Proposed Rule Offers New Hope for Foreign Entrepreneurs

Labor & Employment Law Update

By Jacqueline Lentini McCullough on September 14, 2016

A new proposed rule represents a hopeful change for foreign entrepreneurs looking to stay in the U.S. to start and grow their businesses.

Currently the only routes for foreign entrepreneurs to obtain a visa involve huge risk. Those routes, via a Treaty E visa or the EB-5 visa program, require applicants to make significant investments upfront and essentially build their businesses to satisfy the visa criteria, with no guarantee that a visa will be granted.

One of my clients, who sold all-terrain vehicles, imported several of these vehicles and related equipment, not knowing if he would get his visa. Imagine the time, energy and money he had to invest before he could apply and the risk that he endured on the chance his visa would be denied.

Another problem with existing visa routes is that they fail to support less capital-intensive, more modern business models.

Some of my IT consulting clients were able to bootstrap their way into business with just a few computers, internet access and virtual offices. The existing visa criteria required them to commit to year-long office leases and to prematurely invest other funds in the business, again with no assurance that their visas would come through.

And all the upfront investment – in machinery, leases and human resources – was required when the start-ups were in their most vulnerable, cash-flow challenged phases.

Focus on U.S. Job Creation

The new proposed rule emphasizes job growth instead of established business investment. It allows the Department of Homeland Security (DHS) to consider visa applications on a case-by-case basis.

Under the new proposed rule, entrepreneurs may qualify for a two-year visa if they:

- created their start-up during the past three years
- own at least 15 percent of the business equity
- can show the potential for rapid growth and job creation
- have at least $345,000 in qualified investor funding or $100,000 in government grants, and
- play a key role in the company's operations and future growth.

The U.S. Citizenship and Immigration Services agency (USCIS) anticipates around 3,000 of these visa applications per year, which could result in 30,000 new jobs.

Gaining that visa would then position the entrepreneurs to apply for an extension granting an additional three years if they can show their company has operated lawfully for two years, that they have gained an additional $500,000 in funding or government grants, that the company had at least $500,000 in revenue with average annualized growth of 20 percent or more, and that they had created at least 10 full-time jobs for U.S. workers.

This new approach not only reduces the risk to the entrepreneur, it also supports newer business models such as services that require little capital investment and allows them to channel investor funding toward salaries for employees. With U.S. job creation as the focus, the approach also helps counteract popular concerns that foreign nationals allowed visas lead to a net job loss for Americans.

Currently in Comment Period

The proposed rule was published to the Federal Register on August 31, 2016. USCIS has allowed for a 45-day comment period ending on October 17, 2016. The Obama administration hopes the rule will be completed before the President leaves office on January 20, 2017.