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US IMMIGRATION & NATIONALITY LAW

WHAT ONE HAND GIVETH THE OTHER TAKETH AWAY: ARE WE TRULY WELCOMING FOREIGN ENTREPRENEURS TO AMERICA?

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> *"Our nation has always attracted individuals with great drive and entrepreneurial spirit. As the world's greatest economy and a global leader in innovation, the United States must continue to welcome and retain the next generation of foreign entrepreneurs who will start new businesses and create new jobs here in America."*

The above is an extract from the USCIS' Entrepreneur Pathways Portal which provides guidance on how entrepreneurs can obtain nonimmigrant visa status through a startup entity. The United States Citizenship and Immigration Services (USCIS) launched its Entrepreneurs in Residence initiative in 2012 and later the portal. Prior to that, in an August 2, 2011 press release, the Department of Homeland Security (DHS) stated that "The United States must continue to attract the best and brightest from around the world to invest their talents, skills, and ideas to grow our economy and create American jobs." Through the Entrepreneurs in Residence program, USCIS officers are supposed to be trained to recognize the unique nature of a startup and to understand that a nonimmigrant petition based on a startup will not present the characteristics typical of a petition filed through a more established business entity. Startups often lack a formal office space; they may operate in stealth mode in an effort to hide information from competitors; and the foreign national seeking nonimmigrant status in the US often has a majority interest in the startup. Unfortunately, too often a benefit conferred on one hand is taken away by the other hand. USCIS has created these seemingly great avenues for entrepreneurs but other USCIS initiatives and other agencies such as the

Department of Labor (DOL) make it harder for those same entrepreneurs to continue to obtain benefits.

One example is the DHS' proposed rule, "Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students," which was published in the Federal Register on October 19, 2015 for comment. In sum, the rule proposes to amend the F-1 student visa regulations regarding optional practical training (OPT) for certain students with degrees in science, technology, engineering, or mathematics (STEM) from U.S. institutions of higher education. Under the current rule, students can receive up to 12 months of OPT upon graduation. In 2008, the DHS published regulations authorizing an additional 17-months extension of the OPT period for foreign students who graduated in STEM fields. The new rule proposes to allow F-1 STEM students who have elected to pursue 12 months of OPT to extend the OPT period by 24 months. This new 24-month extension would effectively replace the 17-month STEM OPT extension currently available to these students. This is indeed a positive development, and it encourages talented foreign students to remain in the United States and contribute to the US economy.

A STEM graduate may also utilize the OPT period to work for their own startup. But one aspect of the proposed rule might mean that this STEM graduate may not be able to obtain the 24-month extension to continue working for the startup. One of the things that will be required under the proposed rule is the implementation of formal mentoring and training plans by employers for the STEM OPT employee. The employer must also implement a process for evaluating the OPT employee. The STEM OPT extension could be difficult to establish for the OPT employee who is the majority shareholder in their startup. It appears that here the government will want to see proof of the typical employer-employee relationship which totally goes against everything it tries to do through the USCIS Entrepreneurs Pathway portal and erodes the whole idea of the startup.

Even if the foreign national were to obtain nonimmigrant visa status, that status is temporary. If the foreign national is desirous of obtaining lawful permanent residence in the US through their own company, there s/he may face another roadblock.

Recently, in *Step By Step Day Care LLC*, 2012-PER-00737 (Sept. 25, 2015), the

Board of Alien Labor Certification Appeals (BALCA) affirmed the denial of a PERM labor certification finding that the offered position was not open to U.S. workers because the beneficiary was in a position to control or influence hiring decisions regarding the job. The employer filed a PERM labor certification for the position of "Daycare Center Director" indicating on the application form that the company is a closely-held corporation in which the foreign national has an ownership interest. The DOL issued an audit request for documentation that included information on the business structure; a statement describing any familial relationships between parties with ownership interests in the company and the foreign national; the name of the employee with the primary responsibility for interviewing and hiring applicants; and the names of the employer's officials who have control or influence over hiring decisions involving the job opportunity listed on the PERM application. The employer's audit response showed that the foreign national beneficiary of the PERM application and her husband each held 50% ownership of the company, and they were here on E-2 visas. (The E-2 visa is one such visa that is encouraged for startups in the Entrepreneurs Pathway Portal). The foreign national was the Director and her husband was the Operations Manager. The recruitment was conducted by the company's Assistant Director.

The Certifying Officer (CO) denied the application on the grounds that the employer had not overcome the presumption that exists that a job opportunity is not bona fide when the employer is a closely-held company where the beneficiary has an ownership interest or a familial relationship with the stockholders, officers, incorporators, or partners, and is one of a small number of employees. The CO took issue with the fact that the hiring official, the Assistant Director, was a subordinate of the beneficiary and is not the usual official having authority over hiring decisions.

In its motion for reconsideration, the employer explained that while the beneficiary and her husband typically made the hiring decisions in consultation with the Assistant Director, the hiring process was modified in for purposes under the labor certification recruitment because the beneficiary was also the co-owner. The employer held that neither the beneficiary nor her husband were involved in recruitment. The employer argued that the beneficiary and her husband each held E-2 investor visas as a result of purchasing the company and therefore the beneficiary's stay in the US was not dependent on her position as Director and provided documentation to show that the position was

a requirement for daycare businesses under Florida law and did not exist for the benefit of the foreign national beneficiary. The CO nevertheless upheld the denial.

As background, mere existence of a family relationship, or the fact that the beneficiary is the owner of the sponsoring entity, should not lead to a conclusion that a job opportunity was not bona fide. When determining whether a bona fide job opportunity exists, the CO must consider the totality of the circumstances, considering, among other factors, whether the alien:

1. Is in the position to control or influence hiring decisions regarding the job for which labor certification is sought;
2. Is related to the corporate directors, officers, or employees;
3. Was an incorporator or founder of the company;
4. Has an ownership interest in the company;
5. Is involved in the management of the company;
6. Is on the board of directors;
7. Is one of a small number of employees;
8. Has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and
9. 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 in operation without the alien.

Good Deal, Inc., 2009-PER-00309 (Mar. 3, 2010) (citing Modular Container Systems, Inc., 1989-INA-228, (July 16, 1991) (en banc). The Board should also consider the Employer's compliance and good faith in the application process. Id. No single factor, such as a familial relationship between the alien and the employer or the size of the employer, shall be controlling. *See Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System,* 69 Fed. Reg. 77326, 77356 (Dec. 27, 2004).

Upon review, BALCA held that having recruitment conducted by a subordinate of the foreign national beneficiary is not in the best interests of U.S. worker applicants. BALCA found it difficult to believe that the beneficiary exercised no influence on the hiring process. BALCA cited 20 CFR 656.10(b)(ii) which states:

> *The employer's representative who interviews or considers U.S. workers for the job offered to the alien must be the person who normally*

> *interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien, but which do not involve labor certifications.*

BALCA held that since the Assistant Director did not normally conduct interviews or consider applications, this regulation was not met. With regard to the employer's statement that the beneficiary did not need the position since she held E-2 status, BALCA held that the filing of the labor certification indicated the beneficiary's preference to remain in the position.

The foreign national entrepreneur who successfully obtains nonimmigrant visa status to run a business in the US could later be kicked out when that temporary nonimmigrant visa status expires. In the above discussed BALCA case, the beneficiary held E-2 status which could be extended indefinitely. However, a beneficiary with H-1B status would need to leave the US upon reaching the maximum 6-year limit. While there may be other options for entrepreneurs on a temporary visa to get permanent residency, such as through the national interest waiver or as a person of extraordinary ability, very few can qualify under these pathways. The majority of skilled foreign nationals get sponsored via an employer through the labor certification process, and the odds of winning labor certification substantially lessen when one is the owner or founder of the sponsoring entity. It is not clear how such conflicting policies could work to " individuals with great drive and entrepreneurial spirit" and "welcome and retain the next generation of foreign entrepreneurs who will start new businesses and create new jobs here in America." What one hand giveth the other taketh away.