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 II

by

ALAN TAFAPOLSKY

This two-part *Briefing* examines the special problems confronted by foreign entrepreneurs and foreign national employees who own equity interests in companies. Part I of this *Briefing* surveyed the spectrum of immigration categories that are available to foreign entrepreneurs at the start-up phase. This issue will first explore some of the basic corporate law issues that confront foreign entrepreneurs as they grow their company. It will then 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. Next this *Briefing* will explore how ownership interests affect the filing of an alien employment certification application at the Department of Labor.

This *Briefing* uses the case study approach to illustrate principles and problems related to foreign entrepreneurship and equity financing, and set out at the beginning of Part I, the case of Rejean Verdonne and his venture, Razor's Edge Power. The *Briefing* will next advise Rejean.

Finally, the *Briefing* will suggest needed legislative changes.

The Issue In Brief

THOMSON WEST

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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.

CORPORATE FORMATION, HIRING EMPLOYEES WITH EQUITY AND OPTIONS, RAISING SECONDARY CAPITAL, DILUTION OF EQUITY AND EXIT STRATEGIES

While some of these principles may seem over-simplistic to the corporate lawyer, foreign entrepreneurs and immigration counsel do not necessarily know them. The first issue, choice of corporate entity, may seem incredibly easy to execute, but may have serious consequences to a company's business goals if the proper form of entity is not chosen. This *Briefing* will discuss sole proprietorships, partnerships, limited liability companies ("LLCs"), "S" corporations and "C" corporations. In order to choose the correct form of business entity, foreign entrepreneurs' business and immigration goals must be analyzed. In addition, certain businesses may not be eligible for certain business structures because of the size and nature of their ownership.

In analyzing each foreign entrepreneurial situation, one must examine the importance of each of the following factors: limitation on liability, flow-through taxation,[1] attractiveness of entity to potential investors, ability to compensate employees and other service providers with equity incentives, and the overall exit strategy for the business. Limitation on liability may be important to those persons concerned with shielding personal assets. Flow-through taxation may be important for owners expecting to use initial start-up losses against other income. Certain types of entities are ineligible to receive capital from various types of investors. A company must be structured or restructured in a certain form to either be attractive to potential buyers or to go the initial public offering ("IPO") route.

SOLE PROPRIETORSHIP

Sole proprietorships are businesses owned by one person. Other than filing a "fictitious business name" if the business is run in other than the name of the owner, this type of entity has few legal requirements. Though this type of ownership is popular and simple, it has few advantages. Sole proprietors are personally liable for the debts and other liabilities of their business. Sole proprietorships are usually disfavored by potential buyers or investors because of the potential liabilities associated with not only the business, but also the business owner. Sole proprietorships cannot compensate their employees with equity incentives, and often must restructure into a different business form in order to attract capital or talented personnel. Sole proprietors are able, however, to offset start up losses against other personal income. From an immigration perspective, sole proprietorships make the weakest petitioners. If self-petitioning is prohibited in the non-immigrant or immigrant category, it becomes an unacceptable structure for an owner/petitioner. Even when business owners petition for others, sole proprietorships are more carefully scrutinized for fraud than other forms of business entities. This is another reason most immigration lawyers encourage their clients to form other business entities.

PARTNERSHIPS

By their very nature, partnerships require the existence of at least two owners (partners). Partnerships may be classified in two forms, general partnerships and limited partnerships. In a general partnership, each general partner has management power. That is to say, each general partner may incur liability on behalf of the part-

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nership. Limited partnerships also have general partners that act in a management capacity for the entity, but may also have limited partners who contribute capital and bear liability for the partnership's actions only to the extent of their contributed capital. Limited partners will lose their "limited" liability if they act in a management capacity for the partnership. Partnerships split profits and losses equally among partners in the absence of a written partnership agreement. Partners should be chosen carefully as each partner is liable for the actions of the other partners. Limited liability for partnerships is only available in certain states that have LLP statutes for certain service professions.[2] Absent a provision in a partnership agreement for "buyout," partnerships cease to exist on the withdrawal, retirement, or death of a partner. Partnerships have the advantage of "flow-through taxation" and are thus preferred by partners wishing to take advantage of start-up losses against other income.

Partnerships are dangerous, however, to foreign entrepreneurs for certain reasons relating to the solicitation of capital. If a foreign entrepreneur is seeking to raise capital both in the United States and abroad, he might find a partnership to be unattractive.[3] Most venture capital funds have tax-exempt participants who lose various tax benefits if their fund invests in a partnership.[4] If the foreign entrepreneur seeks to raise foreign capital for a partnership, it might find similar hesitancy amongst foreign investors. This is because foreigners are taxed on income received as a partner in U.S. trade or business. Foreigners are generally not taxed on income received from investments in U.S. corporations. If an entrepreneur is seeking to retain foreign treaty national or common control for E or L purposes, it is advisable to restructure as a corporation.

Partnerships and limited partnerships are not the preferred corporate structure for attracting talented employees and service providers. This is because there is no ability to compensate employees using equity incentives such as stock options. Partnerships usually restructure as an "S" corporations if their objective is to be purchased or go public. This is for both tax reasons and to ensure that potential buyer's liability is limited to the liabilities of the corporation/former partnership.

LLCS

A limited liability company ("LLC") is a popular choice of business entity because it combines the flow-through taxation of partnerships[5] with the limited liability of a corporation. LLCs are available in states that have LLC statutes. The hybrid nature of an LLC makes it an attractive entity to foreign and U.S. entrepreneurs alike. LLCs, like partnerships, are not appropriate for venture capital investment[6] but they do afford many other advantages to entrepreneurs. LLC owners, called "members," can be either corporations, partnerships or individuals. There is no limit on the number of members that can invest in an LLC and both foreign nationals and U.S. investors can be members. The LLC can raise capital from wealthy U.S. angel investors, because it may specially allocate losses through the LLC's operating agreement.[7] Angel investors requiring a loss created by a "start-up" in its formative years can avoid liabilities of the LLC in a manner similar to limited partners. The foreign entrepreneur that is seeking to raise foreign capital should be aware that foreigners are taxed on their U.S. LLC interests by the U.S. government in a similar manner to that of a partnership. Therefore, an LLC may not be the correct business entity if the entrepreneur is seeking to raise capital exclusively from overseas sources.

LLCs are used in early stage start-ups but are often incorporated at later stages of the start-up to acquire venture capital investments or in the event that the business is aimed for a public offering. Unlike "S" or "C" corporations, LLCs may not be able to attract high-powered personnel without incorporating, because the allure of equity incentives including stock options are not available or are too complex to administer in LLCs.

CORPORATIONS

A corporation is a separate legal entity that is owned by shareholders. A corporation can have a single owner (unlike a partnership) or many owners. Depending on the type of corporation, S versus C, a corporation can have either 75 shareholders or less ("S"), or unlimited shareholders ("C").[8] Shareholders are responsible for electing a board of directors that supervises the critical decisions made by the corporation. Included in the board's responsibility is the appointment (or hiring) of corporate officers who provide the daily management of the corporation. Unlike partnerships, a corporation survives when an ownership interest changes by sale or death of a shareholder. Corporations, especially "C" corpo-

rations, are the entity with which the BCIS is most familiar. Corporations' structural simplicity, combined with the BCIS's overall familiarity with them, makes them desirable petitioners for the BCIS. The two types of corporations, however, have very distinct attributes and, as we will see from the description below, most foreign entrepreneurs end up forming a "C" corporations for reasons of eligibility.

◆ **"S" Corporations**

"S" corporations may seem extremely attractive to foreign entrepreneurs. On its face the "S" corporation appears desirable because, like the LLC, the "S" corporation combines flow-through taxation with limited liability for its owners. "S" corporations are an option for companies that have 75 or less shareholders who are individuals.[9] "S" corporations can be taken public.[10] "S" corporations can issue equity incentives (stock) or stock options to potential employees to attract talented personnel. However, since "S" corporations are limited to the issuance of only one class of stock, the favorable pricing often afforded to employees receiving equity or options is often limited to employees who join the company at its earliest stages. The requirement that "S" corporations issue one class of stock makes "S" corporations undesirable for venture funds that generally demand a preferred class of stock in the event that the start-up is liquidated.

Despite its apparent benefits, foreign entrepreneurs should be wary of forming an "S" corporation, given that *only U.S. citizens, lawful permanent residents and eligible trusts* are entitled to be "S" corporation shareholders. Before the corporate lawyer goes down the winding "S" path, be sure to advise her that either present or future shareholders will be foreign individuals—so that she will "C" the way.

◆ **"C" Corporations**

"C" corporations may or may not be the choice of entity for foreign entrepreneurs at a company's inception, but if the goal is to substantially raise capital, grow, and/or eventually sell the company or take it public, it is normally restructured as a "C" corporation at some juncture in its business life. The obvious disadvantage of "C" corporations is that there is no flow-through taxation. That is to say, income is taxed at the corporate level, and then again at the individual level once income has been received by the owner/employee in the form of salary. Currently, un-reinvested distributions, sometimes called dividends, are also taxed.[11] This two and sometimes three tier taxation system is not burdensome in times of corporate prosperity. When a corporation is starting-up, however, and generating losses, being unable to use those losses against other income is the major detraction from choosing a "C" corporation at the outset.

Weighing against flow-through taxation is a number of features that make a "C" corporation very seductive to the foreign entrepreneur. "C" corporations limit the liability of shareholders to the extent of their investment in the company. Foreign entrepreneurs are to be advised, however, that merely choosing a "C" corporation as a form of entity is not necessarily enough to shield a shareholder from personal liability for the actions of a corporation. The foreign entrepreneur, who is both a shareholder and an employee, must *treat* the corporation as a distinct legal entity. If this does not occur, a corporation's limitation of liability may be pierced, exposing an investor's personal assets. Foreign entrepreneurs should be advised to take the following actions to ensure that they preserve the limitation on liability for shareholders:[12]

- Keep corporate funds separate from personal funds;
- Keep corporate records separate from personal records;
- Obtain board approval for all major corporate actions;
- Conduct annual shareholder meetings and frequent board meetings that are recorded with accurate minutes;
- Sign all contracts as an agent or officer of the corporation, not as an individual;
- Maintain an arm's length relationship between the corporation and the principal shareholders, especially with respect to matters of capital and debt; and
- Provide equity and liability insurance.

Foreign entrepreneurs need to be advised of these recommendations early in the corporation's business life, when they are most likely to be overlooked or misunderstood. Foreign entrepreneurs are particularly susceptible

to removing the liability shield because of different practices in their home countries and/or communication issues.

Counteracting the taxation scheme for "C" corporations is its appropriateness for raising angel, venture and/or public capital. Most investors will invest more openly in a corporation because of the corporate limitation on liability and its relative simplicity. Foreign entrepreneurs and U.S. entrepreneurs alike should attempt to issue a "private placement memorandum"[13] to all investors that discloses the material risks of the enterprise. While this type of offering document may or may not be a legal requirement, it may serve as a prophylactic measure against an entrepreneur being sued for fraud at some future point in time. As previously mentioned, most venture firms require a business entity to be structured as a "C" corporation before they will invest in it. "C" corporations will issue venture funds "preferred" stock that will allow them to recover a measure of their investment from a preferential treatment of the liquidation of corporate assets in the event of bankruptcy. Making a "C" corporation even more attractive to venture funds is the fact that it preserves the tax-advantaged status of fund contributors investing in the "C." Lastly, "C" corporation stock presents the most "liquid" form of ownership in the venture world. "C" corporation stock can be swapped for other stock, sold for cash in the event of a corporate sale or IPO, or used as collateral for other investments. This makes their return on investment ("ROI") more liquid. Investors whether they are angels, venture capitalists, or individuals love the liquidity of "C" corporation stock.

Making the "C" Corporation even more attractive to foreign entrepreneurs is its ability to use equity incentives including stock options to attract and compensate valuable employees, including founders, corporate officers, and special service providers. Getting talented people to leave high-paying, stable jobs to join a start-up at low pay without the promise of future riches is almost impossible. Equity incentives take the "im" out of impossible. This *Briefing* will now examine how stock and then stock options can be used as a compensation mechanism. Specifically, the *Briefing* will explain how these compensation tools may or may not affect immigration benefits for foreign entrepreneurs or employees.

EQUITY COMPENSATION

◆ Stock

While "stock options" usually steal the limelight in the media, the issuance of common stock, especially during the founding and early stages of a company, is an important instrument to raise capital and attract star employees. The issuance of early stage stock, sometimes called "founders stock" or "cheap stock," has certain strategic business advantages. The issuance of stock is a taxable event that causes its owners to realize income. The price of the stock, however, may be so cheap that early stage founders and employees can afford the tax hit. Usually a business that has been recently incorporated is valued in terms of existing assets in cash and property rather than its future prospects. The value of the stock is therefore so low that owners are willing to accept the negligible income and its consequent taxation in order to start the "holding period." The holding period is critical for two tax reasons. The first, and perhaps most obvious advantage of incorporating and starting the holding period early, is that a future sale of the stock that occurs beyond one year of holding is treated as a "long term capital gain." The second tax advantage in starting the holding period early is that an early stage entrepreneur/investor or early shareholder may be classifiable as a "qualified small business stock" owner.[14] Non-corporate investors who buy stock at its original issuance may be able to exclude 50% of the taxable gain if it is held for five years. The remaining portion of the gain would also be taxed at the "long term gain" rate.[15]

As explained in Part I of this *Briefing*, ownership cuts both ways. Ownership can qualify one for an immigration benefit, as in the E visa category, or it can disqualify one from a benefit, as in the TN or labor certification (which will be discussed later in this *Briefing*). If the goal is to own, as may be the case in an E or L situation, an immediate grant of founder's stock may be appropriate. If ownership of stock is a goal for business reasons but not for immigration purposes, a foreign entrepreneur can utilize two options: the vesting of stock or the issuance of stock options, or a combination thereof.

◆ Vesting

Vesting is a process where employee/owners accumulate an interest in stock or stock deriva-

tives as their employment continues with a company. The most common scenario is for stock or option ownership to be completely unvested during the first year of employment. This is referred to as a one year "cliff." After the cliff is reached, stock or options vest gradually, usually over a period of 36 or 48 months. If the employee leaves the company before the vesting schedule completes, the company will usually have the right to repurchase the unvested stock either with cash or a promissory note. There are business reasons why issuing vested stock or options makes good business sense. If founding employees and/or management are key staff in terms of growing the company, they should benefit from its prosperity, but only if they stick with the company. Angel investors and especially venture capitalists will be hesitant to contribute capital to any venture unless the key players in the company are tied to the company by vesting schedules. Keeping in mind the business objectives of a company, from an immigration perspective, it may or may not make sense to have stock ownership vest for foreign entrepreneurs or foreign employees. For example, if ownership is an objective, it may make sense for no vesting to take place. But if, as is more often the case, immediate ownership is undesirable, an appropriate vesting schedule can be put into place. For example, if non-ownership is the goal for the purpose of filing a labor certification for an employee, a creative two-year vesting schedule may be appropriate. Two years is coincidentally the amount of time it is taking most RIR labor certifications to be certified.

◆ Options—Qualified & Non-Qualified

Another strategy a foreign entrepreneur may choose is the issuance of stock options in order to camouflage or defer ownership interests, without making misrepresentations to governmental agencies. Stock options generally come in two forms, qualified options, also known as incentive stock options ("ISO"), and non-qualified options ("NSO"). In order for an investor to qualify for an ISO, he must be an employee. Independent contractors, consultants, and directors do not qualify for ISOs. If a foreign entrepreneur wants to retain a position on the Board of Directors, he should be aware that assumption of that duty renders him ineligible for ISOs. ISOs generally get more preferential tax treatment under IRS regulations, but the concept underlying both ISOs and NSOs is the same.

The option grant is a non-taxable event that confers no capital interest in the company. The option is exactly what the word connotes, the right to purchase stock of the company at a specified price, commonly called the "strike price." If combined with a vesting period, the option itself is not owned until the appropriate tenure at the company has been reached. What differentiates the ISO from the NSO is the tax consequence that occurs when the option is exercised. Exercising an option means converting it into a purchase of stock. ISOs are not taxed at the date of exercise. Additionally, if the ISO is held two years from the date of grant and one year from the date of exercise, the sale of the stock will result in a long-term gain[16] rather than ordinary income.

◆ Immigration Considerations

Stock issuance, stock vesting, and options can serve to control ownership interests in a corporation. The intricacy of using stock issuance, vesting, and stock options to either accelerate or defer ownership depending on immigration goals is not the only intersection between immigration and capital interests. The nonimmigrant status of an employee may have direct relevance to the possibility of using vesting as a means of deferring capital interests. More specifically, nonimmigrants who are not in "dual-intent" categories may find that the entire concept, over a period of years, is inconsistent with their status. For instance, a TN may be eligible as an employee to receive ISOs, but may find that a 36-month vesting period is inconsistent with the need for the foreign national to demonstrate an intent to return to Canada/Mexico at the end of their one year of work-authorized status. Both F-1s and J-1s in work-authorized status may experience similar problems. If the category is not a dual-intent category, or one that allows the alien to remain in the United States for a period beyond the duration of their vesting, they may risk a finding of misrepresentation. A foreign national must be especially careful, if an offer letter is used as immigration documentation, and that offer letter possesses information about stock, stock vesting, or options. An offer letter that contains vesting stock options is especially precarious if taken to a Canadian border post adjudicating TNs. NAFTA officers are frequently itching to find documentation that is evidence of the alien's intent to remain in the United States beyond the prescribed one-year period. They will use an offer letter with vesting provisions of over one year to deny an

intending TN applicant entry to the United States. One strategy that may be employed is to use a probationary period in which a foreign national works for the U.S. corporation in TN or F-1 practical training status without any grant of a stock or option package. Most TN professionals or practical training employees can be changed to H-1B status during the probationary period so that they assume a nonimmigrant status that is consistent with the length of their stock or stock option vesting provisions. Another strategy to use when issuing options is to issue NSOs in a higher amount, equivalent to the dollar value of a lower number of ISOs, after adjusting for income taxes. Since a foreign national need not be a U.S. employee to receive vesting NSOs, this is a viable strategy for aliens with short-term or single intent visa statuses. Additionally, foreign nationals working for a U.S. company abroad need no U.S. immigration status whatsoever to be issued NSOs.

OWNERSHIP INTERESTS AND LABOR CERTIFICATION

This *Briefing* now turns to the subject related to "capital" that has had the most direct treatment in immigration law, decisions and commentary. How do ownership interests affect the filing of an alien employment certification application at the Department of Labor? How much ownership is too much and what exactly constitutes "ownership" in today's world of vesting stock and option grants?

Every analysis of ownership and its effect on labor certification begins with a series of questions, any one of which may result in the disqualification of an owner/employee applicant. Is the alien seeking certification an investor rather than an employee? Is there a bona fide job opportunity open to U.S. workers? Does the ownership interest constitute self-employment? There is a great deal of overlap on these inquiries and, in addition, a lack of uniformity in the way the law is applied in this area; thus, providing counsel on these matters is very difficult. The ambiguity surrounding this issue requires an analysis of the law and then a careful preparation of facts that will most likely result in the successful certification of an owner/employee.

◆ Investor

There is no clear definition of "investor" in regulations or law. Form of ownership, rather than amount of ownership interest, seems to play an important part in who is deemed an "investor" for labor certification purposes. Both sole proprietors and partners (general and limited) are disqualified as investors from filing labor certifications.[17] How "members" of the hybrid LLCs are treated will depend on whether they are deemed more akin to general partners or to corporate shareholders. As for corporate shareholders, there is no disqualification, per se, of shareholder/aliens from filing labor certifications. The strictest interpretation of corporate "investor" would include anyone that has a "vested" capital interest in the company. This definition would produce an absurd result; anyone who owned capital stock in their company would be disqualified from labor certification. On the other extreme, a person who is a sole shareholder of a corporation is rarely able to use the alter ego of the corporation to file a labor certification. Certain attributes of the corporate entity make it a more suitable form of business for the filing of labor certifications on behalf of employee/owners. For executives and corporate officers, the existence of a Board of Directors that has the power to remove executives allows the DOL to be convinced that, at least in certain fact scenarios, a position is open and available to U.S. workers. Because shareholders in corporations do not necessarily qualify as "investors" for labor certification purposes, it is important to discern what factors may or may not tip the balance. Foreign entrepreneurs often think there is a magical percentage of ownership—a line certain that they may not cross and still file a successful labor certification. Unfortunately, there is no bright line rule that one can use to determine whether a foreign entrepreneur/owner is an "investor." Rather one must delve into the two other inquiries set forth above to see if the owner/entrepreneur is disqualified as an "investor."

◆ Bona Fide Job Opportunity

In examining whether or not a legitimate job opportunity is open to U.S. workers, a foreign employee/owner must pass a series of tests set forth by the Board of Alien Labor Certification Appeals ("BALCA"). The "sham test"[18] is simply whether the corporation has been set up as a scheme by which the foreign entrepreneur can procure a labor certification. If the corporation is nothing more than a sham to procure labor certifications for a foreign entrepreneur and/or other foreign workers, the test is failed. The second test,

the inseparability test,[19] is whether or not the foreign employee/owner's skills are so integral to the company's operations that the company would cease to exist but for the employee/owner's participation. If the foreign employee/owner's services are indispensable, the test is failed.

The "significant ownership and control test"[20] is yet another test employed by BALCA to determine if the foreign employee/owner is eligible to file a successful labor certification. The Board, in examining the totality of the circumstances, inquires as to whether or not the foreign national has a significant degree of control over the business, using the information to extrapolate that no bona fide job offer exists. Basically, if the foreign national's ownership interest and control over the management of the company is too great, a bona fide job offer cannot exist for a U.S. worker.

BALCA, in its *Modular Container Systems*[21] decision, took all of the above tests and wrapped them into one all-encompassing test, the "totality of the circumstances/significant ownership and control test." At present, this is the most common test employed by the DOL and BALCA for foreign employee/owner alien employment certification cases. Amongst the factors that the BALCA, and derivatively the DOL, uses to discern whether there is a bona fide job opportunity for U.S. workers are:

1. Is the foreign national in the position to control or influence hiring decisions regarding the job for which certification is sought?

2. Is/was the foreign national an incorporator or founder of the company?

3. Does the foreign national have an ownership interest in the company?

4. Is the foreign national involved in the management of the company?

5. Is the foreign national on the Board of Directors of the company?

6. Is the foreign national one of a small number of employees?

7. Does the foreign national have qualifications for the job that are identical to restrictive or unusual job duties that are stated in the ETA 750A job offer?

8. Are the foreign national's services so indispensable to the employer that the business would likely cease to exist without the foreign national.[22]

Modular Container Systems also includes the "sham test."[23] The Board goes further and states that the above test is only used in instances of "true employment" and not "self-employment" which is a per se bar to labor certification.[24]

While some commentators have applauded *Modular Container Systems* for being more flexible, this author believes that this decision has taken flexibility to a yoga type extreme. The *Modular* test is in fact a "we can arrive at any decision we think appropriate" test. A survey of decisions that followed *Modular* in the next decade reveals no discernable pattern regarding which of the above factors will be given greater weight. *Modular,* in aspiring to be a flexible test, went so far as to be amorphous, leaving foreign entrepreneurs and immigration counsel alike guessing as to what BALCA's next decision will be.

STRATEGIC FACTORS

Bearing in mind that there are no guarantees in the uncertain regime governing the adjudication of labor certifications filed by foreign employee/owners, it is still possible to implement certain strategies that increase the chance of certification.

◆ Structure the Entity to Meet the *Modular* Test

One critical factor in devising a successful labor certification strategy on behalf of a foreign owner/entrepreneur is the ability to help structure the facts at the corporate formation phase, rather than just merely present the facts in their most favorable light long after the corporation has been established. This requires working with corporate counsel at the outset, to have the foreign national owner/employee pass as many of the *Modular* factors as possible. For example, a foreign national need not be an "incorporator" of the company. By avoiding an appointment to the Board of Directors, the foreign national can satisfy both the "not a director" and "have no control over the hiring/firing for the position" tenets of the *Modular* test. Additionally, by compensating the foreign national with options or vesting stock, the foreign national can avoid immediate capital "ownership interests" in the company.

◆ **Equity Interest Commensurate With Position as Employee**

Another strategy that should be employed is to compensate the foreign national owner/employee with equity interests in a manner similar to that of a U.S. worker.[25] If the market normally compensates an early stage CEO with a 10% equity interest, then a 10% equity interest is an appropriate amount whether or not the employee is a U.S. worker or a foreign national. If U.S. worker executives exist within the same company, demonstrating to the DOL that equity compensation is normal for this company's executive positions is another strategy that an employer can use to demonstrate that a "bona fide job opportunity" exists. The logic is that someone who fills the position, whether or not it is a foreign national or U.S. worker, will receive equity compensation appropriate for the level of position within the company.

◆ **Dilution**

Another key principle in the filing of labor certifications on behalf of owner/entrepreneurs is "dilution." Ownership is not static. The process of "dilution" is natural and almost inevitable to growing a corporation. As founders raise additional capital for their companies, they give in return ownership interests to other parties in return for the capital that is necessary to make their company grow and become more valuable. "Dilution" of both management and ownership interests is normally the enemy for founders, but in the filing of alien employment certifications for foreign entrepreneurs, it is actually a positive factor. It is interesting to note that most CEO/founders end up with on average, 3% of the stock of their companies upon IPO.[26] If ownership interests make the filing of a labor certification impossible at a given time, waiting for dilution to take its normal course may be an attractive alternative strategy.

REJEAN'S ADVICE

Now that our survey of immigration law and corporate law for foreign entrepreneurs has been completed, we can once again turn to our friend Rejean Verdonne. Examining Rejean's priorities, he wants to:

1. be immediately work authorized;
2. immediately recruit his present and ex-MIT students, but pay them as little cash compensation as possible;
3. secure a green card for himself and his foreign workers;
4. provide a corporate structure that best meets the above immigration goals, yet will be a proper entity for raising future angel, investor and venture capital; and
5. provide a corporate structure that has tax advantages, if possible.

◆ **Choice of Entity**

Rejean's entity cannot be a sole proprietorship because he already has investment partners. A partnership might be a possibility if his brother and foreign investors were limited partners and he was a general partner. Rejean does not think, however, he can attract his ex-students as employee, or seek new rounds of funding needed, using a partnership form. Additionally, his Canadian investors want nothing to do with the U.S. IRS. An LLC is an option, but Rejean thinks that in his first few years of business, he will neither have substantial losses nor substantial income. Neither flow-through losses to offset against income nor double taxation are an immediate concern. While an "S" corporation would be attractive entity to a U.S. entrepreneur, Rejean and his investors, because of their foreign nationality, are not eligible for this particular form of corporation. On the advice of his corporate lawyers and with the nod of his immigration counsel, Rejean decides to form Razor's Edge, Inc., a Delaware corporation, with a registration to do business in the State of California. Most corporate counsel encourage both U.S. and foreign entrepreneurs to eventually incorporate in the State of Delaware. The reason being, the state has a well-developed body of corporate law that lawyers can look to for guidance in the issuance of securities and other corporate matters. In addition, Delaware has special tax and business incentives for corporations that make it an ever more enticing venue for incorporation. Since Rejean will eventually seek venture capital and investments from high tech corporations, having a physical location that is proximal to the concentration of venture capital and high-tech investment makes good sense. Finally, Rejean, having spent years in Canada and then another three in Boston, wants warm weather. He thinks he will be able to attract more employees to his company by establishing its

offices in a warm weather venue. Rejean also thinks that attracting his ex-students with a lucrative package of ISOs will make the warm weather of California even more inviting.

Immigration counsel was glad to see that Razor's Edge Power was formed as a "C" corporation. Because Rejean now holds a large but not controlling interest in Razor's Edge Power, Inc., the company can file either and H-1B or O-1 petition, or perhaps even a TN application, on his behalf. In addition, under the advice of both corporate and immigration counsel, Rejean did not vote himself a seat on the Board of Directors of Razor's Edge Power, Inc. Instead, Rejean votes a nuclear physicist/businessman, who has successfully brought a nuclear power company public, onto the Board of Razor's Edge Power, Inc. The other two Board of Directors members are a banker and a trusted corporate attorney. The Board of Directors has both the power and the expertise to steer Razor's Edge Power, Inc. in the right direction. This Board also has the ability to treat Rejean as an employee and remove him if necessary. Razor's Edge Power, Inc.'s incorporator is its corporate attorney.

Immigration counsel ultimately recommends that Razor's Edge Power, Inc. file an O-1 consular petition on behalf of Rejean. He tells Rejean that once the petition is approved, to reinstate his lawful nonimmigrant status, he will need to make a trip to Canada and return to the United States. The fact that Rejean was an MIT Professor who has already been granted O-1 status is given considerable weight in assessing the high chance of approvability for Razor's Edge Power, Inc.'s petition on his behalf. Rejean will be granted a substantial equity package with a one-year cliff. This will allow him to be compensated on an annual basis at a "high level" but avoid an immediate cash burn. Rejean asks, "How long will it take"? Despite the normally rapid adjudication of O-1 petitions, immigration counsel recommends the "premium processing" of the petition to ensure prompt processing. Rejean is concerned about being "out of status" and basically "self-employed" for the past month, as well as the additional time it will take to prepare and file the O-1 petition. He wonders what implication his unauthorized work may have on his ability to apply for a green card in the United States.

Immigration counsel calms the nervous Rejean and explains to him that the relatively minor violation of working without authorization for less than six months can be forgiven, in most circumstances, for an employment-based immigrant.[27] Immigration counsel goes further and explains that he can use the same evidence used for the O-1 petition, to support an EB-1 Extraordinary Ability self-petition. Rejean asks for a discount in price due to the apparent ease of filing the EB1/AOS concurrent filing after the O-1. Immigration counsel balks at first, and then says he will discuss it with his partners. Rejean is concerned about losing "all of his money" and his "status" if Razor's Edge Power cannot attract the necessary personnel and capital to stay afloat. Immigration counsel explains that by self-petitioning in the field of nuclear power physics, Rejean can exercise his extraordinary ability at any U.S. employer or even be self-employed if Razor's Edge Power, Inc. fails.

Rejean asks about hiring his ex-students. The two Canadian graduate students can have immediate TN Engineer or Physicist border packages prepared on their behalf. This will allow for their immediate employment at a relatively low salary. The Board of Razor's Edge can authorize the grant of their lucrative ISO packages contingent upon their serving a satisfactory six-month probationary period. During this period, the company can file for changes of status to H-1B to allow them to continue to lawfully vest their options without misrepresenting their intent during border crossings. The Indian F-1 OPT students can be immediately hired at relatively low salaries as well. A similar probationary period should be served before the Board will authorize a grant of ISOs.

Immigration counsel advises Rejean to work on his business plan and his 15-minute pitch, because in one year the company will need to raise enough capital to pay these four talented students at prevailing market H-1B wages in addition to their equity derivative packages.

Rejean nods his head up and down, then side to side. He says, "I know, I know."

SIMPLIFY THE IMMIGRATION SYSTEM FOR FOREIGN ENTREPRENEURS

Rejean's story repeats itself a thousand times in reality every day. A foreign entrepreneur, daunted by the business challenges of founding and funding a U.S. entity, is further stymied puzzling out the Rubik's Cube of immigration laws. The oxymoronic "entrepreneurial immi-

gration system" serves to inhibit and not enhance investment in the United States. Lest there be any doubt, foreign investment is good for the United States:

1. It enriches and stimulates the U.S. economy with needed capital;

2. it creates U.S. jobs;

3. it cultivates fresh ideas and diversity in the U.S.; and

4. it inspires the immigration of very talented people to this country.

With the exception of the above number (4), foreign investment achieves the same goals as a tax cut, without some of the tax cut's nasty side effects. So why is there no effort to legislate and regulate a simplification of the business immigration regime that invites foreign investment? Perhaps, it is because nobody has tried. It is not for a lack of already existing basic concepts that, if legislated, could simplify the present system and increase the flow of much needed capital into the U.S. economy.

◆ **The BK-1[28] Visa**

The first step that Congress must take in order to spur foreign investment and entrepreneurship in the United States is to get rid of the B-1 dance. How can we eliminate the B-1 dance, yet still provide a level of precaution sufficient to stifle potentially fraudulent businesses designed solely for the purpose of gaining entry to the United States? A parallel concept exists in another area of immigration law in the form of the K-1 visa, the visa for fiancé(e)s. As most people know, being a fiancée is not quite being married, but it represents a level of commitment beyond which most people do not go unless they are very serious about the prospect of marriage. There should be a special probationary entrepreneur's visa called the BK-1, not limited by country of nationality or treaty, but governed rather by the comprehensiveness of their business plan, with a minimum capital amount of $100,000 held in escrow by a U.S. bank for the purpose of establishing a U.S. business. In much the same way that K-1 visa holders are required to contract a marriage with a U.S. citizen within 90 days,[29] BK-1 visa holders would be "work authorized" but required to establish their business, spend their minimum funds, and apply for another appropriate work authorized nonimmigrant status within 90 days of arriving in the United States. If the BK-1 entrepreneur applies for another work authorized visa within 90 days of arriving in the United States, an additional work authorized status would be conferred for an additional 90 days. This would give a foreign entrepreneur six months to get a business "off the ground" and become work authorized through a conventional nonimmigrant category.

Allowing the BK-1 to work while setting up the business would eliminate the charade of the foreign entrepreneur entering in the United States to set up a business without providing "productive labor" for the U.S. enterprise. Relieving foreign entrepreneurs from the risk of misrepresenting[30] their "work-related" B-1 activities in the United States is a secondary but important benefit of the BK-1 visa. Unlike the B-1, the BK-1 would be a "dual-intent" category. Anyone who has established a business in a foreign country knows that one must uproot oneself to devote the necessary energy required to make the business successful. Making the BK-1 investment more attractive would be the BK-2 derivative category. BK-2 spouses should be eligible to work incident to status, and BK-2 children should be permitted to attend public school in the United States. Again, the objectives of the BK visa are to attract foreign entrepreneurs and their investment, and job creation in the United States.

BK-1 visas would be applied for directly at U.S. embassies and consulates abroad. Much like the special NAFTA trade officers at BCIS border stations, each consulate would have special BK-1 adjudicators who would have both a general business background[31] and normal consular training. The GAO will be the first to identify that adding this staffing to the DOS would add a level of cost and bureaucracy to an already underbudgeted and overwhelmed agency. For this reason, the application fee for a BK-1 visa should be $10,000. The application income alone will be enough to fund a new corps of specially-trained BK-1 consuls.

The BK-1 would be used for those foreign entrepreneurs who are outside the United States and need to obtain a visa to enter the United States to establish their business. But for those foreign entrepreneurs who are already in the United States in valid work authorized non-immigrant status, the extension of an already existing concept in business immigration law will

enhance the mobility of U.S. labor and encourage entrepreneurialism.

◆ **Universal Portability**

H-1B portability has been a huge success for American business and should be extended to all work authorized nonimmigrant categories. H-1B portability allows a business, under certain conditions, to employ an H-1B nonimmigrant already admitted to the United States upon the *filing* of a new petition.[32] An H-1B worker may be portable if the following conditions are met: (1) lawful admission to the United States; (2) a nonfrivolous petition is filed on their behalf before the period of stay authorized by the Attorney General expires; and (3) they have not worked without authorization in the United States subsequent to lawful admission.[33] The concept of portability should be extended to all other work authorized nonimmigrant categories, such as E, O, L or TN. The increased flexibility and mobility allowed by universal portability would allow nonimmigrants who have already met the regulations once to move to a new employer without having to wait for the often glacial BCIS approval process.

Extending change of employment portability to all work authorized nonimmigrant categories would also ease some of the burden on the BCIS to adjudicate petitions in a timely manner. At the same time, cash-sensitive start-up businesses would not be required to pay repeatedly $1,000 premium processing fees to bring new foreign national employees on board. Finally, during the period of portability, a business would undoubtedly grow and become more established. If the BCIS doubts the viability of the business from the nonfrivolous petition filed, they could issue a Request for Evidence ("RFE") to find out more about the business. Usually, by the time an RFE is issued and replied to, a business can get "its legs."

◆ **Allow Self-Petitioning**

Current restrictions against self-petitioning in many of the nonimmigrant work authorized categories present another impediment to foreign entrepreneurship in the United States. The purpose underlying these restrictions is understandable. The laws, regulations and procedures are designed to catch people who set up sham businesses solely for the purpose of gaining entry to the United States in work-authorized status. The current system, however, throws the baby out with the bath water. Foreign entrepreneurs who establish real businesses by investing capital in the United States and creating jobs for U.S. workers should be encouraged to do so. The only category of nonimmigrant visas that does not throw the baby out with the bath water is the E visa category. The E visa category employs a better targeted and more sensible approach to screening out those businesses that are formed primarily for the purpose of obtaining a visa, the "marginality test."[34] A business is "marginal" if it merely generates a minimal living for the investor and his/her family.[35] If the business expands job opportunities for U.S. and other workers, generates income that is substantial, and creates more than a simple skilled position for the owner/investor, the business is not marginal.[36] The substantive marginality test should be applied to the H, L, O and TN nonimmigrant categories rather than creating a formalistic restriction on self-petitioning. The employer, if he is an owner/investor, should be required to demonstrate that the petition filed on his behalf, in addition to meeting the standard regulatory criteria, meets the marginality test. By using the substantive marginality test, adjudicators will be able to adequately distinguish sham petitioners from those whose successful self-petition will result in a prospective benefit to the U.S. economy.

◆ **VPP—Premium Processing For Visas Too**

The BCIS is to be congratulated for implementing premium processing. By adjudicating petitions within 15 days, the Service has added a certainty to the process that has heretofore been unavailable to foreign entrepreneurs. But what the BCIS giveth, the DOS taketh away. As most practitioners and foreign nationals know, the already long waiting periods to receive nonimmigrant visas at U.S. consular posts will become even longer when the DOS goes to an "all interview system."[37] For foreign entrepreneurs who need to obtain visas to invest and create jobs in the United States, the wait can be agonizing.[38] Certainty, premium processing needs to be added to the visa process as well. The DOS should implement a 10-day Visa Premium Process ("VPP") for visa issuance. The VPP should be available for all work-authorized visa categories. The price tag for VPP could be anywhere from $2000 to $5000. The simple fact is that it hurts both the U.S. economy and foreign entrepreneurs to

have to wait for visas to be processed. The fee for this service should more than offset the added burden shouldered by the DOS.

Again, the U.S. immigration regime needs to be reformed to attract foreign capital and entrepreneurship, not inhibit it. VPP is a process that will help achieve that end.

- **Bring Back The Sham Test and Revive National Interest Waiver for Job Creation**

As the death knell tolls for the EB-5 program,[39] it has become increasingly clear that foreign entrepreneurs who cannot slip themselves into one of the EB-1 categories are desperately in need of immigration options. The DOL's permanent labor certification program, with only slight modifications, can provide that help. Disqualifying foreign owner/employees from labor certification because they have significant ownership interest in a business is simply ridiculous. It is ironic that the same agency charged with protecting the jobs and working conditions of U.S. workers, has proliferated a regime that thwarts job creation. This author is not the first person to point out this apparent contradiction between agency mission and incongruent policy. Entire law review articles[40] and even BALCA opinions[41] have pointed out the "paradoxical nature of the DOL's labor certification procedures as applied to self-employed"[42] foreign nationals. Foreign entrepreneurs who create jobs in the United States should bear discrimination, but that discrimination should mean special treatment in a positive sense. For conventional or Reduction In Recruitment ("RIR") labor certification, that means purging *Modular Container Systems* and its progeny of dart board decisions that leave foreign entrepreneurs guessing as to how their labor certification will be treated. Instead, BALCA should return to the "sham test" articulated in *Hall v. McLaughlin*.[43] The "sham test" involves an inquiry by the DOL as to whether foreign owner's business is simply a "scheme" to obtain labor certification.[44] The "sham test" would screen out fraudulent or marginal foreign entrepreneurs from those individuals whose investment in time, capital, and job creation deserve at least equal if not preferential treatment in the labor certification system.

Additionally, the fact that foreign entrepreneurs are uniquely positioned to run the businesses they have founded and developed should be recognized as a positive factor by the DOL. Foreign owner/employees should not be disqualified for "tailoring" job qualifications to owner/employees. These key owner/employees have business justification for "tailoring" because without their unique combination of capital, management know-how, and essential skills, the business would collapse. If a business collapses, U.S. workers lose jobs. The "inseparability test" should be used in precisely the opposite manner it is being employed in now. If an owner/employee can demonstrate that their services are indispensable to the business, the application should be certified.

The National Interest Waiver ("NIW") allows certain foreign nationals in the second preference category to waive the certification process, if the work of the foreign national is in "the national interest."[45] Improving the U.S. economy and improving the wages and working conditions of U.S. workers have always been recognized as being in the national interest.[46] In a somewhat confusing and circular logic, the Administrative Appeals Office ("AAO"), in its decision in *Matter of New York Department of Transportation*[47] ("NYSDOT"), added that those eligible for NIWs must demonstrate that the foreign national's work in the "national interest" outweighs the "national interest" inherent in the labor certification process.[48] NYSDOT has spawned a new realm of inconsistent and unclear BCIS decisions on NIWs reminiscent of BALCA's *Modular Container Systems* progeny. If we must live with a vague notion of what NYSDOT means, it appears that it does not apply to entrepreneurs and job creation. The labor certification purpose is to protect U.S. workers. Those who seek NIWs on the basis of job creation and consequent contribution to the U.S. economy should meet whatever murky test NYSDOT seeks to establish. In addition, this author proposes a bright line test. Foreign entrepreneurs who can prove that they have paid the salaries of at least ten U.S. workers for at least two years should be exempted from the labor certification process and be granted NIWs. Foreign entrepreneurs, especially when they create U.S. jobs, work in the national interest. We should, in the Silicon Valley lingo, "incentivize" their influx of capital and job creation by granting them NIWs when appropriate.

In disqualifying foreign owner/employees from labor certification, the DOL is "cutting off its nose to spite its face." Founding, funding and

growing a U.S. entity that employs U.S. workers is in the national interest. Let us leave on the nose this time and create American jobs.

IMMIGRATION POLICY: SECURITY FROM WITHIN—ATTRACT FOREIGN ENTREPRENEURS

The danger for immigration policy in a post 9-11 world is for regulators, legislators and adjudicators to view the possibility of an explosion as greater than the possibility of economic implosion. In other words, a system, or non-system if you will, that decreases the amount of immigration to the United States, both lawful and unlawful, is preferred to a policy that promotes stagnation in the economy. Security is vital to the health of this country, but security comes in many forms. The terrorists of 9-11 will have accomplished much more than bringing down the World Trade Towers and Pentagon, if they succeed in creating a more restrictionist immigration policy that inhibits the influx of foreign entrepreneurs and their ideas, capital, and job creation. The public and policy makers alike must respond by resisting the temptation to become isolationist, and reform a system that currently is a minefield for foreign entrepreneurs. Taking some of the reform measures outlined above will contribute to U.S. security—security from within—by fostering diversity, openness and the strength of the U.S. economy.

References

1 "Flow-through taxation," also known as "pass-through taxation" is when the entity is not taxed on income but instead its owner is taxed on the income after it flows through the entity.

2 California, for example, has an LLP statute and many legal partnerships including Tafapolsky, Smith, Evans & McCown LLP have chosen this form of entity because of flow-through taxation and limited liability purposes.

3 *See* Constance E. Bagley and Craig E. Dauchy, *The Entrepreneur's Guide To Business Law* (West Publishing: 1998) at p. 58. (hereinafter "Entrepreneur's Guide To Business Law").

4 *Id.*

5 Although an LLC can elect to be taxed as a corporation and may do this to attract venture capital amongst other reasons.

6 *See Entrepreneur's Guide To Business Law at p. 60.*

7 An LLC's "operating agreement" works much like a partnership agreement and can be a very complicated and difficult to maintain document if many investors are being added to the LLC incrementally.

8 "S" Corporations and "C" corporations are named for the subchapter of the Internal Revenue Code that the entity is taxed under.

9 *See* IRC § 1362 or IRS Form 2553.

10 Although upon going public the "S" corporation must convert to a "C" corporation to accommodate the greater span of ownership interests.

11 The tax rate on dividends has also been cut to 15% as a result of the "Jobs and Growth Tax Reconciliation Act of 2003."

12 *See Entrepreneur's Guide To Business Law* at p. 52.

13 A "private placement memorandum" or a more basic "pre-offering summary" has no specific content but will be designed with an aim to disclose inherent risks in buying securities and to comply with state and federal securities laws. The memorandum will also illuminate what federal registration exemption is being relied upon in the issuance of the securities.

14 IRC § 1202.

15 *Id.*

16 IRC § 1222. Long term gains tax rates have been recently cut in the "Jobs and Growth Tax Reconciliation Act of 2003."to 15% for most high net worth individuals.

17 20 C.F.R. § 656.3 defines employment as "full time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employer."

18 Hall v. McLaughlin, 864 F.2d 868, 6 Immig. Rptr. A2-225 (D.C. Cir. 1989).

19 Lingomat U.S.A., Ltd., 88-INA-267, 7 Immig. Rptr. B3-123 (BALCA Oct. 24, 1989) (en banc).

19 INA § 203(b)(2)(B)(i) [8 U.S.C.A. § 1153(b)(2)(B)(i)].

20 Ocean Paradise of Hawaii, 89-INA-188, 7 Immig. Rptr. B3-186 (BALCA Nov. 21, 1989).

21 Modular Container Systems, 89-INA-228, 1991 WL 223955, 9 Immig. Rptr. B3-109 (BALCA July 16, 1991).

22 9 Immig. Rptr. B3-110.

23 *Id.*

24 See In Re Amger Corp., 87-INA-545, 1987 WL 341738 (Oct. 15, 1987 (en banc).

25 This idea emanates from the brilliant mind of my partner Jeptha Evans who is presently DOL liaison for our Northern California Chapter of AILA. The logic of "equity" as a normal benefit for an occupation should make it into case law or regulations in the near future. Why equity as a "normal" means of compensating employees has not made it into the law, is a function of how slowly the immigration legal regime changes to reflect the modern business world.

26 *High Tech Start Up* at p.7.

27 *See* INA § 245(k) [8 U.S.C.A. § 1255(k)] absolves employment based applicants for adjustment in the first three preferences from periods of unauthorized work or violations of status, as long as the period of violation is 180 days or less.

28 This is not a slight on MacDonald's but instead is a hybrid of the B-1 and K-1 visas, hence the name "BK-1."

29 8 C.F.R § 214.2(k)(5) and (6).

30 INA § 212(a)(6)(C) [8 U.S.C.A. § 1182(a)(6)(C)].
31 A Master's in Business Administration or its equivalent would be a requirement for the position.
32 INA § 214(m) [8 U.S.C.A. § 1184(m)].
33 INA § 214(m)(2) (A), (B) and (C) [8 U.S.C.A. § 1184(m)(A), (B) and (C)].
34 8 C.F.R. § 214.2(e)(15); 22 C.F.R. § 41.51(e).
35 *Id.*
36 Memorandum, Assoc. Comm'r, Adjudications CO 214(e)-C (June 14, 1985).
37 *See Wall Street Journal Reporting That Consuls Will Interview All NIV Cases* as posted on AILA Infonet at Doc. No. 03051640 (May 16, 2003).
38 For example the current wait to process a new E visa in Tokyo is 1-3 months.
39 *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 audience that the actual success rate of EB-5 applications is around 15%. *See* section on "EB-5 Petitions Theory vs. Reality" at p. 173.
40 For an in-depth treatment exposing the contradiction of agency mission (congressional intent) and agency policy on self-employed aliens *see* Heather L. Brown, "Immigration Comment: The Paradoxical Nature of the DOL's Labor Certification Procedures as Applied to Self-Employed Aliens" 16 Houston Journal of International Law 43 (Fall 1993).
41 *See* Chief Administrative Law Judge Litt, concurring opinion in Matter of Nakano Warehouse and Transportation Corp., 92 INA-337, 12 Immig. Rptr. B3-112 (BALCA Nov. 23, 1993).
42 *See supra* note 40.
43 Hall v. McLaughlin, 864 F.2d 868, 6 Immig. Rptr. A2-225 (D.C. Cir. 1989).
44 *Id.* See also a restatement in part of the "sham test" in *Lingomat U.S.A., Ltd.*, 88-INA-267, 7 Immig. Rptr. B3-123 (BALCA Oct. 24, 1989) (en banc).
45 INA §203(b)(2)(B)(i) [8 U.S.C.A. § 1153(b)(2)(B)(i)].
46 See Matter of Mississippi Phosphate, (EAC 92 091 50126 (AAU July 21, 1992) as reported in 69 Interpreter Releases 1364 (Oct. 26, 1992).
47 Matter of New York State Department of Transportation (NYSDOT), 22 I & N Dec 215, Interim Dec. No. 3363 (Comm'r 1998).
48 *Id*.

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