CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

# VISA OPTIONS FOR FOREIGN ENTREPRENEURS IN THE US - WHILE KEEPING AN EYE ON THE POTENTIAL TRAPS AND PITFALLS

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**By Cyrus D. Mehta**

On paper, there are many attractive options for foreign entrepreneurs to live and work in the US temporarily without investing large sums of money. This blog takes the reader through these options, but will also make one aware about the many traps that may befall him or her on the way to achieving fame and fortune in the land of opportunity. This may sound a bit cliché as the US economy remains sluggish and the unemployment rate hovers over 9%, along with the fact that immigration bureaucrats have been tending to restrictively apply the rules. Yet the Administration, at the highest levels, has welcomed entrepreneurs and investors. On August 2, 2011, the Department of Homeland Security Secretary Napolitano Secretary Napolitano and United States Citizenship and Immigrant Services 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." Many were left wondering whether this was simply hot air or whether it represented an attitudinal shift to encourage a surge of entrepreneurs into the US.

## H-1B Visa

The DHS announcement acknowledged that the H-1B visa, which is the workhorse nonimmigrant work visa, could be used by entrepreneurs who

formed their own entities and were even the owners of these entities.The H-1B visa requires the employer to demonstrate that the position normally requires a bachelor's degree is a specialized field, regardless of the size of the company or the investment. Prior decisions have recognized the existence of the separate corporate entity as being able to petition for the beneficiary, even though it may be solely owned by him or her. However, in recent times, this concept got somewhat muddied by the insistence that the sponsoring entity also control the H-1B worker's employment, and such a sponsorship could not be possible when the H-1B worker owned the sponsoring entity. In the H-1B Question and Answers accompanying the August 2, 2011 announcement, 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. This may be established by creating a separate board of directors, which has the ability to hire, fire, pay supervise and otherwise control.There is nothing preventing such a board constituting foreign nationals or family members of the beneficiary.

Yet, despite this announcement, USCIS officers in the field still appear to display an anti-small business attitude. Take the example of Amit Aharoni, an Israeli citizen who graduated with an MBA from Stanford University. He founded a hot startup, www.cruisewise.com, and received over $1.65 million in venture capital funding. The H-1B visa that was filed on his behalf by the company got denied and he was forced to leave the US and run his company from Canada. It was only after ABC news reported the story that the USCIS changed its mind and reversed the denial.Since the H-1B visa requires a bachelor's degree in a specialized field, be aware that when one is managing a small company as its CEO, the USCIS may absurdly view the position based on old administrative decisions as too generalized and not requiring a specialized bachelor's degree. *See Matter of Caron International Inc.*, 19 I&N Dec. 791 (Comm. 1988). While Mr. Aharoni was fortunate that the USCIS relented because the media shone a bright light on his case, one wonders how many similar deserving cases that have not received media attention have been denied, resulting in the loss of so many jobs here. The H-1B visa is also subject to a 65,000 annual cap, which gets exhausted well within the fiscal year.

**L-1A Visa**

If the entrepreneur has been running a company in his or her home country as

a manager or executive, the L-1A visa also readily lends itself to a foreign national who wishes to open a branch, subsidiary or affiliate in the US, but it is important that the beneficiary must still be able to establish that he or she will work in an executive or managerial capacity. The source of the salary can come from the foreign entity. *Matter of Pozzoli*, 14 I&N Dec. 569 (RC 1974). A sole proprietorship can also qualify as a qualifying entity for L purposes. *Johnson-Laid v INS*, 537 F.Supp. 52 (D. Or. 1981). If the beneficiary is a major stockholder or owner, then "the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and evidence that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States." 8 CFR § 214.2(l)(3)(vii). The purpose of this regulation is to ensure that the beneficiary will maintain the qualifying foreign entity, which is a pre-requisite for the L visa. The entity in the US must generally be the subsidiary, parent or affiliate of the foreign entity.

Yet, in recent years, the USCIS has come down on L-1A petitions by small businesses with a heavy hand. Denial decisions often argue, albeit erroneously, that the manager in a small business would also be involved in day to day operations, which are considered disqualifying activities. Despite the salutary amendment to the L-1A definition by the Immigration Act of 1990 to also include one who manages an essential function, INA § 101(a)(44)(A)(2), as opposed to people, the USCIS appears to have read this provision out of the INA by insisting that such a manager still cannot perform the duties of the function. There have also been credible reports that the US Consulates in India have been denying L visa applications in what is thought to be an unofficial trade war against India, although these also include employees of established global companies who are applying for L-1B specialized knowledge visas.

**E-1 and E-2 Visas**

The E-1 and E-2 visa categories lend themselves readily to foreign entrepreneurs, but they are only limited to nationals of countries that have treaties with the US. This category thus disqualifies entrepreneurs from dynamic BRIC countries – Brazil, Russia, India and China. For the E-1 visa, the applicant must show substantial trade principally between the US and the foreign state. For the E-2 visa, the applicant must demonstrate that he or she has made a substantial investment in a US enterprise. While there is no bright line amount as to what constitutes a substantial investment, it must be

weighed against the total cost of purchasing the enterprise and whether the investment will lead to the successful operation of the enterprise. However, based upon the proportionality test in the Foreign Affairs Manual,the lower the cost of the enterprise, the investor under the E-2 will be expected to make a higher proportion of investment. 9 FAM 41.51 N.10. Note that the E-2 visa will be denied if the enterprise is marginal – if it does not have the present or future capacity to generate more than a minimal living for the investor and family.

**Conclusion: The Importance of Foreign Entrepreneurs**

These three options, if applied consistent with the true intent under their respective statutory statute provisions, provide wonderful opportunities for foreign entrepreneurs, including students graduating out of a US university, to implement their business ideas in the US. Unfortunately, in recent times, immigration adjudicators have become the self-appointed guardians of US economic well being by assuming that the entry of foreign nationals in the US would eliminate US jobs. In fact, it is quite the opposite as such individuals through their innovations will generate more jobs for Americans. New York City Mayor Bloomberg has categorically called the failure to bring in foreign entrepreneurs and skilled workers as being akin to committing "national suicide."There also exists the Employment-based Fifth Preference (EB-5) pursuant to INA §203(b)(5) resulting in permanent residency, which is specifically designed for investors, but this involves an investment of $1 million (or $500,000 in targeted areas with high unemployment or that are rural) and the creation of 10 jobs. Investments in designated regional growth centers allow the showing of the indirect creation of 10 jobs and also allow passive investment. The H-1B, L and E categories can offer speed and flexibility to a foreign entrepreneur who may not be able to afford a $ 1 million or $500,000 investment, and the need to immediately create 10 jobs. Also, the EB-5 option is fraught with risks if the investor cannot show his or her own source of funds and if the 10 jobs are not created directly or indirectly at the end of the two year conditional residency period. Another important bill, the Startup Visa Act, remains stuck in Congress as a result of partisan stalemate, which would allow the investor to demonstrate that he or she has obtained funding or created jobs to a lesser degree than the EB-5. While we wait for the Startup Visa, an enlightened interpretation of the already existing H-1B, L and E visa categories for entrepreneurs will surely benefit the US at this point of time and be consistent with the Administration's August 2, 2011 announcement.