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US IMMIGRATION & NATIONALITY LAW

PATHWAYS FOR TERMINATED H-1B WORKERS WHO WANT TO BECOME ENTREPRENEURS

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The list of options for an H-1B beneficiary who has been laid off is often narrow. At the top of the list sits the most obvious option: find another employer who will sponsor you for an H-1B. Although, in the current job market, which is growing more competitive due to the influx of laid off employees, there simply may not be enough open positions to fill. But laid off H-1B beneficiaries who can't find another employer to sponsor them and who have been dreaming of setting up their own startups may not need to pack their bags and book their flights home just yet as there might be another, more creative option to consider: starting your own company and extending H-1B status through that company. Whichever option laid off beneficiaries pursue; they have 60 days to get their affairs in order under 8 C.F.R. § 214.1(l)(2) which allows H-1B beneficiaries to remain in the U.S. for up to 60 days after their H-1B employment ceases.

The last time we explored the topic of H-1B entrepreneurs, the control test in the Memo "Determining Employer-Employee Relationship for Adjudications of H-1B Petitions, Including Third-Party Site Placements" by Donald Neufeld posed an obstacle. The Neufeld Memo attempted to clarify what constitutes a valid employer-employee relationship under 8 C.F.R. § 214.2(h)(4)(ii) and established a policy wherein H-1B petitioners had to establish that they had the right to control over when, where and how the beneficiary performed the job. Neufeld urged USCIS officers to consider eleven factors in determining whether a petitioner had sufficiently established its "right to control". Despite the Neufeld Memo, we still entertained, in our blog, the idea of whether a startup owner can be able to get sponsored on an H-1B through a startup, while

simultaneously addressing the potential obstacles that one might experience in attempting such a feat.

Now, ten years after that blog was published, changes have occurred in immigration policy that contemplate scenarios in which entrepreneurs can remain in the U.S. on an H-1B through their startup or be paroled into the U.S. to set up their start-ups. For starters, on June 17, 2020, the Neufeld Memo was rescinded, effectively ending the "right to control" era. Instead, in assessing whether an employee and a beneficiary have an employer-employee relationship, USCIS officers were instructed to consider whether the petitioner has established that it meets at least one of the "hire, pay, fire, supervise, or otherwise control the work of" factors with respect to the beneficiary. *See* 8 C.F.R. § 214.2(h)(4)(ii). Most recently, on March 10, 2023, USCIS issued comprehensive guidance on parole for international entrepreneurs.

USCIS has also provided FAQs where it addresses parole pathways for entrepreneurs under the International Entrepreneur Rule, a topic that is not the focus of this blog, but which also touches on the key requirements that one must fulfill to qualify for classification as an H-1B specialty occupation worker. The first requirement is establishing an employer-employee relationship with the petitioning U.S. employer. Here, the sole or majority owner of the petitioning company may be able to establish a valid employer-employee relationship if the facts show that the petitioning entity meets at least one of the "hire, pay, fire, supervise, or otherwise control the work of" factors. Old decisions recognize the separate existence of the corporate entity as 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 when Neufeld has been rescinded. 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 they have 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 U.S.

The second requirement is establishing that the job qualifies as a specialty occupation under one of the four criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A). The third requirement is establishing that the job is in a specialty occupation related to the beneficiary's field of study which may done by submitting a detailed description of the specific duties of the position, written opinions from experts in the field, resources describing the degree fields normally associated with the occupation, or evidence that similar companies in the industry require similar degrees for similar positions. 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. Lastly, the fourth requirement is that an H-1B visa number be available at the time of filing the petition, unless the petition is exempt from numerical limits, though the topic of this blog assumes that one has already been counted against the cap. Notably, this new guidance does not seem to elevate control over all the other components in the employer-employee relationship under 8 C.F.R. § 214.2(h).

There are other challenges 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 (LCA) 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.

Still, these challenges are not insurmountable. H-1B beneficiaries who wish to obtain H-1B status through their startups face a less hostile environment as they do not have to deal with the control test under the Neufeld memo. Before, our answer to the question of "can the startup owner be able to sponsor themselves on an H-1B through the startup?" was a shaky "maybe". Now, however, while still not implying a definitive "yes", there is at least more reason

to believe that an entrepreneur should be able to successfully sponsor him or herself through their own startup, especially in light of the June 17, 2020 guidance and the latest FAQs. If the beneficiary has an approved I-140, then he or she can also get three year H-1B extensions if eligible. Recall though that those who qualify for three year extensions only do so because they are nationals of countries with per-country limitations. Thus, when their priority dates become current, they will no longer be eligible for three year H-1B extensions. At that point, they could file an EB-2 National Interest Waiver (NIW), for instance, in order to be to apply for a green card through a viable I-140 petition and in doing so, will be able to recapture their old priority date. As a result of starting their own companies, these entrepreneurs can now capitalize on their startups and use them as a basis for establishing their eligibility for the NIW. The NIW may also be a viable option for those in the STEM field as the USCIS Policy Manual was updated last year to clarify how the NIW can be used by STEM entrepreneurs.

On the other hand, H-1B beneficiaries who are terminated and have pending I-485 applications can attempt to port to self-employment. INA § 204(j) allows foreign workers who are being petitioned for permanent residence by their employer to change jobs once their I-485 applications have been pending for 180 days or more. 8 C.F.R.§ 245.25(a)(2)(ii)(B) even allows a beneficiary to port to a new employer based on an unadjudicated I-140, filed concurrently with an I-485 application, so long as it is approvable at the time of filing. Therefore, H-1B beneficiaries who have a pending or approved I-140 and who have adjustment applications that have been pending for 180 days can, after being terminated by their H-1B/I-140 sponsor, start their company and port to that company, or even a sole proprietorship, so long as their job duties are same or similar to the occupation that was the basis of the I-140 petition. They may ne able to rely on their pending I-485 application, and employment authorization document, rather than remain in H-1B status.

While there is no specific startup visa in the INA, USCIS should think of immigration in a strategic sense as a mechanism to create wealth and expand the economy. By encouraging H-1B entrepreneurs the USCIS should also think like an entrepreneur, use all its authority under the INA to allow entrepreneurs to remain and thrive in the U.S., and adjudicate H-1B petitions consistent with this objective. Notwithstanding a downturn in certain sectors of the economy, the talents and creative energies of H-1B workers who have been laid off can

be unleashed so that they be part of the effort in turning around the economy in addition to landing on their feet.

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