FROM THE BEGINNING: AGILE IMMIGRATION ADVOCACY FOR NEW BUSINESSES

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I. INTRODUCTION

Despite the trauma and shock of September 11, the United States is still viewed by many as a land of great opportunity.[1] Although the recent economic slowdown took a bit of bloom off the rose, the United States continues to offer one of the highest standards of living in the world, and its residents can be counted on to consume goods and services of all types with a seemingly insatiable appetite. As a result, people from all over the world still wish to settle permanently and raise their families in this country. These factors and others make the United States an attractive locale for foreign nationals seeking to begin a new business venture, whether alone or in combination with American partners. Immigration lawyers play a critical role in this process by working with entrepreneurs and new companies to ensure that the immigration system facilitates rather than impedes achievement of their business goals.

This article will discuss a potpourri of immigration issues that may be relevant to a company in the initial stages of creation and will offer general guidance on possible immigration strategies for company principals and key employees. The reader is cautioned, however, that this article does not cover the universe of potential immigration issues that may impact a new business and should not be viewed as, or relied upon, as legal advice of the authors.

II. THE FIRST DAY – THE IMMIGRATION ATTORNEY'S ROLE

Immigration lawyers should take a proactive role in advising new business entities. By discussing the potential immigration consequences of various company structures at the outset, immigration lawyers can manage client expectations and ensure that the corporate client is in the best position to achieve its desired immigration-related goals.[2] It is important to remind clients that a long-term immigration strategy

[1] If the terror attacks on America had been successful in diminishing the country's magnetic appeal, one would suspect that the first group to stay away would be foreign students, one of the subsets of aliens subjected to intense scrutiny. Yet even foreign students continue to seek opportunities in the United States. See, e.g., Foreign student body grows. State, U.S. trend is surprising in light of Sept. 11 attacks, OU official says, Detroit Free Press, Apr. 4, 2002, at http://www.freep.com/news/education/nstude4_20020404.htm.

[2] This article will at times use such terms as "corporate" and "company" in describing business entities. The terms are intended to cover a variety of forms of business organizations including sole proprietorships, joint ventures, limited liability companies, trusts, and partnerships of various types, as well as traditional stock corporations. For a discussion of various

involves more than just getting a toe in the door in the United States. The company should be focused on ensuring that key personnel are in a position to remain in the United States as long as necessary to achieve the goals of the company, which may involve analyzing legitimate nonimmigrant and immigrant visa options at the outset.

Additionally, immigration counsel must develop and maintain an awareness of the latest trends in adjudication standards and evidentiary requirements within the Immigration and Naturalization Service (INS) that affect new businesses. This up-to-the-minute insight is necessary in order to better determine the required supporting documentation to submit as well as to assess the overall likelihood of success in a particular case. In the recent past, some INS adjudicators at a number of the Regional Service Centers (RSCs) have exhibited an almost virulent animus toward new businesses that petition for employment-based immigration benefits. This development is perhaps not surprising in the wake of September 11, given that a primary focus of the Service (aside from concerns for its continued survival) appears to be on identifying fraudulent cases.[3] At least one RSC appears to be issuing greater numbers of Requests for Additional Evidence (RFEs) in H-1B (specialty occupation), L-1 (intracompany transferee) and EB1-3 (multinational manager/executive) cases, especially cases involving new businesses.[4] In some cases, the information requested may be quite extensive, including "certified and signed" corporate income and payroll tax returns, and detailed organizational charts that include information on subordinate employees (names, job duties, educational level, annual salaries and manner of paying wages) for both the U.S. and foreign entities. For example, the INS in some cases has requested proof of wire transfers establishing acquisition and ownership of the U.S. entity and detailed information regarding the physical premises, including photographs, floor plans, and copies of escrow documents, or other evidence of title, demonstrating ownership of a building where the premises were leased.

While this trend of burdensome demands for documents has apparently not yet become widespread at U.S. consular posts abroad, immigration counsel should also note that the policies and procedures of various consular posts regarding the processing of visa applications can differ significantly. Therefore, it is essential to review current information regarding the particular post, including the embassy's or consulate's web site, and solicit further information from colleagues and published sources before advising a corporate client on employment-based visa applications.[5] This need to confirm local practices

types of business structures, see W. Stock, "The Law of Business Organizations for the Immigration Lawyer: Advising Companies, Employees and Investors," 2 *Immigration & Nationality Law Handbook* 459 (2000-01 ed.).

[3] The authors understand from reliable sources within the Service that the INS Commissioner, James Ziglar, has recently issued a directive announcing a "zero-tolerance" policy applicable to Service personnel. The directive – issued on the heels of the much-publicized belated approval of F-1 change of status applications for two dead terrorists – allegedly forewarns INS employees that the agency will not countenance any violations of "policy." Even a casual observer of the bureaucratic mind-set would readily assume that the Commissioner's directive will likely result in greater level of caution and skepticism on the part of the RSCs' Center Adjudications Officers in determining eligibility for immigration benefits.

[4] Some Service supervisory personnel have been heard to challenge the claims of attorneys that RFEs are spewing forth in greater numbers. The explanation they offer is that diligent INS personnel are rapidly working down their backlogs of unadjudicated employment-based cases, and that this flurry of backlog reduction results in essentially the same average number of RFEs that are merely concentrated in a shorter span of time.

[5] *See also,* AILA's U.S. Consular Posts Handbook (2002 ed.)

is particularly important in the E-1 (treaty trader) and E-2 (treaty investor) visa categories where consular officers exercise independent authority to approve or deny such visas even if the INS had already approved a change of status to the E-1 or E-2 classification. Thus, an understanding of current trends at consular posts will help determine whether a particular application for an employment-based visa benefit is likely to be successful.

III. THE SECOND DAY – DOCUMENTATION

The cornerstone of the immigration case involving an early-stage company will be documentation of the company's existence and viability. Often, at the preliminary stages of a company's existence, extensive documentation of business activities may not yet be available. Thus, immigration counsel may need to rely on evidence such as a business plan, lease agreements, articles of incorporation, stock certificates and other proof of initial business activity, such as copies of contracts, invoices, letters of credit, etc.

At the threshold of company activities, a clear and fully developed business plan may turn out to be key to the approvability of a particular case. Therefore, immigration counsel may want to outline the basic elements that the INS may expect to see in this document. In *Matter of Ho*, an EB-5 (employment-creation immigrant investor) case, a laundry list of factors to consider and address in a business plan is outlined.

> A comprehensive business plan . . . should contain, at a minimum, a description of the business, its products and/or services, and its objectives. The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and description of the target market/ prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/ or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.[6]

Although the foregoing description is derived from an EB-5 immigrant investor case, its description of a comprehensive business plan is likely to satisfy other nonimmigrant and immigrant visa categories as well.

[6] *Matter of Ho*, Int. Dec. 3362 (Assoc. Comm. 1998).

Immigration counsel should also caution clients not to be short-sighted in their efforts to collect and maintain required documentation. For example, companies whose structure requires that periodic board meetings be held should conduct these meetings and maintain appropriate minutes. Although a company principal or employee may have already obtained a nonimmigrant visa, there may be a point in the future where the company would like to request extension of his or her stay or would like to consider immigrant visa or permanent resident options. At the time of extension of status, it may be difficult, impossible or illegal to develop documents that should have been maintained all along.

IV. THE THIRD DAY – SHORT-TERM IMMIGRATION STRATEGIES

The founder of a new venture may be abroad seeking a legitimate manner to enter the United States to explore a new business opportunity. Alternatively, he or she may already be in the United States employed with another company, in possession of an employment-based visa, and planning to terminate the employment relationship with his or her current petitioner. In either case, the foreign national may be eligible for B-1/ WB business visitor status.[7] A business visitor may engage in business activities, which can legitimately include exploring a new business opportunity, so long as no actual labor is performed. Permissible business activities include negotiating contracts and other "activities of a commercial or professional nature."[8] The individual must be mindful of the fact that B-1 visitors must demonstrate that they are visiting temporarily and can show a foreign residence which they "ha[ve] no intention of abandoning."[9] Evidence of a permanent foreign residence may include family members abroad, a home abroad, or other business or personal ties abroad such as bank accounts and insurance policies.

Unfortunately, it is difficult to draw the line between appropriate business visitor activities and unlawful employment. Foreign nationals who are rounding up financing to start a new business enterprise often want to be able to hold themselves out as representatives of the new company. This should be discouraged as should activities such as obtaining business cards or establishing specific office space for the B-1 visitor at the company's U.S. offices. Additionally, the company should be discouraged from issuing any press releases announcing the founder's position with the new U.S. company, unless the commencement of employment is described as prospective.

V. THE FOURTH DAY – LONGER-TERM NONIMMIGRANT VISA STRATEGIES

Once the new venture is sufficiently off the ground, the next step is finding an appropriate nonimmigrant visa classification for the founder or other prospective key employees.

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[7] The B-1 and WB categories are virtually identical in terms of the underlying substantive eligibility criteria that allow entry to the U.S. as business visitors. INA §101(a)(15)(B); 8 USC §1101(a)(15)(B)(defining the B-1/B-2 classification). INA §217; 8 USC §1187 (defining the WB classification). Hence the above legal analysis is equally applicable to both.

[8] 22 CFR §41.31. For a discussion of the B-1/ WB business visitor classification, see A. Paparelli and S. Wehrer, "The Incredible Rightness of 'B'-ing – Prudent and Practical Uses for the B-1 and WB Business Visitor Categories" 2 *Immigration & Nationality Law Handbook* 105 (2000-01 ed.)

[9] INA §101(a)(15)(B); 8 USC §1101(a)(15)(B).

A. E-1/E-2 Issues

A foreign national seeking to start a new business in the United States may qualify for E-1 or E-2 status if he or she is a national of a country that has entered into a treaty of Friendship, Commerce and Navigation or bilateral investment treaty[10] with the United States, and otherwise meets the requirements for the classification.[11]

The prospective "treaty national" business owner may not need to meet all of the requirements as a prerequisite for entering the United States to conduct activities related to the formation of the business. A foreign national who is interested in making an investment in the United States that would permit the grant of status as an E-2 investor is eligible to enter the United States in B-1 status to conduct preliminary business activities.[12] The individual may not actively participate in the management of the business until the prospective investor is granted E-2 status. This may be an attractive option for a foreign national who is currently outside the United States. The alien should be cautioned, however, to engage only in activities that are consistent with B-1 status rather than actively running the new enterprise.

To qualify for E-2 status, sufficient legwork must be completed to be near "the start of actual business operations, not simply in the stage of signing contracts (which may be broken) or scouting for suitable locations and property. Mere intent to invest, or possession of uncommitted funds in a bank account, or even prospective investment arrangements entailing no present commitment, will not suffice."[13] Specifically, to qualify as an "investment," the foreign national must demonstrate possession and control

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[10] INA §101(a)(15)(E); 8 USC §1101(a)(15)(E).

[11] 8 CFR §214.2(e)(1) defines treaty trader as follows: "An alien, if otherwise admissible, may be classified as a nonimmigrant treaty trader (E-1) under the provisions of section 101(a)(15)(E)(i) of the Act if the alien:

Will be in the United States solely to carry on trade of a substantial nature, which is international in scope, either on the alien's behalf or as an employee of a foreign person or organization engaged in trade principally between the United States and the treaty country of which the alien is a national, taking into consideration any conditions in the country of which the alien is a national which may affect the alien's ability to carry on such substantial trade; and

Intends to depart the United States upon the expiration or termination of treaty trader (E-1) status."

8 CFR §214.2(e)(2) defines treaty investor as follows: "An alien, if otherwise admissible, may be classified as a nonimmigrant treaty investor (E-2) under the provision of section 101(a)(15)(E)(ii) if the alien:

Has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living;

Is seeking entry solely to develop and direct the enterprise; and

Intends to depart the United States upon the expiration or termination of treaty trader (E-2) status."

For a further discussion of the E visa classification, *see* H. Chang, "Revised Strategies in E Visa Processing," 2 *Immigration & Nationality Law Handbook* 109 (2001-02 ed.).

[12] 9 U.S. Department of State Foreign Affairs Manual (FAM) §41.31 N6.7; INS Operations Instructions §214.2(b)(11).

[13] 9 FAM §41.51 N8.1-3b.

of the relevant funds[14], that the funds are placed at risk in the commercial sense[15], and that the funds are irrevocably committed.[16] Fortunately, the Department of State (DOS) has indicated that irrevocable commitment of funds would include "the purchase or sale of a business which qualifies for E-2 status in every respect [except that it is] conditioned upon the issuance of the visa."

In some cases, a qualifying employer may seek an E-1 or E-2 visa for an employee who will be involved in starting up a new business or activity in the United States. The regulations governing the E classification provide that an employee who "has special qualifications that make his or her service essential to the efficient operation of the enterprise" may be eligible for an E visa.[17] The visa applicant bears the burden of demonstrating the need for the skills as well as the length of time the skills will be required.[18] The E regulations governing extensions of stay further state that "it is presumed that employees of treaty enterprises with special qualifications who are responsible for start-up operations should be able to complete their objectives within 2 years. Absent special circumstances, therefore, such employees will not be eligible to obtain an extension of stay."[19] Therefore, employers seeking the full two years of initial admission or seeking an extension of stay for such employees should be prepared to demonstrate the special circumstances warranting approval of such a stay in detail to the consular officer or INS officer reviewing the E visa application/ extension petition.

B. H-1B Issues

An H-1B visa may be an option for a company founder or key employee of a new venture.[20] Although the number of H-1B visas that may be issued is governed by statute, current demand appears to be such that the classification will likely be an available option throughout this fiscal year (ending September 30, 2002).[21] A significant drawback of this classification, however, is that it is the most highly regulated, with oversight by both the INS and the U.S. Department of Labor (DOL). For example, unlike other categories, the new company must pay the H-1B worker at least the prevailing wage for the relevant geographic area and must bear the burden of ensuring that appropriate documentation is maintained in a

[14] 9 FAM §41.51 N8.1-1.

[15] 9 FAM §41.51 N8.1-2

[16] 9 FAM §41.51 N8.1-3.

[17] 8 CFR §214.2(e)(3).

[18] 9 FAM §41.51 N14.3-1.

[19] 8 CFR §214.2(e)(20)(ii).

[20] The H-1B classification applies to aliens who are coming temporarily to the United States to perform services in a specialty occupation. 8 CFR §214.2(h)(1)(ii)(B)(1).

[21] 1st Quarter FY 2002 H-1B Processing, *posted on* AILA InfoNet, Doc. No. 02030633 (Mar. 6, 2002). "The [INS] reported that during the first quarter of the current fiscal year, from October 1, 2001, to December 31, 2001, approximately 28,000 H-1B petitions had been approved against the 195,000 limit for FY 2002."

public access file.[22] In some cases, the prevailing wage for the position in question may be higher than a new company is willing or able to pay. Additionally, the requirements of the H-1B classification are difficult to satisfy if the company does not have an officer, director, or managerial employee other than the foreign national, who can ensure that appropriate postings are made and can sign the petition on behalf of the company.[23]

Company founders and key employees often have a significant ownership interest in the new venture. Although there is no specific prohibition against an ownership interest in the INS and DOL H-1B regulations, an employment relationship is required whereby the employer has the power to "hire, pay, fire, supervise, or otherwise control the work of such employee."[24] Immigration counsel should ensure that an H-1B beneficiary's ownership interest in the company is disclosed in the petition documents to avoid any potential claim of fraud or misrepresentation.[25]

If the H-1B petition will be for a foreign national who is serving in a management position with the company, such as President, be prepared for a more difficult case than the usual Software Engineer with a relevant bachelor's degree. The INS previously has taken the position that management is not necessarily a profession.[26] Therefore, practitioners will want to look at the alien's educational background

[22] 20 CFR §655.731; 20 CFR § 655.760.

[23] 20 CFR §655.734; 20 CFR §655.760.

[24] 8 CFR §214.2 (h)(1)(ii). "United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States, which:

Engages a person to work within the United States:

Has an employer-employee relationships with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and

Has an Internal Revenue Service Tax identification number." *Id.*

The DOL regulations similarly define an employer as "a person, firm, corporation, contractor, or other association or organization in the United States which has an employment relationship with H-1B nonimmigrants and/or U.S. worker(s). The person, firm, contractor, or other association or organization in the United States which files a petition on behalf of an H-1B nonimmigrant is deemed to be the employer of that H-1B nonimmigrant." 20 C.F.R. §655.715.

[25] INA §274C; 8 USC §1324c (statutory provision addressing document fraud). See also *Matter of M*---, 8 I&N Dec. 24, Int. Dec. (BIA) 952, 1958 WL 9869 (BIA) (Sept. 5, 1958) (Alien who is the sole owner of a bona fide corporation may qualify as beneficiary of a first preference petition filed by the same corporation. Petitioner's failure to disclose that beneficiary was a sole owner of the company did not amount to a "deliberate effort . . . to conceal" the ownership interest and, therefore, the visa petition approval was not procured through fraud or misrepresentation. The attorney general affirmed the decision but disapproved the rationale.); *compare Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, Int. Dec. 3017 (Aug. 13, 1986) (occupational preference petition may be filed on behalf of a prospective employee who is a shareholder in the corporation; however, the ownership interest is a material fact in determining whether job offered was open to all qualified applicants).

[26] *Matter of Caron International*, 19 I. & N. Dec. 791 (Assoc. Comm'r Exam 1988) (position of vice president of manufacturing for a major textile firm, with responsibility for 725 employees found not to be a "profession."); c*ontra Hong Kong T.V. Video Program, Inc. v. Ilchert*, 685 F. Supp. 712, 2 Immig. Rptr. A2-63 (N.D. Cal. 1988) (position of president and chief executive officer of foreign language video cassette importer and distributor employing over 70 workers found to be a "profession."). For a further discussion of the "professional" designation and the definition of "specialty occupation," see M. Lawler, *Professionals: A Matter of Degree, Cases and Materials* (AILA 3rd ed.).

and identify specific education (other than general business knowledge) required for the position. For example, if the foreign national has a master of business administration degree with an emphasis in marketing and the position of president can be shown to involve extensive marketing activities, this should be emphasized in the petition.

C. L-1 Issues

L-1 intracompany transferee status may also be an option for foreign nationals seeking to start a business in the United States. The alien will need to be able to demonstrate one year of full-time employment abroad (in the three years preceding the application for admission in L-1 status) with a parent, branch, affiliate or subsidiary of the U.S. organization.[27] This may be difficult for some aliens, but may be a viable option for others who have an established or been employed in an active business abroad or who are willing to wait a year or more before filing a petition while they establish and are employed in a foreign business operation.

It is a common misconception among foreign nationals seeking L-1 classification that once they arrive in the United States, the foreign operation upon which the qualifying L-1 relationship was based may be closed or may "wind down" operation. The regulations require that the qualifying organization, both in the United States and abroad, must be "doing business . . . as an employer in the United States and in at least one other country . . . for the duration of the alien's stay in the United States as an intracompany transferee."[28] Thus, counsel should instruct clients to ensure that the qualifying organizations continue operating and employing personnel for the duration of the foreign national's stay in the United States.

The regulations governing the L-1 classification set forth additional evidentiary requirements when the beneficiary is coming to the United States to open or be employed in a "new office" in the United States."[29] Specifically for executives and managers, the petition will need to include evidence that sufficient physical premises have been secured, that the beneficiary's position in the organization abroad was executive or managerial and that the proposed employment is executive or managerial, and that within one year of petition approval, the U.S. operation will support the position (*i.e.,* that the position will meet the definition of managerial or executive).[30] For aliens who will be employed in the United States in

[27] 8 CFR §214.2(l)(1)(ii). "Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge." For a further discussion of the L-1 classification, *see* J. Soloman, "Intracompany Transferees (L Nonimmigrants)," 2 *Immigration and Nationality Law Handbook* 8 (2001-02 ed.).

[28] 8 CFR §214.2(l)(1)(ii)(G)(2). "Doing business" is defined as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 CFR §214.2(l)(1)(ii)(H).

[29] 8 CFR §214.2(l)(3)(v).

[30] Id.

a specialized knowledge capacity in a new office, the petition must include evidence that sufficient physical premises have been secured, and that the petitioning organization "has the financial ability to remunerate the beneficiary and commence doing business in the United States."[31]

Petitions for foreign nationals to be employed in a new U.S. office can only be approved for a maximum of one year.[32] To obtain an extension, the petitioner will need to provide evidence that the U.S. and foreign entities continue to be qualifying organizations; that the U.S. entity is doing business[33]; a description of the staffing of the U.S. entity, including wage information for other employees (if the employee is a manager or executive); and evidence of the company's financial status.[34] In practice, it may be difficult for a company to meet these evidentiary requirements after only one year of operation.

When asserting that prospective employees qualify as managers, counsel should note that the Immigration and Nationality Act (INA) does not require that managerial employees manage other employees.[35] In reality, however, it may be difficult to convince the INS that a manager who supervises no employees and perhaps is the sole employee of the organization is eligible for L-1A status.[36] Therefore, in such cases, counsel may want to consider whether the prospective L-1A beneficiary will be managing relationships with outside contractors and, in extension cases, may want to submit copies of contracts signed by the employee as evidence that he or she makes policy decisions and otherwise manages the organization.

If the prospective L-1A manager will be managing a small number of people, counsel should note that the regulations state that a "first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional."[37] The L-1A manager would not likely be considered a first-line supervisor, however, if he or she managed at least two levels of employees. Therefore, counsel may want to clarify with the company whether the

[31] 8 CFR §214.2(l)(3)(vi).

[32] 8 CFR §214.2(l)(7)(i)(A)(3).

[33] "[D]oing business" is defined under INS regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 CFR §214.2(l)(1)(ii)(H).

[34] 8 CFR §214.2(l)(14)(ii).

[35] INA §101(a)(44)(A)(iii); 8 USC §1101(a)(44)(A)(iii). See *Matter of Irish Dairy Board, Inc.*, A28-845-421 (AAU Nov. 16, 1989) ("[T]he sole employee of a firm may be classified as an executive in certain circumstances provided his primary function is to plan, organize, direct and control and organization's major functions through other employees. No discussion of the size or staffing level of the organization is included in the definition of the term 'executive'." Note that this decision was based on the pre-Immigration Act of 1990 definition of "executive," which was analogous to the current definition of "manager.")

[36] Some INS officers appear to believe that the size of the company is relevant in determining whether an individual qualifies for L-1A status.

[37] 8 CFR §214.2(l)(1)(ii)(B).

subordinate employees could properly be characterized as falling into more than one level within the company hierarchy.

A prospective L-1A manager may also qualify as a function manager if he or she would be managing an "essential function within the organization."[38] Officers at one Regional Service Center have informally opined that management of a product line or management of the business development or public relations function for an organization may qualify a foreign national as a function manager. In the same informal discussion, several INS officers recommended that the attorney, in his or her covering letter, specifically identify the factual basis and rationale for L-1A eligibility (*i.e.*, "We believe that Mr. Doe qualifies as an L-1A function manager because . . . .") in an effort to assist the adjudicators.

With regard to foreign nationals who may be eligible for L-1 status, but have an ownership interest in the new venture, the L-1 regulations contain a provision for owners or major stockholders indicating that petitions for such individuals must ostensibly contain "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."[39] Note, however, that the L-1 regulations were implemented and related cases were decided before H-1B and L-1 nonimmigrants were removed from the intending immigrant presumption by § 205(b)(1) of the Immigration Act of 1990.[40] Therefore, the regulation and related case law appear to be honored more in the breach than the observance.

The L-1 classification may be an attractive option for foreign nationals who qualify as executive or managerial employees and who wish to become permanent residents of the United States. The requirements for immigrant visa classification in the EB1-3 multinational executive/manager classification essentially mirror those for the L-1A classification, making this approach for obtaining a green card extremely attractive for those who qualify.[41]

D. TN Issues

The TN classification may be an option for Canadian or Mexican citizens who fit within one of the professions enumerated in the North American Free Trade Agreement (NAFTA).[42] This category may be particularly attractive if a company would like to hire a qualifying Canadian national and would like him or her to commence employment quickly by making application for TN admission at an authorized U.S. port

[38] INA §101(a)(44)(A)(iii).

[39] 8 CFR § 214.2(l)(3)(vii). Similarly, the Board of Immigration Appeals has held that a situation in which the L-1 beneficiary is an owner/operator requires a higher degree of proof that the utilization of the beneficiary's services in the U.S. will be temporary. *Matter of Isovic*, 18 I&N Dec. 361 (Comm. 1982).

[40] Codified at INA §214(b), 8 USC §1184(b).

[41] 8 CFR §204.5(j).

[42] 8 CFR §214.6.

of entry.[43] Unfortunately, the TN classification may not be a viable option for individuals with a significant ownership interest in a U.S. company. The regulations governing the TN classification state that an individual may not enter the United States in TN status for the purpose of "establish[ing] a business or practice in the United States in which the professional will be, in substance, self-employed. A professional will be deemed to be self-employed if he or she will be rendering services to a corporation or entity of which the professional is the sole or controlling shareholder or owner"[44] Given that the immigration regulations in other contexts typically contemplate at least 50 percent ownership as the primary measure of control of an entity, this may serve as a useful guide in determining what level of ownership interest is likely to be acceptable to the INS.[45]

VI. THE FIFTH DAY – GREEN CARD OPTIONS

If permanent residence is the ultimate objective for the company founder, an ownership interest may adversely affect the ability of the company to obtain approval of a labor certification on the owner's behalf. In order to be eligible for approval of labor certification, the DOL requires that a bona fide job opportunity exist (*i.e.*, that the employer would be willing to hire an available and qualified U.S. worker).[46] The Board of Alien Labor Certification Appeals (BALCA) has held that whether a job is clearly open to qualified U.S. applicants depends on the totality of the circumstances and listed nine factors, of which one is whether the alien possesses an ownership interest and another is whether the alien was a company founder, to be considered when determining the totality of the circumstances.[47] An ownership interest in the company

[43] Canadian nationals may apply for admission to the United States in TN status at any Class A port of entry. 8 CFR §214.6(e). Note that Mexican nationals are not granted the same speedy option. They must file a Form I-129 petition, including a labor condition application certified by the DOL, with the Nebraska Service Center in order to request TN classification. *See* 8 CFR §214.6(d).

[44] 8 CFR §214.6(b).

[45] 8 CFR §214.2(e)(16) states that "An alien seeking classification as a treaty investor must demonstrate that he or she does or will develop and direct the investment enterprise. Such an applicant must establish that he or she controls the enterprise by demonstrating ownership of at least 50 percent of the enterprise, by possessing operational control through a managerial position or other corporate device, or by other means." 8 CFR §214.2(l)(1)(ii)(K) defines a subsidiary as a legal entity of which a parent owns, directly or indirectly, more than half or half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

[46] 20 CFR §656.20(c)(8).

[47] *Matter of Modular Container Systems*, 89-INA-228 (BALCA July 16, 1991). Specifically, the Board looks at whether the alien:

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;

does not establish lack of a bona fide job opportunity *per se*, unless the investment is so great that employment of the alien is tantamount to self-employment.[48] In several cases, BALCA has applied the "totality of the circumstances" test to determine whether a bona fide job opportunity exists.[49]

Fortunately, for some aliens, labor certification may not be the only option. If an individual has been employed by an organization abroad that could potentially qualify the alien for an immigrant visa as an EB1-3 multinational executive/ manager, this would be an option exempt from labor certification.[50] Similarly, if the foreign national is highly acclaimed in his or her field, the alien may be eligible for a first preference immigrant visa such as an extraordinary ability alien,[51] or outstanding researcher,[52] or if the individual's services qualify, he or she may be eligible for a national interest waiver.[53]

VII. THE SIXTH DAY – SELECTED ISSUES

A. Successorship-In-Interest

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 the alien's pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien. Id. at 235.

[48] *Id.* at 235.

[49] *Matter of Goodway Company*, 91-INA-49 (BALCA June 4, 1992) (Labor certification was denied because the alien had a 10 percent interest in the company's stock, was one of five shareholders in the parent's closely held company, and his 10 percent interest was equal to that of three other investors. In addition, the alien was a director, secretary, and CFO of the company); *Matter of Foodmix, Inc.*, 90-INA-521 (BALCA June 4, 1992) (Labor certification was denied because the alien was the employer's incorporator, president, one-third shareholder, and incumbent import/export manager. The corporate secretary's authority to dismiss the alien was conferred after the filing of the labor certification); *Matter of Morex, Inc.*, 91-INA-206 (BALCA Oct. 27, 1992) (A bona fide job opportunity did not exist where the alien held 25% of the employer's stock, was a director and corporate secretary, and the alien's three brothers held the other positions on the board of directors and the remaining shares of stock); *Matter of Human Performance Measurement, Inc.*, 89-INA-269 (BALCA Oct. 25, 1991) (A bona fide job opportunity exists notwithstanding the alien's relationship with the employer where the alien owned just 4 percent of the company's stock, along with 30 other shareholders, the alien had no family relationship with key company personnel; evidence demonstrated that other employees were more influential within the company).

[50] 8 CFR §204.5(j). Note that the prospective U.S. employer must have been doing business for at least one year at the time the multinational executive/ manager petition is filed. 8 CFR §204.5(j)(3)(i)(D).

[51] 8 CFR §204.5(h).

[52] 8 CFR §204.5(i).

[53] INA §203(b)(2)(B)(i); 8 USC §1153(b)(2)(B)(i). For a further discussion of national interest waivers, *see* C. Weber and R. Wada, "National Interest Waivers 2002 – A Practice Update," 7 *Bender's Immigration Bulletin* 361 (Apr. 1, 2002). *See also* A. Paparelli and G. Pigeaud, "Read My Lips: No New National Interest Waivers!," *11th Annual (1998) California Chapters Handbook* (AILA).

Often, new ventures are begun with the hope or expectation that the company will be acquired after some period of time or that the company will engage in an initial public offering.[54] Thus, immigration counsel should educate new companies regarding the immigration consequences of corporate restructurings at the outset of the client relationship and recommend that immigration be included as a part of the due diligence process so that the potential immigration implications of the transaction can be assessed prior to the closing of the transaction. In reality, immigration counsel is often not involved in or informed of corporate restructurings before the closing of the transaction. If notified prior to closing, however, immigration counsel must assess the type of transaction that will take place and consider potentially affected employees, both nonimmigrant and immigrant.

In the E context, eligibility turns on treaty nationality. Therefore, a change in ownership may impact a foreign national's ongoing eligibility for E status. If informed prior to the transaction, immigration counsel should evaluate whether continued E eligibility exists and, if not, explore other immigration options. Additionally, if continued E status is sought, counsel should note that INS regulations require the filing of an amended E petition *prior* to a "substantive"[55] change in the terms and conditions of E status.[56] Thus, counsel should try to file an amended petition prior to the restructuring, if possible.[57]

Given that L-1 visa eligibility turns on the qualifying relationship between a U.S. and foreign organization,[58] as with E visa holders above, a corporate restructuring may adversely impact an L-1 visa holder's continued eligibility for this classification. INS regulations governing the L-1 classification require that an amended petition be filed "to reflect changes in approved relationships . . . or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act."[59] In some cases, a corporate restructuring will render an L-1 nonimmigrant ineligible for this classification and may require a request for change of status to another classification, if possible.

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[54] The topic of corporate restructurings is broader than can be addressed in this overview of specific issues related to start-up companies. For a more complete discussion of the impact of corporate restructurings on various immigration processes, see A. Paparelli, A. Tafapolsky, T. Chiappari, S. Cohen, and S. Yale-Loehr, "It Ain't Over Till It's Over: Immigration Strategies in Mergers, Acquisitions and Other Corporate Changes," 5 *Bender's Immigration Bulletin* 789 and 849 (Oct. 1, 2000 and Oct. 15, 2000); A. Tafapolsky, A. Paparelli, A. Vazquez-Azpiri and S. Wehrer, "Thriving on Change: How to Solve Immigration Problems in Merger & Acquisition Deals," *New Rules for the New Millennium* (AILA 2001); A. Paparelli and S. Wehrer, "Update on Mergers and Acquisitions: Congress Toys With the H-1B," 2 Immigration & Nationality Law 1 (AILA 2001-02).

[55] INS regulations state that "[t]he Service will deem there to have been a substantive change necessitating the filing of a new Form I-129 application in cases where there has been a fundamental change in the employing entity's basic characteristics, such as a merger, acquisition, or sale of a division where the alien is employed." 8 CFR §214.2(e)(8)(iii).

[56] 8 CFR §214.2(e)(8)(iii).

[57] The INS has informally acknowledged some flexibility in the regulatory requirement that an amended petition be filed prior to a substantive change. Given that such commentary has been informal, however, it is advisable to attempt to file an amended petition before a restructuring occurs.

[58] 8 CFR §214.2(l)(1)(ii)(A).

[59] 8 CFR §214.2(l)(7)(i)(C).

Establishing that a new company is a successor-in-interest can be extremely important to foreign nationals as a method of preserving pre-existing immigration benefits, such as previously approved visa classifications and immigrant visa priority dates. In the past, to qualify as a successor-in-interest, the successor must have acquired all the assets and have assumed all the liabilities of the predecessor organization.[60] Fortunately, with regard to foreign nationals in H-1B status, in 2000, Congress enacted the Visa Waiver Permanent Act, which amended Section 214(c) of the INA to state that "[a]n amended H-1B petition shall not be required where the petitioning employer is involved in a corporate restructuring, including but not limited to a merger, acquisition, or consolidation, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner."[61] Shortly thereafter, in its interim final rule implementing the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), the DOL, another agency with enforcement authority over the H-1B classification, provided that a new LCA will not be required when a corporate restructuring has occurred so long as the successor entity includes a sworn statement containing specific information in the public access files of affected H-1B employees. *prior to* their continued employment.[62]

In recent correspondence interpreting the Visa Waiver Permanent Act provision, the INS has acknowledged a more manageable standard, stating that "the assumption of liabilities refers to immigration-related liabilities, such as LCA obligations and violations thereof. It does not refer to non-immigration related obligations and liabilities, such as environmental or tort obligations, for example."[63] Therefore, these letters suggest that amended H-1B petitions are no longer required if the new employing entity has assumed the immigration-related liabilities of the predecessor.

Similarly, in correspondence addressing the successorship-in-interest concept at the I-140 stage, the INS confirmed that "a company is a successor-in-interest [for I-140 purposes] when it has taken on all of the immigration-related liabilities of the company it has acquired, merged, etc."[64] One can hope that this more enlightened approach will continued to be applied, making the road a bit easier for emerging companies confronted with a corporate restructuring.

B. Professional Employer Organizations

[60] *Matter of Dial Auto Repair*, 19 I&N Dec. 481 (Comm'r 1986).

[61] INA §214(c)(10); 8 U.S.C. §1184(c)(10).

[62] 20 CFR §655.730(e)(1). Note that the "prior to" language is in the preamble rather than the regulation itself. 65 Fed. Reg. 80124. However, the regulation states that "[u]nless such statement is executed and made available in accordance with this paragraph, the new employing entity shall not employ any of the predecessor entity's H-1B nonimmigrants without filing new LCAs and petitions." 20 CFR §655.730(e)(1).

[63] Letter from Efren Hernandez III, Director, Business and Trade Services, to Steven Ladik (Mar. 22, 2001), *posted on* AILA InfoNet, Doc. No. 01032901 (Mar. 29, 2001); see also Letter from Efren Hernandez III to Martha Schoonover (June 7, 2001), *posted on* AILA InfoNet, Doc. No. 01062832 (June 28, 2001).

[64] Letter from Efren Hernandez III, Director, Business and Trade Services, to Douglas Donenfeld (Oct. 17, 2001).

Many new and smaller companies outsource their human resource function to what are sometimes called professional employer organizations (PEOs). This outsourcing can result in a situation in which a foreign national, for whom the company submitted a petition with the INS, may actually be paid and nominally employed or co-employed by another entity.[65] This has resulted in confusion among attorneys and employers as to which of the entities is the employer and should be the petitioner for purposes of immigration petition filings.

The INS has informally addressed the issue of PEOs in the H-1B context in correspondence, stating that "an entity can file an H-1B petition on behalf of an alien even though the alien's salary is paid from another source, provided that an employer-employee relationship exists. The existence of the employer-employee relationship can be demonstrated by evidence establishing that the entity has control over the H-1B nonimmigrant even though the alien's salary is paid from another source."[66] In earlier informal correspondence addressing employee leasing companies, the INS indicated that if both companies exercise a degree of control over the alien, "one of the firms involved in the leasing agreement would either have to designate itself as the petitioner for immigration purposes, provided it meets the regulatory definition of a United States employer, or both firms could petition for the alien."[67]

Thus, when an employer has outsourced more than the payroll function, it runs the risk of being deemed a co-employer for immigration purposes. Under certain circumstances, to avoid the need for both entities to file a petition on behalf of each nonimmigrant worker, it may be possible for the company and the PEO to execute a written agreement designating which party will serve as the employer for all immigration purposes. It may be safest, however, for H-1B workers to be taken off of the payroll of the PEO and instead be paid by the petitioner, if possible.

VIII. THE SEVENTH DAY – CONCLUDING THOUGHTS, BUT NO REST YET

Immigration lawyers often provide immeasurable assistance to foreign entrepreneurs and their employees in helping the clients realize their business goals in the United States. But diligent counsel may never get a "day of rest." By advising companies from the outset, and for the duration, on the immigration consequences of various business decisions, practitioners can at least rest assured that immigration concerns are not an afterthought, but are instead an integral part of new companies' overall development strategy. As new companies evolve, however, their goals and priorities will likely change. Thus, counsel's eternal vigilance and ongoing interaction with corporate clients are necessary to increase the likelihood that company principals and their employees will achieve their ultimate immigration objectives.

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[65] For a further discussion of outsourcing, see A. Paparelli, "Yes, We Have No Employees: The U.S. Immigration Consequences of Corporate Outsourcing and Secondment," 13 *Immigration Law Report* No. 16 (Aug. 15, 1994).

[66] Letter from Efren Hernandez III to Kari Ann Woodward (Dec. 20, 2000), *posted on* AILA Infonet, Doc. No. 01062632 (June 27, 2001). Immigration counsel should note that adjudicators are not bound by such correspondence. *Matter of Izumii*, Int. Dec. (BIA) 3360, 1998 WL 483977 (BIA) (Jul. 13, 1998) ("[The] OGC [INS Office of General Counsel] is not an adjudicative body and is in the position only of being an advisor; as such, adjudicators are not bound by OGC recommendations.")

[67] Letter from Yvonne M. LaFleur, Chief, Business & Trade Services, Adjudications, to H. Ronald Klasko (Feb. 5, 1996), *reproduced at* 73 Interpreter Releases 342 (Mar. 18, 1996).