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BIDEN'S USICS WELCOMES ENTREPRENEURS THROUGH THE H-1B AND O VISAS. WILL TRUMP DO THE SAME?

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On January 8, 2025, USCIS issued updated guidance in its Policy Manual clarifying how entrepreneurs may qualify for O visas. The guidance states that:

"O beneficiaries may not petition for themselves. However, a separate legal entity owned by the beneficiary, such as a corporation or limited liability company, may file the petition on their behalf."

USCIS' guidance on this point was more ambiguous previously, which created concerns that an O petition filed through a beneficiary's own company would be viewed as tantamount to self-employment. This updated guidance will afford a clear pathway for entrepreneurs to obtain O-1 visas through their own companies. Interestingly, the new guidance appears to apply to all O beneficiaries and not merely those who qualify for O-1 classification. This guidance also does not require such startups to meet conditions such as their ability to control the O-1's employment by requiring a majority shareholder or a board of directors. USCIS seems to have relied on old administrative decisions that 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).

USCIS' updated O-1 guidance is in line with a provision in the Department of Homeland Security (DHS)'s H-1B modernization final rule (see our commentary), set to take effect on January 17, 2025. In the final rule, DHS

clarified that beneficiaries with a controlling ownership interest in the petitioning entity may still be eligible for H-1B status subject to "reasonable conditions". In a previous blog, we explored the conditions under which an entrepreneur could qualify for H-1B classification. Even under the existing regulations, it was possible for a startup founder or entrepreneur to qualify for H-1B classification if the petitioning company could establish a valid employer-employee relationship under at least one of the "hire, pay, fire, supervise, or otherwise control the work of" factors, and the job qualifies as a specialty occupation under one of the four criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A). An entrepreneur who was able to meet these requirements through his or her own company would have been eligible for H-1B classification for an initial 3 year period, as well as a subsequent 3-year extension. Although the final rule more clearly states that a beneficiary with a controlling interest in the petitioning organization may nonetheless be eligible for H-1B classification, it limits the validity of the initial H-1B petition and first extension to 18 months each.

It is indeed salutary that the USCIS is thinking of encouraging entrepreneurs to obtain visas through their startups. While it would be ideal if Congress enacted a startup visa, it is at least a good start for USCIS to create pathways within the existing nonimmigrant visa system for entrepreneurs. It is hoped that the new Trump administration continues down the same pathway. Entrepreneurs should be encouraged to come to the US to establish startups that may succeed, and create more jobs and new business models that break the paradigm, which in turn will result in economic growth and create even more jobs. There are many Trump advisors, as well some on the left like Bernie Sanders, who view nonimmigrants on work visas as a threat to US workers and want to curb lawful nonimmigrant pathways to the United States. They are misguided, and it is hoped that they realize the benefits that noncitizen entrepreneurs bring to the US and should not kill the goose that lays the golden eggs!

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