chinese laborers already in the United States. Act of May 6, 1882, § 3. Therefore, the Act provides no corollary to Article II in the treaty where merchants were explicitly recognized as an exempt class. Instead, the Act more simply contemplates Chinese laborers and Chinese other than laborers. The Act addresses the latter classification in Section 6. However, unlike Article II of the treaty, Section 6 of the Act does not establish any positive rights for the class but instead imposes upon such persons the requirement of providing a certificate stating, among other things, entitlemen to enter in conformance with the 1880 treaty. See id. at § 6. In this sense, the Act limited the rights available to the exempt classes under the treaty. See Proposed Repeal of the Chinese Exclusion Acts, INS MONTHLY REV., Aug. 1943, at 13-19, [hereinafter Proposed Repeal], available at www.immigration.gov/graphics/aboutus/history/mraug43.htm (last modified Feb. 28, 2003).

25 See Act of May 6, 1882, 22 Stat. 58 (1882) (providing the exemption of merchants from the general exclusion of Chinese immigration); see also ROGER DANIELS & OTIS L. GRAHAM, DEBATING AMERICAN IMMIGRATION, 1882 – PRESENT 8 (2001) (stating that the 1882 Act reflected an understanding that the rights of merchants had long been recognized by treaty); Todd Stevens, Tender Ties: Husbands’ Rights and Racial Exclusion in Chinese Marriage Cases, 1882 – 1924, 27 LAW & SOC. INQUIRY 271, 280 n.13 (2002) (explaining that merchants’ special privileges resulted from Congress’s interest in maintaining U.S. merchants’ ability to sell American goods in China); Yanni, supra note 1, at 1 (stating that “a cynic may view [the treaty merchant exception] as acceptance of the color of one’s money while rejecting the color of one’s skin”); Proposed Repeal, supra note 24, at 13-19 (commenting that both the 1880 treaty and the Exclusion Acts which followed “recognized the desirability of not closing the door to China completely”).
on immigration became increasingly important to the development of future immigration statutes. This pedigree makes the E visa one of the oldest visa categories still utilized in immigration.

The 1924 Act codified the treaty merchant exception as an excepted-class or a class of nonimmigrants. The 1924 Act classified the group of merchants who were able to enter under this exception as "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation." Although this provision caused much litigation concerning the classification of Chinese "treaty merchants" for the purposes of naturalization under either the earlier 1880 treaty or the 1924 Act, it did allow for a greater number of nationals from various

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26 See Hutchinson, supra note 1, at 81-82 (indicating this as an important shift toward the modern immigration system); see also Daniels & Graham, supra note 25, at 8 (stating that Chinese exclusion "became the pivot upon which all American immigration policy turned"); Stevens, supra note 25, at 281 (reviewing the merchant exemption as it appeared in the 1880 treaty and the Acts of 1882, 1884, and 1888).

27 See Stevens, supra note 25, at 280 n.13 (noting that the relevant exemption language in the Burlingame Treaty of 1868 was carried over to the Treaty of 1880 and was copied in each of the Exclusion laws); see also Gordon, supra note 11, § 17.02[1] (observing that the treaty merchant category owes some of its characteristics to the treaty-based merchant exemptions to the Chinese exclusion laws); Id. at § 17.02[2] (commenting that the section 6 certificate requirement was the earliest use of the visa requirement as part of the system of immigration controls).

28 See Act of May 26, 1924, § 3(6), 43 Stat. 153 (1924) (codifying this modification); see also Gordon, supra note 11, § 17.02[3] (providing that the Act created a non-immigrant category out of the original exception carved out of the general exclusion of Chinese nationals); An Act of Good Will Toward China, INS MONTHLY REVIEW, Jan. 1944, at 4-6, 13 [hereinafter Good Will], available at www.immigration.gov/ graphics/aboutus/history/ mrjan44.htm (last modified Feb. 28, 2003) (describing the state of the law in 1944 to provide that treaty merchants have the status of nonimmigrants who may only remain only so long as their merchant status is maintained).

29 Act of May 26, 1924, § 3(6). See Cheung Sum Shee v. Nagle, 268 U.S. 336, 345-346 (1925) (reviewing § 3(6) and concluding that the Act must be construed so as to preserve treaty rights unless clearly annulled); see also Gordon, supra note 11, § 17.02[3] (describing meaning, as construed prior to the 1932 amendment, of the term "trade" within this section of the 1924 Act).

30 See Hing Lowe v. United States, 230 F.2d 664, 665 (9th Cir. 1956) (determining that Chinese nationals who entered before the 1924 Act or pursuant to the earlier provisions entered for permanent residence, but individuals who entered pursuant to the 1924 Act entered for temporary residence); United States v. Kwai Tim Tom, 201 F.2d 595, 597 (9th Cir. 1953) (holding that son of merchant under Article II of the Chinese treaty is a permanent resident); United States v. Lee Cheu Sing, 189 F.2d 534, 536 (10th Cir. 1951) (affirming admission of minor son of Chinese treaty merchant who had entered the United States prior to the effective date of the Act).
countries to enter the United States.\textsuperscript{31} Since the act removed reference to treaties entered into before 1886, citizens from countries that had subsequently entered into commercial treaties were able to take advantage of the exception.\textsuperscript{32}

Because the 1924 Act encompassed all conceivable trade and was not limited to international trade, one major flaw persisted in the administration of the treaty trader classification.\textsuperscript{33} The requirement that trade be international in scope had been fundamental to the intention of the exception\textsuperscript{34} and was embodied in the regulations,\textsuperscript{35} but the courts had consistently interpreted the act to extend to local as well as international trade.\textsuperscript{36} To rectify this problem, Congress amended the statute in

\textsuperscript{31} See GORDON, supra note 11, § 17.02[3] (indicating that the 1924 Act extended the ability to enter under treaties entered into after the enactment of the Chinese Exclusion Laws); see also Proposed Repeal, supra note 24, at 13-19 (noting that in 1924 William Walter Husband, Commissioner General of Immigration, declared that the 1924 Act rendered the Chinese Exclusion Acts superfluous); cf. DANIELS & GRAHAM, supra note 25, at 11 (commenting that the 1924 impacted the immigration rights of Chinese treaty merchants).

\textsuperscript{32} See GORDON, supra note 11, §17.02[3] (providing that this was one of the key rationales for Congressional action).

\textsuperscript{33} The House Committee on Immigration made this intention explicit when it stated the purpose was:

To clarify the wording of the section in order to make clear the intent of the Congress that the provisions of the section should relate only to treaty aliens coming to the United States to engage in trade of an international character between the territory stipulated in the treaty and the United States, and not for the purpose of engaging in purely local trade. Court decisions have indicated the necessity of clarifying the wording of the section of the act referred to in order to make clear the intent of Congress as set forth above when it passed the Immigration Act of 1924.


For information regarding the intent of this amendment, see S. REP NO. 805, 72d Cong., 1st Sess.; 75 CONG. REC. 13840 (June 24, 1932) and GORDON, supra note 11, § 17.02[4].

\textsuperscript{34} See H.R. REP. No. 72-431, at 2 (1932) (indicating that Congress intended to make the treaty merchant category available only to persons conducting trade that was international in scope); see also GORDON, supra note 11, § 17.02[4] (indicating that one of the stated purposes of the amendment was to limit treaty trader status to persons engaged in trade between the U.S. and the treaty country, rather than in purely local trade).

\textsuperscript{35} See GORDON, supra note 11, § 17.02[4] (noting the requirement was consistently embodied in the treaty merchant regulations but was not specifically expressed in the statute); see also Good Will, supra note 28, at 4-6, 13 (describing, in an article written prior to the 1952 Act, the requirement that treaty merchant engage "chiefly in trade between ... the country of [the merchant's] allegiance, and the United States").

\textsuperscript{36} See Asakura v. City of Seattle, 265 U.S. 332, 343 (1924) (holding that acting as a local pawnbroker was within the meaning of trade within the treaty between the United States and Japan); Shizuko Kumanomido v. Nagle, 40 F.2d 42, 43-46 (9th Cir. 1930)
the 1932 Act to allow for an individual to enter "the United States solely to carry on trade between the United States and the foreign state of which he is a national under and in pursuance of a treaty of commerce and navigation. . .". Although the language of the statute could more clearly embody its purpose, the legislative history unequivocally demonstrates that the amendment was intended to solve the problem of purely local trade. In order to rectify the problem of the local trade, Congress included the specific requirement of nationality. Although this requirement of nationality was meant to rectify a specific problem, it has had broad implications for the ability of the visa category to meet the challenges of the current trends of multinational and transnational corporations. The addition of this requirement is the crucial component of the investigation of the immigration problems confronting the SE.

In the 1952 Act, Congress changed the landscape of the E visa category by adding the treaty investor (E-2) category. This new classification allowed an individual to enter the United States

(holding that performing the duties of an editor of a Japanese newspaper in Los Angeles constituted "carrying on trade" and providing a history of the jurisprudence on the inclusion of local trade); see also Proposed Repeal, supra note 24, at 13-19 (reporting that the meaning of the term "merchant" was expanded by administrative rulings and court decisions).

37 Act of July 6, 1932, 47 Stat. 607 (1932). See Good Will, supra note 28, at 4-6, 13 (observing that after repeal of the exclusion acts in 1943, Chinese merchants could seek entry to the United States as "treaty merchants" like all other aliens—that is, without any additional requirements such as section six certificates); see also, GORDON, supra note 11, § 17.02(4) (discussing the 1932 Amendment).


39 See GORDON, supra note 11, § 17.02(4) (indicating that the legislative history clearly embodies this intent even if the language of the statute has broader implications); see also Timothy R. Hager, Recognizing the Judicial and Arbitral Rights of Aliens to Review Consular Refusals of "E" Visas, 66 TUL. L. REV. 203, 206-07 (1991) (explaining current requirement that persons applying for an E-1 visa must show that they are seeking to enter solely to carry on substantial trade principally between the United States and the foreign state of which the applicant is a national).

40 See GORDON, supra note 11, § 17.02(4) (indicating that this provision has had broad implications beyond the problem in which the amendment was intended to rectify); see also infra Part II.

41 See H.R. REP. NO. 82-1365, at 44 (1952) (amending the language of the relevant statute to allow for the inclusion of international investment); see also GORDON, supra note 23, § 17.02(5) (explaining that the 1952 Act expanded the class to include "treaty investors"); Catherine Sun, The E-2 Treaty Investor Visa: The Current Law and the Proposed Regulations, 11 AM. U. J. INT'L L. & POL'Y 511, 514 (1996) (stating that the 1952 Act created the E-2 treaty investor class in order to promote international investments and to attract foreign investment in the U.S.).
"solely to develop and direct the operations of an enterprise in which he has invested or is in the process of investing a substantial amount."\textsuperscript{42} Besides the addition of this new category, the 1952 Act did little to alter the scheme concerning treaty traders developed in the 1932 Act except to codify the already administrative requirement that the trade be "substantial."\textsuperscript{43} After this minor addition and the substitution of "spouse" for "wife,"\textsuperscript{44} Congress adopted the statute that it considered "satisfactory in most instances."\textsuperscript{45} With these minor changes, the statute governing the treaty trader visa category remained virtually unchanged for almost fifty years.

The most significant and recent revision of the E classification came in 1990. Congress made three modifications to the category. First, it modified the term "substantial trade" to include "trade in services or trade in technology."\textsuperscript{46} This statutory amendment was merely the codification of long standing

\textsuperscript{42} H.R. REP No. 82-1365, at 44 (1952); see also GORDON, supra note 11, § 17.02[5] (citing corresponding committee statement specifying that the treaty investor class was intended to allow entry to aliens who would be involved in an actual enterprise and not a fictitious operation). See generally id. § 17.06 (discussing current E-2 treaty investor provisions).

\textsuperscript{43} See S. RES. No. 80-137, at 563 & 567 (1950); see also The Immigration and Nationality Act of June 27, 1952, 66 Stat. 163 (1952) (perpetuating immigration policies from prior statutes, while modifying and adding significantly to the existing classes of nonimmigrants); GORDON, supra note 11, § 17.02[5] (indicating that the inclusion of this term only codified the consistent regulatory requirement of substantiality); IMMIGRATION AND NATURALIZATION LEGISLATION FROM THE STATISTICAL YEARBOOK: IMMIGRATION AND NATIONALITY ACT OF JUNE 27, 1952 available at http://www.immigration.gov/graphics/aboutus/statistics/legishist/511.htm (last modified Feb. 26, 2003) [hereinafter YEARBOOK: INA 1952] (stating that, while the 1952 Act perpetuated immigration policies from prior statutes, it did not modify and add significantly to the existing classes of nonimmigrants).

\textsuperscript{44} See H.R. REP. NO. 82-1365, at 44 (1952).

\textsuperscript{45} See S. RES. No. 80-137, at 567 (1950); see also YEARBOOK: INA 1952, supra note 43 (indicating that the 1952 "brought into one comprehensive statute the multiple laws which, before its enactment, governed immigration and naturalization in the United States"); cf. IMMIGRATION AND NATURALIZATION SERVICE HISTORICAL REFERENCE LIBRARY, AN IMMIGRANT NATION: UNITED STATE REGULATION OF IMMIGRATION, 1798 – 1991, June 18, 1991, at 19 [hereinafter IMMIGRANT NATION], available at www.immigration.gov/graphics/aboutus/history/1.pdf (last visited Sept. 1, 2003) (noting that President Truman vetoed of the bill and that Congress overrode his veto).

Department of State regulations.\textsuperscript{47} Second, it defined the term “substantial” in reference to trade and amount of capital.\textsuperscript{48} Third, it extended treaty trader and treaty investor benefits to Australian and Swedish nationals provided they continue to extend reciprocal benefits to United States nationals.\textsuperscript{49}

After this long history of amendment and minor modifications, the current statute governing the requirements of E visa categories states:

an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him: (i) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of any enterprise in which he is actively in the process of investing, a substantial amount of capital.\textsuperscript{50}

The current E visa category has essentially three basic requirements. First, a treaty of commerce and navigation must exist between the United States and the foreign state.\textsuperscript{51} Second,
the person or corporation carrying on the trade or making the investment is a national of the country with a qualifying treaty.\textsuperscript{52} Third, the person is entering either to carry on substantial trade or to invest a substantial amount of capital in the United States.\textsuperscript{53} The first two requirements will be the central focus of discussion because they are the source of the potential impediments facing the expatriation of SE employees utilizing the E visa category.

\textbf{A. Required Treaty Between the United States and the Foreign State}

The E visa category establishes the right to enter the United States pursuant to a treaty of commerce and navigation. Traditionally, treaties classified by the Department of State as treaties of “friendship, commerce and navigation” (FCN) met the treaty requirement.\textsuperscript{54} The prototypical language of an FCN, which establishes the eligibility for the E visa, states:

Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein; (a) for the purposes of carrying on trade between the territories of the two Parties engaging in related commercial activities; (b) for the purposes of developing and directing the operation of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital; and (c) for other purposes subject to the laws

\textsuperscript{52} See 8 U.S.C. § 1101(a)(15)(E) (2003); 22 C.F.R. § 41.51; see also Sun, supra note 41, at 522-24 (indicating the intimate link that exists in the language of the qualifying treaty which grants visa eligibility to its citizens and nationals); I Lost My H1 Job...What Now?, supra note 51 (stating that the applicant should be from treaty country).

\textsuperscript{53} See 22 C.F.R. § 41.51 (providing that either the trade must be substantial or that there must be an investment of substantial capital); see also Sun, supra note 41, at 524-26 (elucidating the investment requirement of the E-2 category); Michael D. Patrick, \textit{New E Treaty Trader/Investor Rules}, N.Y.L.J., Nov. 24, 1997, at 3 (explaining the treaty trader status).

relating to the entry and sojourn of aliens.\textsuperscript{55}

This language clearly indicates that reciprocity of trade and investment that is indicative of an FCN.\textsuperscript{56} These bilateral treaties create the entitlement to enter in either E-1 or E-2 status because the foreign country confers a reciprocal benefit upon United States citizens.\textsuperscript{57}

More recently, the Department of State has recognized that a Bilateral Investment Treaty (BIT) qualifies a country's citizens for admission under the E visa category.\textsuperscript{58} A BIT is similar to an FCN because it is a bilateral agreement that provides for reciprocal rights of entry between citizens of the United States and citizens of the treaty nation.\textsuperscript{59} The subject matter of the treaty is the distinguishing factor between the two types of treaties.\textsuperscript{60} The FCN extends to navigation and commerce and the

\textsuperscript{55} Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.- Japan, 4 U.S.T. 2063, 2066 (utilizing the language of the 1953 treaty between Japan and the United States as indicative of the language authorizing entry in the E visa category). See generally Paparelli et al., supra note 54 (discussing language of FCN treaties); Hamabe, supra note 54, at 67 (discussing FCN treaty with Japan).

\textsuperscript{56} See GORDON, supra note 11, § 17.03[2][a] (noting the reciprocity provision as the principle reason why a treaty qualifies the nationals for E visa status); see also Paparelli et al., supra note 54 (describing purpose of FCN treaties); Hamabe, supra note 54, at 67 (discussing 1953 bilateral treaty known as JFCN Treaty).

\textsuperscript{57} See GORDON, supra note 11, § 17.03[2][a] (establishing investment and protection of intellectual property as the essential concerns of the treaties); see also Hamabe, supra note 54, at 67 (discussing ratification of bilateral treaty); Michael D. Patrick, Immigration Considerations in Corporate Reorganizations, N.Y.L.J., Mar. 27, 2000, at 3 (discussing bilateral nature of FCNs).


\textsuperscript{60} See Chifor, supra note 59, at 179 n.18 (discussing difference between FCNs and BITs); see also Ernest R. Larkins, Tax Treaties and Other International Agreements, CPA J., May 1997, at 22 (distinguishing BITs and FCNs); Jorge F. Perez-Lopez & Matias F. Travieso-Diaz, The Contribution of BITs to Cuba's Foreign Investment Program; Bilateral
BIT concerns the protection of investments and intellectual property.\textsuperscript{61} Because a BIT involves treaties whose subject is foreign investment and not foreign trade, they qualify a national for treaty investor (E-2) but not for the treaty trader (E-1) designation.\textsuperscript{62}

Even in the absence of a treaty conforming to the requirements of an FCN or BIT treaty, the Department of State has recognized the ability to enter the United States pursuant to the E visa category.\textsuperscript{63} The formation of diplomatic agreements that grant entitlement to enter the United States in the E visa category, even though they do not strictly conform to the formal requirements of an FNC or BIT, are the first important exception to the formal treaty requirement.\textsuperscript{64} One example of such a diplomatic agreement is North American Free Trade Agreement (NAFTA).\textsuperscript{65} It does not strictly conform to the requirements of a

\textit{Investment Treaties, LAW AND POL'Y IN INT'L BUS.}, Mar. 22, 2001, at 529 (stating purpose of BITs is to promote and protect foreign investment).

\textsuperscript{61} See U.S. Dept' of State, Bureau of Economic and Business Affairs, \textit{supra} note 58 (indicating that the BIT partner is expected to adopt the WTO's Trade-Related Aspects of Intellectual Property Rights (TRIPS) as part of the BIT agreement in addition to protecting foreign investments); \textit{see also} Chifor, \textit{supra} note 59, at 179 n.18 (stating that BITs are concerned exclusively with investment, unlike FCNs); Vandevelde, \textit{supra} note 58, at 627 (indicating that the typical BIT preamble is concerned with "increased prosperity through foreign investment").


\textsuperscript{63} See \textit{GORDON}, \textit{supra} note 11, § 17.03[2][a] (providing for the Dep't of State recognition pursuant to Congressional authorization as another means of granting the nationals of a country the ability to utilize the E visa category); \textit{see also} Jerald A. Jacobs & Jennifer Roepel, \textit{Understanding Immigration Law: A Guide to Working with Foreign Nationals}, ASSOC. MANAGEMENT, Mar. 1, 2002, at 19 (discussing other visa options); William R. MacGregor, \textit{Crossing the U.S. Border: Tips on Entering the U.S. For Business Purposes}, INT'L BRIEFING, Sept. 8, 2000 (discussing availability of E visa under NAFTA).

\textsuperscript{64} See \textit{GORDON}, \textit{supra} note 11, § 17.03[2][a] (indicating these as a major exception to the formal treaty requirement); \textit{see also} Jacobs & Roepel, \textit{supra} note 63, at 19 (discussing grant of E visa); Michael D. Patrick, \textit{Expanded Rules Under NAFTA}, N.Y.L.J., Jan. 24, 1994, at 3 (stating exception to treaty requirement).

treaty of commerce and navigation, but it contains a specific statutory provision authorizing E visas to the nationals of Mexico and Canada.66

Even in the absence of a formal treaty or other agreement, the United States has extended E-visa eligibility to countries that have traditionally granted similar immigration rights to United States citizens.67 Eligibility based on a history of reciprocity forms a second important exception to the formal treaty requirement, but only within very limited Congressional acquiescence.68 The 1990 Act specifically granted the right to be admitted to the United States under the E visa category to citizens of Australia and Sweden because of a history of reciprocity.69

B. Nationality

Once it has been established that a qualifying treaty exists, usually through consulting the official list of the Department of State contained in the Foreign Affairs Manual,70 it is necessary

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66 See North American Free Trade Agreement, §1603 B (specifically authorizing Mexican and Canadian entry into the U.S. in the E visa category); see also Jacobs & Roeper, supra note 63, at 19 (discussing how citizens of Canada and Mexico may qualify); Patrick, Expanded Rules Under NAFTA, supra note 64, at 3 (describing NAFTA authorization of E visas to nationals of Mexico and Canada).

67 See GORDON, supra note 11, § 17.02[2][a] (providing that E visa eligibility may be granted to the nationals of countries when authorized by specific statutory provisions); Charles M. Miller, Why Off-Shore Acquirers Must Heed Immigration Laws, Mergers & Acquisitions, July 1991, at 43 (citing 1990 Act which established eligibility subject to a finding of reciprocity for U.S. citizens); see also Patrick, New E Treaty Trader/Investor Rules, supra note 53, at 3 (discussing exception to treaty requirement).

68 See Miller, supra note 67, at 43 (citing 1990 Act which established eligibility subject to a finding of reciprocity for U.S. citizens); see also Robert Charles Hill & Donald Kerwin, Immigration and Nationality Law, 36 INT'L LAW. 527, 532 n.42 (2002) (discussing eligibility for E visas on the basis of multilateral agreements or legislative exceptions rather than bilateral trade or investment treaties); Patrick, New E Treaty Trader/Investor Rules, supra note 53, at 3 (citing Australia and Sweden as few countries with exceptions).

69 See 8 U.S.C. § 1101(a)(15)(E) as amended by Immigration Act of 1990, Pub. L. No. 101-649, § 204(a), 104 Stat. 4978 (1990) (providing the statutory availability of E visas for citizens of Sweden and Australia); see also Australians Can Receive E Visas, supra note 11, at 7-8 (citing the two Department of State cables indicating Australia's ability to take advantage of the E visa category); INTERPRETER RELEASES, supra note 49, at 302 (citing the two Department of State cables indicating Sweden's ability to take advantage of the E visa category).

70 See GORDON, supra note 11, § 17.03[2][a] (stating that the normal means of determining the existence of a qualifying treaty is through consultation of the FAM). But see Matter of Inguanti, 11 I & N Dec. 393, 393 (BIA 1965) (indicating that although their
to determine whether the individual or corporation qualifies as a national of the foreign state. Determination of the nationality of an individual is a relatively uncomplicated matter. Nationality is determined by the laws of citizenship applicable within a given country and not those governing nationality in the United States. Given the diversity of laws governing nationality, the consul normally utilizes the passport as the principle indicia of nationality. If an individual is the citizen or national of more than one country, the Department of State requires that person to declare himself or herself as a national of one of these countries for the purposes of entry. In most instances, this is a simply a matter of declaring oneself the national of the country of one's employer.

existed a treaty with Italy that was designated in the FAM as qualifying Italian citizens for E-2 visas it did not meet the requirements to qualify the alien for treaty investor status). See generally Ronald F. Storette, Significant Changes in Work Related Nonimmigrant Visas Under the Immigration Act of 1990, 422 PL/LIT 9,13 (1991) (indicating reliance on FAM for determination of nationality status).

See 8 U.S.C. § 1101(a)(15)(E)(ii) (embodying the nationality requirement for the E visa category); 22 C.F.R. § 41.51(c)(2) (2003) (providing the regulatory provision elucidating the ownership requirement); see also GORDON, supra note 11, § 17.03[3][b] (indicating the relative ease of determining individual nationality even given the requirement that the nationality law of the foreign country is applicable).

See GORDON, supra note 11, § 17.03[3][a] (providing that determination of nationality is normally determined by the presentation of a passport); see also FAM, supra note 46, § 41.51 n.3 (illustrating that nationality is resolved by looking at individual's claimed nationality).

See GORDON, supra note 11, § 17.03[3][a] (declaring that the "principle applicant must be a national of the treaty country."); see also FAM, supra note 47, § 41.51 n.3 (stating nationality is determined by the "authorities of the country of which the alien claims nationality"). See generally Anna Williams Shavers, A Century of Developing Citizenship Law and the Nebraska Influence: A Centennial Essay, 70 NEB. L. REV. 462, 467 (1991) (indicating reliance on FAM for determination of nationality status).

See GORDON, supra note 11, § 17.02[3][a] (explaining that the consul will typically rely on a passport in determining nationality). See generally 22 C.F.R. § 41.104(a) (revealing scope of what may be considered valid in place of a passport); FRAGOMEN, supra note 19, § 3.2(c) (illustrating that nationality of foreign national is a critical factor to be determined).

See FAM, supra note 47, § 41.51 n.3 (indicating the requirement of a declaration of nationality when a person is a dual national); see also Matter of Ognibene, 18 I. & N. Dec. 425, 426 (1983) (affirming that an individual who has dual nationality can utilize either nationality to take advantage of a qualifying treaty and that declaration of nationality will not be scrutinized if lawful). But cf. Matter of Damioli, 17 I. & N. Dec. 303, 306 (1980) (holding that a dual national of the United States is not permitted to claim alternate nationality to qualify an employee for the E visa category).

See FAM, supra note 47, § 41.51 n.3 (noting that the individual is required to be the same nationality as the treaty country); see also Matter of Ognibene, 18 I. & N. Dec. 425 at 428 (finding that nationality claimed by individual upon arrival in the United States
The determination of nationality of a company becomes more complex. Although the simplest means of determining the country of citizenship would be to utilize the country of incorporation, the country of incorporation is irrelevant for determining nationality.\textsuperscript{77} The Foreign Affairs Manual unequivocally states that the country of incorporation has no effect on the determination of nationality of a company.\textsuperscript{78} One possible explanation for the irrelevance of incorporation was to foreclose the utilization of incorporation as a means to circumvent the treaty requirement.\textsuperscript{79}

The Department of State utilizes ownership as the keystone for determining the nationality of a corporation.\textsuperscript{80} The ownership requirement extends to the ultimate owner of a company.\textsuperscript{81} When dealing with a subsidiary, it is the ownership of the parent company that is determinative of the ability to obtain an E visa.\textsuperscript{82}

will be considered, for immigration purposes, as that individual's nationality during his or her entire stay). See generally FRAGOMEN, supra note 19, § 3.2(c) (revealing that a critical factor for those coming to United States is a determination of nationality).

\textsuperscript{77} See FAM, supra note 47, § 41.51 n.3.2 (indicating explicitly that place of incorporation is irrelevant in the determination of a company's nationality); see also Sun, supra note 41, at 524 (indicating the complete irrelevance of the place of incorporation and the principal place of business in determining nationality). See generally FRAGOMEN, supra note 19, § 3.2(b) (illustrating that nationality of corporation is determined by principle nationalities of at least 50% of its investors).

\textsuperscript{78} FAM, supra note 47, § 41.51 n.3.2. (stating "the country of incorporation is irrelevant to the nationality requirement for E visa purposes"); see also Sun, supra note 41, at 524 (noting that the nation of incorporation is not a factor in determining nationality for visa purposes). See generally, FRAGOMEN, supra note 19, § 3.2(b) (indicating reliance on 50% rule for determining nationality of corporation).

\textsuperscript{79} Since at least 1949, both the INS and the Dep't of State have utilized ownership as a key to determining nationality. See Paul W. Ferrell, The Corporate Alien and Treaty Visa Nationality, 7 GEO. IMMIGR. L.J. 283, 285-86 (1993). No definitive history of explanation has been uncovered to illustrate why this became the keystone. See id. at 286 n.24. For the only mention of the history of the crucial test for nationality, see Matter of N-S-, 7 I. & N. Dec. 426, 427-428 (1957).

\textsuperscript{80} See FAM, supra note 47, §41.51 n.3 (providing ownership as the sole means of determining the nationality of a company); see also GORDON, supra note 11, §17.02[19] (indicating that ownership is the fundamental inquiry when determining nationality of a corporation); Yanni, supra note 1, at 15 (stating nationality is based on a determination of ownership).

\textsuperscript{81} See FAM, supra note 47, §41.51 n.3.1 (declaring that the ownership must be traced to the parent organization and that the rule applies with respect to that ownership); see also Sun, supra note 41, at 523 (stating that the analysis is concerned with ultimate ownership); Yanni, supra note 1, at 15 (indicating that ultimate ownership determines nationality).

\textsuperscript{82} See Matter of N-S-, 7 I. & N. Dec. 426 (BIA 1957) Sun, supra note 41, at 523 (clarifying that the nationality of the ultimate owner is controlling); see also Yanni, supra
In order for the company to be a national of a treaty country, 50 percent of the ultimate owners stock must be concentrated in citizens or nationals of one country. The current 50 percent rule is more flexible than the previous 51 percent rule. The flexibility lies in the ability of a company to be the national of two countries when exactly 50 percent of the company is owned by the nationals of only two countries. Although this situation may be exceedingly rare, it does allow for a company possess dual nationality if exactly 50 percent is owned by the nationals of two countries.

Although the determination of the precise ownership of a company may be efficient in a closely held company, the determination of ownership along lines of nationality becomes exceedingly difficult when dealing with a large publicly held corporation. In recognition of this difficulty, the Department of State has adopted a corollary to the 50 percent rule. The corollary provides a presumption that the company is a national of the country on whose stock exchange it is exclusively traded if

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83 See 22 C.F.R. § 41.51(c) (providing the regulatory requirement to demonstrate nationality); see also FAM, supra note 47, § 41.51 n.3.1 (elucidating the 50% rule); GORDON, supra note 11, § 17.03[3] (specifying 50% ownership as the test for determining nationality); Yanni, supra note 1, at 15 (providing that 50% ownership is required to qualify a company as a national of a country).

84 See 22 C.F.R. § 41.51(c)(2) (stating that the corporation must be “at least 50% owned by persons having the nationality of the treaty country who are maintaining nonimmigrant treaty trader or treaty investor status if residing in the United States or if not residing in the United States who would be classifiable as treaty traders or treaty investors.”); see also GORDON, supra note 11, § 17.03[3][b] (indicating that the 50% test of ownership provides greater flexibility). See generally FRAGOMEN, supra note 19, § 3.2(b) (illustrating that principle business nation of corporation will be determined by individual nationalities of at least 50% of its investors).

85 See GORDON, supra note 11, § 17.03[3][b] (illustrating how the 50% rule provides increased flexibility in albeit rare instances); see also Yanni, supra note 1, at 15-16 (noting the possibility of dual nationality in the joint venture context). See generally FRAGOMEN, supra note 19, § 3.2(b) (revealing that corporation is the nationality where 50% of the investors reside).

86 See FAM, supra note 47, § 41.51 n.3.1 (indicating that in modern business structures the determination of ownership can place a heavy burden on the consular officer); see also Yanni, supra note 1, at 15 (illustrating some of the great lengths that proof of ownership may require given modern business structures and securities ownership). But see GORDON, supra note 11, § 17.03[3][b] (recognizing that where difficulty exists based upon determining nationality of 50% of stockholders, nationality may be recognized as that of the country of incorporation if it is also the sole place of trading).
this is also the country of incorporation. The presumption flows from the presumption that most of the stock will be owned by the nationals of a country in which the stock is traded. This is only a presumption and not definitive proof of ownership. If the Department of State doubts the validity of the presumption in reference to a particular company, a determination of actual ownership must be undertaken. In order to facilitate determinations of actual ownership, the Department of State offers consuls assistance and keeps a record of past determinations.

PART II: THE CREATION OF THE EUROPEAN COMPANY

The European Company squarely confronts the problem of the nationality requirement of the E visa category through the

87 See FAM, supra note 47, § 41.51 n.3.2 (stating that when the "corporation is sold exclusively on a stock exchange in a country of incorporation, however, one can presume that the nationality of incorporation is that of the location of exchange"); see also GORDON, supra note 11, § 17.03[3][b] (elucidating the application of this corollary to the ownership rule). See generally FRAGOMEN, supra note 19, § 3.2(b) (suggesting that where large corporation have problems determining nationality based upon stock ownership, they may utilize this means of determining nationality).

88 See generally FAM, supra note 47, § 41.51 n.3.2 (revealing that presumption as to nationality is allowed where stock of corporation is sold solely on exchange in country of incorporation); GORDON, supra note 11, § 17.03[3][b] (indicating that nationality presumption based on 50% rule may be circumvented when the nationality of stockholders is difficult to determine and stock is listed exclusively on an exchange in the country of incorporation); FRAGOMEN, supra note 19, § 3.2(b) (highlighting that presumption of corporation's nationality may be utilized where large corporations have difficulty determining actual nationality of its shareholders).

89 See FAM, supra note 47, § 41.51 n.3.2 (stating "the applicant should still provide the best evidence available to support such a presumption"). See generally GORDON, supra note 11, § 17.03[3][b] (explaining that this is only a presumption of nationality); FRAGOMEN, supra note 19, § 3.2(b) (illustrating that place of incorporation may provide a presumption of nationality in these circumstances but this is not definitive proof).

90 See 22 C.F.R. § 41.51 (noting that consular must be satisfied in order that alien corporation be classified under a nonimmigrant treaty); see also FAM, supra note 47, § 41.51 n.3.2 (indicating that if in the absence of this presumption in a complex situation, that the consular officer should avail itself of any assistance the Department of State can provide); GORDON, supra note 11, § 17.03[3][b] (explaining that where presumption of nationality cannot be established to the satisfaction of the consular officer, evidence must be submitted).

91 See FAM, supra note 47, § 41.51 n.3.1 (indicating in order to obtain the Department of State's assistance by submitting a request to the Advisory Opinion Department). See generally Halliday, supra note 18, at 71 (mentioning the E visa entity is registered with consulate or embassy of company's nationality); Sun, supra note 41, at 522 (discussing nationality of corporation).
creation of a supranational corporate entity. After almost 50 years of debate and committee review, the European Union finally approved the statute and regulations forming the European Company (SE) on October 8, 2001. Although at least one commentator has traced the idea of a transnational European Company as far back as 1910, the most concerted effort to implement it can be traced back to 1959. The goal of the initial proposal was to create a truly supranational corporation or organization and not to harmonize the corporate laws of the various Member States. This goal was embodied in the proposal that would create a pan-European corporate structure that would be governed by the laws of the European Union and not those of each Member State. From its inception, its proponents envisioned the SE as a company without national

92 See Blackburn, supra note 17, at 697 (stating "The goal of the early proposals was not to achieve a harmonization of national company laws . . . but rather to bypass them entirely using a separate supra-national form of organization."); Kellerhals & Trüten, supra note 17, at 73 (mentioning European Company as the creation of supranational company). See generally Sun, supra note 41, at 522 (discussing nationality requirements of company applying for E-2 visa).

93 See COUNCIL REGULATION (EC), supra note 12 (indicating regulations obtained final approval of European Union on October 8, 2001); see also EU to Permit Firms to Operate Across Region as Single Entity, WALL ST. J. (Europe), Oct. 9, 2001, at B1 [hereinafter EU to Permit] (noting that regulations cleared final hurdle). See generally Kellerhals & Trüten, supra note 17, at 71-72 (mentioning idea to create uniform statute on European companies began in 1952 with Council of Europe).

94 See ERIC STEIN, HARMONIZATION OF EUROPEAN COMPANY LAW 439 (1971) (tracing the history of the SE proposals back to 1910, before Pieter Sanders proposal); see also Blackburn, supra note 17, at 697 (mentioning Stein's tracing of the pedigree of the SE to 1910).

95 See Blackburn, supra note 17, at 697 (indicating it was 1959 proposal which first fully introduced notion of Societas Europaea in comprehensive systematic way); see also Kellerhals & Trüten, supra note 17, at 71-72 (tracing preliminary working notion to Pieter Sanders proposal before Council of Europe in 1952).

96 See Blackburn, supra note 17, at 697 (noting Pieter Sanders remarks concerning necessity of proposal); see also Uwe Blaurock, Steps Toward a Uniform Corporate Law in the European Union, 31 CORNELL INT'L L.J. 377, 383 (1998) (mentioning work is in progress to create supranational corporations); Kellerhals & Trüten, supra note 17, at 73 (mentioning European Company as creation of supranational company).

97 See Blackburn, supra note 17, at 697 n.4 (citing Pieter Sanders statements concerning supranational corporate entity to complete proposed market integration envisioned by original convention); see also Blaurock, supra note 96, at 383 (stating new corporate standards will be uniform); Charles de Navacelle, Council regulation No 2157/2001 of October 8, 2001 Establishing the European Company Statute, 9 COLUM J. EUR. L. 199, 199 (2002) (stating European Company Statute is important step towards European Company law).
identity. In 1970, the proposal was first submitted to the Council of Ministers for adoption by the Commission of the European Community. The initial proposal languished in the Council primarily because of disputes between the Member States regarding the general purpose and role of a corporation and employee involvement in the decision-making and management of a corporation. After a series of committee reviews and amendments, the proposal was submitted again for adoption in 1991. These amendments created a major modification to the initial proposal by retaining the indicia of Member State “citizenship” through the registration process.

For another ten years, the proposal was virtually unchanged until its final adoption in 2001. The current regulations will enable the formation of an SE on October 8, 2004. This paper is not concerned with all of the provisions governing the creation of SEs.

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98 See Blackburn supra note 17, at 697 (stating that the goal was bypassing national laws entirely and to create a supra-national organization). See generally de Navacelle, supra note 97, at 199 (stating purpose of Regulation was to allow companies to operate under one structure as SE); Kellerhals & Trütener, supra note 17, at 75 (stating “European Union has legal competence to create its own supranational company forms to erase cross-border economic operations and free companies formed there under from national legal regulation.”).


100 See Blackburn, supra note 17, at 698 (stating adoption of proposal for Societas Europaea is controversial because of disagreement within European Community concerning role of corporations and role that workers play in supervisory and decision making processes); de Navacelle, supra note 97, at 199 (mentioning disagreements related to worker involvement); see also Durham, supra note 99, at 1480 (mentioning differences in opinion existed in reference to implementation).

101 See Blackburn, supra note 17, at 700 (mentioning 1991 proposed regulation); Blaurock, supra note 96, at 385 (stating in 1991 Commission presented modified proposal); de Navacelle, supra note 97, at 199 (stating regulation proposals were drafted in 1991).

102 See Blackburn, supra note 17, at 699 (stating companies retained important indicia of member state citizenship). See generally Blaurock, supra note 96, at 385 (discussing 1991 draft as being unsuccessful); de Navacelle, supra note 97, at 200 (mentioning companies are rewired to be formed under law of member state with registered offices and head offices to become SE).

103 See COUNCIL REGULATION (EC), supra note 12, at art. 70 (indicating regulations will enter into force on October 8, 2004); de Navacelle, supra note 97, at 199 (mentioning on Oct. 8, 2004 European Company regulations will be put into effect). See generally EU to Permit, supra note 93 at B1 (stating law cleared its final hurdle).
and regulation of an SE, but primarily with its formation and its supranational identity.\textsuperscript{104}

A. Formation of SE

In Article 2, the regulations describe the four ways in which a SE may be formed.\textsuperscript{105} First, two or more public limited-liability companies contained within the Annex which are formed under the laws of at least two Member States can create an SE through a merger.\textsuperscript{106} It should be underscored that this provision is only applicable to publicly held companies within the Member States and not to private companies or a merger between a private company and a public company.\textsuperscript{107} It should also be noted that the formation through merger requires diversity of nationality within the Community.\textsuperscript{108} The second means of forming an SE is through the formation of a holding company.\textsuperscript{109} The provisions require that the companies promoting the holding company are

\textsuperscript{104} For a list of the four ways an SE may be formed, see \textit{COUNCIL REGULATION (EC)}, \textit{supra} note 12, at art. 2. For a discussion about the formation of the SE, see Blackburn, \textit{supra} note 17, at 712-15. For a more detailed explanation of the various regulations governing other aspects of the SE, see generally Kellerhals & Truiten, \textit{supra} note 17, at 71-72.

\textsuperscript{105} \textit{See} \textit{COUNCIL REGULATION (EC)}, \textit{supra} note 12, at art. 2 (stating four ways SE may be formed); Blackburn, \textit{supra} note 17, at 712 (mentioning four ways SE can be formed); Kellerhals & Truiten, \textit{supra} note 17, at 78 (listing four ways European Company can be formed).

\textsuperscript{106} The provision specifically provides that “[p]ublic limited-liability companies such as referred to in Annex I, formed under the law of a Member State, with registered offices and head offices within the Community may form an SE by means of a merger provided that at least two of them are governed by the law of different Member States.” \textit{COUNCIL REGULATION (EC)}, \textit{supra} note 12, at art. 2. An SE may be formed by merger. \textit{See} Blackburn, \textit{supra} note 17, at 712. One of the four ways a European Company may be formed is through a merger. \textit{See} Kellerhals & Truiten, \textit{supra} note 17, at 78.

\textsuperscript{107} \textit{See} \textit{COUNCIL REGULATION (EC)}, \textit{supra} note 12, at. art. 2(2) (mentioning public limited liability companies formed under law of Member State may form SE by means of merger); \textit{see also} Blackburn, \textit{supra} note 17, at 713-15 (discussing public limited liability requirement). \textit{See generally} Kellerhals & Truiten, \textit{supra} note 17, at 75 (discussing creation of EU company forms).

\textsuperscript{108} \textit{See} \textit{COUNCIL REGULATION (EC)}, \textit{supra} note 12, at. art. 2(1) (stating SE may be formed by means of merger provided that at least two of them are governed by law of different Member States); \textit{see} Blackburn, \textit{supra} note 17, at 715-16 (discussing diversity requirement); Kellerhals & Truten, \textit{supra} note 17, at 78 (stating formation through merger requires registration in different member states).

\textsuperscript{109} \textit{See} \textit{COUNCIL REGULATION (EC)}, \textit{supra} note 12, at. art. 2(2) (stating SE may be formed through holding company); \textit{see} Blackburn, \textit{supra} note 17, at 717-18 (discussing forming SE through holding company); Kellerhals & Truten, \textit{supra} note 17, at 78 (stating formation may be established through holding company).
governed by the laws of different Member States, or that the company has maintained a subsidiary or a branch governed by the laws of another Member State for at least two years.\textsuperscript{110} The third means of forming an SE is through the formation of a subsidiary SE.\textsuperscript{111} This provision requires that the parent and the subsidiary either have diverse nationality or that the subsidiary have a branch in another Member State.\textsuperscript{112} The final means of forming an SE is the process of conversion, which allows a publicly held corporation to convert into an SE in the absence of a merger or the formation of a holding SE if the company has at least one subsidiary governed by the laws of different Member States.\textsuperscript{113} Another provision, debatably creating a fifth means of

\textsuperscript{110} The regulations states:

Public and private limited-liability companies such as referred to in Annex II, formed under the law of a Member State, with registered offices and head offices within the Community may promote the formation of a holding SE provided that each of at least two of them:

(a) is governed by the law of a different Member State, or

(b) has for at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.

\textsuperscript{111} See \textsc{Council Regulation (EC)}, supra note 12, at art. 2(3) (stating companies may form subsidiary SE); see also Blackburn, supra note 17, at 722 (discussing formation by subsidiary); Kellerhals & Trüten, supra note 17, at 78 (mentioning formation in form of common subsidiary can be done through public or private law companies).

\textsuperscript{112} The regulations state:

Companies and firms within the meaning of the second paragraph of Article 48 of the Treaty and other legal bodies governed by public or private law, formed under the law of a Member State, with registered offices and head offices within the Community may form a subsidiary SE by subscribing for its shares, provided that at least two of them:

(a) is governed by the laws of a different Member State, or

(b) has for the at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.

\textsuperscript{113} The regulations states:

A Public limited-liability company, formed under the law of a Member State, which has its registered office and head office within the Community may be transformed into an SE if for at least two years it has had a subsidiary
formation, extends the right to take part in the formation of an SE to companies with head offices outside the European Union. These companies are able to form an SE provided that they are formed and registered under the laws of a Member State and maintain real and continuous links with that Member State.

The common link between these provisions concerning formation is the requirement for diversity in nationality prior to formation. Diversity of nationality is required because the rationale for the development of an SE was to abolish the hindrances to cross-border mergers and the operation of cross-border enterprises. Only when the varied corporate laws of the Member States present an impediment to market integration, are the provisions of the SE required. Thus, all barriers should

company governed by the law of another Member State.

COUNCIL REGULATION (EC), supra note 12, at art. 2(4). See generally India: A Tax For Life, BUS. LINE, Oct. 27, 2001 (stating a European company can be set up by the conversion of an existing company set up under national law); Company Law: Ministers Usher Through Company Statute, EUR. REPORT, Oct. 10, 2001, at 2625 (stating that under the SE, a European Company can be set up by the conversion of an existing company set up under national law).

See Kellerhals & Trüfen, supra note 17 at 75 (indicating this provision as an additional means of formation). But see EUROPEAN COMPANY-FAQ, supra note 12 (not specifically classifying as a means of formation). See generally Laura Snyder, Acquiring a Business in France: A Buyers Guide, 57 BUS. LAW. 793, 855-56 (2002) (stating that a business operating in France as well as in another one or more European Union member states will no longer be obliged to establish a separate subsidiary in each member state where it operates).

See COUNCIL REGULATION (EC), supra note 12, at art. 2(5) (providing the language concerning this provision); see also Alison Keith, Legal Brief; Level Playing Field for Cross Border Companies, THE SCOTSMAN, Oct. 22, 2001, at 20 (noting SE's have to be established by a regulation which is directly applicable in each Member State and maintain contacts with those states). See generally Blake Evans-Pritchard, Council Finally Adopts European Company Statute, EUOBSERVER.COM, Oct. 8, 2001 (stating a European Company must maintain an operational head office in the Member State under which it is registered).

The preamble to the regulations makes it clear that the European Council determined that one key hindrance to the integration of the internal market was the limitations on cross-border mergers. See COUNCIL REGULATION (EC), supra note 12 at art. 2. They also determined that the completion of the internal market was conditioned on the ability of companies to adapt trade and production to a Community wide dimension. See COUNCIL REGULATION, supra note 12 at art. 2. The Council also specifically recognized that integration based on the harmonization of national laws was inherently inadequate. See COUNCIL REGULATION (EC), supra note 12 at art. 2.

See COUNCIL REGULATION (EC), supra note 12 at art. 2 (indicating that only in the instance that national laws limit integration of markets is a supranational corporate organization needed). See generally Frits Bolkestein, The New European Company: Opportunity in Diversity, Address to Conference at the University of Leiden, RAPID, Nov.
be removed without requiring all corporations to accept the uniformity of the SE.\textsuperscript{118} Where a Member State's corporate laws apply and all that is required is harmonization of laws, then the company does not need the added supranational provisions provided by the SE.\textsuperscript{119}

\textbf{B. Supranational Character of the SE}

Although the creation of a supranational entity is not unprecedented,\textsuperscript{120} it is a novel approach in corporate law and is an approach that goes beyond the harmonization of laws normally utilized by the European Union.\textsuperscript{121} The SE creates 29, 2002 [hereinafter Bolkestein Speech] (stating that moving across borders will be possible without the burdensome process of dissolution and winding up in one Member State and re-registering in another Member State); \textit{THE EUROPEAN COMMISSION, EUROPEAN COMPANY STATUTE: COMMISSION WELCOMES POLITICAL AGREEMENT, available at http://europa.eu.int/comml/internal_market/en/company/company/news/1495.htm} [hereinafter COMMISSION WELCOMES] (last visited Sept. 1, 2003) (stating that SE will give companies operating in more than one Member State the option of being established as a single company under community law and to operate throughout the EU without the impediment of divergent laws governing various entities).

\textsuperscript{118} See \textit{EUROPEAN COMPANY -FAQ, supra note 12} (indicating that the SE form is not mandatory and is to be utilized to overcome the limitations imposed by successive incorporation in various Member States). See generally Evans-Pritchard, \textit{supra} note 115 (stating that under the statute, existing companies are not obliged to become European Companies); \textit{30 Year Debate Over Statute Ends, THE DESERET NEWS, Oct. 8, 2001, at B06} [hereinafter 30 Year Debate] (implying that companies have a choice whether or not to take advantage of the new option).


\textsuperscript{120} See Kellerhals & Trüiten, \textit{supra} note 17, at 75 (providing that the formation of the European Economic Interest Grouping (EEIG) in 1985 represented the first formation of a transnational company but that this company represented a framework for the cooperation of companies and not the formation of a unitary corporate entity). See generally \textit{Internal Market Council: Agreement Reached on European Co-Operative Statute, EUR. REPORT, May 25, 2002} (outlining agreement for new supranational venture); Bolkestein Speech, \textit{supra} note 117 (noting the significance of the euro as an important instrument within the economic and monetary union in terms of access to capital for pan-European projects).

\textsuperscript{121} See Kellerhals & Trüiten, \textit{supra} note 17, at 73-74 (indicating that the formation of a transnational company is a distinct level of action from the harmonization process which is the usual starting point of European Union activities). \textit{But see de Navacelle, supra} note 97, at 199 (stating that European Company Statute is still many steps away from creating true harmonization). See generally H. Onno Ruding, \textit{Tax Harmonization in
something that is decidedly European.\textsuperscript{122} Since its first introduction, the SE was conceived to operate community wide and beyond the regulation and control of the various Member States.\textsuperscript{123} This original conception has remained the impetus for the efforts to institute the SE.\textsuperscript{124} Only as a practical matter is there a reference to the company laws of the Member States in the area of registration.

The remaining link to a nationality of a Member State remains in the provision of registration. This remaining link to nationality provides no assistance in determining nationality for the purposes of the E visa category.\textsuperscript{125} Since the Member State of registration is akin, although not identical, to the country of incorporation, it is irrelevant for the purposes of determining nationality.\textsuperscript{126}

\textit{Europe: The Pros and Cons,} 54 TAx. L. REV. 101, 108-09 (2000) (stating that tax implications that may be linked to SE statute would be radical).

\textsuperscript{122} See Kellerhals \& Trütener, \textit{supra} note 17, at 75 (stating SE builds on existing European laws). \textit{See generally} de Navacelle, \textit{supra} note 97, at 199 (stating that the European Company law is the "result of a mixture of European Community law and national laws"); Ruding, \textit{supra} note 121, at 109 (stating that law behind European Company Statute is ideal for Europe).

\textsuperscript{123} See Blackburn, \textit{supra} note 17, at 697 n.4 (quoting Pieter Sanders, the original drafter of the SE provisions, that the SE was to be an entity organized under and governed by a uniform European company law irrespective of national company law). \textit{But see} Snyder, \textit{supra} note 114, at 855 (stating that outside of issues relating to corporate formation, management, and reporting, the operations of European Company will remain subject to the laws and regulations of the member state). \textit{See generally} Daniela Spinant, \textit{Cox Avoids Row With EU States on Company Statute, EUOBSERVER.COM, Feb. 1, 2002} (stating European company is aimed at enabling multinationals operating across Europe to register under one set of rules rather than various national provisions).

\textsuperscript{124} See \textit{COUNCIL REGULATION (EC), supra} note 12, at (7) (stating "such Regulation will permit the creation and management of companies with a European dimension, free from the obstacles arising from the disparity and the limited territorial application of national company law"). \textit{But see} de Navacelle, \textit{supra} note 97, at 199 (stating that new regulation proposals drafted in 1989 and 1991 were key to defining current statute). \textit{See generally} Goldman \& Filliben, \textit{supra} note 119, at 698 (noting that original proposal that has driven current statute was proposed in 1970).

\textsuperscript{125} See 8 U.S.C. § 1101(a)(15)(E) (outlining statute for E Visa category); \textit{GORDON, supra} note 11, § 17.03[3][b] (indicating the relative ease of determining individual nationality); \textit{see also} id. § 17.03[3][a] (stating that determination of nationality is normally determined by the presentation of a passport).

\textsuperscript{126} See \textit{FAM, supra} note 47, § 41.51 n.3.2 (indicating that place of incorporation, like member state of registration, is irrelevant in determination of nationality); \textit{see also} Sun, \textit{supra} note 41 at 524 (indicating the irrelevance of place of incorporation and principal place of business in determining nationality). \textit{See generally} Evans-Pritchard, \textit{supra} note 115 (stating that although a European Company can only be registered in the member state where it has its operational head office, it can operate under the same rules throughout the EU).
PART III: IMMIGRATION PROBLEMS CONFRONTING AN SE

The Department of State regulations present three distinct problems in their potential application to an SE. First, the regulations are incompatible with the intent of the European Union in creating the SE.\textsuperscript{127} The SE was created to transcend national identity of a corporation and create a pan-European company.\textsuperscript{128} The European Union intended the SE to create effective cross-border mergers and integration of enterprises and to increase the seamless flow of commerce within the union.\textsuperscript{129} Although the declaration of nationality conflicts with the aim of the European Union, it is a requirement, which must be met under the current immigration laws and Department of State regulations.\textsuperscript{130}

\textsuperscript{127} See generally Peter Norman, EU Establishes European Company Statute, FIN. TIMES (London), Oct. 9, 2001, at 16 (quoting Internal Market Commissioner Fritz Bolkstein discussing intentions behind European Statute); Plender, supra note 119, at 17 (stating that the aim of the European Company Statute is to give companies operating in more than one member state the option of being established as a single company with one set of rules, however the corporate founders can choose the state in which to register the new company; thus there will be at least as many forms of the new European company as there are member states); \textit{European Company Statute: Commission Welcomes Formal Adoption}, RAPID, Oct. 8, 2001 [hereinafter \textit{Commission Welcomes}] (stating intended goals of passing European Company Statute).

\textsuperscript{128} See generally \textit{30 Year Debate}, supra note 118, at B06 (noting internal market commissioner Frits Bolkestein said companies would be able to set up cross-border mergers across EU without the costs and red tape of setting up a network of subsidiaries); \textit{Commission Welcomes}, supra note 127 (quoting Internal Market Commissioner Frits Bolkestein as saying that "adoption of the European Company Statute will give companies the option of using this efficient structure for their pan-European operations"); \textit{Policies to Boost Potential Output Growth}, OECD-ECONOMIC SURVEYS-FINLAND, July 1, 2002, at 47 n.73 (stating that the European Company established a single company under Community law that operates throughout the EU with one set of rules and a unified reporting system).

\textsuperscript{129} See John Rossant, \textit{Commentary: Europe’s Unfinished Business: The Single Currency Is A Good Start, But Europe Still Has Lots of Work To Do in Breaking Down National Barriers}, BUS. WEEK ONLINE, Nov. 30, 2001 (implying SE could relieve problems associated with large swaths of industry which remain stubbornly national, making for higher prices in some countries, poorer service, and ultimately less efficiency); Norman, supra note 127, at 16 (relaying comments of Frits Bolkestein, the Internal Market Commissioner, hailing the European Company Statute as a "practical step to encourage more companies to exploit cross border opportunities," because SE would "enable companies to expand and restructure their cross-border operations without the costly and time-consuming red tape of having to set up a network of subsidiaries"). \textit{But see Now For the Big Push?}, THE ECONOMIST, Dec. 1, 2001 (noting that SE offers option to incorporate as European entities rather than as national ones, but as long as corporate taxes remain unharmonized it will not likely succeed).

\textsuperscript{130} See 8 U.S.C § 1101(a)(15)(E) (2003)(delineating rule for E visas); see also FAM, supra note 47, § 41.51 n.3.2. (outlining rule for determination of a company’s nationality).
A second related problem is the potential unworkability of the current nationality determination in reference to an SE. The determination of nationality is based on the 50 percent rule. This rule presupposes an economic environment in which ownership is closely related to nationality and an increasingly outmoded notion of corporate interrelationship. The regulations view the multinational relationship of companies as governed by the traditional relationship created through the formation of a holding company, the creation of a subsidiary by a parent corporation or the creation of a cross border joint venture. All of these structures envision the creation of a hierarchical or lateral relationship between distinct companies with clearly defined relationships. The courts analysis in Matter of N-S demonstrates the traditional model of determining a company's nationality. In this case, the E visa holder worked as an Assistant Manager at Wrangell Lumber

See generally Keith, supra note 115, at 20 (stating that SE's must be established by regulation).

131 See Yanni, supra note 1, at 15 (providing that 50% ownership is required to qualify a company as a national of a country); see also FAM, supra note 47, § 41.51 n.3.1 (outlining 50% rule); GORDON, supra note 11, § 17.03[3] (specifying 50% ownership as the test for determining nationality).

132 See Yanni, supra note 1, at 15 (indicating the problematic nature of the rules evidentiary requirements); see also FAM, supra note 47, § 41.51 n.3.1 (elucidating the 50% rule). See generally GORDON, supra note 11, § 17.03[3][b] (indicating that the 50% test of ownership provides flexibility).

133 These are the categories of corporate relationships that are recognized on the various forms and applications that the Bureau of Citizenship and Immigration Services utilizes in reference to multinational or transnational corporate relationships. Although these categories of relationships are not outmoded, the SE offers the most immediate example of a direct supranational relationship that does not follow the model of multinational or transnational currently utilized. See generally Maggio et al., supra note 3 at 898 (discussing business affiliations for which State Department regulations typically issue a visa); Keith, supra note 115 at 20 (stating that SEs will be registered in a member state on the same register as companies operating under the relevant national law).

134 Parent/Subsidiary relationships, as well as certain holding company formats, are hierarchical in nature. The parent, or the holding company owns and exercises control over its respective subsidiaries. The regulations are governed by the traditional model of ownership and control when interpreting corporate relationships. See 22 C.F.R. § 41.51(c) (2003). In contrast, the SE envisions a unitary structure with decentralized ownership and control with the various entities acting as a single corporate unit within the European Union. See COUNCIL REGULATION (EC), supra note 12, at art. 2. This new regulation would allow a company to supranational identity for companies formed within the regulations.

Company. The plant was a wholly owned subsidiary of Alaska Pulp Company, Inc. The Alaskan lumber company was a subsidiary of Alaska Pulp Company, Ltd., its Japanese parent company. Because the Japanese parent was the ultimate owner, the court analyzed the nationality of its ownership. Since all of the shares of the corporation were owned by nationals of Japan, the corporation was a Japanese corporation. In most cases, the analysis follows these general rules of tracing the ultimate ownership back to a single country or in a somewhat rare case to multiple countries.

The SE presents a more complicated analysis. The tracing of the United States subsidiary back to the SE will lead ownership by the nationals of not one or two countries but to potential pan-European ownership. The existence of ownership across the 15 Member States creates a decisive presumption against any one country owning at least 50 percent of any SE. This

\[\text{136 See id. at 426 (indicating the company operated saw mill in Alaska, and sold fifty percent of its product to Japan).}\]
\[\text{137 See id. at 427 (describing the corporate relationship between the companies).}\]
\[\text{138 See id. (indicating that all but five shares of stock were owned by the Japanese parent corporation).}\]
\[\text{139 See id. (providing that since the Japanese corporation owned 11,995 of the 12,000 shares of Alaska Pulp Company, Inc., it was the ownership of this corporation that was important in making its decision).}\]
\[\text{140 See id. at 427, 429 (indicating that all 75,000 shares of this corporation were owned by nationals of Japan); FAM, supra note 47, § 41.51 n.3.2. (explaining rule for determination of a company's nationality relies heavily on the nationality of shareholders); Yanni, supra note 1, at 15 (noting that ownership may ultimately decide nationality).}\]
\[\text{141 The courts have generally followed this form of analysis. See, e.g. Matter of Lee, 15 I. & N. Dec. 187 (1975). One potential reason for the absence of court relevant precedent pertaining to complex corporate structures is the procedures for obtaining an E visa. Most of the complex multinational corporate relationship will be initially evaluated by the consular officer at the U.S. Embassy or consulate. The determinations of these officers are not subject to judicial review by courts in the United States. See 8 U.S.C. §1104 (2003); see also Lenni B. Benson, Breaking Bureaucratic Borders: A Necessary Step Towards Immigration Law Reform, 54 ADMIN. L. REV. 203, 266 (2002). So once a determination has been made that the company does not have the required nationality, the issue never reaches the review of the courts.}\]
\[\text{142 See COUNCIL REGULATION (EC), supra note 12, at art. 2 (highlighting the importance of the incorporation of an SE under the EU for the effective and efficient utilization of an international community); EUROPEAN COMPANY-FAQ, supra note 12 (illustrating that of the several possible modus operandi for an SE, an EU incorporation would be the most beneficial); see also Ruding, supra note 121, at 109 (noting that success for the European Community will be promoted by such formations).}\]
\[\text{143 Normally, the Department of State presumes that 50% of a company's stock is owned by the nationals of the country in which the listing stock exchange is in. GORDON,}\]
presumption becomes increasingly hard to prove in a situation where diversity of ownership creates no indicia of nationality to the satisfaction of the Department of State.144

Because what would be a simple analysis becomes more complex when it involves a publicly traded company, the Department of State employs the corollary to the 50 percent rule in most of these circumstances.145 As discussed earlier, the Department of State makes a presumption that at least 50 percent of a company's stock is owned by nationals of the country on whose stock exchange the stock is listed.146 But recent developments in global markets in general and the European stock exchanges in particular tend to destabilize the assumptions that form the basis of this presumption.147 Two converging trends in particular make this presumption questionable. The first trend is the consolidation of equity markets in Europe.148 The

supra note 11, § 17.03(3)(b). Therefore, a supranational company, sharing the currency of 15 nations and trading on a European Stock Exchange is difficult to pinpoint. See James McAndrews & Chris Stefanidis, *The Consolidation of European Stock Exchanges, CURRENT ISSUES IN ECON. AND FIN.*, June 1, 2002, at 1. As it is, many European companies list in multiple markets throughout the EU. See also Amir N. Licht, *Genie in a Bottle? Assessing Managerial Opportunism in International Securities Transactions, 2000 COLUM. BUS. L. REV. 51, 71-72 (2000).

144 The Department of State has a formula by which it determines the nationality of a corporation. See GORDON, supra note 11, § 17.03(3)(b). Traditionally, most nations utilized their own currency. However, 12 of the nations in the European Union have adopted the Euro as the currency of their monetary system. Brian R. Cheffins, *The Metamorphosis of “Germany Inc.”: The Case of Executive Pay, 49 AM. J. COMP. L. 497, 504 (2001). Another index that is no longer of use the Department of State is which market the company is listed and is traded. There is a growth of a common exchange concept in the EU. See McAndrews & Stefanidis, supra note 143, at 2.

145 See FAM, supra note 47, § 41.51 n. 3.2 (explaining the rule for determination of a company's nationality); GORDON, supra note 11, § 17.03(3)(b) (outlining several variations of incorporation where the 50% rule is used invariably); Yanni, supra note 1, at 15 (noting that ownership may ultimately decide nationality).

146 See 22 C.F.R. § 41.51(c) (2003) (providing the regulatory requirement to demonstrate nationality); see also FAM, supra note 47, § 41.51 n.3.1 (elucidating the 50% rule); GORDON, supra note 11, § 17.03[3] (specifying 50% ownership as the test for determining nationality); Yanni, supra note 1, at 15 (providing that 50% ownership is required to qualify a company as a national of a country).

147 See Cheffins, supra note 144, at 500-01(highlighting the intricacies of a common currency); McAndrews & Stefanidis, supra note 143 at 2 (noting the elimination of a securities market in every nation, and the creation of united markets); *The Battle of the Bourses, THE ECONOMIST*, May 5, 2001 [hereinafter Bourses] (explaining that the rise in the number of equity holders, or “equity culture”, in Europe has sparked those exchanges lacking in this area to unite with ones that are established equity traders).

148 See McAndrews & Stefanidis, supra note 143, at 2 (highlighting the trend towards consolidation of the European securities markets as a major initial step towards market consolidation); *All for One, or One for All, THE ECONOMIST*, Jan. 25, 2003 [hereinafter All
consolidation has taken two distinct routes. One is the consolidation of local and regional stock exchanges under a unified system. 149 Two examples of this type of consolidation are the NOREX and Euronext. 150 NOREX is a consolidation of the Stockholmsbörsen, the Copenhagen Stock Exchange and the Iceland Stock Exchange. 151 These exchanges have adopted common trading rules and a uniform trading platform. 152 Euronext represents another form of consolidation in which the Paris Bourse, the Amsterdam Exchange and the Brussels Exchange obtain local licensing rules but share a uniform trading platform. 153

The second form of consolidation is occurring in the form of start-ups which are attempting to create a pan-European exchange. 154 One notable example is the Virt-X that is a joint

for One] (explaining the effects of consolidation of markets); After Life, The ECONOMIST, Nov. 3, 2001 (discussing the strategic considerations of European stock exchanges when trying to stay alive).

149 See McAndrews & Stefanidis, supra note 143, at 2 (noting these as two significant examples of exchange consolidation in the form of a unified exchange market); Bourses, supra note 147 (postulating that the consolidation of the European markets has plenty of downsides); All for One, supra note 148 (explaining the need for a central regulator between buyers and sellers in the unified exchanges).

150 See All for One, supra, note 148 (discussing the development and future prospects of Euronext); McAndrews & Stefanidis, supra note 143, at 2 (listing the components of NOREX as the Stockholmsbörsen, the Copenhagen Stock Exchange and the Iceland Stock Exchange); Carina, THE ECONOMIST, July 6, 2002 (noting that the Euronext is composed of the exchanges of Paris, Amsterdam, Brussels and Lisbon).

151 See McAndrews & Stefanidis, supra note 143, at 2 (noting these as examples of an important alternative form of consolidation); Stock Exchange Demutualization in Sweden and Australia, N.Y.L.J., Aug. 19, 1999, at 3 (illustrating that NOREX was created to enhance liquidity in the Baltic markets); Bourses, supra note 147 (stating that the operator of the Stockholm exchange had been involved in a hostile bidding situation for the London Stock Exchange prior to merging into the NOREX).

152 See All for One, supra note 148 (explaining the need for unprecedented cooperation and information exchange, so that a disaster at one exchange will have utterly no effect on the others); McAndrews & Stefanidis, supra note 143, at 2 (indicating these as the key to consolidation without unification of exchanges).

153 See Carina, supra note 150 (noting that the Euronext is composed of the exchanges of Paris, Amsterdam, Brussels and Lisbon); McAndrews, & Stefanidis, supra note 143, at 2 (indicating these as the points of consolidation without creating a unified exchange); Running Into Trouble, THE ECONOMIST, June 17, 2000 (explaining that a potential problem when exchanges consolidate and have separate local licensing it that if a larger constituent wants to shut down a smaller one it wont be able to).

venture between a Tradepoint and the Swiss Stock Exchange. This is an attempt to form a new exchange rather than consolidating or uniting pre-existing exchanges. These market attempts at consolidation, may become replaced by formal consolidation of Europe's financial markets and regulation of securities by the European Union. Even in the absence of formal or structural consolidation, many European companies utilize multiple listing of stocks throughout Europe to take advantage of the larger union market. Foreign listed stocks account for anywhere from almost 24 percent of the listed companies to as little as 2 percent. Trading in foreign listed

155 See The Hunt, supra note 154 (noting that the electronic exchange for retail investors made a good showing on its opening day); McAndrews & Stefanidis, supra note 143, at 2 (stating the promise of the cross border electronic exchange).
158 See, e.g. Amir N. Licht, David's Dilemma: A Case Study of Securities Regulation in a Small Open Market, 2 THEORETICAL INQ. L. 673, 686 (2001) (stating 27 percent of the Tel Aviv Stock Exchange's market capitalization was also being traded on the American stock markets). See generally Licht, supra note 143, at 71-72 (explaining that when a firm lists its stocks on multiple exchanges, it is thereby expanding its potential investor base); Anthony M. Vernava, Latin American Finance: A Financial, Economic and Legal Synopsis of Debt Swaps, Privatizations, Foreign Direct Investment Law Revisions and International Securities Issues, 15 WIS. INT'L L.J. 89, 127 (1996) (explaining that listings of stocks on multiple international exchanges are beneficial to investors in different markets).
160 See McAndrews & Stefanidis, supra note 143, at 3 (citing Federation of European Securities Exchanges 2002 statistics); EUROPEAN SECURITIES EXCHANGE STATISTICS, supra note 159, at Table 4 (illustrating that most exchanges, including the Athens,
companies also represents a large percentage of the value of trading on these exchanges.\textsuperscript{161}

The second key factor that destabilizes this presumption in Europe is the uniform monetary system in these markets.\textsuperscript{162} The common currency has removed one of the main obstacles for cross-border trading and stock ownership.\textsuperscript{163} A common monetary system drastically decreases investment risk associated with unexpected fluctuations in exchange rates.\textsuperscript{164} Since the monetary system remains stable across investments, an investor does not need to factor in fluctuations in domestic and foreign exchange rates when calculating the risk of cross-border investment.\textsuperscript{165}

The Department of State presumption seems to be based on the home-country bias that economists have noted in stock exchanges. Copenhagen, Cyprus, Helsinki, Iceland, Italian, Malta, Prague, Spanish, and Warsaw Exchanges have low percentages of foreign traded stocks).

\textsuperscript{161} See McAndrews & Stefanadis, supra note 143, at 3 (indicating that 57.30 percent of the value of the trading on the London Stock Exchange involve the trading of foreign stocks); EUROPEAN SECURITIES EXCHANGE STATISTICS, supra note 159, at Tables 3a and 3b (comparing domestic and foreign equity turnover).

\textsuperscript{162} See McAndrews & Stefanadis, supra note 143, at 1 (citing Federation of European Securities Exchanges 2002 statistics). See generally Cheffins, supra note 144, at 504 (stating twelve of the fifteen Member States of the European Union have adopted a single currency, which in turn has resulted in reduced trade barriers); Peter H. Schuck, The Perceived Values of Diversity, Then and Now, 22 CARDOZO L. REV. 1915, 1952-53 (2001) (explaining that the Euro was introduced in January 1999 amid "great fanfare and optimism").

\textsuperscript{163} See McAndrews & Stefanadis, supra note 143, at 2-3 (discussing barriers to consolidation); Poser, supra note 156, at 498 (opining that "[t]he adoption of the euro as the common currency of eleven of the countries in the European Union has stimulated cross-border trading of securities by eliminating currency risks."); Tom Saler, Stability of Sinking Euro May Depend on the U.S., MILWAUKEE J. SENTINEL, Sept. 30, 2000, at 01D (noting currency risk is no longer a barrier to cross-border investment).

\textsuperscript{164} See McAndrews & Stefanadis, supra note 143, at 2-3 (discussing various obstacles to consolidation); see also Joseph F. Jacob, The Impact of the Euro on the United States Equity Markets, 13 ST. JOHN'S J. L. COMM. 399, 402 (1998) (stating the strength of Europe's uniform currency permits Europe to standardize its capital markets); George M. von Furstenberg, One Region, One Money?, 579 ANNALS AM. ACAD. POL. & SOC. SCI. 106, 115 (2002) (noting that a benefit standardization on a common currency is the ability to calculate risk exposure).

\textsuperscript{165} See, e.g. George A. Bermann, Reflections on the Papers Presented by Weiler, Goebel, and Meyers & Levie, 4 COLUM. J. EUR. L. 353, 354 (1998) (noting a common monetary system precludes the possibility of national currency devaluation); Jonathan Ford, Survey - Euro-Zone Economy: Investor Power is Ruffling Feathers, FIN. TIMES (LONDON), Dec. 3, 1999, at 7 (noting both liquidity and currency risks serve as bars to cross-border investments); Chris Huhne, It's Official: The Euro is a Success: Britain Would Benefit Immensely from Joining As Soon As Possible, THE GUARDIAN (LONDON), June 6, 2002, at 18 (stating "[s]eparate currencies increase investment risk and reduce cross-border investment").
ownership. A recent study indicated that 92 percent of the stock owned by individuals in developed countries are from domestic companies. This combined with a regionalized market system, makes a strong presumption that stock ownership will be centralized in the country of incorporation or at least of exchange. But given the sure number of countries that will have access to one given stock leaves this presumption less stable when dealing with an SE.

The instability of this presumption is also destabilized by the added lack of nationality. In the current market, corporations

166 See McAndrews & Stefanadis, supra note 143, at 4 (defining home country bias as "a distinct preference for hoing assets in [one's own] country"); Mark Hulbert, Investors Root for the Home Team and Don't Venture Abroad, N.Y. TIMES, May 5, 2002, § 3, at 7 [hereinafter Home Team] (stating that worldwide, investors favor stock from their own country and this "home bias" exists in all major global markets); Mark Hulbert, A Plan to Overcome Investors' Home Bias, N.Y. TIMES, Jan 23, 2000, § 3, at 9 [hereinafter Home Bias] (opining that "home bias is so ingrained in investors' psyches that it clouds their judgments").

167 See, e.g. Louis Beckerling, After the Boom, Bust is Unlikely, BUS. TIMES (SINGAPORE), Sept. 17, 1999, at 12 (discussing pervasive home bias in Malaysia); Home Team, supra note 166, at 7 (commenting that while American stocks represent only 53 percent of stocks worldwide, "United States equity fund investors allocate nearly 90 percent of their portfolios to American stocks."). See generally Karen K. Lewis, Trying to Explain Home Bias in Equities and Consumption, J. ECON. LITERATURE, June 1, 1999 (analyzing whether individuals adequately hedge risks across countries).


169 See, e.g., EUROPEAN SECURITIES EXCHANGES STATISTICS, supra note 159, at Table 5 (listing most traded shares on various European exchanges; for instance Nokia is listed as a top seller on several exchanges). See generally Licht, supra note 143, at 74 (explaining that multiple listing of the same stock may lower transaction costs and increase the demand for that stock); Alexander B. St. John, The Regulation of Cross-Border Public Offerings of Securities in the European Union: Present and Future, 29 DENV. J. INT'L. L. & POLY 239, 244 (2001) (explaining that the same stock can be listed on one or more stock exchanges in the numerous nations).

170 See, e.g., At Last: The Long-Awaited European Company Law May Prove a Disappointment, BUS. EUR., Jan. 24, 2001 (explaining that the design of the SE permits companies to organize their operations on a European Union-wide scale, without being forced to decide between different sets of national laws); Plender, supra note 119, at 17 (explaining that the SE permits corporate founders to select the state in which to register new companies); Philip Woolfson, Regulation Analysis, INT'L FIN. ADVISER, Nov. 1, 2001 (stating that corporations organized under the SE will be treated as multinational companies).
are considered foreign mainly because of the lack of contact that investors have with the functioning and actual operation of the company.\textsuperscript{171} The SE will decrease this lack of contact because the corporation will be operating in any given country within the union, not as a separate entity, but as a centralized and consolidated entity.\textsuperscript{172} The unitary structure provides the investor with a domestic point of relations in which he or she can identify with the larger corporate entity.\textsuperscript{173} Through the access to a corporation doing business directly in the country rather than through a complex web of corporate relationships, the investor will gain a personal relationship with the domestic portion of the company, and the company will create a foundation of confidence both through this connection and its foreign operations.\textsuperscript{174} Its size will foster a sense of stability while its geographic proximity will foster a sense of personal connection to the investor.\textsuperscript{175}

\textsuperscript{171} See McAndrews & Stefanadis, supra note 143, at 4 (indicating that geographic distances, cultural differences and access to information are key factors enforcing the home-country bias); see also Barrie Dunstan, Lower Returns Look Set to Stay, So What to Do?, AUSTRALIAN FIN. REV., Mar. 1, 2003, at 38 (explaining that Australian investors may not choose foreign diversification of their stock portfolios as they are concerned with their earnings and retirement funds, as well as exchange rates); John Plender, A Bumpy Ride to the Market: Investors Who Expect Double-Digit Returns on their Equities Over the Next Decade May Be Disappointed, FIN. TIMES (LONDON), Jan. 3, 2000, at 16 (noting that in Japan, home-country bias is culturally based).

\textsuperscript{172} See Licht, supra note 143, at 82-83 (illustrating how a company's operations and stock ownership can alter its local perception from that of a "foreign exploiter" to a benevolent partner). See generally Linda A. Mabry, Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality, 87 GEO. L.J. 563, 567 (1999) (explaining pertinence of geographic location of operations plays on corporate identity and nationality).

\textsuperscript{173} See Licht, supra note 143, at 82-83 (indicating how operational familiarity can attract domestic investment); Craig M. Wasserman, Mergers of Equals, 1232 PLI/CORP. 397, 540 (2001) (explaining that it is beneficial to a corporation to have positive relationships with its investors, as well as the surrounding community). See generally Marby, supra note 172 (demonstrating the dissolution or substitution of national identity that can be accomplished through operational proximity).

\textsuperscript{174} See Licht, supra note 143, at 82-83 (illustrating the way in which operation and investment can foster and alter investors views of a company). See generally Mabry, supra note 172 (elucidating the role geography and operational familiarity play in consumer confidence in investing).

\textsuperscript{175} See Andrew Baxter, Machine Tool Body Proposes Policy for Industry, FIN. TIMES (LONDON), July 7, 1993, at 2 (stating that the adoption of the SE will permit creation of companies of an "optimum size"). See generally First Capital Intl, Inc., Will Enter into the Ukrainan Telecom Market, PR NEWSWIRE, July 24, 2001 (quoting a corporate executive who argues investors should be concerned with the corporations geographic proximity to the target marketplace); Olicom Invests in Scalado AB, PRIMEZONE MEDIA NETWORK, Aug. 22, 2001 (quoting corporate executive stating his firm values "daily dialogue" with investors, and therefore values geographic proximity).
Given that there is strong evidence challenging the validity of the Department of State's stock exchange presumption, SEs would need to prove that stock was actually owned by 50 percent of the nationals of one country. This would become exceedingly difficult to demonstrate given the realities of the rapid cross border exchange of stock within the European market. Even given a relatively static ownership, the potential of ownership being spread over fifteen countries presents a presumption against any one country having the requisite 50% ownership required to establish nationality. A company like GlaxoSmithKline (GSK) which operates through its subsidiaries in fourteen of the fifteen Member States, presents an example of how a company could become nationless under the existing rule. Although GSK is a British company, 10 percent ownership in strong centers of research and development like

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176 See MERRICK T. ROSSEIN, Hiring Foreign Nationals and Placing American Employees Overseas: Determining Corporate Nationality, 1 EMP. L. DESKBOOK HUM. RESOURCES PROF. § 4:26 (2001) (explaining that for a corporation to claim a particular nationality, at least fifty percent of the corporation must be owned by “persons having the nationality of the treaty country”); Klasko, supra note 58, at 5 (stating that the E (treaty) visa requires the U.S. employer to be owned by at least fifty percent by nationals of the same nation as the employee, and the E visa employee immediately loses authorization to be employed in the U.S. if the employing company loses this fifty percent status). See generally Michael D. Patrick, New E Treaty Trader/Investor Rules, supra note 53, at 3 (stating that the INS and Department of State finalized new rules making changes to the administrative interpretation of regulations governing the E visa).

177 See McAndrews & Stefanadis, supra note 143, at 4 (indicating that 57.30 percent of the value of the trading on the London Stock Exchange involve the trading of foreign stocks); Poser, supra note 156, at 498 (stating that the elimination of currency risks by the adoption of the euro by the majority of the European Union nations has led to cross-border trading of securities); see also Werner Van Lembergen & Margaret G. Wachenfeld, Economic and Monetary Union in Europe: Legal Implications of the Arrival of the Single Currency, 22 FORDHAM INT'L L.J. 1, 55 (1998) (commenting that the introduction of the euro is expected to increases cross-border activities in stocks throughout Europe).

178 The sure number of countries whose nationals may own the stock of a European or global company make it difficult to maintain this presumption. Even if stock ownership is relatively small in each country, the disperse ownership among many countries makes this situation exceedingly rare. Unless the company has a truly national or localized identity, this presumption is virtually illogical.

France, Germany and Italy, and minimal ownership in other community states, would likely create a lack of any one country having the required 50% ownership.\textsuperscript{180}

Assuming that the company does not have any determinative national identity and has a true European identity, there is no treaty with the European Union \textit{per se}. This lack of treaty would be fatal to any individual company wishing to expatriate an employee in the E visa category.\textsuperscript{181} Although all Member States of the European Union have a qualifying treaty with the United States, there is no treaty between the European Union and the United States as such.

\textbf{PART IV: POSSIBLE SOLUTIONS}

Since it is likely that at least some of the potential SEs will have no discernible nationality under the current Department of State regulations, solutions to restructure the statute or regulations governing nationality must be revised to prevent potential future immigration problems.\textsuperscript{182} The intervening year should provide adequate time for implementation of some adequate solution provided there is sufficient impetus for action.\textsuperscript{183} Since the problem potentially threatens some of the expatriation of key figures within some of Europe's most influential companies, it is almost guaranteed that they will provide the required impetus for action to resolve this problem.

\textsuperscript{180} If a total of thirty percent of GSK were owned among citizens of Germany, France and Italy (10% each), another thirty percent owned by nationals of the other member states (3% per Member State), and British citizens owning the remaining 40 percent, GSK would not have any nationality under the existing Dep't of State regulations. \textit{See} 8 U.S.C § 1101(a)(15)(E) (2003).


\textsuperscript{182} \textit{Compare} 8 U.S.C. § 1101 (a)(15)(E) with \textit{COUNCIL REGULATION (EC), supra} note 12 at art. 2 (representing conflicting provisions that as law stands now is not compatible). \textit{See generally} Hader & Syfert, \textit{supra} note 5, at 567-70 (describing procedures to apply to E visa petitions).

\textsuperscript{183} \textit{See COUNCIL REGULATION (EC), supra} note 12, at art. 2 (indicating Oct. 8, 2004 as date when SEs will begin to be available as a registration option). \textit{See generally} 8 U.S.C. § 1101 (a)(15)(E) (establishing requirements for E visa status); Hutchinson, \textit{supra} note 1 (summarizing the legislative history of immigration law).
before it becomes a catastrophe.\textsuperscript{184} Various solutions may be adequate to solve the conflict between the future SE and the United States immigration laws.\textsuperscript{185}

A. Department of State Regulations Concerning Place of Incorporation

Since nationality is required of an employer for the purposes of obtaining an E visa and an SE has no discernable nationality given the traditional tests, the Department of State would need to apply some test to determine the nationality of an employer.\textsuperscript{186} The simplest means of determining nationality for an SE would be to look at the country of registration. Since the country of registration is the virtual equivalent to the place of incorporation, this simple solution is unlikely to be adopted.\textsuperscript{187} Since the earliest adoption of the E visa, the place of incorporation has been determined to be irrelevant for the actual determination of nationality.\textsuperscript{188} It is unlikely that without a

\textsuperscript{184} See generally George A. Berman, American Regulatory Cooperation Between the European Commission and U.S. Administrative Agencies, 9 ADMIN. L.J. AM. U. 933, 935 (1996) (stating U.S. and E.U. will need to cooperate in various areas, including immigration law); ANNUAL REPORT 2001, supra note 179, at 136-37 (indicating multinational nature of GSK, therefore these provisions could adversely affect GSK); 2001 STATISTICAL YEARBOOK, supra note 6 (providing statistics on numbers of visitors to United States).

\textsuperscript{185} See generally Berman, supra note 184 at 935 (indicating need for new approach to immigration with respect to the EU); Hader & Syfert, supra note 5 (discussing immigration status changes as result of business consolidations); Hiroshi Motomura, Federalism, International Human Rights, and Immigration Exceptionalism, 70 U. COLO. L. REV. 1361 (1999) (examining theories of immigration law).

\textsuperscript{186} See 22 C.F.R. 41.51 (c) (delineating requirements that are needed to obtain a treaty trader visa). See also GORDON, supra note 11, § 17.03[b] (listing countries U.S. has negotiated bilateral treaties with); IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK: A COMPREHENSIVE OUTLINE AND REFERENCE TOOL 404-5 (7th ed. 2000) (explaining corporate nationality requirement).


\textsuperscript{188} See Matter of N –S –, 7 I & N Dec. at 428 (BIA 1957) (indicating that since at least 1949 the Department of State and the Immigration and Naturalization service have agreed that place of incorporation is irrelevant in making the determination); R. PATRICK MURPHY, ET AL., IMMIGRATION & NATIONALITY LAW HANDBOOK, 132 (1996) (stating “The country of incorporation is irrelevant to nationality requirements for E visa purposes).
change in statute that the Department of State regulation declaring this as the nationality of a company would withstand judicial scrutiny.\textsuperscript{189} Even in the absence of judicial determination that the regulations are inconsistent with the statute, it could still present potential immigration problems.\textsuperscript{190} Although the Bureau of Citizenship and Immigration Services (formerly the INS) does not adjudicate the E visa before it is issued by the Department of State, it is responsible for making a determination of whether the visa was properly issued upon the alien's request for admission into the United States.\textsuperscript{191} Although the former INS was usually deferential to the Department of States' determinations,\textsuperscript{192} it did deny admission to individuals attempting to gain entry under validly issued E visas.\textsuperscript{193} It is also unlikely that the minute differences between the place of incorporation and the Member State of registration would

\textit{also} FRAGOMEN, \textit{supra} note 19, at 3-5 (describing factors accounted for in determining corporate nationality).

\textsuperscript{189} See Hernandez v. Reno, 91 F.3d. 776, 780 (5th Cir. 1996) (stating that “[the INS] has no power to either ignore clear congressional intent or amend the legislation), \textit{see also} United States v. Larionoff, 431 U.S. 864, 873 (1977) (stating, that “in order [for regulations] to be valid they must be consistent with the statute under which they are promulgated.”). \textit{See generally} Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-46 (1984) (providing the framework for the review of regulations that interpret or implement a statute).

\textsuperscript{190} See Matter of Walsh & Pollard, 20 I & N Dec. at 60, 69 (BIA 1988) (illustrating potential problems arising in this area even though the court ultimately rejected the INS denial of visas); \textit{see also} GORDON, \textit{supra} note 11, § 17.03 [3][a] (indicating while Dep't of State endorses visa, its approval is irrelevant to meeting statutory requirements). \textit{See generally} FRAGOMEN, \textit{supra} note 19, at 3-5 (explaining nationality requirement under statute).

\textsuperscript{191} See FRAGOMEN, \textit{supra} note 19, at 3-5 (indicating this as a key source of uncertainty for an employee wishing to enter in the E-visa category even after obtaining the visa from the Dep't of State). \textit{See generally} Matter of Walsh & Pollard, 20 I & N Dec. 60 (BIA 1988) (demonstrating INS and Dept. of State both have authority in determining qualifications); \textit{INS and State Dept. Redefine Trade For E-2 Cases to Include Services}, INTERPRETER RELEASES, Jan. 9, 1989 (revealing authority vested in INS and Dep't of State).

\textsuperscript{192} See FRAGOMEN, \textit{supra} note 19, at 3-5 (noting the normal deference that the INS gives to Dep't of State determinations of eligibility); \textit{see also} Richard S. Goldstein, \textit{Treaty Visa Techniques}, 535 PLI/LIT 161, 170 (1995) (discussing balance of power between Dep't of State and INS). \textit{But see} Matter of Walsh & Pollard, 20 I & N Dec. 60 (BIA 1988) (arising from conflict between Dep't of State and INS).

\textsuperscript{193} See Matter of Walsh & Pollard, 20 I & N Dec. 60 (BIA 1988) (resolving the issue of the meaning of substantial investment, but illustrative of tension that may exist between the Dep't of State's role in issuing an E visa and the Bureau of Citizenship and Immigration Services' role in judging the admissibility of an alien); \textit{see also} Goldstein, \textit{supra} note 192, at 170 (PLI Corp. Practice Course Handbook Series 1995) (illustrating potential conflicts between INS and Dep't of State). \textit{But see} FRAGOMEN, \textit{supra} note 19, at 3-5 (positing that the INS normally gives deference Department of State determinations).
provide enough of a difference to allow the Department of State to distinguish the two for the purposes of justifying its position. Another major problem is that this solution would not be in conformity with the intent of the European Union in creating the SE. The benefits of this solution are the ease of nationality determinations and the availability of preexisting treaties required for treaty trader or treaty investor status.

B. Revision of Department of State Regulations Concerning Nationality

A concerted and coordinated revision of the current regulations is required to solve the complex problem that the SE presents to the current E visa category. Because the SE requires a revision of the nationality test and/or a revision in the treaty requirement, one potential solution is for the Department of State to declare that an SE is a national of all countries in which it performs a "significant portion" of its business. Two major problems confront this solution. The first is the statute which the regulations and administrative rules are meant to interpret.

194 See Dr. Gabriele Apfelbacher, The German Corporate Governance Code, in PLI's SECOND ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE at 610 (indicating small differences between corporation law in Germany and registration law under EU). See also Di Pietro, supra note 187, at 197 (utilizing both terms in similar contexts); The Internal Affairs Doctrine, supra note 187, at 1481-82 (implying slight differences in meaning of incorporation and registration).


196 See 22 C.F.R. 41.51 (c)(1) (discussing nationality requirement under federal law, met by 50% ownership); see also GORDON, supra note 11, § 17.03[3][b] (explaining nationality requirement for employer); FRAGOMEN, supra note 19, at 3-5 (investigating consequences of nationality requirement for employer).

197 I would suggest the use of the term 'significant' rather than 'substantial' given its almost consistent use in immigration law to indicate a majority. If the trade were significant, it would overcome the traditional problem of purely local trade and trade which bears only a minute relationship to the United States. It strikes the proper balance between the trades relationship between the country and the United States and the of a binary trade relationship which is antiquated in the modern globalization and multinational negotiation of trade.

198 See generally Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 121 n.6 (2002) (noting Chevron doctrine of deference does not apply to all situations); Nat'l Cable &
Because the statute requires nationality, it is unlikely that the regulations or rules would be in conformity with the statute and would thus be subject to judicial scrutiny and possible invalidation. The second problem is that the solution would not be in conformity with the intent of the SE regulations. The European Union did not envision a multinational company but a truly supranational company. This solution would need to be based on a grant of authority from the Congress.

C. Declaration of the European Union as a Nation for Immigration Purposes

Another solution, is for the Department of State to declare the European Union as a nationality and that the historical uniformity and reciprocity of trade and granting entry between the United States and Member States of the European Union qualifies it to take advantage of the E visa irrespective of the lack of a trade treaty. This would not be an unprecedented act. The


199 See Hernandez v. Reno, 91 F.3d. 776, 780 (5th Cir. 1996) (finding, "[the INS] has no power to either ignore clear congressional intent or amend the legislation); see also United States v. Larionoff, 431 U.S. 864, 873 (1977) (stating, "[f]or regulations, in order to be valid must be consistent with the statute under which they are promulgated."). See generally Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984) (providing the framework for the review of regulations that interpret or implement a statute).

200 See Blackburn, supra note 17, at 704 (remarking purpose of SE is to reduce problems associated with conducting business across borderlines); Douglas M. Branson, The Very Uncertain Prospect of "Global" Convergence in Corporate Governance, 34 CORNELL INT'L L.J. 321, 337 (2001) (noting Societas Europea has encountered difficulties because of its characteristics); Richard Waters, Towards a Single Europe 10; Hindrance to Open Market, FIN. TIMES (LONDON), Nov. 17, 1988 (noting purposes and criticisms of the Societas Europaea).

201 See Catherine Barnard & Simon Deakin, 'Negative' and 'Positive' Harmonization of Labor Law in the European Union, 8 COLUM. J. EUR. L. 389, 406 (2002) (labeling SE as "a free standing cross frontier European Company that could be established independently of existing national laws"); Blackburn, supra note 17, at 698 (arguing SE would be governed by European law as opposed to law of participating nations); Kellerhals & Truten, supra note 17, at 71 (mentioning SE was intended to establish a "pan-European" corporation law).

202 See Hader & Syfert, supra note 5, at 569 n.94 (discussing the treaty requirement between nations for the issuance of an E visa); William Z. Reich & Jill A. Apa, The Fundamentals of Canadian Immigration Under the North American Free Trade Agreement, 28 OHIO N.U.L. REV. 707, 724 (2002) (arguing the U.S. is moving towards free
Department of State has declared that Australia and Sweden as a state that can take advantage of the E visa category even in the absence of a formal trade agreement, but this grant was made pursuant to a change in immigration law in 1990.\textsuperscript{203} The grant of power was limited to these situations and did not make this provision available to other nations.\textsuperscript{204} Because of these differences, reliance on this provision is highly suspect and open to scrutiny by the courts.\textsuperscript{205} Although this may give the Department of State a basis for extending an E visa to the European Union it does not provide them with the power to declare the European Union a nation or quasi-nation for the purposes of the E visa category.\textsuperscript{206} Although the governmental action of the European Union and its overall structure make it seem like a nation, it has never been recognized by the United States government as one.\textsuperscript{207} The President could classify it as a trade with European Union); see also Steve Emmett, Business and Holiday in One; Who Wouldn’t Swap Our Winter for a New Working Life in the Sun?, INDEPENDENT (LONDON), Mar. 15, 1998, at 8 (noting that although doing business across borders in Europe has become more simplified, there are still many hindrances).

\textsuperscript{203} See 8 U.S.C. § 1101(a)(15)(E) (defining immigrant for purposes of the statute); see also Sun, supra note 41, at 518 n.30 (remarking Sweden and Australia were granted E visa benefits pursuant to the Immigration Act of 1990); Patrick, New E Treaty Trader/Investor Rule, supra note 53, at 3 (noting Australia and Sweden were granted E visa benefits without the creation of a treaty).

\textsuperscript{204} See Hill & Kerwin, supra note 68, 532 n.42 (mentioning Australia and Sweden as exceptions to requirement a treaty must exist to receive the benefits of E visas). See generally Shearn, supra note 59 at 18 (noting treaty requirement of E visas and its limitations); Wangerin, supra note 6, at 851 (remarking E visa require a treaty with the United States to be in force).


\textsuperscript{206} See generally Rain Levy Minns, Registry Systems for Foreign and Domestic Farmworkers in the United States: Theory v. Reality, 15 GEO. IMMIGR. L.J. 663, 702 n.249 (2001) (mentioning power of the Department of State in the process of obtaining an E visa); Sun, supra note 41, at 515 (stating role of the Department of State in immigration); Yost, supra note 205, at 225 (asserting power of the Department of State in immigration matters).

nation pursuant to an executive order, but it is unlikely that he will take such action.\textsuperscript{208}

\textbf{D. Presidential Action under Trade Promotion Authority}

A related solution is for President Bush to utilize his recently granted trade promotion authority to create a trade agreement between the European Union and the United States.\textsuperscript{209} Trade promotion authority, previously fast-track authority,\textsuperscript{210} would allow the President to negotiate treaties that the Congress would be able to approve or disapprove without the normal amendment process.\textsuperscript{211} In order for the agreement to be an effective solution to the problems confronting the SE, it must include at least three distinct provisions. First, the President would need to negotiate a provision that includes the formation of a qualifying trade treaty between the European Union and the United States.\textsuperscript{212}

\textit{Concordat: Principles to Facilitate the Resolution of International Insolvencies}, 70 AM. BANKR. L.J. 533, 539 (1996) (mentioning the European Union has created a market system without the confines of borders).


\textsuperscript{211} See \textit{Trade Act of 2002}, § 2105 (mandating Congress may not amend the agreement in committee or otherwise); see also Elizabeth Becker & Edmund L. Andrews, \textit{Performing a Free Trade Juggling Act, Offstage}, N.Y. TIMES, Feb. 8, 2003, at C1 (noting trade promotion authority does not permit Congress to amend the trade agreement); David R. Francis, \textit{Politics, War, Likely to Slow Trade Talk}, CHRISTIAN SCI. MONITOR, Feb. 24, 2003 at 17 (describing trade promotion authority).

\textsuperscript{212} See generally Edmund L. Andrews, \textit{Bush Scales Back Tariffs on Steel}, N.Y. TIMES, Aug. 23, 2002, at A1 (mentioning actions taken by President Bush have assisted trade relations with the European Union); Philip Crane & Charles Rangel, \textit{Unity Against Sanctions: Democrats and Republicans Must Work Together to Solve the Dispute over World Trade}, FIN. TIMES (LONDON), Sept. 16, 2002, at 23 (arguing U.S. and European
Second, it would need to stipulate that the European Union is a nation or a quasi-nation for the purposes of immigration.213 Finally, it would need to provide that all nationals of European Union Member States would be considered citizens of the European Union.214 Only by including all of these provisions would this be an effective tool to rectify the potential immigration problems confronting an SE.

It is unlikely that this trade promotion authority will be utilized to create a trade treaty between the United States and the European Union, because of both the limitations on the grant of authority and the other more pressing trade concerns of the Bush administration.215 The first major impediment to this solution is that the negotiation of this type of agreement is not clearly within the grant of authority because it would not seem to support equitable and fair trade,216 promote respect for core labor standard,217 promote the trade in services218 or any of the other

Union must work together to negotiate trade agreements); Joseph Nye, Europe is too Powerful to be Ignored, FIN. TIMES (LONDON), Mar. 11, 2003, at 19 (mentioning U.S and Europe must work together to develop free trade).


214 See Barbara Crutchfield George et al., U.S. Multinational Employers: Navigating Through the “Safe Harbor” Principles to Comply with the EU Data Privacy Directive, 38 AM. BUS. L.J. 735, 750 n.68 (2001) (referring to citizens of the European Union); Schwartz, supra note 213, at 2 (remarking people of Europe share common characteristics); Seyla Benhabib, In Search of Europe's Borders, DISSENT, Oct. 1, 2001, at 33, (stating institutional framework and not culture bind the citizens of the EU together).


216 See Trade Act of 2002, § 2102(a)(1) (stating purpose of the Act is “to obtain more open, equitable, and reciprocal market access”); see also Trade Scene: 2002's Suspenseful Trade Show, J. OF COM. (JoC Online), Jan. 14, 2002 (mentioning purpose of the Act is to promote free trade); Jeff Chappell, Industry Lauds Fast Track Bill, ELEC. NEWS, Dec. 17, 2001, at 4 (arguing idea behind the Act is to facilitate international trade).

217 See Trade Act of 2002, § 2102(b)(11) (describing U.S. standards for labor and environment); see also David Armstrong, Taking Down Trade Barriers; Congress in U.S., Chile are to Vote on a Deal, SAN FRANCISCO CHRON., Jan. 12, 2003, at G3 (discussing labor implications on trade authority); Harold Brubaker, Factory Workers Give Courses Mixed Reviews, CHI. TRIB., Oct. 30, 2002, at 3 (discussing impact on labor and employment).
negotiation objectives necessary to gain Congressional approval.\textsuperscript{219} Since the applicable negotiating constraints are primarily concerned with the removal of existing trade barriers and to ensure the uniformity of labor and environmental standards, it is unlikely that the negotiation of a treaty with some of our largest trading partners would fall within the negotiating objectives.\textsuperscript{220}

The other impediment facing the negotiation and approval of an agreement under the statute is the focus of President Bush’s trade expansion. The trade promotion authority is seen by the administration more as a tool to expand NAFTA into the Free Trade Area of the Americas, rather than to expand already established trade with Europe.\textsuperscript{221} Even if President Bush were interested in utilizing his authority to create a treaty with the European Union the negotiations with the European Union

\textsuperscript{218} See Trade Act of 2002, § 3802(b)(2) (explaining one of the objectives of the Act is to promote trade in services); see also Terese Carr, \textit{The Executive Trade Promotion Authority and International Environmental Review in the Twenty-First Century}, 25 \textit{Hous. J. Int'l L.} 141, 151 (2002) (noting that modern international trade agreements include as an objective to promote trade in services); Sean D. Murphy ed., \textit{Contemporary Practice of the United States Relating to International Law,} 96 \textit{Am. J. Int'l L.} 956, 980 (2002) (describing the objectives of the Bipartisan Trade Promotion Authority Act as including trade in services).

\textsuperscript{219} See 19 \textit{U.S.C.} § 3802 (a)-(b) (indicating that the agreement must meet one of the objectives specifically outlined in § 3802 (a) or (b)). See generally Jean Heilmann Grier et al., \textit{International Legal Developments in Review: 2001}, 36 \textit{Int'l L.} 361, 370-71 (2002) (explaining the role Congress will play in accepting treaties which are developed by the President); Murphy, \textit{supra} note 218, at 980 (describing Congress’ authority under this Act to accept or reject any treaties proposed by the President).

\textsuperscript{220} Since negotiations with the European Union are unlikely to fit within one of the enumerated reasons for negotiation elucidated in 19 \textit{U.S.C.} § 3802 (a)-(b) it is unlikely that negotiations would meet this statutory requirement. For elucidation of the specific provisions restricting the exercise of the power see Hal Shapiro & Lael Brainard, \textit{Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More Than a Name Change}, 35 \textit{Geo. Wash. Int'l L. Rev.} 1, (2003) and Charles W. Smitherman III, \textit{The New Transatlantic Marketplace: A Contemporary Analysis of United States - European Union Trade Relations and Possibilities for the Future}, 12 \textit{Minn. J. Global Trade} 251 (2003).

\textsuperscript{221} See \textit{Who Cares About Trade?}, \textit{Wash. Post}, July 21, 2002, at B06 (noting that president Bush’s focus is on expanding trade in South America with the Free Trade Area of the America Act); Elizabeth Bumiller, \textit{Bush Signs Trade Bill, Restoring Broad Presidential Authority}, \textit{N.Y. Times}, Aug. 7, 2001, at A5 (stating that President Bush specifically cited the Free Trade Area of the Americas as on of the initial areas of negotiation in which he would use the new trade promotion authority); Glenn Hubbard, \textit{How Latin America Can Grow Again: The Region’s Governments Need to Follow Free Market Principles Rather than Rely on International Assistance}, \textit{Fin. Times}, Aug. 22, 2002, at 21 (indicating that the President plans on implementing the Free Trade Area of the Americas by Jan. 2005).
would be exceedingly complex and likely to provide the United States with little benefit. Because of this lack of substantial economic benefit, it is unlikely that the United States would pursue such a route.222

E. Congressional Amendment of the E-visa Category

The most direct solution to the problem is the Congressional amendment to the current statute governing the E visa category.223 The amendment should take one of two tracks. One would be to remove the language requiring the determination of the national ownership of a company.224 The revised language would make an individual eligible to obtain an E visa if he or she was “an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state.”225 This amendment would do little to modify the original intention of the inclusion of the nationality requirement in the 1932 Act.226 The amendment would still require that the trade be international in scope and substantial in nature, but would only


223 Congressional action would provide the most direct solution, because it possesses the necessary powers to change the underlying statute that governs this category.

224 See generally Hader & Syfert, supra note 5, at 568-69 (explaining that the people who apply for E-visas must have the same nationality as the owners of the U.S. company); Hagar, supra note 39, at 206-07 (describing the nationality requirement for employees who wish to obtain E-visas to work in the United States); Halliday, supra note 18, at 69 (noting the nationality requirement for obtaining E-visas is that the employees have the same nationality as the company's shareholders).


226 See generally, GORDON, supra note 11, § 17.02(4) (describing the purpose of the amendments in the 1932 Act); Hader & Syfert, supra note 5, at 568-69 (clarifying the nationality requirement in obtaining a E visa, added into the 1932 Act); Lairold M. Street, Helping Japanese Firms Cope with Employee Benefits and U.S. Labor and Employment Laws, 35 HOW. L.J. 381, 394 n.75 (explaining the nationality requirement added by the 1932 Act).
remove the nationality requirement.\textsuperscript{227} Although this solution presents the potential to rectify some of the problems made by an the myopic solution to a troublesome problem in the 1924 Act, it is unlikely that the Congress is willing to loosen the corporate immigration laws at a time of heightened national security concerns and in a slumping economy.\textsuperscript{228}

A better alternative would reflect the increasing role that the World Trade Organization (WTO) plays in regulating and facilitating trade between its members. In order to make the provisions of the E visa category reflect the multilateral\textsuperscript{229} or plurilateral\textsuperscript{230} nature of contemporary trade negotiations, Congress could allow WTO membership to govern eligibility for the E visa category.\textsuperscript{231} The amended statute would modify the

\textsuperscript{227} See generally, Mae M. Cheng, Immigration Q & A: Marriage Changes the Picture of the Tourist Visa, NEWSDAY (N.Y.), Apr. 21, 2002, at G34 (explaining that the E-visa also requires that the person who wishes to obtain this visa must be from a country who has a certain treaty with the United States); Joe Serge, There Are 2 New Ways to Get Visa for U.S., TORONTO STAR, Feb. 17, 1990, at K5 (describing the criteria for obtaining an E-visa to include that the applicant have substantial investments in the U.S.); Robert W. Yarra, Visas for Foreign Visitors, PITTS. POST-GAZETTE, Aug. 13, 1998, at E-1 (noting that the E-visa “requires substantial investment in a U.S. business.”).


\textsuperscript{230} See Demaret, supra note 229, at 134-135 (indicating that plurilateral agreements are only binding to those parties who choose to accept them); David Palmeter & Petros C. Mavroidis, The WTO Legal System: Sources of Law, 92 AM. J. INT'L L. 398, 399-400 (1998) (noting that the WTO has also enacted plurilateral agreements amongst its members); see also Eric M. Burt, Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization, 12 AM. U. J. INT'L L. & POLY 1015, 1057 (1997) (describing the benefits and drawbacks of plurilateral agreements within the WTO).

\textsuperscript{231} But see Sun, supra note 41, at 534-35 (explaining the stringent requirements imposed by the INS for E-visa applicants); Wangerin, supra note 6, at 851-53 (describing
language to state that an individual would be eligible for entry into the United States "to carry on trade which occurs between the United States and any member or members of the World Trade Organization and the individual is a national of any member in which significant portion of trade is being conducted." In order to protect the United States interests that may not be shared by the WTO an exception to this general rule could be based on any national security concern. This revised definition would ease the antiquated restrictions that reflect a 19th and early 20th century notion of trade negotiations.

This solution would present three basic advantages to the United States. First, it would decrease the necessity of the current eligibility requirements for obtaining an E-visa); Seth Mydans, Foreign Millionaires in No Rush to Apply for Visas, U.S. Finds, N.Y. TIMES (L.A.), Dec. 22, 1991, at 18 (noting the pros and cons in obtaining an E-visa, under current law).

The proposed modification would keep the intent of the 1934 modifications to the category intact but would solve many of its unforeseen shortcomings. It would enable for one company to be considered a national of several countries provided that at least a significant portion of the trade occurred between that country and the United States. These changes would also allow for the transfer for nationals from many additional related companies and not those merely from the home office. These changes would ensure that the category retain its validity but does not open the floodgates of nonimmigrants wishing to use this category.


negotiating complex and complicated trade treaties on a bilateral basis.\textsuperscript{235} The formation of bilateral treaties was appropriate in the absence of an international body governing international trade.\textsuperscript{236} In the presence of such a body, it is exceedingly more efficient to utilize the WTO to negotiate rules governing international trade with its 144 members, rather than negotiating separate bilateral agreements with each member.\textsuperscript{237} Since the inception of the system that became embodied in the WTO, the focus of trade negotiations has been through an international trading body.\textsuperscript{238} Although multilateral negotiations do not allow the United States as much bargaining power as bilateral negotiations, its important presence in the WTO and the

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\textsuperscript{237} See generally Robert Collier, \textit{Strong Bay Presence at Earth Summit; Challenge to U.S. Contingent Even Greater than 10 years ago}, San. Fran. Chron., Aug. 24, 2002, at A6 (commenting on a trend to allow the WTO more authority, its member nations at a recent WTO summit decided to allow WTO decide its jurisdictional disputes); Stanley Lubman, \textit{A Case of Courtroom Complexity: Commercial Disputes: Legal Institutions are not Expected to Solve their Myriad Problems Any Time Soon}, Fin. Times (London), Oct. 8, 2001, at 6 (noting the many treaties that WTO has established which bind its members, including dispute resolution); Mike Moore, \textit{WTO's Dispute Settlement System Comes of Age}, Bus. Times (Malay.), July 10, 2000, at 12 (describing the WTO's dispute settlement system as forum in which WTO members resolve disputes based on WTO obligations).

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admission system allow it to exercise sufficient control.\textsuperscript{239}

The second major benefit that this solution provides is to embody the more flexible trade that is actually occurring in the international market.\textsuperscript{240} When the treaty-trader category was first enacted, trade was limited in scope, slow paced and nationally controlled.\textsuperscript{241} Current international trade is increasingly swift and increasingly governed by international laws or international organizations and not the laws of any one individual country.\textsuperscript{242} To attach the term treaty-trader to such an

\textsuperscript{239} The admission process, formally called the accession process, is governed by two basic steps. The first is the bilateral negotiations between the country seeking accession and any "contracting party." These bilateral negotiations are a process of obtaining special concessions that are required to obtain entry into the WTO. See Raj Bhala, \textit{Enter the Dragon: An Essay on China's WTO Accession Saga}, 15 AM. U. INT'L L. REV. 1469, 1471 (2000). The second step of the process is the harmonization of the individual bilateral agreements into a "protocol of accession." \textit{See id.} Once the terms have been harmonized and negotiations concluded, the country seeking admission is formally admitted into the WTO through a vote of the current members. \textit{See id.} Although, the United States uses the considerable bargaining power it has within the WTO to gain concessions from other countries. \textit{See Thomas J. Duesterberg, Zhu Rongji, Political Magician, WASHINGTON QUATERLY, Autumn 1999, at 15. Also, the United States is hesitant to become involved in any outside negotiating talk because of fears that they would reduce their bargaining power within the WTO. \textit{See Raymide Colitt, Free Trade Talks Risk Stalemate, Warns Brazil, FIN. TIMES (Japan), Feb. 13, 2003, at 5.}

\textsuperscript{240} \textit{See generally David Palmeter, The Role of International Law in the Twenty-First Century International Trade Law in the Twenty-First Century, 18 FORDHAM INT'L L.J. 1653, 1654 (1995) (commenting that flexible trade is the trend of international trade and the more dominated by the powerful); Douglas Armstrong, First Bank Eases Risks of Exporting Forms Can Turn Receivables into Quick Cash, MILWAUKEE J. SENTINEL, Dec. 18, 1995, at 6 (noting that flexible trade increases competitiveness in the international market); Francis X. Clines, Upheaval in the East: Trade Bloc; Soviets and Partners Say Comecon Need Repair, N.Y. TIMES, Jan. 9, 1990, at A13 (announcing that flexible trade is focused on the free-trade movement in the international market).}

\textsuperscript{241} \textit{See GORDON, supra note 11, § 17.02 (examining the origins and status of trade leading to the treaty-trader provision). \textit{See generally} Sun, supra note 41, at 513 (noting favored status of treaty merchants in 1880's); Jan C. Ting, "Other Than a Chinaman": How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigrants, 4 TEMP. POL. & CIV. RTS. L. REV. 301, 302 (1995) (discussing conditions surrounding the Chinese Exclusion Act which contained first treaty-trader provision).}

\textsuperscript{242} \textit{See Daniel Carroll, Havana Club Holding, S.A. v. Galleon, S.A.: District Court Orders Up "One Havana Club Rum and Whatever Congress is Having", 8 TUL. J. INT'L & COMP. L. 507, 509 (2000) (noting many countries have joined into trade agreements and trade alliances to encourage international trade). \textit{See generally} Chris Kraul & Evelyn Iritani, U.S. Targets Brazil, Japan in Steel Dumping Ruling; Trade: Commerce Secretary Says the Findings, Which Could Lead to Tariffs, Provide 'Much-Needed Relief' to American Steelmakers, L.A. TIMES, Feb. 12, 1999, at C1 (discussing WTO as the preferred U.S. tool to protect industry); Eric Schmitt, Albright Defends Policies on China as G.O.P. Attacks, N.Y. TIMES, Mar. 11, 1999, at A1 (arguing because WTO governs international trade countries outside WTO have difficultly negotiating trade agreements).}
arcane idea of trade is to virtually confine the category to an outmoded system of trade and trade negotiations.\textsuperscript{243}

The third major benefit is that it will allow for greater ease of administration of the visa category.\textsuperscript{244} The easy of administration would come from two converging effects. The first is the ease of determining the existence of an applicable treaty.\textsuperscript{245} In order to establish that there is a qualifying treaty, the Consulate would merely need to consult a list of members of the WTO who have signed the GATT\textsuperscript{246} or the TRIMS agreement\textsuperscript{247} or could otherwise qualify under a bilateral agreement.\textsuperscript{248} This solution would not require the interpretation of separate agreements to

\textsuperscript{243} See 8 U.S.C. § 1101(E)(ii) (defining treaty-trader); see also Ting, supra note 242, at 302 (discussing system of trade when treaty-trader exclusion was established); Kristen Weldon, Piercing the Silence or Lulling You to Sleep: The Sound of Child Labor, 7 WID. L. SYMP. J. 227, 237 (2001) (noting evolution of world trade).


\textsuperscript{246} Contracting parties to GATT would allow an individual to enter in E-1 status because it focuses on trade in goods and the extension to trade in services under the GATS agreement. See generally GATT 1994, supra note 245.

\textsuperscript{247} Contracting parties to the TRIM would allow an individual to enter under the E-2 visa category because the major focus of the provisions is investment. Although the agreement lacks many substantial details, it does provide the required extension of most-favored-nations status and national treatment that is indicative of most current BITS agreements. See generally TRIM, supra note 245.

see if they qualify as nationals of a country for E visa status. The second advantage would be to solve future problems when individual countries enter into custom union or other compacts that may allow for supranational corporate formations. It would solve the imminent problem of the SE because the European Union is a member of the WTO as are all of its Member States.

F. Utilization of Other Visa Categories

Even in the absence of a potential solution, there are possible alternatives. Although it is not a perfect solution and does not solve the problem of individuals already in the United States in E

249 Although the language among treaties signed during the same time period often contain the same standard language, differences in treaties arising from different period or unique negotiations can present problems in determining the creation of E visa eligibility. The courts may not always follow the department of States recognition of qualifications when performing a review of eligibility. For example in Matter of Inguanti, the Board of Immigration Appeals indicated that, although their existed a treaty with Italy that was designated in the FAM as qualifying Italian citizens for E-2 visas, it did not meet the requirements to qualify the alien for treaty investor status. See Matter of Inguanti, 11 I & N Dec. at 393. The Ninth Circuit has noted that “courts must interpret treaties for themselves.” Kun Young Kim v. INS, 586 F.2d 713, 714 (9th Cir. 1978). However, the U.S. Supreme Court has stressed that the meaning given treaties “by the departments of government particularly charged with their negotiation and enforcement is given great weight.” Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

250 Customs unions are an agreement whereby countries enter into an agreement to remove trade barriers amongst its members and agree upon regulation of trade with third-party states. See R. FOLSOM & M. CLOES, EUROPEAN UNION BUSINESS LAW HANDBOOK 10 (1995); see also EU – TURKEY CUSTOMS UNION – QUESTIONS AND ANSWERS available at http://www.mfa.gov.tr/grupa/ad/adc/gumruk.htm (last visited Sept. 1, 2003) (discussing the EU-Turkey customs union) and THE CUSTOMS POLICY OF THE EUROPEAN UNION available at http://europa.eu.int/commltaxation-customs/publications/customs/customsbrochure.html (providing information on the European customs union).


status, an SE would still be eligible to transfer employees using the L visa category. Although this is a viable alternative, the E visa offers several benefits that the L visa does not. First, the E visa confers a more expedient means of gaining entrance into the United States. The E visa is issued directly by a consulate and once issued provides the employee immediate ability to enter the United States. This application process can take as little as two weeks at some consulates. The L visa is

253 The E visa presents a unique problem in the area of mergers and acquisitions because any change in corporate structure requires that the company obtain pre-approval from either the U.S. Consulate abroad or the INS. See 8 C.F.R. § 214.2(e)(8)(C)(iii). In order to rectify the problem that this would create to individuals already within the United States, the foreign company would need to submit an Application to Change of Nonimmigrant Status. See Hader & Syfert, supra note 5, at 565. An E class visa holder must waive all privileges under nonimmigrant visa to apply for immigrant visa. See FAM, supra note 47, § 40.203.

254 See generally 8 U.S.C. § 1101(a)(15)(L) (providing the statutory provisions for the L visa category); Wangerin, supra note 6, at 856 (discussing the requirements of the L visa category); Hader & Syfert, supra note 5, at 579 (pointing to main areas of concern for L visa classified persons).


256 The presumption of expedience is based on the difference in processing time. This presumption is only relevant in the absence of a company utilizing a blanket L to transfer its employees. See MEMORANDUM FROM THOMAS COOK, ACTING ASSISTANT COMMISSIONER FOR ADJUDICATIONS, TO ALL REGIONAL DIRECTORS (Feb. 13, 2001) available at http://www.immigration.gov/graphics/lawsregs/handbook/l1blanke.pdf [hereinafter MEMORANDUM FROM THOMAS COOK] (last visited Sept. 1, 2003). The blanket L allows for the company to certify all of its corporate relationships, and requires the employee to utilize this blanket petition to apply directly at a United States consulate or embassy. See also GORDON, supra note 11, § 24.01. Obtaining an L visa based on blanket petition requires essentially the same processing time as an E visa. See generally FRAGOMEN, supra note 19, § 4.

257 See FRAGOMEN, supra note 19, § 3 (indicating the relative simple and atypical procedure for obtaining an E-visa directly from the U.S. embassy or consulate); Reich & Apa, supra note 202, at 716-17 (discussing consulate discretion in reviewing L visa petitions); GORDON, supra note 11, § 24.01 (noting L petition must be issued at a U.S. Consular Office).

258 According to the Department of State information for the Berlin and Paris Embassies, the approximate processing time can be as little as two to three weeks. See THE US DIPLOMATIC MISSION TO GERMANY, VISA INFORMATION available at http://www.usembassy.de/travel/index.htm; US EMBASSY PARIS HOMEPAGE, HOW LONG WILL IT TAKE TO GET MY VISA?, available at http://www.amb-usa.fr/consult/niv_del.htm. The processing times vary drastically from consulate to consulate and even from day-to-day. Because of terrorism concerns after September 11, 2001 the processing times have become longer and more unpredictable. See DEPARTMENT OF STATE BUREAU OF CONSULAR AFFAIRS, NOTICE ON CURRENT VISA PROCESSING SITUATION (Nov. 1, 2002) available at http://travel.state.gov/specialnotice.html.
processed in a more familiar but circuitous route.\textsuperscript{259} The employer must first file a Nonimmigrant Visa Application with the Bureau of Citizenship and Immigration Services in the United States.\textsuperscript{260} This process is governed by a statutory scheme that gives the Bureau of Citizenship and Immigration Services 30 days in which to make a decision on such applications.\textsuperscript{261} This limitation provides some efficiency in processing, but the requirement is not always followed.\textsuperscript{262} The employer is also able to expedite the application by paying a premium-processing fee that is intended to reduce the processing time to 15 days.\textsuperscript{263} Utilizing premium processing, an approved application will be received by the applicant in approximately three weeks.\textsuperscript{264} Even after the employer obtains the approval notice, the employee must submit a visa application to the consulate in order to obtain a visa.\textsuperscript{265} Realistically, the process for obtaining an L visa

\textsuperscript{259} See Memorandum from Thomas Cook, supra note 266 (discussing the petition process of L-1 nonimmigrant aliens). See generally Gordon, supra note 11, § 24.01 (providing purpose and basic requirements of L visa classification); Reich & Apa, supra note 202, at 716-17 (outlining the L visa process for Canadian applicants).

\textsuperscript{260} See Gordon, supra note 11, § 24.08 (stating eligibility is determined upon petition of the importing employer); Fragomen, supra note 19, at 4-18 (noting procedures for L visa classification); Fragomen, supra note 19, § 5:18.2 (discussing employer must petition INS to classify nonimmigrant temporary worker).

\textsuperscript{261} See 8 C.F.R. § 214.2(l)(7)(i) (providing statutory definition); Gordon, supra note 23, § 24.08(3)(a) (noting "service is obligated by statute to adjudicate a completed L-1 petition within 30 days of filing"); Amy McCallen, Note, Non-Immigration Visa Fraud: Proposals to End the Misuse of the L Visa by Transnational Criminal Organizations as a Method of Illegal Immigration, 32 Vand. J. Transnat'l L. 237, 247 (1999) (stating INS must decide an L visa petition under normal conditions in 30 days).

\textsuperscript{262} See Employment Coordinator, ¶ EP-34, 825.4 (West Group 2003) (stating that INS has 30 days to act on a L visa application); McCallen, supra note 261, at 246-47 (providing insight into L visa application process). See generally Margaret David & Mitchell L. Wexler, Recent Immigration Legislation, Orange County Law., Jan. 2000, at 6 (commenting on the legislation approving 30-day rule).

\textsuperscript{263} See 8 U.S.C. § 1356(u) (authorizing the Immigration and Naturalization Service to institute the program of expediting approved applications including the applications for the L visa category); Hill & Kerwin, supra note 68, at 536 (discussing the implementation of the premium processing service); Laura L. Lichter, Developments in Immigration-Related Employment Issues, Wyo. Law., June 2002, at 18 (noting that the fee for premium processing is 1,000 dollars).

\textsuperscript{264} See Lichter, supra note 263, at 19 (noting that premium processing "buy[s] a two week response"); Austin T. Fragomen, Jr. & Howard W. Gordon, Managing Change: Recent Legislation and Current Immigration Topics, 1340 Pl/Corp 173, 184 (2002) (stating that premium processing cases must be completed within 15 days); Hill & Kerwin, supra note 68, at 536 (referring to the program as one "that has resulted in quicker processing of employment-based ... visa petitions").

\textsuperscript{265} See Fragomen, supra note 19, § 4-18; Hader & Syfert, supra note 5, at 564-65 (noting that once an employee is granted an approval, he must apply for a visa in a
requires 30 to 45 days more than an E visa. This may not always be a drastic increase in time, but it may be a critical difference when dealing with the transfer of employees to fill critical vacancies or to complete or manage critical projects.

Second, even if the processing time is not a determinative factor, the duration of employment with the company may be an important factor militating against the use of the L visa category. In order for an employee to take advantage of the L visa category, the employee must have been employed by the corporation or a related entity for at least one year out of the immediately preceding three years. In comparison, E visas have no requirement concerning length of service with the company before transfer. This disparity in the length of service may become an important factor when deciding whether or not an executive or manager should utilize an E visa or an L visa to
obtain entry into the United States.\textsuperscript{271} If the executive is a new hire from an unrelated company, the option of obtaining an L visa for him or her is foreclosed, and the E visa offers the best alternative.\textsuperscript{272}

Third, even if the processing time and length of employment are not major factors in the transfer of employees, the ease of transferring an employee to open a new office is easier in the E-2 visa category.\textsuperscript{273} The use of an L visa to open a new office is only granted on proof of the feasibility of the endeavor and then only for a conditional one year period.\textsuperscript{274} The feasibility requires that the company provide a detailed business plan that shows the economic viability of the company.\textsuperscript{275} The Bureau of Citizenship and Immigration Services heavily scrutinizes these applications.\textsuperscript{276} In comparison, an individual or company wishing to transfer an individual in the E-2 visa category needs only to show that there is a substantial investment that is dedicated to a

\textsuperscript{271} See FRAGOMEN, supra note 19, § 4-17 (noting the factors that are decisive of which visa to obtain); Angelo A. Paparelli et al., Consular Processing of Nonimmigrant Visas: a Roundtable Discussion, 90-09 IMMIGR. BRIEFINGS 1 (1990) (providing factors to consider in selecting a visa); Street, supra note 226, at 395 (noting differences between two visas).

\textsuperscript{272} It is of course not the only alternative, because most executives would be able to obtain an H-1B visa; see Lowell & Martin, supra note 205, at 651 (establishing that “the L visa [is] for intra-company transfers of executives and managers [and] the E visa [is] for investors and traders who enter via bilateral treaty arrangements”); Trucios-Haynes, supra note 268, at 986-87 (stating that L visa is for intracompany transferees).


\textsuperscript{274} See 8 U.S.C. § 1101(a)(15)(L) (describing the conditions of getting a visa); Charles M. Miller, Immigration Planning for Cross-Border Mergers and Acquisition, 27 SAN DIEGO L. REV. 831, 841 (1990) (stating that “If the L-1 intracompany transferee is entering the United States to start up anew office, the initial admission will be limited to one year”); Wangerin, supra note 6, at 856 (establishing the criteria of getting an L visa).

\textsuperscript{275} See FRAGOMEN, supra note 19, § 4-17 (discussing the requirement of a business plan). See generally L-1 "New Office" Clarification, BENDER'S IMMIGR. BULL., Mar. 1, 1999, at 204 (discussing the viability requirement); Susan K. Wehrer & Angelo A. Paparelli, From the Beginning: Agile Immigration Advocacy for New Businesses, 1340 PLI/CORP 59 (2002) (presenting the various issues in immigration law).

\textsuperscript{276} See FRAGOMEN, supra note 19, § 4-18 (noting the review process). See generally Steven S. Mukamal & Martin L. Rothenstein, The "L" Visa Category, 521 PLI/LIT 101 (1995) (discussing issues relating to the L visa); Wehrer & Paparelli, supra note 275 (noting the level of scrutiny).
project that will create substantial trade between the United States and the foreign country.\footnote{See FRAGOMEN, supra note 19, § 3-17; Michael Maggio et al., supra note 3, at 899-900 (stating that substantial investment is one of the requirements for E visa); Sun, supra note 41, at 539-40 (listing INS as the source of substantial investment requirement); Hedayat Tahbaz, Visas: An Analysis of the Legislative History and Proposed Governing Regulations, 3 U. MIAMI Y.B. INT'L L. 151, 168 (1995) (tracing the substantial investment).}

Fourth, the E visa allows for greater duration of stay in the United States without obtaining permanent residence.\footnote{See Kim Francis A. McLoughlin, Jr. et al., Guidelines Letters: Developments in the Executive Branch, 8 GEO. IMMIGR. L.J. 104, 104 (1994) (noting that "aliens granted E classification have been able to receive extensions of stay indefinitely"); Motomura, supra note 185, at 1387 (suggesting that E visa holders may have longer stays). See generally Angelo A. Paparelli & Mona D. Patel, The Immigration Act of 1990: Death Knell for the H-1B?, 25 INT'L LAW. 995, 1017 (1991) (discussing E visa benefits).} The E visa theoretically allows for an indefinite stay in the United States as long as the E visa holder can demonstrate to the satisfaction of the Bureau of Citizenship and Immigration Services that he or she intends to leave the United States.\footnote{See 8 C.F.R. § 214.2 (e) (5) (requiring an intention to depart); see also IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK: A COMPREHENSIVE OUTLINE AND REFERENCE TOOL (7th ed. 2000) (referring to the satisfaction requirements). See generally Gabrielle M. Buckley, Immigration and Nationality, 32 INT'L LAW. 471, 485 (1998) (discussing E visa regulations).} The L visa offers an employee only seven years in the United States without obtaining permanent residence.\footnote{See 8 U.S.C. § 1101(a)(15)(L) (outlining the requirements for a visa); Austin T. FRAGOMEN, An Overview of the Immigration System, 500 PLI/LIT 9, 25 (1994) (stating that the maximum stay for L visa employees is seven years); Thomas E. Moseley, Immigration Rulemaking under the APA, 414 PLI/LIT 195, appendix (1991) (providing that an employee with L visa may not be readmitted into the United States after a seven-year period).} This may not be a major concern unless the individual wishes to stay in the United States for an extended period, and the employer does not want to go through the time or expense of obtaining permanent residence for the employee.\footnote{See generally Bowdre, supra note 268, at 238 (stating that employers have to terminate employment at the expiration of the visa); McCallen, supra note 261, at 246-50 (discussing the strict L visa requirements and the possibility of permanent stay); Wangerin, supra note 6, at 856 (stating that aliens must have the intent of temporary stay).}

**CONCLUSION**

The SE presents a unique problem for the current incarnation of the E visa category. In this seemingly intractable problem, it
is the E visa that must yield and transform its arcane provisions into a system that accommodates the current and future trends in international trade. It must shed the confines of its outmoded, historic basis and metamorphose itself into a flexible and relevant visa category. The category must shed its contortionist persona and be reborn in the new millennia if it is to deal directly with the problem confronting it in the form of the SE and to be equipped to deal with new corporate forms in the future.

Although the SE confronts it with its most immediate problem, the solution must not be myopic. The real solution to the problems confronting the E visa category lies in the future of international trade – the WTO. By utilizing current and future structures to implement trade policies, the E visa category will ensure its continued relevance in the area of corporate immigration. If it does not adapt itself in this manner, it will become a visa category that fades from memory from lack of use.