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A New And Promising Immigration Tool For Entrepreneurs

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A sea change in entrepreneur immigration could be underway. On Dec. 27, 2016, the United States Citizenship and Immigration Services Administrative Appeals Office (AAO) issued precedent decision Matter of Dhanasar,[1] potentially a game-changer in how entrepreneurial-minded individuals can utilize the EB-2 national interest waiver (NIW) to secure a green card.


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Previously, most entrepreneurs needed a minimum $500,000 investment with precise job creation requirements to confer EB-5 conditional residency. The EB-2 NIW visa was a fool's errand for most entrepreneurial immigrants given 19-year-old precedent that led to inconsistent adjudications and limited flexibility. Dhanasar, however, is poised to expand the NIW within reach of the international entrepreneur, opening an exciting new avenue for pursing permanent residency.

The Rigid and Often Unworkable Previous Status Quo

When entrepreneurs gauge their immigration options, many are first drawn to the EB-5 immigrant investor program. An entrepreneur must create a new commercial enterprise that, in turn, will create full-time employment for at least 10 U.S. workers.[2] EB-5 immigration also requires a minimum $1 million personal investment of capital, which is halved if the enterprise is operating in a targeted employment area.[3] Entrepreneurial-minded individuals will deploy EB-5 funds to businesses they control (known as a "direct EB-5"). However, the vast majority of visas are awarded to investors participating in the EB-5 regional center program where they take a much more (but not purely) passive role in their enterprises.

The EB-5 visa first confers conditional permanent residency, subject to a subsequent condition removal filing after two years of residence that must prove, inter alia, that the investment was sustained and the requisite jobs created.[4] In a direct EB-5 filing, one must generally submit voluminous evidence showing that the investment funds were placed at risk during the conditional residency period and that 10 full-time positions have been or can be expected to be filled with qualifying U.S. workers.[5]

As long-time stakeholders, we are big fans of the EB-5 visa, which has been a boon for scores of our clients. But it is not for everyone, including many entrepreneurs. Many simply do not have the minimum personal funds needed to invest. EB-5 is also suffering from its success — its processing times are

lamentable,[6] and because one cannot concurrently file for adjustment of status[7] as is possible with a priority date-current EB-1, EB-2 or EB-3 petition, the mere filing of an I-526 does not allow a U.S.-based investor authorized stay or work authorization to manage the enterprise. An underlying status — such as E-2 which is limited in its applicability — is needed. Because W-2 employees are required in direct EB-5s, certain industries which primarily leverage independent contractors (such as property development or agriculture) face difficulty designing a business plan that qualifies. Finally, EB-5 is currently subject to congressional and regulatory reforms,[8] and some entrepreneurs balk at this legal uncertainty.

The EB-2 NIW has historically been a much more restrictive option for entrepreneurs. Unlike EB-5, all EB-2 immigrants must hold an advanced degree or "exceptional ability."[9] EB-2 visas also generally require proof of a bona fide employer-employee relationship and a PERM (permanent labor certification program) labor certification. A prospective EB-2 immigrant may waive both requirements and self-petition when USCIS "deems it to be in the national interest"[10] Yet despite the visa's existence in the Immigration and Nationality Act for over 25 years, USCIS has never codified substantive regulations to define "national interest."

Without such regulatory guidance, USCIS has relied upon a 1998 AAO decision, Matter of New York State Department of Transportation[11]. This was not an entrepreneurial case — the Department of Transportation sought to employ a civil engineer that would construct bridges. In the decision, the AAO developed a three-part test for NIW adjudications:

1. The immigrant must seek employment in an area of substantial intrinsic merit. The AAO stressed that this would be applied on a case-by-case basis rather than blanket waivers for entire fields[12];

2. The proposed benefit would be national in scope. In NYSDOT, the AAO rationalized that New York's bridges and roads connect the state to the nationwide transportation system, and thus this criterion was met[13]; and

3. The petitioner must demonstrate that it would be contrary to the national interest to potentially deprive the prospective employer of the services of the alien by making available to U.S. workers the position sought.[14] The AAO denied the case on these grounds, finding that the petition did not meet this criterion.

The NYSDOT framework has raised concerns for entrepreneurs seeking NIWs, largely because of the questions and ambiguities it raises. For instance, it is not clear what kinds of business are of substantial intrinsic merit. Could a local business bring about benefits that are national in scope, or would it need to operate coast-to-coast? Conceptually, how could an entrepreneur make his or her own position available to U.S. workers? Because of these uncertainties, most immigration attorneys representing self-petitioning entrepreneurial clients have shied away from the EB-2 NIW category.

However, now presents an excellent time to revisit the NIW for entrepreneurs, given some of EB-2's advantages over EB-5.

Enter Dhanasar

The new Dhanasar decision can be interpreted as the AAO signaling that the NIW door is now wide open for entrepreneurs. At issue in the case was a self-petitioning science, technology, engineering or math

(STEM) professional who sought to engage in research and development relating to propulsion systems and to teach aerospace engineering at North Carolina A&T University.[15] The text of the decision could have been limited to discussing such scientists operating in the academic/research sphere. However, its guidance and rationale are much further reaching, especially for entrepreneurs.

The AAO began its decision in Dhanasar by finding particular fault with its third NYSDOT prong listed above, which was "particularly ill-suited for USCIS to evaluate petitions from self-employed individuals, such as *entrepreneurs*."[16] The NYDOT test was therefore scrapped, and superseded by a new three-part test with profound implications. The new framework articulated in Dhanasar is as follows:

1. The proposed endeavor has both substantial merit and national importance.

The AAO has reframed this prong with a focus on the specific endeavor to be undertaken. It reasoned that merit may be demonstrated in "a range of areas such as *business, entrepreneurialism*, science, technology, culture, health or education. Evidence that the endeavor *has the potential to create a significant economic impact may be favorable* but is not required[.]"[17]

The implications for entrepreneurs here are obvious — unlike the approach in NYSDOT, business and entrepreneurial pursuits are explicitly included as qualifying fields under the new test. Further, the AAO discussed a significant economic impact as favorable, but not required. Now for the first time it appears that the economic impact of potential immigrants will lead to favorable adjudications with greater latitude compared to the finite job creation and payroll requirements of EB-5. This is a positive development as many entrepreneurs can meet a standard of significant economic impact as opposed to a standard requiring the creation of 10 full-time W-2 qualifying jobs.

2. The foreign national is well-positioned to advance the proposed endeavor.

Under this new prong, the AAO instructed that the potential prospective impact is to be examined. It reasoned that while some endeavors may have a nationwide reach, this prong is to be measured more broadly as enterprises focusing on one geographic area "may properly be considered to have national importance."[18] Further, an endeavor which has "significant *potential to employ U.S. workers* or has other substantial positive economic effects, *particularly in an economically depressed area* ... may well be understood to have national importance."[19]

The focus then shifts to the immigrant who must show the appropriate positioning. USCIS is to consider factors including education and skills, record of success, model or plan for future activities, progress towards achievement, and the interest of potential customers, investors or other relevant entities. Critically, the AAO recognized that many "entrepreneurial endeavors may ultimately fail, in whole or in part, despite an intelligent plan and competent execution. We do not, therefore, require petitioners to demonstrate that their endeavors are more likely than not to ultimately succeed […] petitioners must establish, by a preponderance of the evidence, that they are well positioned to advance the proposed endeavor." [20]

This "well-positioned" standard is remarkably lower than the standard required for EB-5s. In addition to the core job creation requirements, EB-5 petitions must include a comprehensive Matter of Ho-compliant[21] business plan proving that within two years, 10 qualifying employees will be hired.[22] EB-5 endeavors must be successful, or the consequences are dire. If qualifying job creation does not take place or cannot be expected to take place within a reasonable time of the filing window, the I-829 is denied and the immigrant and derivative family are placed into removal proceedings.[23]

The NIW immigrant entrepreneur will be in the strongest position to meet this prong if he or she is the sole or majority owner of the company[24] and accordingly can direct efforts to meet the proposed endeavor.

3. On balance, it would be beneficial to the U.S. to waive the requirements of a job offer and thus of a labor certification.

As discussed above, the AAO took serious issue with the third prong of NYSDOT and has completely turned it on its head. Dhanasar now requires the petitioner to show waiving a job offer would be beneficial to the U.S. Recognizing the breadth of the NIW, USCIS is instructed to examine whether a job offer or labor certification is impractical, recognizing that "[B]ecause of the nature of the proposed endeavor, it may be impractical for an entrepreneur … when advancing an endeavor on his or her own, to secure a job offer from a U.S. employer."[25] Further, USCIS is advised to consider the foreign nationals contributions and whether the national interest is "sufficiently urgent" to warrant forgoing a labor certification.[26] This new prong explicitly does not require a showing of harm to the national interest or a comparison against U.S. workers, as the AAO recognized (yet again in the opinion) how difficult NYSDOT was for "certain petitioners, such as entrepreneurs[.]"[27]

In this new third prong, the AAO has unambiguously stressed that entrepreneurs qualify for NIWs. The specific contributions necessary to generate a favorable adjudication recognizing immigration as beneficial to the U.S. remain to be seen, but based on this new, more inclusive third-prong language, we can expect to see an increase in positive adjudications for NIW entrepreneur cases in the right circumstances.

Moving Forward

The revamp of the NIW is significant for entrepreneurs managing U.S. businesses who now have a potential additional avenue for immigration. Not all prospective direct EB-5 investors will qualify for an NIW, but with the right accolades and prospective impacts, EB-2 may prove to be a comparatively better option. Unlike EB-5, an NIW green card may present the opportunity to concurrently file adjustment, obtain unconditional residency immediately, and avoid the harsh prospects of deportation should a business fail. Perhaps most importantly to the entrepreneur, there is no personal or threshold investment requirement. Still, it is important to note that this option might not be best for all entrepreneurial immigrants. Factors such as visa retrogression and the nature of the business itself must be carefully considered.

We are optimistic that Dhanasar will revitalize active business managers otherwise stymied by EB-5's rigidity to pursue an immigrant visa. It is far too early to accurately predict how USCIS will treat such cases on a routine basis, yet we hope that others in the industry will be as courageous and willing to test these new waters as we are. In a time when there is much anxiety in the immigration realm, this is one recent development that is quite promising.

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[1] 26 I&N Dec. 884 (AAO 2016)

[2] INA § 203(b)(5)

[3] 8 CFR 204.6(f)

[4] See INA § 216A and 8 C.F.R §. 216.6. Investors may also argue that the jobs are expected to be created within a reasonable time if not created at the time of Form I-829 filing.

[5] See USCIS Policy Manual, Vol. 6, Chapter 5, "Removal of Conditions" at B, available at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartG-Chapter5.html (last accessed Jan. 5, 2017).

[6] As of Oct. 31, 2016, USCIS was adjudicating I-526 petitions filed on July 12, 2015. See "Average Processing Times for Immigrant Investor Program Office as of: Oct. 31, 2016"https://egov.uscis.gov/cris/processingTimesDisplay.do (last accessed Jan. 5, 2017).

[7] 8 C.F.R. § 245.2(a)(2)(i)(B

[8] See, e.g., "It Sure Looks Like New EB-5 Regulations are Coming in 2017" The Immigrant Investor Blog, Dec. 27, 2016, available at http://www.gandsinvestors.com/the-immigrant-investor-blog/blog-post/blog/2016/12/27/it-sure-looks-like-new-eb-5-regulations-are-coming-in-2017-(part-1).

[9] 8 CFR § 204.5(k).

[10] INA § 203(b)(2)(B)(i)

[11] 22 I&N Dec. 215 (AAO 1998)

[12] Id. at 217.

[13] Id.

[14] Id. at 217-218.

[15] 26 I&N Dec. at 891.

[16] Id. at 888 (emphasis added)

[17] Id. at 889 (emphasis added).

[18] Id. at 889.

[19] Id. at 890 (emphasis added).

[20] Id. at 890.

[21] 22 I&N Dec. 206 (AAO 1998).

[22] 8 C.F.R. § 204.6(j)(4)(B)

[23] See 8 C.F.R. § 216.6(d)(2).

[24] It should be noted, however, that regional center investors are unlikely to find an alternate route to residency under the NIW because of this prong. As discussed above, such investors are often in relatively passive roles, such as limited partners or nonmanaging limited liability members. Because such investors generally give up active management rights, it would be difficult to demonstrate that they are in a position to "advance the proposed endeavor."

[25] Dhanasar, 26 I&N Dec. 884 at fn.10

[26] Id. at 891.

[27] Id.
