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REVIVING THE NATIONAL INTEREST WAIVER FOR INTERNATIONAL ENTREPRENEURS

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A proposed rule would allow the Department of Homeland Security (DHS) to use its existing discretionary statutory parole authority for entrepreneurs of startup entities whose stay in the United States would provide a "significant public benefit through the substantial and demonstrated potential for rapid business growth and job creation." Under this proposed rule, DHS may parole, on a case-by-case basis, eligible entrepreneurs of startup enterprises:

- Who have a significant ownership interest in the startup (at least 15 percent) and have an active and central role to its operations;
- Whose startup was formed in the United States within the past three years; and
- Whose startup has substantial and demonstrated potential for rapid business growth and job creation, as evidenced by:

– Receiving significant investment of capital (at least $345,000) from certain qualified U.S. investors with established records of successful investments;

– Receiving significant awards or grants (at least $100,000) from certain federal, state, or local government entities; or

– Partially satisfying one or both of the above criteria in addition to other reliable and compelling evidence of the startup entity's substantial potential for rapid growth and job creation.

Under the rule, entrepreneurs may be granted an initial stay of up to two years to oversee and grow their startup entities in the United States. A subsequent request for re-parole (for up to three additional years) would be considered only if the entrepreneur and the startup entity continue to provide a significant public benefit as evidenced by substantial increases in capital investment,

revenue, or job creation. What is truly lacking is the lack of a pathway to permanent residence for the entrepreneur.

Several organizations and individuals submitted comments to the rule by the deadline on October 17, 2016. The Alliance of Business Immigration Lawyers, www.abil.com, of which I am a shareholder and member, also submitted comments in order to improve the rule and point out its limitations. The thrust of the comments was to make parole more accessible to entrepreneurs by lowering the investment amounts and expanding the types of persons who could qualify as investors. I was pleased to be part of the ABIL comment team of distinguished immigration attorneys, and my focus was to comment that the rule also provides a pathway to permanent residence. If the rule does not provide a pathway to permanent residency, it will not be viable at all. It is thus imperative that the rule also provide a pathway for permanent residence through the National Interest Waiver. In fact, this is not the first time that the DHS has thought about providing a pathway for permanent residence to entrepreneurs.

When USCIS announced its policy to encourage foreign entrepreneurs to take advantage of the existing immigration system on August 2, 2011, it provided Question and Answers on the Employment-based Second Preference (EB-2 Q&A) suggesting that an entrepreneur can be sponsored through a "national interest waiver". The EB-2 (Q&A) acknowledges *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Comm. 1998) (NYSDOT), which set forth a three-prong test, and how it could apply to entrepreneurs seeking the NIW.

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." It was always difficult for an entrepreneur to show that localized employment through his or her enterprise would be national in scope. This concern was addressed 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.

The third criterion in NYSDOT 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."

Still, the EB-2 Q&A provides helpful guidance 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.

Nevertheless, if the parole rule provides guidance on how to seek a NIW, it should do away with the NYSDOT test, especially the subjective third criterion. Indeed, when President Obama's executive actions on immigration were announced on November 20, 2014, a memo specifically aimed to improve the system for skilled immigrants also sought to:

> Clarify the standard by which a national interest waiver may be granted to foreign inventors, researchers and founders of start-up enterprises to benefit the U.S economy

ABIL therefore suggests that the final rule should contain a rebuttable presumption stating that an international entrepreneur who has maintained parole status for five years is presumed to qualify for the national-interest waiver. The five years should be extended for entrepreneurs who have already started the permanent residency process, however long it takes, given the processing delays and backlogs. Alternatively, because of prolonged visa quota backlogs, those which adversely affect persons in the EB-2 and EB-3 preferences such as beneficiaries born in India and China, ABIL suggests that entrepreneurial parolees be able to use the NYSDOT national-interest waiver

standards to qualify as a person of extraordinary ability under INA § 203(b)(1)(A). Even if an entrepreneur cannot readily meet the three out of ten criteria under 8 C.F.R. § 204.5(h)(3), the petitioner can also qualify as a person of extraordinary ability by submitting comparable evidence under 8 C.F.R. § 204.5(h)(4). Hence, the final rule should expressly provide that comparable evidence includes (but is not limited to) proof that an entrepreneur meets the NYSDOT national-interest waiver criteria, and thus may qualify as a person of extraordinary ability.

Given the lack of certainty in a national-interest waiver adjudication due to NYSDOT, ABIL further suggests that the seven factors set forth in the non-precedent decision of *Matter of Mississippi Phosphate*, EAC 92 091 50126 (AAU July 21, 1992) be reconsidered. The seven factors include 1) improving the U.S. economy; 2) improving wages and working conditions of U.S. workers; 3) improving education and training programs for U.S. children and underqualified workers; 4) improving health care; 5) providing more affordable housing for young and/or older, poorer U.S. residents; 6) improving the environment of the U.S. and making more productive use of natural resources; or 7) involving a request from an interested U.S. government agency. This decision provided good guidance for the national interest waiver petitioner as well as the adjudicating officer and seemed to signal an understanding of congressional intent.

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. In fact, an entrepreneur who cannot qualify under EB-2, can also theoretically obtain labor certification for purposes of obtaining permanent residency under EB-3. The DOL, on the other hand, 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.

An entrepreneur who may successfully obtain parole will most likely fail under the *Modular Container Systems* "totality of circumstances" test. ABIL suggests that USCIS consult with the DOL before issuing this guidance so that DOL be receptive to the USCIS's new policy of encouraging entrepreneurs and liberally interpret *Modular Container Systems, which are incorporated in* 20 CFR §656.17(l). For example, if an entrepreneur who qualifies for parole and owns a minority state in the enterprise should still be able to obtain labor certification if he or she did not influence the recruitment, even if the entrepreneur may have been a founder or is on its board of directors.

In conclusion, quite independent of the parole rule, the proposed broadening of the National Interest Waiver should also similarly be applicable to entrepreneurs who have used existing nonimmigrant visa categories. This is explained in the Entrepreneur Pathways portal. Indeed, the parole rule and the Entrepreneur Pathways should exist alongside each other. Neither is perfect, especially in the absence of a Congressionally mandated startup visa, but if an entrepreneur cannot qualify under the parole policy, every encouragement must be given for the entrepreneur to qualify for a visa through his or her startup under the existing visa system, such as through an H-1B visa. In order to provide viability to both the parole rule and existing policy supporting entrepreneurs, the National Interest Waiver ought to be broadened. Most importantly, entrepreneurs born in India and China should also be allowed to

take advantage of the person of extraordinary ability category under EB-1. The EB-1 is current for these countries. It would be unviable for the beneficiary of an EB-2 National Interest Waiver born in India or China to wait for several years to obtain the green card. It is hoped that this administration and the next does everything in their power to attract foreign entrepreneurs.

Given the centrality of immigrant entrepreneurs to the American economy, it may come as a shock to many when they realize that, on an increasing number, immigrant entrepreneurs are going home. With the economic renaissance in India, China, Korea, Chile, Mexico and other traditional sources of immigration, while entrepreneurs continue to come to America, we are, it seems, no longer the only game in town. Faced with uncertain green card prospects and what appears as an unfriendly and intractable immigration system that questions their value rather than welcoming their talent or appreciating their contributions, immigrant entrepreneurs are having second thoughts. It is impossible to understand or appreciate the current entrepreneurial initiative without this foundation. It is therefore hoped that this administration and the next does everything in their power to attract foreign entrepreneurs to the United States.