USAIE U.S. ALLIANCE FOR INTERNATIONAL ENTREPRENEURS

- FOR IMMEDIATE RELEASE -

COMMENTS ON USCIS FINAL RULE: EMPLOYMENT-BASED IMMIGRATION

INTRODUCTION

USAIE applauds United States Citizenship and Immigration Services (USCIS) for issuing a final rule clarifying a wide variety of issues with employment-based immigration, specifically concerning H-1B visa petitions and permanent residency petitions.

Many of these clarifications were previously addressed by USCIS through a series of non-binding policy memoranda over the past 15 years, with no definitive rules in place. The new rules offer foreign national entrepreneurs some clarity in their immigration options, and thus the USCIS action is welcome.

For international entrepreneurs, the changes are mostly positive.

DETAILS

H-1B workers now receive an automatic 10-day grace period before and after their employment. That was possible before, but depended on the United States Customs and Border Protection officer making a subjective decision to allow an extra ten days on the I-94 entry card. More importantly, H-1B workers now have a 60-day grace period after a job ends. For example, if an international entrepreneur is working a "day job" on an H-1B while trying to set up a company, and the entrepreneur loses that "day job," then she can still stay in the United States in H-1B status for 60 days. That gives time to transition to an H-1B or other visa at the new startup. Any flexibility in the visa system is beneficial to entrepreneurs.

It is now possible for those with approved I-140 petitions to receive an Employment Authorization Document (EAD) if there are "compelling circumstances". This is particularly good news for Indian and Chinese entrepreneurs who have an approved National Interest Waiver petition but whose priority date is not yet current. An unrestricted EAD offers more flexibility than an H-1B, valuable because startups evolve rapidly. The H-1B requires a specific salary, and that may hard for a startup with uneven cash flow. For example, consider the situation of an entrepreneur working for a startup on an H-1B, with a Labor Certification and I-140 approved (the first two steps of a green card). If the startup restructures or goes through a "major change," then the entrepreneur may now be able to apply for an EAD based on "compelling circumstances." The new rule seems to imply that anyone with a National Interest Waiver approved will qualify for this "compelling circumstances" work card.

DETAILS, CONTINUED

NOTE: those who use an EAD rather than H-1B status may be creating an issue when it comes time to Adjust Status to Permanent Residency, as maintaining a valid-nonimmigrant status is required in most, but not all, cases.

The new rules provide for a 180-day automatic extension when an EAD extension application is timely filed prior to the EAD expiring. This will be a huge benefit because USCIS very often takes more than 90 days to adjudicate such extension requests. NOTE: This automatic extension does not cover EADs for spouses of L-1, J-1, and E-1/E-2 workers. Moreover, there is no automatic extension for Advance Parole, even though this privilege to enter the United States is noted on the EAD.

The new rules also clarify key provisions about being able to change jobs while in H-1B status, change employers toward the end of the green card process, and for Chinese and Indian employees, to keep old "priority dates" from a prior green card application filed with a previous employer.

A particularly positive part of the new rules is that USCIS has kept intact the regulation permitting private companies to obtain a cap-exempt H-1B when it locates its H-1B employee "at" a university, a nonprofit research organization, or a government research organization. This could include university-owned properties such as incubator or accelerator space. The rules clarify that the H-1B employee must spend a majority of his/her time while located at the cap-exempt organization, and the employee's job duties must "directly and predominantly" further the goals of the organization. USCIS provides examples of higher education, nonprofit, and governmental research.

One negative change for international entrepreneurs relates to "concurrent" employment. The rules permit an entrepreneur who obtains a full-time or part-time cap-exempt H-1B sponsored by a college or university to then also obtain a concurrent cap-exempt H-1B to work concurrently for a private startup. In the past, based on formal guidance, if the college or university job ended, the H1-B for the startup could still continue until its expiration. This provision has been the basis of a wide variety of campus programs for entrepreneurs. Now, USCIS reserves the right to cancel the second H-1B for the startup, reasoning that the individual is no longer exempt from the cap. It is unclear at this time whether USCIS will actively revoke the concurrent H-1B, so for now USAIE recommends continuing cap-exempt employment in all concurrent employment situations. Clearly such an individual will want to have the employer file for a cap-subject H-1B the following April 1, because if that petition should win the H-1B lottery, then the employee is no longer tied to the concurrent employment by the university.

Overall, USAIE welcomes the new rules, and hopes that regulations for the new "entrepreneur parole" category are next to come.