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THE SWEET SMELL OF SUCCESS: H-1B VISAS FOR ENTREPRENEURS

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The title of this blog may seem odd as the H-1B visa is usually associated with an employee who earns a regular wage at the prevailing rate. Yet, entrepreneurs may benefit from the H-1B. Since the USCIS recently set up an Entrepreneur Pathways Portal inviting entrepreneurs to use existing nonimmigrant visas, including the H-1B visa, an analysis on how the H-1B visa can be legitimately exploited by entrepreneurs is worthy of further exploration.

At the outset, it is worth noting that law is neither applied nor interpreted in a vacuum but is suffused with the attitudes and assumptions of the adjudicator. The same is true here. What does the USCIS want to achieve through its new embrace of foreign entrepreneurs? What is its end goal? Does it accept the legitimacy of the H-1B and does it believe that its proper application or deployment will be in the national interest? Unless we know these things first, no formula or set of legal guidelines can result in a proper, informed decision. In the end, unless and until the moral and ethical legitimacy of employment based immigration is both embraced and appreciated, there will not be the intellectual flexibility necessary to help entrepreneurs reach their dreams.

Last week's blog summarized the nonimmigrant options for entrepreneurs suggested in Entrepreneur Pathways, and it also speculated whether this new welcoming embrace of foreign entrepreneurs may possibly change the "Culture of No" within USCIS, whose officials generally places a small business under a fraud profile. A startup may be even more rudimentary than an established small business and thus more susceptible to being viewed as a fraudulent artifice. Startups may not yet be generating a revenue stream as they are

developing new technologies that may lead to products and services later on. Many have received financing through venture capital, angel investors or through "Series A and B" rounds of shares. Startups may also operate in more informal spaces, such as the residences of the founders (with regular meetings at Starbucks) instead of a commercial premise. Some are also operating in "stealth mode" so as not to attract the attention of competitors and may not display the usual bells and whistles such as a website or other marketing material. Startups may also not have payroll records since founders may be compensated in stock options. Still, such startups are legitimate companies that should be able to support H-1B, L, O or other visa statuses. While, in the past, USCIS has often been accused by critics of harboring a systemic bias against small business, Entrepreneur Pathways holds out the promise of a new and more welcoming attitude. The degree to which this flexibility will operate in practice will depend, in large measure, on the extent to which emerging companies and inventive business strategists press their case for immigration benefits.

Regarding the H-1B visa, it is true that 8 CFR § 214.2(h)(4)(ii) requires the existence of an employer-employee relationship, which includes the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of such employee." Can the startup owner be able to sponsor himself or herself on an H-1B through the startup? The USCIS portal is surprisingly receptive, but still limited by the rigid methodology and narrow assumptions of the Neufeld Memo that elevates the right of control over all the other factors set forth in the regulation, such as the right to hire, pay, fire or supervise the employee. Still, the USCIS suggests that a startup may be able to demonstrate this if the ownership and control of the company are different. This can be shown through a "board of directors, preferred shareholders, investors, or other factors that the organization has the right to control the terms and conditions of the beneficiary's employment (such as the right to hire, fire, pay, supervise or otherwise control the terms and conditions of employment)." Some of the suggested evidence could include a term sheet, capitalization table, stock purchase agreement, investor rights agreement, voting agreement or organization documents and operating agreements. Not only can observance of corporate formalities serve legitimate business interests and avoid the "piercing of the corporate veil", by providing the patina of control over individual initiative they may also serve to convey immigration benefits.

The ethos of any new business idea is change, an unwillingness to sacrifice creativity and growth on the alter of certainty. It is the preference for certainty, however, most notably reflected in the Neufeld Memo that may make it difficult for the 100% owner of a startup to successfully obtain an H-1B visa. If the beneficiary has not only conceptualized the business, but also invested only her own capital, it will be difficult for her to have a board of directors that can have the ability to discipline or fire her. Indeed, noted attorney David Ware asks a good question: "What entrepreneur in his or her right mind is going to invest blood, sweat and tears, not to mention money, in an entity holding this power?" If we expect the entrepreneur to take a chance, must not the USCIS itself accept some measure of risk? Concern over fraud, while totally legitimate, must be balanced against no less compelling concerns for allowing the honest expression of commercial imagination.

Although Mr. Ware's point is well taken, we caution against being completely dismissive of the USCIS effort to welcome entrepreneurs, especially the H-1B visa, which one can have more access to over other visas such as the O-1, E-2 or L-1A. The agile practitioner should invoke old decisions that recognize the separate existence of the corporate entity. It is well established that a corporation is a separate and distinct legal entity from its owners and stockholders. *See Matter of M,* 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm.1980); and *Matter of Tessel,* 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). As such, a corporation, even if it is owned and operated by a single person, may hire that person, and the parties will be in an employer-employee relationship. This point needs to be brought out when advancing an H-1B for an entrepreneur. Still, we acknowledge that the H-1B petition may have more success when there is another investor or shareholder, and the beneficiary is not the sole owner of the entity. That person may be able to exercise control over the H-1B beneficiary, even if he or she has a minority interest. It may not be necessary to show that the other individual or entity has the power to discipline the beneficiary, but only that this person can exercise negative control over the beneficiary's decisions. There is nothing preventing the other individual from being a family member, and the shareholder or director also need not be residing in the US.

There are other difficulties for an H-1B entrepreneur that may be beyond the USCIS's control. Every H-1B petition must be accompanied by a certified Labor

Condition Application from the DOL. Under an LCA, the employer attests that it must pay the beneficiary the higher of the prevailing or actual wage, and must also do so on a regular prorated basis. In a startup, there may be no revenue stream to pay the entrepreneur initially. Thus, unless the startup is sufficiently capitalized through venture capital or other forms of financing that can ensure a steady stream of income to the H-1B beneficiary at the required wage, the petitioning entity may be in violation of the DOL rules if it cannot guarantee a regular prevailing wage.

Also, a DOL rule at 20 CFR § 655.731(c)(9)(iii)(C) states that any attorney fees paid by the H-1B beneficiary will be viewed as a lowering of the required wage that the employer is required to pay the beneficiary. There is also a prohibition of the employee paying the training fee of $750 or $1,500. In the case of a startup, where the H-1B beneficiary has invested his own money into the enterprise, the fact that the petitioning entity makes these payments ought not to be viewed as a violation of the DOL rules regarding impermissible payments. Since it is the entity that is making these payments, which is considered separate from the beneficiary, and which also controls the beneficiary, it should not be viewed as impermissible. Otherwise, there is no way that the USCIS can promote the H-1B to entrepreneurs.

Even if an H-1B founder of a company successfully establishes that the entity can control her employment through a board of directors or through preferred shareholders, the USCIS could likely challenge whether a position in a startup, where the beneficiary may be wearing many hats, can support a specialized position. The H-1B visa law requires the petitioner to demonstrate that a bachelor's degree in a specialized field is the minimum qualification for entry into that occupation. Also, positions in innovative startups may not necessarily fit under the occupations listed in the Department of Labor's Occupational Outlook Handbookbut may yet require at least a bachelor's degree. It is hoped that USCIS examiners are trained to be receptive to other evidence to demonstrate that the position requires a bachelor's degree. Furthermore, an MBA degree should be considered a specialized degree in itself since many MBA programs at top business schools focus on entrepreneurship and other fields, such as technology or web analytics, which equip one to be a successful entrepreneur. The very notion of specialized occupations has and will continue to change as the pervasive impact of technology in the Internet Age makes itself felt at all levels of economic activity.

While there are insurmountable hurdles for H-1B entrepreneurs, it is hoped that the USCIS will make every effort for the program to work for them. The H-1B is the most accessible visa to a foreign student as the E-2 visa only applies to nationals of limited countriesthat have a treaty with the US, and none of the BRIC countries have such treaties. Very few entrepreneurs can qualify as extraordinary under the O-1 and the L-1A visa would only apply to an individual who has been employed overseas for one year in the past three years in an entity that has a parent, subsidiary, affiliate or branch in the US. It also raises a larger question: How can we use US immigration policy not merely to preserve the status quo but actually create wealth and jobs? For it to work successful, USCIS officials have to examine and approve cases consistent with this objective. The problem goes beyond the "Culture of No." The USCIS should think of immigration in a strategic sense as a mechanism to create wealth and expand the economy. Presently, USCIS thinks in static terms so naturally the focus is on protecting what now is and judging people not by their potential but by their documented accomplishments. USCIS, on the other hand, should think like an entrepreneur so as to avoid a dissonance or disconnect between the regulators and those whom they regulate. The USCIS Entrepreneur in Residence program, from which the Entrepreneur Pathways portal has ensued, appears to be a step in the right direction. Only time will tell whether it will truly serve the needs of entrepreneurs. The willingness of the entrepreneur to take risks must be matched in full measure by an immigration system that also embraces the value of innovation. As T.S Elliot famously reminded us: "Only those who risk going too far can possibly find out how far it is possible to go."