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

SENATOR GRASSLEY "HACKS" THE H-1B VISA FOR FOREIGN ENTREPRENEURS

Posted on March 7, 2016 by Cyrus Mehta

The H-1B visa program is in trouble. It has become everyone's favorite whipping boy. Critics rail against the H-1B for bringing in so called cheap labor to the US, but ignoring the fact that an employer is required to pay the prevailing wage set by the Department of Labor. Some of the wages mandated by the DOL at www.flcdatacenter.com are unusually high. Take for example the position of Marketing Managers in New York City. A Marketing Manager on an H-1B visa would need to be paid an entry level wage of $108,493 year. The level two wage is $144, 123 per year, the level three is $179, 774 per year and level four is at a whopping $215, 405 per year. This is hardly cheap labor. The employer on top of these wages must also pay costs towards the H-1B visa including lawyer fees and excessively high filing fees in excess of $6,000. If the employer is dependent on H-1B or L workers, it has to additionally pay a super fee of $4,000. Only an employer who wishes to employ a highly skilled foreign worker will go through all the expenses, as well as all the regulatory procedures, under the H-1B visa.

The H-1B visa serves as the main entry point for a skilled foreign worker to aspire to work and immigrate to the United States. There already exists a shortage of H-1B visas with a meager annual cap of 65,000 plus another 20,000 for those with advanced degrees from US universities. If the H-1B visa is further restricted, there will be no entry point whatsoever. Foreign students graduating from top US universities will not get a chance to work and remain in the United States. The immigration system is already broken because of restricted pathways for non-citizens to acquire permanent residency, resulting in backlogs lasting decades. If the entry point through the H-1B visa is cut off, then we will truly have an unworkable immigration system that will no longer attract talent to the United States.

To rub further salt in the wound, Senator Grassley on February 26, 2016 wrote an angry missive to USCIS Director Leon Rodriguez protesting the use of the H-1B visa by entrepreneurs, which he likens to one who tries to "hack" the H-1B program. This is in direct contradiction to the USCIS's well intentioned Entrepreneur Pathways portal that provides guidance on legitimate ways a founder can apply for a nonimmigrant visa through his or her own startup. According to Grassley, this is abusive and illegal, but he is wrong. Note that there is no independent startup visa in our immigration system, although America has spectacularly succeeded off the success of entrepreneurial ventures, many of which have been founded by people who were not born in the United States. Sergey Brin of Google is a prime example. Startups have to compete with more established companies within the immigration system, and where there is already a bias against the small business. 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, the Entrepreneur Pathways portal provides guidance for USCIS offices to adjudicate such H-1B petitions more favorably.

Grassley has now thrown the wrench into the works of such an entrepreneur trying to "hack" an H-1B visa. My esteemed colleague Tahmina Watson clarifies in a news article that Grassley misinterprets "hack", which in the tech world "is a word of respect in which one finds a solution to a complicated problem." Grassley even has the chutzpah to accuse established universities of colluding with entrepreneurs. Unfortunately, his letter is not backed up by the black letter INA provisions which support these sorts of collaborations between

universities and entrepreneurs under the H-1B visa.

Under INA 214(g)(6), it is permissible for an entrepreneur to be employed by a cap-exempt employer such as a university on a part-time basis and then be able to obtain an H-1B, without being counted under the annual H-1B cap, through his or her own startup. Under INA 214(g)(5), an H-1B worker who is sponsored through a startup entity is not counted under the H-1B cap lottery if he or she is employed "at" a cap-exempt institution of higher education or is employed "at" a non-profit affiliated to an institution of higher education. While it is true that 8 CFR § 214.2(h)(4)(ii) requires the existence of an employer-employee relationship for the H-1B visa through a startup, this includes indicia such as the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of such employee." It is the Neufeld Memo that elevates the right of control over all the other factors set forth in the regulation. Still, it is possible to 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.

Difficult as it already is to gain an H-1B through a startup, Senator Grassley is needlessly thwarting the intent of Congress under the H-1B visa program to attract entrepreneurs who will only benefit the country. And this is being done when we have such a paltry number of visas. With respect to H-1B filings under the FY2017 H-1B cap, some are of the opinion that there will be fewer H-1B filings because of the increase in the super fee from $2,000 to $4,000 and also

since the F-1 Optional Practical Training program is vulnerable to attack in litigation. I completely disagree. The increase in the fee to $4000 will not deter certain employers dependent on H-1B or L employees from filing H-1B cases as there still continues to be a lack of skills in the US workforce, and the need to execute and manage transformative IT projects with a skilled foreign IT workforce. Most of corporate America relies on the very employers who depend on skilled H-1B workers and have been unfairly penalized with the $4,000+ fee to keep their business and operations humming, which in turn benefit the American consumer. An increase in the fee thus will not be daunting whatsoever as the stakes are truly high for both IT consulting firms and most of corporate America.

Also, the prospects of the STEM or regular OPT being held invalid by a court create further uncertainty for the foreign entrepreneur. Fortunately, the likelihood of the court invalidating F-1 OPT is slim since the DHS has now allayed the court's concern by proposing regulations for notice and comment under the Administrative Procedures Act. If at all there is any uncertainty with respect to OPT, entrepreneurs will be more concerned and will want to file H-1B petitions sooner than later while OPT is still in effect in order to ensure that there vital foreign worker can still be employed. This will create additional pressure on the H-1B cap, unless they are doing so in collaboration with universities and are seeking H-1B cap exemption.

All this demonstrates the need for more H-1B numbers rather than less as H-1B workers, including entrepreneurs, are essential for our economic growth and prosperity. The H-1B visa provides the entry point for someone to work in the United States, and in the absence of a special startup visa, the H-1B visa also serves an additional important purpose. Many universities have created programs to attract entrepreneurs and collaborate with them, so that they can legitimately take advantage of gaining H-1B cap exemption through INA 214(g)(5) and 214(g)(6). Senator Grassley's letter may discourage USCIS adjudicators from granting H-1B visas filed by entrepreneurs, despite favorable policy guidance through Entrepreneur Pathways and provisions in the INA that provide cap exemption. Still, the USCIS should be assured that there is a sufficient legal basis to approve such H-1B petitions, and there is also undoubtedly a great policy argument, which Grassley overlooks, to allow entry of promising foreign entrepreneurs into the US in the hope that their startups will succeed, which in turn will create jobs and benefit the US economy.