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DO WE HAVE A START-UP VISA FOR ENTREPRENEURS EVEN WHEN CONGRESS HAS NOT LIFTED A FINGER?

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The US economy remains sluggish. The joblessness rate is still much too high. Even after the debt ceiling crisis was averted at the last minute, the compromise did not generate any excitement or renewed optimism. Indeed, the Dow Jones industrial average plunged more than 500 points on August 4, 2011 on fears that the US may enter into another recession.

We need something new that would give us cause for hope. How about an immigration stimulus?

On August 2, 2011, the Department of Homeland Security Secretary Napolitano Secretary Napolitano and USCIS Director Mayorkas made dramatic announcements advising that foreign entrepreneurs could take advantage of the existing non-immigrant and immigrant visa system to gain status and permanent residency. According to the DHS press release, these administrative tweaks within the existing legal framework would "fuel the nation's economy and stimulate investment by attracting foreign entrepreneurial talent of exceptional ability." Director Mayorkas wrote a blog acknowledging that entrepreneurs and skilled workers would "fuel our nation's economy by creating jobs, and promoting new technologies and ideas."

All this has happened without Congress lifting a finger. In fact, even the DHS has not done much. It has clarified the true meaning of the provisions in the Immigration and Nationality Act, which Congress itself enacted, which it had previously distorted. For example, in its prior policy memo authored by Donald Neufeld on H-1B employment relating to third party sites, the USCIS indicated that to qualify as an H-1B worker, the petitioning employer must demonstrate an employer-employee relationship. Under such circumstances, it would be practically impossible for an owner of a company to be sponsored for an H-1B

if it could not demonstrate that the entity could control the employment, despite administrative decisions upholding the separate existence of the corporate entity. In the latest H-1B Question and Answers, the USCIS appears to still hold the line about the need to demonstrate an employer-employee relationship, but has conceded that this can nevertheless be demonstrated even when the owner of the company is being sponsored on an H-1B visa, so long as there is a right of control by the petitioner over the employment of the beneficiary. According to the USCIS Q&A:

For example, if the petitioner provides evidence that there is a separate Board of Directors which has the ability to hire, fire, pay, supervise or otherwise control the beneficiary, the petitioner may be able to establish an employer-employee relationship with the beneficiary.

This is indeed a welcome clarification, and is something that we also advocated in a prior article on our website, *See* Cora-Ann Pestaina, USCIS GRAPPLING WITH THE RIGHT OF A CORPORATION TO PETITION FOR ITS OWNER FOR AN H-1B VISA:

Also, the chance of an approval is greater if others are also involved in the management of the entity. Petitioners must endeavor to establish the power to make final decisions and to terminate the beneficiary's employment. For example, the employer-employee relationship might be satisfactorily illustrated where petitioner's bylaws clearly dictate how the corporation will be managed. Petitioner may be able to show, through its bylaws, that its business and property will be managed by a Board of Directors and that a majority vote of this Board will govern the employment, compensation and discharge of all employees of the corporation. A Board of no fewer than three Directors, including the beneficiary, would mean that the majority vote belonged to Directors other than the beneficiary and essentially, that petitioner held the power to make decisions for the company and to terminate the beneficiary's employment. As a result, the employer-employee relationship is less likely to be questioned.

We hope that this policy announcement becomes a reality and that the officers in the field faithfully follow the directives. Vivek Wadhwa, noted scholar on entrepreneurship, has stated in his recent column in the Washington Post, "We could easily see thousands of start-ups generating tens of thousands of jobs in the next couple of years if these changes are enacted in the spirit that they were intended." Indeed, unlike the legislative proposal for the Start-Up Visa

(which has not made much progress in Congress), or the more onerous EB-5 Investor category that exists presently, there is no minimum investment requirement or creating a minimum number of jobs within a certain time frame. The petitioner, however, will still need to demonstrate that it will be employing the beneficiary in a specialty occupation, which is a position that requires the minimum of a bachelor's degree in a specialized field, and that the entity will be able to provide work for the beneficiary in this specialty for the duration of the H-1B visa.

The H-1B visa has a six year limit. What happens to this entrepreneur after six years? The USCIS has clarified other existing provisions to encourage entrepreneurs. to apply for the green card. Another set of Question and Answers on the Employment-based Second Preference (EB-2) suggests that an entrepreneur can be sponsored under this immigrant visa category, which generally requires a labor certification, but can seek an exemption of the labor certification requirement through a "national interest waiver." In addition, the beneficiary must be able to demonstrate an advanced degree (or its equivalent - bachelor's degree + 5 years of post-baccalaureate experience) or exceptional ability. This too is nothing new. The national interest waiver was enacted by Congress in 1990, and exists under INA §203(b)(2)(B), except that it had become impossibly hard to obtain under *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Comm. 1998) (NYSDOT), which set forth a three-prong test.

With respect to the first two criteria under NYSDOT, the petitioner must show that he or she will be employed "in an area of substantial intrinsic merit" and that the "proposed benefit will be national in scope." Interesting, until this new policy, it was always difficult for an entrepreneur to show that localized employment through his or her enterprise would be national in scope. This concern has now been put to rest in the EB-2 Q&A:

For example, the entrepreneur might be able to demonstrate that the jobs his or her business enterprise will create in a discrete locality will also create (or "spin off") related jobs in other parts of the nation. Or, as another example, the entrepreneur might be able to establish that the jobs created locally will have a positive national impact.

It is the third that is extremely opaque and difficult to overcome. The petitioner must demonstrate that "the national interest would be adversely affected if a

labor certification were required for the alien. The petitioner must demonstrate that it would be contrary to the national interest to potentially deprive the prospective employer of the services of the alien by making available to U.S. workers the position sought by the alien." The AAO went on to further illuminate this criterion as follows: "Stated another way, the petitioner, whether the U.S. employer or the alien, must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications."

Overcoming the third prong is difficult, and allowed the USCIS to shoot down the best of arguments made by a national interest waiver claimant. Indeed, the USCIS could always resort to this subjective criterion to thwart even the most meritorious of claims, which is that the claimant does not overcome the inherent interest of the government in making the job available to US workers.

The EB-2 Q&A refreshingly provides the following golden nugget to the entrepreneur to overcome the third prong:

The entrepreneur who demonstrates that his or her business enterprise will create jobs for U.S. workers or otherwise enhance the welfare of the United States may qualify for the NIW. For example, the entrepreneur may be creating new job opportunities for U.S. workers. The creation of jobs domestically for U.S. workers may serve the national interest to a substantially greater degree than the work of others in the same field.

It would have been nice if the USCIS had thrashed the three prong test in NYSDOT, as in my opinion, INA section 203(b)(2)(B) does not set forth such a cumbersome test, and the statute, which is a clear expression of Congress, is more important than an AAO decision, which added a spin on an unambiguous statutory provision. And what if the entrepreneur cannot demonstrate that he or she is working in the national interest or cannot qualify under the EB-2 because he or she lacks an advanced degree or exceptional ability?

The EB-2 Q&A appears to suggest that the entrepreneur can also be sponsored for a green card under the EB-2 through a labor certification. Presumably, an entrepreneur under the EB-3 could also be sponsored through a labor certification. This is a surprise. The DOL has always frowned upon an owner of an entity being sponsored for a labor certification. In order to obtain labor certification, the employer must establish that it has conducted a good faith test of the labor market and that there were no qualified US workers who were

available for the position. The DOL has denied labor certification to both 100% and minority owners of companies who filed a labor certification on their behalf. *See ATI Consultores*, 07-INA-64 (BALCA Feb. 11, 2008); *M. Safra & Co. Inc*., 08-INA-74 (BALCA Oct. 27, 2008). The test for determining whether an employee closely tied to the sponsoring entity could qualify for labor certification was set forth in *Modular Container Systems, Inc.* 89-INA-228 (BALCA July 16, 1991) (en banc), where BALCA applied a "totality of circumstances" test to determine whether there was a bona fide job offer to US workers. *Modular Container Systems* considers whether the foreign national:

a) Is in a position to control or influence hiring decisions regarding the job for which LC is ought;
b) Is related to the corporate directors, officers or employees;
c) Was an incorporator or founder of the company;
d) Has an ownership interest in the company;
e) Is involved in the management of the company;
f) Is on the board of directors;
g) Is one of a small number of employees;
h) Has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; or
i) Is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue without the foreign national.

Clearly, an entrepreneur who may successfully obtain an H-1B visa under the new guidance will most likely fail under the *Modular Container Systems* "totality of circumstances" test. Did the USCIS consult with the DOL before issuing this guidance? Will the DOL be receptive to the USCIS's new policy of encouraging entrepreneurs and liberally interpret *Modular Container Systems*? When DOL implemented the new PERM labor certification program, it also promulgated 20 C.F.R. §656.17(l), which incorporates some of the *Modular Container* analysis, and also requires the employer to certify on the PERM labor certification application whether the foreign national has an ownership interest in the sponsoring entity or has a familial relationship with the stockholders, corporate officers, incorporators or partners. What will become of this regulation? I do not feel that the DOL will change its ways on entrepreneurs. Whether one agrees or not, the DOL believes that its narrow mission is to protect the jobs of US workers, and not to spur economic recovery and growth. Of course, one can

argue that foreign entrepreneurs who are allowed to start up businesses and stay in the US will likely create jobs for US workers, rather than take the jobs of Americans, but this logic may fall on deaf ears as far as the DOL is concerned. I hope I am proved wrong on this by the DOL.

In conclusion, the new policy, if implemented, will allow foreign entrepreneurs to obtain H-1B visas, and under certain circumstances, also qualify for a "fast track" green card under the National Interest Waiver. Much administrative tinkering still needs to be done if we really want to create a system that will spur amazing economic activity. The DOL will need to fall into line. The horrendous EB-2 and EB-3 backlogs for Indian and Chinese beneficiaries will still persist. It makes no sense to encourage entrepreneurs from India and China if the wait to get a green card will be in excess of 5 years in the EB-2 or more than a decade in the EB-3. In Tyranny of Priority Dates, Gary Endelman and I offered a blueprint for further administrative action to allow beneficiaries of approved I-130 and I-140 petitions to file adjustment of status applications even if the priority date is not current as well as allow the grant of employment authorization and parole, which would include spouses and other dependants. We have also provided an administrative blueprint for DREAM kids. Our proposals are more ambitious, but I am heartened that the Executive Branch on August 2, 2011 did the right thing by recognizing that foreign national skilled workers and entrepreneurs can be an asset rather than a liability, even in such hard economic times. If the USCIS guidance is properly implemented, these skilled foreign nationals may provide much needed stimulus for the flagging and lackluster US economy.