IMMIGRATION BRIEFINGS®

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Practical Analysis of Immigration and Nationality Issues

FOREIGN ENTREPRENEURS AND IMMIGRATION: FOUNDING AND FUNDING A BUSINESS IN THE UNITED STATES—WHAT ARE YOUR OPTIONS?

How Ownership Interests Affect Business Immigration Benefits

Part I

by

ALAN TAFAPOLSKY

RAZOR'S EDGE POWER

Rejean Verdonne, a Canadian citizen and Visiting Professor of Physics and Engineering at the Massachusetts Institute of Technology ("MIT") has a revolutionary idea. The technology is a new process for "cold fusion" where atoms are split on sharpened edges (like razor blades) to create a nuclear reaction. Only a handful of his top students, former and past, know about this project. These include two presently enrolled Canadian citizen graduate students and two recent graduate Indian research engineers presently employed by the Millette Company, a large razor company, in F-1 Optional Practical Training status.

Rejean's research and experiments have always been met with skepticism or scorn by his colleagues at MIT. With dreams of enormous wealth, revolutionizing the world as we know it, and proving his detractors wrong, Rejean quits MIT and decides to establish a business entity, Razor's Edge Power. And the American venture capital dream begins...

FRIENDS AND FAMILY SHARPEN THE BLADE

Rejean's brother, Jacque Verdonne, a successful Canadian banker, agrees to give Razor's Edge Power $200,000, and Rejean collects $25,000 from four life-

The Issue In Brief

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He wishes to thank his friend and colleague, Terry Kelly, for editing this colossus on a very sunny weekend in Northern California. He dedicates this Briefing to his father and the memory of his father-in-law, both of whom are his inspiration in the way they dedicated themselves to their work and their families.

THOMSON WEST

long personal Canadian friends as initial equity capital. He adds this to the $200,000 of personal funds he has provided in equity capital financing to Razor's Edge Power. Rejean and Jacques each own 40% of Razor's Edge Power and Rejean's foreign friends own the remaining 20%.

With this capital, Rejean decides to establish Razor's Edge Power's R&D facility in a Cupertino, California warehouse and begins hiring employees. Top on his recruitment list are the four students he left behind in Boston who helped him in creating the science that has blossomed into his business dream. Rejean's corporate attorney advises him that before hiring any foreigners, he must seek immigration counsel.

Rejean has the following concerns:

1. *He wants to be work authorized;*

2. *He wants a green card;*

3. *He wants to hire his ex-students lawfully, but pay them as little as possible, and sponsor them for green cards.*

Immigration compliance and corporate equity financing—not exactly a rhymed couplet. The two concepts rarely meet each other in the formal body of laws and regulations that govern these subjects. The two distinct areas of law, immigration law and corporate law, are generally practiced by different types of attorneys, in different forums, and often at different times. Often, immigration compliance is merely an afterthought to the more immediate concern of founding and financing a business. It would be a mistake, however, to conclude that immigration compliance and equity financing are like two parallel lines that never meet. For foreign entrepreneurs, these two concepts will overlap and pose formidable obstacles to the successful evolution of a business. This two-part *Briefing* (which concludes next month) will serve to expose the intersection of these two areas of law in the following fashion. For foreign entrepreneurs and immigration practitioners, it will provide a basic roadmap of the key stages in corporate formation and equity financing. For securities specialists, corporate attorneys and venture capitalists, it will highlight the unique immigration issues confronting an equity- financed business.

From the Corporate perspective, the *Briefing* will address issues such as: choice of business entity, equity financing compliance at early stages, equity financing through venture capital, selling a business or other exit strategies, and compensating employees with equity and equity derivative instruments. From the immigration side, the *Briefing* will focus on: special problems confronted by foreign entrepreneurs in the early stages of setting up businesses in the United States, equity interests and how they affect nonimmigrant and immigrant benefits, and how equity and equity derivative compensation of foreign nationals may affect immigration benefits.

The objective of this *Briefing* is simple: to illuminate the special problems confronted by foreign entrepreneurs and foreign national employees who own equity interests in companies. The ultimate goal is to spur enough interest in these issues to develop a body of law, and secondary commentary that more adequately addresses the needs of foreign entrepreneurs who may choose to start businesses in the United States.

In order to illustrate principles and problems related to foreign entrepreneurship and equity financing, this *Briefing* will use the case study approach. Rejean Verdonne and his venture, Razor's Edge Power,

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though entirely fictitious creations of the author's mind, will be used to analyze the substantive and procedural problems faced by foreign entrepreneurs and foreign employee owners of equity interests in companies, as well as their prospective foreign national employees.

This month's *Briefing* will survey the spectrum of immigration categories that are available to foreign entrepreneurs at the start-up phase.

FROM THE BEGINNING—THE CATCH-22 FOR FOREIGN ENTREPRENEURS

U.S. immigration law, at least at its incipient stages, was not designed for the immigrant entrepreneur. There is no special seed stage entrepreneur's nonimmigrant visa. Instead the immigrant entrepreneur must untangle a hodgepodge of visa categories and regulations in order to lawfully finance and evolve an idea into a growing or established company. Immigration compliance is often an afterthought to the more daunting challenge of equity financing and growing a business in the U.S. markets. Take Rejean Verdonne: he quit his job at MIT to set up Razor's Edge Power. But like many foreign entrepreneurs living in the United States, he forgot about maintaining his own nonimmigrant status to pursue his venture. He was an O-1 extraordinary ability alien at MIT, but forgot to think about the immigration consequences of quitting his job. Now he has remained unlawfully in the United States for about one month and paid himself a salary.

The Catch-22 is that to obtain a business related *work authorized* visa, a foreign national must have a business sponsor. Between the time when the company is an idea and the time it is organized and capitalized, there is no appropriate *work authorized* visa category for a foreign national. In order to fully understand when a "start-up" reaches the critical mass at which it can sponsor *work authorized* nonimmigrant visas, an overview of the discreet stages of an emerging company's growth is necessary.

START UP 101[1]—IDEA, KITCHEN TABLE, CLOSING CAPITAL AND FOUNDERS' COMMITMENTS, PULL OUT AND …START UP

◆ Idea

There is an infinite supply of ideas in the world. What differentiates the normal "idea" from the "idea stage" is that the idea's creator envisions forming a company to exploit the idea. In our case study, Rejean's idea to produce cold fusion on a razor's edge evolved during years of research while at MIT, but his idea to form a company based on the idea occurred only in his last few months at that prestigious university. For an idea to be transformed into a vision of a company, it must be grounded reality. Though Rejean is a brilliant physicist, his idea is not easily actualized. Though the value of a successful process for cold fusion is doubtless, there is uncertainty around the patentability of the process and / or the ownership of the idea (intellectual property). What is even less clear is how it will be possible to transform the patent or technology into a commercially viable company. To transform an idea into a viable company, its commercial applicability must be assessed. Is the idea commercially valuable? Is the idea unique and protectable? Can the idea be transformed into a product or service that is commercially viable? If these questions are answered in the affirmative or at least those possibilities exist, the idea evolves into the "kitchen table" stage.

◆ Kitchen Table—Sharing The Idea

An idea can only be kept to oneself for so long. Usually, a discussion amongst trusted friends, spouses, and colleagues will test an idea. The idea, when exposed and shared, meets its first outward critics. At this early stage, there are usually no patents, non-disclosure agreements or instruments to protect intellectual property. Therefore, it is best to reveal the idea to only those who are close friends, colleagues or family who have earned the founder's trust. In our case study, Rejean's brother and close personal friends are critics as well as prospective investors. Sitting across the kitchen table, they point out to Rejean some of the prospective hurdles Razor's Edge Power must surmount. Some of these potential issues are: the potential claim that MIT might have on the intellectual property; the amount of investment required to take Razor's Edge Power to viability; and the relative inexperience Rejean has in business, as opposed to science.

◆ Founders' Commitments

Without commitment in terms of capital and participation, no idea upon which a venture can be built will come to fruition. This includes "pullouts" from current employers and initial commitments from both "founders" and "core employees." The two processes of initial funding and employment are necessarily intertwined because it takes money to pay new employees. While initial funding of a start-up is a common concern for both domestic and foreign national entrepreneurs, "pullouts" from current employers have special implications for foreign national entrepreneurs.

Those special concerns include whether foreign national core employees can "maintain status," be "work authorized," and retain any progress toward lawful permanent residence ("green card") if they leave their current employment. Either way, there is no start-up unless employees pullout and investors ante up.

◆ The Foreign National Entrepreneur and Initial Employees

Corporations do not result from Immaculate Conception. The chicken-egg dilemma for a founding foreign national employee is that most work-authorized nonimmigrant visas require an existing corporate entity to act as a nonimmigrant visa petitioner. Additionally, most nonimmigrant visa categories' work authorizations are limited to the employer who has petitioned for his / her existing nonimmigrant status. In Rejean's case, his O-1 employment is limited to his employment at MIT. Hence, he is faced with the Catch 22 of either trying to set up a corporation without having appropriate employment authorization, or utilizing alternative strategies. These alternative strategies include entrusting incorporation or formation of the entity to another employee who is a citizen, lawful permanent resident, or entrusting incorporation[2] and initial activities to an ethically-bound professional contact such as a corporate attorney or accountant. Another strategy a foreign entrepreneur may use is to apply for permanent residence with his / her prior employer using one of the employment-based categories that allow for self-petitioning, such as a first preference employment-based extraordinary alien petition[3] or a second preference national interest waiver petition,[4] and then working on the unrestricted employment authorization document[5] provided by a concurrent immigrant petition / adjustment of status (AOS) filing. Even more recent, strategically speaking, is the use of an unrestricted employment authorization card based on AOS portability.[6] The problem with these latter strategies, especially AOS portability, is that they require substantial lead-time, sometimes up to two years to be put into place.

Other obstacles faced by foreign entrepreneurs who use nonimmigrant visas include the restrictions on self-petitioning and the need to obtain NIV *approval* for petitions for all but those portable under the H-1B category.

WHICH NONIMMIGRANT CATEGORY TO USE FOR EARLY STAGE EMPLOYEES

This *Briefing* will next perform a survey of employment based nonimmigrant categories and discuss their suitability for early stage employees including foreign national founders.[7] The author will presuppose the reader's basic knowledge of each of the categories and only discuss issues that pertain to foreign entrepreneurs. Amongst the issues to be discussed are: speed of procurement, availability of self-petitioning, flexibility or elasticity of the category in terms of amending job duties and / or benefits, feasibility of petitioning for a "young" company, and how readily the category segues into permanent residence.

◆ The B-1 Dance and the Foreign Entrepreneurial Conundrum

The nonimmigrant B-1 business visitor visa including the Visa Waiver business visitor, with few exceptions,[8] is not a work authorized visa; but, it may be the only nonimmigrant category in which a foreign entrepreneur can gain access to the United States during the pre-incorporation phase of a business. A business visitor may engage in commercial activities that do not result in the performance of productive labor. Permissible activities include negotiating the purchase of a business or entering into contracts related to the new business, and other non-work related commercial activities.[9] Only one category, the E[10] treaty worker contemplates a foreign entrepreneur entering the United States in B-1 business visitor status, and performing certain investment-related activities until a legitimate work authorized visa can be approved.[11] The restriction on these authorized preliminary business activities is that the petitioner / owner should not be actively managing the running business nor be paid in the United States while in B status preceding E status.[12]

Using the B visa as an entry vehicle for other work authorized visas requires a dance that resembles the Frug[13] more that the Minuet.[14] The entrepreneur seeking entry must maintain an unabandoned foreign residence, not be paid in the United States, and not perform work in the United States, yet somehow set up a business. That is the B-1 dance. As the litmus test for propriety, this author suggests employing the "laugh test." To pass, the business visitor must look at himself in the mirror and say, "I have an unabandoned foreign residence, am not paying myself in the United States and am not performing work in the United States," without laughing. If the laugh test is passed, the action must then be repeated without any laughing, giggling, twitching or other involuntary facial responses, since this phrase is to be repeated in front of a consular officer or immigration inspector.

Doing the B-1 dance in the pre-incorporation phase underscores the "foreign entrepreneurial conundrum." Because the current regulatory regime does

not provide adequate pre-incorporation work-authorized visas for foreign entrepreneurs, they must do the B-1 dance until their work authorized visa is filed and usually approved or wait until Congress does something to ameliorate this intractable situation.[15]

◆ H-1B

The H-1B, the Toyota Camry / Honda Accord of the nonimmigrant categories, is a double-edged sword for the foreign entrepreneur. While it is the only nonimmigrant category that allows for employment authorization upon filing in certain situations, it is also laden with certain burdens that make the category extremely unattractive to the foreign entrepreneur. The most oppressive of these is the Labor Condition Application ("LCA").[16] The LCA, a prerequisite to the filing of an H-1B petition with the Bureau of Citizenship and Immigration Services ("BCIS" or "Service"), is designed to protect the wages and working conditions of similarly employed U.S. workers, but works in effect to discriminate against small and start-up organizations. It compels the employer / petitioner to pay H-1B wages that meet, at a minimum, the "prevailing wage"[17] for the occupation in the area of intended employment. Further cramping the budget of the early-stage entrepreneur is the "no benching" rule that applies to H-1Bs requiring them to be paid their wages whether or not they are put into "non-productive" status.[18] By requiring employers to pay prevailing wages for the occupation without consideration of the size of business, the LCA process discriminates against small and start-up employers. Additionally, because of the start and stop nature of an early business, requiring an employer to pay the H-1B worker the amount prescribed on the LCA whether or not he / she is providing productive employment further hamstrings the early-stage entrepreneur's financial resources.

Additionally, any material change in the job duties or benefits of an H-1B worker requires that an amended petition be filed with the BCIS.[19] For young companies, where employees wear many hats depending upon the time of day and the type service required, the requirement to file amended petitions with the BCIS when those duties change is crippling. The H-1B category is designed for the professional that performs duties within his specialty occupation. The category's limits do not recognize the scientist / businessman hybrid or the multi-hat wearer so often found in many of America's high-tech startups. Even more dangerous for the entrepreneur / specialty occupation worker is a prevalent view that most "managerial" positions are not specialty occupations.[20] A petitioner should be sure to frame the job description to emphasize the "theoretical discipline"[21] required, rather than managerial functions, when filing for a manager that works in a specialty occupation.

Further inhibiting start-ups from using the H-1B category is its cumbersome additional $1,000 filing fee[22] imposed by the American Competitiveness Workforce Improvement Act ("ACWIA").[23] While certain institutions[24] are exempted from this fee, there is no "small business" or "start-up" exemption. While H-1B petition amendments without a request for an extension of authorized nonimmigrant stay are not subject to this $1,000 fee, initial petitions and first extension requests are required to submit the fee.[25] Another hindrance imposed by the ACWIA for start-up businesses with a high concentration of foreign national workers is the prospect of H-1B dependency.[26] Start-up foreign national employers are not usually cognizant of becoming H-1B dependent, and may quickly become dependent if their first several H-1B hires are all foreign nationals. For Razor's Edge Power, and other similar start-ups, the consequence of being H-1B dependent will mean further recruitment and attestation requirements[27] that further encumber the LCA requirements.

Finally, the H-1B is usually unavailable to self-petitioners.[28] It may be difficult for owners with significant ownership interests to meet the requirement in the regulations that there be an employer-employee relationship.[29] This includes privately held corporations or partnerships filing for owner-employees. Just how much is *too much* to own is arguable, but an H-1B worker who owns more than 50% of the sponsoring entity will have a slim chance of meeting the employer-employee relationship and therefore will not be able to petition for him / herself. An owner / employee may be tempted not to reveal his ownership interest if being sponsored by the corporate entity for an H-1B visa, but such a strategy may have more deleterious effects than a mere denial of the petition. Immigration counsel and owner / beneficiaries alike should reveal substantial ownership interests or risk a finding of fraud.[30]

Like almost all nonimmigrant petitioners, H-1B petitioners are subject to a fraud profile if the entity is new, small, and / or without a track record of income or financing. When a start-up company is considering filing a petition, it must possess at a minimum: a Federal Employer Identification Number[31] ("EIN" tax ID); a year of establishment; a source of income; and an address. An entity must have at least the above to fill out a petition. An EIN can be obtained almost

instantaneously by calling the Internal Revenue Service ("IRS") Hotline (TELE-TIN)[32] in the United States or by filing an SS-4 application with the IRS.[33] The business entity must be "established," but what that means is ambiguous. It is not clear whether or not the entity needs to file documentation in the state where it is conducting business or whether such establishment simply means the company's petitioner deems it to exist. The company needs to designate a business address in the United States where the H-1B worker will work. With respect to questions regarding a new business' net income, "N / A" is an acceptable answer, but in the gross income section of the form, the amount of capital available to the company should reflect an amount significant enough to petition for the worker(s) involved. This can be stated as "Capital funding of $____" or "Debt funding of $_____."

Though there is no "new business" H-1B petition, a start-up should treat itself akin to a new business in the L category[34] and provide information such as lease of premises, photos of premises, and evidence of its ability to not only remunerate the H-1B employee, but also finance the business. If this is not done, the case may not pass muster vis-à-vis a new business fraud profile.

One of the main advantages of the H-1B category, and what makes it stand alone amongst all of the nonimmigrant categories, is the advantage of portability.[35] If a foreign entrepreneur is lucky enough to establish itself and find a suitable candidate who is already in the United States in H-1B status, the entrepreneur may employ the H-1B status upon the filing of the nonimmigrant petition.[36] With H-1B petitions taking as long as six months to process unless a premium fee is added, H-1B portability allows a new company some breathing room to immediately employ an individual without worrying about a substantive decision from the Service. Again, the truly cash-strapped company needs to weigh this "immediate availability of employment" advantage against prevailing wage issues that may tempt it to "overextend" its payroll beyond early stage budgets.

For many companies, the H-1B may be the only nonimmigrant category available for a prospective employee. One strategy to consider is the option of part-time employment. A new employer may choose to employ an individual for a period of time less than 40 hours, if that is agreeable to both parties. When this strategy is implemented, it is best to pay the employee by the hour and put an hourly range on both the LCA and I-129 petition such as 20-30 hours per week. This allows a company flexibility depending upon how much work it has or how much cash it has for payroll. When a company becomes financially stable enough to afford the employee on a full-time basis, it can simply file an H-1B amendment petition to convert the employee to a 40 hour week. The company can alleviate the need to pay the burdensome $1,000 ACWIA fee by filing an amendment only to full-time employment without any request for an extension of the beneficiary's stay.

While there is no mirror-image immigrant category that an H-1B can easily convert to lawful permanent residence, there are certain advantages to being an H-1B worker while pursuing lawful permanent residence. If an H-1B has a labor certification or immigrant petition filed on his behalf before the end of his fifth year of nonimmigrant stay, that person may extend his stay beyond the usual maximum six-year period of H-1B status.[37] H-1B workers also need not apply for advance parole to travel after applying for adjustment of status.[38] (This holds true as well for the L-1 workers discussed below.) "Grounding" an adjustment employee to await his / her parole may not be an option if the individual is a key employee who must travel abroad. Finally, H-1B workers who are laid off during the permanent residence process can accept work more immediately through portability.

This *Briefing* will address in-depth some of the issues related to labor certification and ownership interests in a later section. In the meanwhile, it is worth noting that given a founder's ownership interest in a start-up may average 20-100% in the early phases of a company's growth, and usually 3-5% at its latter stages,[39] waiting to file a labor certification until a company has grown sufficiently to divest an owner of disqualifying interest could be strategically advisable. Ensuring that a company's capital structure is strong enough to support the "ability to pay the proffered wage" requirement[40] at time of filing is another important consideration. Rushing to file labor certifications for early stage H-1B workers may not always be the best course of action to take in light of the above factors.[41]

◆ L-1

While the L-1 nonimmigrant category may seem to have limited uses for new entrepreneurs, the category should not be immediately dismissed.[42] Often a foreign entrepreneur needs to relocate its operations from foreign soil to the United States in order to access the huge consumer and capital markets that the United States has to offer. If an entrepreneur has performed the early stages of corporate formation

abroad, and established a foreign entity that will continue to operate, it may seek to establish a "new office"[43] in the United States.

L-1 petitions can be granted relatively quickly. Regulations require L petitions to be adjudicated in 30 days or less,[44] but in recent years that period has ranged from 30 to 120 days. An entrepreneur who needs to obtain an L visa quickly is advised to use the $1,000 premium fee to guarantee a 15-day adjudication.

New office L petitions must comport with certain special BCIS regulations. A "new office" L is an operation that has been doing business less than a year in the United States[45] A new office L is normally granted an authorized period of stay for a probationary period of one year and a petition for extension must be filed again before the end of the one year to demonstrate the continuation of business activities.[46] In order to file a "new office" L the petitioner needs to submit additional evidence including, but not limited to, demonstrating the acquisition of office space, business plan, and evidence of monetary resources or capital able to sustain the start-up.[47] The Catch 22 in filing a new office L petition is that the enterprise must amass sufficient initial evidence to get the new business to the point at which a new office L can be filed. If the foreign entrepreneur is the person responsible for building the business, he finds himself in the "immigration entrepreneurial conundrum." In order to work to create a business that can file work authorized petitions, he must have a work authorized visa himself. Yet, normally, there is no nonimmigrant visa available to the foreign entrepreneur to create the business. One strategy is to employ U.S. workers as agents to establish the "new office," managing the initial infrastructure from abroad, and waiting until the new business evidence is put in place to have the entity petition for him.

Much like the H-1B category, there must be a U.S. employer "doing business"[48] with an employer-employee relationship established to file a new office L. What differentiates the L from the H nonimmigrant is that while the *legal entity*[49] must petition an owner / manager / executive, that owner can retain a majority ownership interest the business. That is to say, an L-1 owner can self-petition as long as the petitioner is a corporation, partnership, proprietorship or other legal entity, rather than the individual.[50] Therefore, assuming necessary corporate relationships exist, a corporation, partnership, branch office, and even the sole proprietorship of a foreign business entity, may file an L petition for an owner / manager.

A new business L owner / manager may, however, encounter difficulties not normally experienced by non-owner / manager L petitioners. The Service has a practice of requiring a higher level of proof that the individual's managerial services are indeed required, and are, in fact, temporary until the business can be established.[51] The Service's logic is to prevent foreign entrepreneurs who are business owners from filing L visas to merely gain long-term access to the United States without providing the required managerial or executive employment.

Another roadblock for all new business L-1 managers is the Service's requirement that L-1A petitions show a sufficiently large structure to support a manager.[52] That usually means either showing very rapid growth or a business plan demonstrating the future need for the manager to perform supervisory and functional managerial duties. What frustrates the petitioner is that it usually takes a manager / executive to hire the workforce and set up the infrastructure that the Service expects. In addition, every early stage entrepreneur manager must lick some stamps, make a few copies and answer the phones, in addition to their core managerial duties. One assumes that the Service knows this too. Nevertheless, the petitioner should exercise caution and downplay any of the peripheral administrative duties required of new business managers. The petition should list by percentage of time the manager / executive's core managerial functions. If not, the Service may deny the case as not being "purely" managerial.

Any entrepreneur, even a sole proprietor who only employs himself knows it takes a manager to grow a successful small business. The Service has still not recognized this verity and prefers to apply Intel, Exxon and Microsoft managerial standards to small foreign owned businesses. This overzealous practice inhibits the flow of foreign capital into the United States and ignores the fact that Intel, Exxon and Microsoft were once small businesses.

Specialized knowledge or L-1B new business L petitions face a similar but not identical challenge to L-1As. To support the employment of any prospective L-1B workers, the infrastructure of the new business must be sufficient.[53] The chicken-egg foreign entrepreneurial conundrum occurs because these specialized workers are often required to build an infrastructure that will support both their employment and that of U.S. workers.

An advantage of both the E and L categories for small business entrepreneurs is the potential advan-

tage of a "2 for 1 sale." To clarify, if both husband and wife are entrepreneurs, the spouse not getting the primary L-1 or E visa may be eligible for L-2/E-2 spousal employment authorization after entering the United States.[54] Using the services of a spouse, especially in a small business enterprise, is an especially attractive feature of the E and L nonimmigrant visa categories. The L-2 spousal employment authorization is not restricted, so the spouse will have the flexibility to receive low or high wages and wear a myriad of hats, depending on the needs of the organization. This is the kind of flexibility that every foreign entrepreneur seeks for initial employees, but interestingly, only persons obtaining unrestricted work authorization cards such as F-1 OPT students, certain J-2 spouses, E or L spouses, and AOS applicants possess such flexibility. The 2 for 1 sale is usually a good buy if the situation presents itself.

If one's experience abroad is managerial, L-1A entrepreneurs may be tempted to immediately file for permanent residence under the employment-based multinational manager[55] (EB 1-3) category, which virtually mirrors the L-1A category. This is especially the case under the present practice of concurrent immigrant petition / Adjustment of Status ("AOS") filings.[56] The advantages of filing immediately into the multinational manager immigrant category include the imminent issuance of Employment Authorization Documents ("EADs")[57] and starting the clock on AOS portability.[58] One should be wary, however, of some of the pitfalls of undertaking this strategy. Firstly, the ability to pay the proffered wage[59] at the time of filing may be called into question for almost any new business filing in the EB categories. Secondly, the managerial nature of both the new U.S. position and the position abroad will receive more heightened scrutiny than is applied to L-1 petitions. At this juncture, BCIS service centers are issuing "kitchen sink" RFEs for all but the most "slam dunk" of multinational manager petitions, asking for, amongst other things, supervisory and functional hierarchical charts of managerial duties for both the company abroad and in the United States If an RFE is issued on the immigrant petition, the issuance of EADs is tolled, as is the issuance of an interim EAD 90 days after the filing of Form I-765 with the AOS.[60] Although being patient may be difficult, it may behoove the foreign entrepreneur to wait until the business has grown enough to make it clear that the company has both the underlying infrastructure and the financial resources to pay and support a U.S. manager or executive on a permanent basis. While there is no exact formula, waiting at least one year or until the business has obtained sufficient capital or revenue stream to file an EB1-3/AOS filing may be advisable. To satisfy the Service's supervisory managerial definition, waiting to petition until a sufficient professional workforce is in place is strategically desirable.[61]

◆ E-2

The E-2 or treaty investor visa is sometime deemed the "entrepreneurs visa" but those familiar with the E visa law and its administration know that this term is a misnomer. The E-2 only fits certain entrepreneurial situations. First of all, it is discriminatory. It is only available to nationals of countries with which the United States has a treaty of Friendship, Commerce and Navigation or a bilateral investment treaty.[62] Notably absent on the list of 78 countries[63] that have such a treaty are India and China. Engineers and entrepreneurs from these two countries, in large part, drive the U.S.high tech economy. Not having the E-2 as a tool for nationals from these two countries greatly restricts its use as an entrepreneurs' visa. The reason that this *Briefing* only mentions the E-2 treaty investor[64] rather than its sibling the E-1 treaty trader[65] relates to the stage at which a company can file for E-2 or E-1 status. An E-1 can be filed for an alien who "can carry on trade of a substantial nature"[66] whereas an E-2 can be filed for an alien who "has invested or is *in the process of investing*[67] a substantial amount of capital in a bona fide enterprise in the U.S..." (emphasis added). The fact that the founding and growth of a business is viewed as a "process" is an idiosyncratic but welcome component of the E-2 regulations. The fact that substantial trade already needs to be in existence almost always eliminates the E-1 from the menu of start-up nonimmigrant categories. In addition to demonstrating a committed investment or one that is in the process thereof, the E-2 application needs to demonstrate that the U.S. business is an active commercial enterprise directed or controlled by treaty nationals.[68] This is usually accomplished by demonstrating that treaty nationals possess more than 50% of the company's capital stock or ownership.[69] This situation is especially tricky for those foreign entrepreneurs seeking U.S. investment in terms of venture, angel or other capital funding. Treaty national owners and founders can easily hold more than 50% ownership at the early stages of corporate formation, but if their target is U.S. investment capital, that position can be rapidly erased.[70] One strategy for E-2 foreign entrepreneurs to choose is the path of obtaining U.S. debt funding rather than capital funding. While debt funding is not as sexy as capital investment, it preserves the treaty national capital ownership. Debt

funding not only helps to preserve E-2 status, but from a business perspective, it allows foreign entrepreneurs to retain managerial control.

It should be clear that E-2 investor / owner managers can petition for themselves[71] but they also must prove that the application is not only for themselves.[72] This is the proviso that the investment be more than marginal.[73] The investment needs to be in an enterprise that has the present or future capacity to generate income that is not exclusively for the purpose of generating a token living for the treaty investor or his family.[74] Business plans, job creation, and other evidence of business growth must be demonstrated. It is clear that while an E-2 enterprise need not be fully established, it needs to be established partially in order to meet the tests of substantiality[75] and marginality, and to be considered "active." How much needs to be invested by a pre-E-B and how active the enterprise must be, prior to applying for E status, is a matter of discretion for Service and consular officers.

Though the E-2 enterprise needs to generate more than just income for the investor / manager's family, it does have the 2 for 1 advantage.[76] Like the L category, E spouses can engage in unrestricted employment after they have entered the United States and obtained an EAD. This is an attractive advantage for the owner / entrepreneurial couple. The couple should be mindful of the marginality requirement, however, if they are the sole employees of the enterprise.[77]

While a future E-2 applicant may obtain a pre-E-B[78] quickly, the speed of procuring actual E-2 status will depend on how quickly the initial investment and infrastructure can be put into place, as well as the application venue. If the E-2 entrepreneur needs to travel to overseas destinations frequently, he will need to apply for an E-2 visa stamp. That process can take anywhere from one to several months. If the entrepreneur enters on a B-1 and elects to remain in the United States and change status, that can be accomplished quickly (in about 15 days) using the premium filing process. It should be noted, however, the Service's decision on E-2 eligibility is of only nominal value in applying for an E visa stamp at a DOS consular post, inasmuch as the Service's approval does not constitute the same prima facie evidence of eligibility as it does in many other nonimmigrant categories.[79] A common strategy is to file a change from B-1 to E-2 classification in the United States, and then grow the business to a point where an E-2 consular visa application has a greater chance of prompt and successful adjudication. Whatever the strategy employed, the E-2 consular visa applicant should count on being grounded abroad for at least several weeks to obtain a visa stamp.

E-2 visa stamps can be granted for durations of up to five years, with each period of admission into the United States being up to two years.[80] If, however, the treaty investor is an employee (as opposed to a manager / owner) coming to use "special qualifications" to start-up operations, it is anticipated that they should be able to complete their objectives within two years, and hence may be granted a visa of that limited duration.[81] Special qualifications are those skills an E-2 uses to bring a new enterprise to efficient operation.[82] Foreign entrepreneurs should be prepared to argue that E-2 special qualifications employees have unique skills and knowledge that are not available and cannot be learned in the United States, if they intend to get E-2 "special qualifications" visas or durations beyond two years.[83] While this may not be an issue for the E-2 owner / manager, it can inhibit an operation where both "managerial" and "special qualifications" workers are transplanted to the United States to start-up a U.S. enterprise. The E-2, unlike the H or L visa, subject to the contingency described above, has no overall status limit and can be renewed indefinitely[84] as an alternative to obtaining lawful permanent residence.

The E-2 category has certain similarities with the immigrant EB-5 investor category.[85] At one point in time, it may have made sense to segue the E-2 intending immigrant into an EB-5 investor visa. Unfortunately, the EB-5 program is no longer a practical means of obtaining permanent residence due to the increasingly restrictive regime governing its implementation.[86] Until that regime changes, E-2 owner / entrepreneurs are advised to explore the EB-1 categories of multinational manager, outstanding researcher or extraordinary ability alien. E-2 owner entrepreneurs will find their applications for labor certification subject to extreme scrutiny due to the restrictions on filing these applications for employees having a substantial ownership stake in their businesses. The reasons for this disqualification, and its inherent unfairness, will be the subject of an in-depth discussion later in Part Two of this *Briefing*. It should be noted, however, that the inverse of E-2 disqualification occurs from a labor certification perspective. In other words, as the amount of U.S. capital increases, and treaty national ownership decreases, the initial E-2 investor who is now in H or L status, may be able to pursue labor certification if the amount of the applicant's ownership stake has decreased enough.[87]

◆ O-1

The O-1 category is a double-edged sword for the foreign entrepreneur. Though there was some debate on the subject in the promulgation of the 1994 regulations for Os and Ps, the category does not permit self-petitioning.[88] What does it mean that an O-1 alien cannot "self-petition"? While there is no clear guidance on this issue, it means at a minimum that the alien cannot, without a separate employing entity, petition for himself. It also *may* mean that an alien with a controlling ownership interest (over 50%) may not petition for himself. This phenomenon is particularly confounding in light of the fact that the O-1's close cousin on the immigrant side, the EB1-1 extraordinary ability worker, *can* self-petition.[89] Though we will examine the strategy of immediately filing a concurrent EB1-1 / AOS filing later in this section, it is important to note that for those non-self petitioning O-1s, there are a variety of advantages to this category.

Unlike the H-1B, there is no cumbersome LCA and prevailing wage requirement for O-1 aliens.[90] Unlike the L-1, there is no foreign employment requirement for O-1s. Unlike the E-2, there is no substantial investment that is required for O-1s. Unlike Hs and Ls, there is no overall limitation on being in O status in the United States.[91] There is only the need for a job offer from a U.S. employer and the requirement that the alien establish himself as an alien of extraordinary ability. Possessing extraordinary ability means rising to the very top of one's field of endeavor.[92] That can be established either through the receipt of a major international award (e.g., Nobel Prize) or through the showing that the alien qualifies under at least three of eight of evidentiary categories set forth in the regulations.[93] Extraordinary ability can also be established through "comparable evidence"[94] of the alien's rise to the top of their field of endeavor. If the alien is not a household name in the field of science, business or education, the normal strategy is to narrow the field of endeavor to demonstrate that the alien has risen to the top of his field. To use our case study, Rejean would qualify as a physicist in the field of nuclear fusion, rather than just as a scientist or physicist.

While O-1 petitions are typically adjudicated in normal processing within 30 days,[95] many petitioners still choose to employ the premium processing fee for guaranteed adjudication in the 15 day time frame. Unlike E-2 visa status, the O-1 is a petition-based category requiring that a consul, in the absence of contradicting information, issue a visa stamp on the basis of the approved O-1 petition.[96]

Unless for tax[97] or other reasons (such as the cost of filing, imminent marriage) a potential O-1 alien does not want lawful permanent residence, it is hard to imagine why a person who qualified under the O-1 regulations would not immediately self-petition by filing an EB1-1 / AOS concurrent filing. Firstly, the regulations in the O-1 and EB1-1 categories are virtually identical.[98] Secondly, there is no prohibition on self-petitioning in the EB1-1 category.[99] While the alien must demonstrate the future exercise of his demonstrated "extraordinary ability" within the United States,[100] it need not be tied to a particular corporate entity. This means if the start-up fails, or the alien's employment at the start-up discontinues, the alien's employment authorization within the United States and, ultimately, his application for lawful permanent residence need not come to a grinding halt. With self-petitioning, there are no worries of being removed by the Board of Directors when a new round of investment begins, or when the company restructures to become a new entity. While the lag time for receiving an AOS— based EAD is usually 90 days, it gives the extraordinary ability alien a peace of mind that does not exist for the employment-specific O-1 alien.

◆ TNs

While Canadians are afforded many procedural benefits under U.S. immigration law, there seem to be no special advantages carved out for foreign entrepreneurs who qualify as NAFTA professional workers ("TNs"). On the contrary, TNs are a bad option for foreign owner / entrepreneurs. TNs are not entitled to self-petition.[101] The regulations are quite specific; neither individual owners nor entities in which the TN professional will hold a greater than 50 percent ownership may petition for the alien / owner.[102] The category is made even more unattractive to early stage entrepreneurs because it authorizes durations of employment for only one year or less.[103] In addition, the TN is specifically not a dual-intent category.[104] This means that each TN owner / applicant would have to represent to the BCIS that he planned to return to Canada after the year of professional employment in the United States. For the foreign entrepreneur, one year is simply not enough time to make an employment offer work. It stretches credulity to offer start-up employees handsome option packages that vest over a period of four to five years, and at the same time represent that their employment is only for one year with the intent to return to Canada. The TN category may serve a limited purpose as an entry vehicle.[105] Its

main advantage is the speed with which it can be procured—usually within days. If a Canadian non-owner professional employee needs to be employed immediately, that person may do so initially as a TN and then change status to H-1 in order to accept more long-term employment with the start-up company.

OUTSTANDING RESEARCHERS

While there is no corresponding non-immigrant category, the EB1-2, Outstanding Researcher / AOS concurrent filing will have limited applicability for companies that are truly in the "start-up" phase of their development. This is because a company must have a department employing at least three full-time researchers and have documented accomplishments in the field of research to be able to petition.[106] It is ironic that many start-up companies are founded by aliens who would otherwise qualify as "Outstanding Researchers" cannot qualify under this category because of the above referenced petitioner requirements. Rejean, like many other researchers in the United States, may be a brilliant research scientist, but he will not be able to make use of this category until his company has grown enough to document its research achievements. The Service's regulations governing the EB1-2 category fail to recognize that companies will, for confidentiality reasons, decline to document or publicize its scientific and / or research accomplishments until those achievements have been protected and are commercially viable.

◆

Next month's *Briefing* will:

- explore some of the basic corporate law issues that confront foreign entrepreneurs as they grow their companies
- examine how stock and then stock options can be used as a compensation mechanism and explain how these compensation tools affect immigration benefits for foreign entrepreneurs or employees
- explore how ownership interests affect the filing of an alien employment certification application at the Department of Labor
- advise Rejean
- suggest needed legislative changes

References

1 There are a plethora of books and articles written about the basic phases in starting a company in the U.S. Two of the author's favorite sources for this type of information are: John L. Nesheimn, *High Tech Start Up*, (Free Press: 2000) (hereinafter "*High Tech Start Up*") and, as a mini-treatise, R. Harroch, *Start-Up & Emerging Companies: Planning, Financing and Operating the Successful Business* (Law Journal Seminars Press: 1998). This author will also embarrassingly admit that for a quick and dirty resource for emerging company issues he uses, R. Harroch's more condensed version of the treatise, R. Harroch, *Small Business Kit for Dummies* (Hungry Minds, Inc.: 1998)

2 The process of incorporating a company is a somewhat formalistic process that is often delegated to a professional such as an accountant or attorney. Using such a professional as an "incorporator" may afford an immigration advantage to a foreign national founder if he later pursues labor certification. The foreign national founder should be aware of the basic tenets of the charter documents such as the certificate of incorporation, articles of incorporation and by-laws, but need not be the incorporator.

3 8 C.F.R. § 204.5(h)(5).

4 8 C.F.R. § 204.5(k)(4)(ii).

5 8 C.F.R. § 274a.12(c)(9).

6 A foreign national whose adjustment of status application remains unadjudicated for more than 180 days may change jobs or employers as long as the employment remains in a same or similar job classification without affecting the validity of his immigrant petition. American Competitiveness in the 21st Century Act (AC21), Pub. L No. 106-313.

7 For an excellent summary of how immigration categories can be used for start-up companies *see* S. Wehrer and A. Paparelli, *From The Beginning: Agile Immigration Advocacy for New Businesses* in Immigration & Nationality Law Handbook (AILA: 2002-2003 edition vol. 2).

8 8 C.F.R. § 274a.12(c)(17) lists the limited instances where B-1s may be work authorized with an employment authorization document.

9 *See* 22 C.F.R. § 41.31 and for an in depth discussion of the proper uses of the B-1 category *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* in Immigration & Nationality Law Handbook (AILA 2000-2001 edition vol. 2).

10 This author uses the term "Pre-E-B" for the specific category of B visa that is reserved for future E visa holders.

11 *See* 9 FAM § 41.31 n.5; *See also Matter of Kung*, 17 I. & N. Dec. 260, 264-265 (Comm'r 1978) to examine the difficulty in distinguishing when an activity is allowable in a Pre-E-B context and when it exceeds the bounds of the B visa.

12 *Id.*

13 This rather undisciplined dance was born from a

dance called the Chicken as kids grew lazier and started moving only their hips while standing still. The Frug spawned the Swim, the Monkey, the Dog, the Watusi, and the Jerk.

14 A slow, graceful dance with short steps danced by partners.

15 *See discussion infra* of BK-1 visa.

16 20 C.F.R § 655.730 et seq.

17 20 C.F.R. § 655.731(a)(2).

18 20 C.F.R. § 655.731(c)(7)(i).

19 8 C.F.R. § 214.2(h)(2)(E).

20 *See Matter of Caron International,* 19 I & N Dec. 791 (Assoc. Comm'r Exam 1988).

21 *See* definition of specialty occupation at 8 C.F.R. 214.2(h)(ii) requiring that the job require a theoretical and practical application of highly specialized knowledge in various fields for which the minimum requirement for entry into the occupation is a bachelor's degree or its equivalent.

22 *See* 20 C.F.R. § 655.731(c)(10)(ii) requiring that the $1000 ACWIA fee be borne by the employer.

23 ACWIA § 411, Division C, Title IV of Pub. L. 105-277, 112 Stat 2681 (1998).

24 *See* 8 C.F.R. § 214.2(h)(19)(iii)(c) to see whether an institutional exemption applies.

25 8 C.F.R. § 214.2(h)(19)(v).

26 *See* 20 C.F.R. § 655.736 et seq.

27 20 C.F.R. § 655.738 and 20 C.F.R. § 655.739.

28 8 C.F.R. § 214.2(h)(1)(ii) defines employer and requires that employer meet three conditions to qualify as a petitioning employer: 1) engage a person to work within the U.S.; 2) have an employer-employee relationship with respect to employees...as indicated by that it may hire, fire, supervise or control the work of said employee; and 3) has an I.R.S. tax number.

29 *Id.*

30 INA § 274C [8 U.S.C.A. § 1324c].

31 *Id.*

32 In most states the IRS TELE-TIN number is 800-829-4933, but always check the IRS website for updated information at http://www.irs.gov.

33 For more information on EINs *see* IRS publication 1915 (Understanding Your IRS Taxpayer Identification Number).

34 *See* 8 C.F.R. § 214.2(l)(3)(v) and discussion *infra.*

35 INA § 214(m) [8 U.S.C.A. § 1184(m)].

36 A foreign entrepreneur should be careful not to employ a foreign national who otherwise qualifies for portability, but has worked without authorization subsequent to his last admission. INA § 214(m)(2)(C) [8 U.S.C.A. § 1184(m)(2)(C)].

37 This exception to the six-year limit was established in the "21st Century Department of Justice Appropriations Act" HR 2215, Pub. L. 107-273.

38 8 C.F.R. § 214.2(h)(16)(i).

39 High Tech Start Up at p. 129.

40 8 C.F.R. § 204.5(g)(2).

41 *See* discussion *infra* on "Dilution."

42 8 C.F.R. § 214.2(l)(1)(ii) explains the basic qualification for L status. A foreign entrepreneur would have to establish an entity abroad and work there in a managerial/executive or specialized knowledge position for at least one continuous year within the three years filing. The foreign entity needs to continue to exist after the proposed transfer of the owner/employee in L-1 status.

43 8 C.F.R. § 214.2(l)(3)(v).

44 8 C.F.R. § 214.2(l)(7).

45 8 C.F.R. § 214.2(l)(ii)(F).

46 8 C.F.R. § 214.2(l)(7)(i)(A)(3).

47 8 C.F.R. § 214.2(l)(3)(v).

48 8 C.F.R. § 214.2(l)(1)(ii)(H).

49 INA § 101(a)(15)(L) [8 U.S.C.A. § 1101(a)(15)(L)].

50 *See* INS commentary to final rule on L and H regulations. 52 Fed. Reg. 5738, 5741 (Feb. 26, 1987).

51 8 C.F.R. § 214.2(l)(3)(vii).

52 8 C.F.R. § 214.2(l)(3)(v)(C).

53 8 C.F.R. § 214.2(l)(3)(vi).

54 Pub. L. No. 107-124, 115 Stat. 2402, and Pub. L. No. 107-125, 115 Stat. 2403 as implemented by INS memorandum, "Guidance on Employment Authorization for E and L nonimmigrant Spouses" (Feb. 28, 2002).

55 8 C.F.R. § 204.5(j). Though the categories of L-1A and Multinational Manager are very similar, there are some important differences. Most importantly, to qualify as a Multinational Manager, one must serve in a managerial/executive capacity both in the qualifying year abroad and at the qualifying organization in the U.S. 8 C.F.R. § 204.5(j)(3)(i)(A)and (B). Also, to qualify as a Multinational Manager, the corporation or other legal entity at which the foreign national was employed must continue to exist. 8 C.F.R. § 204.5(j)(3)(i)(C). These distinctions, however slight, can affect eligibility. It is wise not to presume an L-1A qualifies as a Multinational Manager without conducting new analysis of the facts and the regulations.

56 *See* 8 C.F.R. §§ 245.1(g)(1), 245.2(a)(2)(i) *as amended,* 67 Fed. Reg. 49561,49563 (July 31, 2002). Please note that concurrent filing was reinstated in the summer of 2002 for the first three employment based preferences and may be "news" to certain foreign nationals who have started the immigrant process before this time.

57 8 C.F.R. § 274a.12(c)(9).

58 INA § 204(j) [8 U.S.C.A. § 1154(j)].

59 8 C.F.R. § 204.5(g)(2). Ability to pay the proffered wage is required for all EB preferences that require a job offer. Some of the financial statements, tax returns, auditor's reports, etc. that the Service will require to prove "ability to pay" will not be available or easily generated in the early stages of an enterprise's development.

60 *See CSC Answers to Liaison Questions* (Question #9) as posted on AILA InfoNet at Doc. No. 02110531 (Nov. 5, 2002) reporting the topics discussed in the Oct. 30, 2002 AILA/CSC Liaison meeting.

61 *See* 8 C.F.R. § 204.5(j)(4)(i) and (ii).

62 INA § 101(a)(15)(E) [8 U.S.C.A. § 1101(a)(15)(E).

63 9 F.A.M. § 41.51 Exhibit 1.

64 8 C.F.R. § 214.2(e)(2).

65 8 C.F.R. § 214.2(e)(1) (Countries listed include those E-1 and/or E-2 sanctioned).

66 8 C.F.R. § 214.2(e)(1)(i).

67 8 C.F.R. § 214.2(e)(2)(i).

68 8 C.F.R. § 214.2(e)(13) and (16).

69 8 C.F.R. § 214.2(e)(3)(ii) and (16). Control, may be demonstrated without 50% ownership in limited circumstances where it can be shown that treaty nationals have "operational control" of the company. In

some situations where share ownership is below 50%, "operational control" can be demonstrated through treaty national control on the Board of Directors.

70 *See* discussion of "Dilution" *infra.*

71 A foreign national may qualify as a treaty investor if "the alien" has invested. 8 C.F.R. § 214.2(e)(1) and (2)(i). It should be apparent from the plain meaning of the regulations that owner / investor's can self-petition.

72 The "marginality" test is spelled out quite literally in the regulations. A treaty investor needs to invest a substantial amount of capital in a bona fide U.S. enterprise "as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living." 8 C.F.R. § 214.2(e)(2)(i). *See also* 8 C.F.R. § 214.2(e)(15), which further elaborates on the marginality requirement.

73 *Id.*

74 *Id.*

75 The regulations provide some further guidance on "substantial" in that it must be: "I) substantial in relationship to the total cost of either purchasing an established enterprise or creating the type of enterprise under consideration; II) sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and III) of the magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise. Generally, the lower the cost of the enterprise, the higher proportionately the investment must be to be considered 'substantial.'" 8 C.F.R. § 214.2(e)(14).

76 *See Supra* at note 54.

77 Note that the phrase "minimal living for the treaty investor and his / her *family*" is used rather than just "treaty investor" in defining marginality. 8 C.F.R. § 214.2(e)(15).

78 9 F.A.M. § 41.31 N. 6.7

79 In contrast, *see eg.* 9 FAM § 41.55 N.8.4. for O-1 petitions.

80 8 C.F.R. § 214.2(e)(19(i).

81 8 C.F.R. § 214.2(e)(20)(ii).

82 8 C.F.R. § 214.2(e)(18).

83 8 C.F.R. § 214.2(e)(18)(i) and (ii).

84 8 C.F.R. § 214.2(e)(20)(iii).

85 For an excellent concise comparison of the two categories *see* Richard A. Gump, Jr. *A Brief Comparison of E-2 and EB-5 Visas* in Immigration & Nationality Law Handbook (AILA: 2001-2002 vol. 2).

86 *See* Stephen Yale-Loehr, *EB-5 Immigrant Investors* in Immigration & Nationality Law Handbook (AILA: 2002-2003 vol. 2). In this article, Mr. Yale-Loehr informs the reader that the actual success rate of EB-5 applications is around 15%. *See* section on "EB-5 Petitions Theory vs. Reality" at p. 173.

87 *See* discussion *infra* on "Dilution."

88 *See INS Finalizes H, O, and P Nonimmigrant Regulations* in 32 Interpreter Releases 1079 (Aug. 22, 1994). There was some debate and inconsistent application of policy on O-1 self-petitioning until the promulgation of these regulations, but now it is clear that O-1 aliens cannot self-petition.

89 8 C.F.R. § 204.5(h)(5).

90 Be careful though; paying an O-1 a wage that is too small may be result in the Service inferring that the foreign national is not truly "extraordinary."

91 8 C.F.R § 214.2(o)(10) and (11).

92 8 C.F.R. § 214.2(o)(3)(ii). Please note that this is the standard for an O-1 in science, education, business, or athletics. The standard is different if the O-1 is an alien in the "arts" or in the "motion picture or television industry."

93 8 C.F.R. § 214.2(o)(3)(iii) (A) and (B).

94 8 C.F.R. § 214.2(o)(3)(iii)(C).

95 This usual 30-day adjudication period has been extended to 30-120 days in the post 9 / 11 BCIS adjudicatory environment.

96 9 FAM § 41.55 N.8.4.

97 A lawful permanent resident is responsible to pay U.S. tax on his worldwide income. IRC § 7701(b). Foreign nationals, especially "extraordinary aliens," may have substantial, offshore, income producing assets that may make lawful permanent residence unattractive.

98 Compare the evidentiary requirements found in 8 C.F.R. § 214.2(o)(3) with the evidentiary requirements found at 8 C.F.R. § 204.5(h)(3).

99 8 C.F.R. § 204.5(h)(5).

100 *Id.*

101 8 C.F.R. § 214.6(b).

102 *Id.*

103 8 C.F.R. § 214.6(d)(3)(iii) for Mexicans and 8 C.F.R. § 214.6(f)(1) for Canadians.

104 8 C.F.R. § 214.6(b).

105 8 C.F.R. § 214.6(e)(2). Please note that only Canadian TN applicants may submit applications at Class "A" border applicants and that the TN category does not afford any "speed advantage" for Mexican applicants.

106 8 C.F.R. § 204.5(i)(3)(iii)(C).

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