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US IMMIGRATION & NATIONALITY LAW

STATUS THROUGH SELF-EMPLOYMENT

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by
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While the economy has taken a nosedive resulting in the slashing of hundreds of thousands of jobs, and depriving foreign nationals of obtaining status through employment-based sponsorships, it is useful to analyze how foreign nationals may still gain status through self-employment. In its narrowest terms, self-employment involves someone working for himself or herself as an artist or a writer. In broader terms, it could cover a foreign national rendering services to a corporation where he or she is the sole or dominant shareholder. In its broadest terms, it could encompass any situation involving self-sponsorship.

This outline will examine some of the main nonimmigrant and immigrant visa categories in the context of whether a foreign national may gain status through self-employment.

I. NONIMMIGRANT VISAS

B-1 Visa

The B-1 visa allows a foreign national to conduct business in the US on behalf of a foreign corporation or business, which could include a sole proprietorship. The B-1 visitor must engage in activities of a commercial character and must ensure that the profits of the B-1 activities must accrue to the foreign entity. Also, the B-1 visitor's sojourn in the US must have a temporary character. *See Matter of Hira,* 11 I&N Dec. 824.

H-1B Visa

A recent AAO decision held that a foreign national could be sponsored by his or her own corporation where he or she is a sole or majority shareholder. (*See*

FURTHER AAO SUPPORT FOR THE RIGHT OF A CORPORATION TO PETITION FOR ITS OWNER FOR AN H-1B VISA). The AAO relied on an old decision, *Matter of Aphrodite Investments*, 17 I&N Dec. 530 (Comm'r 1980), holding that a corporation enjoys an entity separate from the owner. One must caution that the USCIS will view such an H-1B petition with askance because the beneficiary will still have to establish that the petitioning entity has enough business to employ him or her in a specialty occupation. On the other hand, a sole proprietor without the corporate entity, such as a lawyer, cannot sponsor himself or herself for an H-1B visa. On the other hand, one partner may sponsor another partner in a partnership. *Matter of Zang*, 13 I&N Dec. 290.

L Visa

The L visa also readily lends itself to a foreign national who owns the business, but it is important that the beneficiary must still be able to establish that he or she will work in an executive, managerial or specialized knowledge capacity. The source of the salary can come from the foreign entity. *Matter of Pozzoli*, 14 I&N Dec. 569 (RC 1974). A sole proprietorship can also qualify as a qualifying entity for L purposes. *Johnson-Laid v INS*, 537 F.Supp. 52 (D. Or. 1981). If the beneficiary is a major stockholder or owner, then "the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and evidence that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States." 8 CFR § 214.2(l)(3)(vii). The purpose of this regulation is to ensure that the beneficiary will maintain the qualifying foreign entity, which is a pre-requisite for the L visa. The entity in the US must generally be the subsidiary, parent or affiliate of the foreign entity.

O-1 Visa

Although a foreign national cannot self-petition for an O-1 visa, the same principle ought to be applicable to an O-1 as an entity sponsoring the beneficiary for a H-1B visa, where the foreign national owns the corporation. Also, in the O-1 context, the beneficiary who is traditionally self-employed may be sponsored by a US agent. 8 C.F.R. §214.2(o)(2)(i).

TN Visa

A TN cannot be self-employed, but the definition of self-employment is narrow. A TN will be deemed to be self employed only if he/she will be rendering services to a corporation or entity of which the professional is the sole or controlling shareholder or owner. 8 C.F.R. §214.6(b). Therefore, a TN may be

able to render services to a U.S. employer even if he or she is the owner of a company. A TN does not have to be a W-2 employee. He or she can be a consultant or independent contractor so long as the services are being rendered to a US company.

E-1 Visa
The E-1 and E-2 visa categories lend themselves readily to self-employment as they allow the foreign national to own the US enterprise, but they are restricted to nationals of countries that have treaties with the US.

II. IMMIGRANT VISAS

There may be a tension in obtaining nonimmigrant status and immigrant status in the US through self-employment. While obtaining nonimmigrant status is easier, it may be harder, or at this time impossible, to obtain permanent residence through self-employment, especially if one is resorting to sponsorship through labor certification.

Categories in the Employment-Based First Preference (EB-1)
The "person of extraordinary ability" category is well suited for self-employment and the foreign national can even self-petition for permanent residency. It is important that the foreign national must demonstrate that he or she will continue to work in the area of extraordinary ability. Even if there is no employment, the self petitioner applying for this benefit must develop a concrete business plan of not only his or her intent but also the means to carry on activities reflecting extraordinary ability in the US.

With respect to multinational managers and executives, like the L-1, a foreign national can also convert the L-1 to permanent residence visa, though it will be a much more challenging endeavor. The USCIS will look more closely at the entity's ability to employ a foreign national in a qualifying managerial or executive capacity on a permanent basis. Also, the entity must demonstrate its ability to pay the foreign national at the time of filing immigrant visa petition and when the beneficiary obtains permanent residence.

National Interest Waiver
The national interest waiver within the Employment-based Second Preference (EB-2) facilitates the waiver of the job offer as well as the labor certification requirement. In *Matter of New York State Department of Transportation (NYSDOT)*, 22 I&N Dec. 215 (Assoc. Comm'r 1998), the foreign national has to satisfy a

three-prong test. With respect to the first two, the applicant 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 is the third that 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 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."

A national interest waiver applicant may be able to use self-employment to overcome the third prong by establishing that labor certification would be futile in the case of a self-employed individual who is contributing to the national interest of the US though his or her own business venture. As we will discuss below, obtaining labor certification, in the context of one's own business is difficult.

Labor Certification

Labor certification is usually the first step when an employer wishes to sponsor a foreign national for permanent residence. It is essential for the employer to demonstrate but for the unavailability of a minimally qualified US worker the foreign national is not needed for the position. Thus, if the foreign national is so inherent and essential to the sponsoring employer, the DOL assumes that even a qualified US worker will not be able to replace the foreign national worker.

20 C.F.R. § 656.17(l) thus provides for greater scrutiny where: 1) employer is a closely held corporation or partnership in which the alien has an ownership interest, 2) there exists a familial relationship between the stockholders, corporate officers, incorporators, or partners and the alien or 3) the alien is one of a small number of employees.

Form ETA 9089, Question C9 states: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?"

Employment is defined to mean: "Permanent full time work by an employee other than oneself. For purpose of this definition, an investor is not an employee. In the event of an audit, the employer must be prepared to

document the permanent and full time nature of the position by furnishing the position descriptions and payroll records for the job opportunity involved in the Application for Permanent Employment Certification." 20 C.F.R. § 656.3.

In the event of an audit, what will probably trigger if C9 on ETA 9089 is answered in the affirmative, the employer must be able to demonstrate the existence of a bona fide job opportunity, i.e. the job is available to all US workers, and must provide the following supporting documentation:

> 1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business necessity;
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> 2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationship to each other and to the alien beneficiary;
>
> 3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
>
> 4) The name of the business official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
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> 5) If the alien is one of 10 of fewer employees, the employer must document any family relationship between the employees and the alien. 20 CFR § 656.17(l).

The DOL has adopted the "totality of circumstance" test in *Modular Container* Systems, 89- INA – 288 (BALCA 1991) to determine whether a labor certification may be approved when the foreign national has an ownership interest in the sponsoring entity.

In *Modular Container Systems*, BALCA held that the rule requires that an Employer has a "bona fide job opportunity." The need to question the existence of a bona fide job opportunity arises when "the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the

sponsoring Employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant." *Id.* The following criteria will be used to make such a determination:

- is in the position to control or influence hiring decisions regarding the job for which labor certification is sought;
- is related to the corporate directors, officers, or employees;
- was an incorporator or founder of the company;
- has an ownership interest in the company;
- is involved in the management of the company;
- is on the board of directors;
- Is one of a small number of employees;
- has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and
- 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.

Therefore, with respect to owners and entrepreneurs, there is a de facto presumption that an employer and owner controls the hiring process. Even if one shows that the entity is viable and sustainable, that finding is insufficient for approval if the employee owns a significant portion of the employer. However, in *Matter of Human Performance Measurement*, 89-INA-269 (BALCA 1991), the labor certification was granted where the employer had a diffused ownership pattern, where the alien was a limited partner, and only had a collegial and professional relationship with the sponsoring employer.

EB-5

Finally, the EB-5 category is well suited to self-employment. In fact, investing in a regional center is perfect for self-employment especially for passive investors who want to undertake other activities to gain the benefit of permanent residence in the US.

Portability

Under INA §204(j), a foreign national can change jobs provided it is same or similar to the original position, if an application for adjustment of status has been pending for 180 days or more. Portability is applicable to beneficiaries of petitions under the EB-1 (Outstanding Professor/Researcher and Multinational Manager categories), EB-2 and EB-3 preferences. According to a USCIS Memo of

December 27, 2005, posted at AILA InfoNet at Document No. 06092763, it may be possible for a foreign national to "port" into self-employment provided the new employment is a "same or similar" occupational classification as the job for which the original I-140 petition was filed. The USCIS will also focus on whether the I-140 petition represented the truly intended employment at the time of filing both the I-140 petition and the adjustment of status application. Finally, the USCIS will likely investigate whether the foreign national's business is viable to support the "same or similar" employment.

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