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New Waiver Test May Aid Entrepreneurs Seeking Green Cards

By **Allissa Wickham**

Law360, New York (January 6, 2017, 5:01 PM EST) -- Staying in the U.S. can be a tricky process for startup founders, but a new decision could make it easier for entrepreneurs to get key waivers and green cards, according to attorneys, with the ruling coming as the government prepares to roll out a separate regulation for entrepreneurial immigrants.

In a last-minute holiday gift to immigration attorneys and foreign nationals with "exceptional ability," a U.S. Citizenship and Immigration Services appeals office on Dec. 27 **issued** its first precedential decision in more than a year, unveiling a fresh standard for a crucial waiver available to some green card applicants.

The office — known as the Administrative Appeals Office — revamped the test for granting a "national interest waiver," which can be used by immigrants seeking green cards through the EB-2 visa category. The visa is for people with exceptional abilities or advanced degrees, and the waiver allows immigrants to avoid the usual job offer requirement, as well as the labor certification process.

The new decision will likely make it easier for EB-2 visa applicants, especially entrepreneurs, to get national interest waivers and green cards, according to several immigration attorneys. Startup founders in particular may breathe a sigh of relief since there essentially isn't a solid immigration avenue for entrepreneurs, according to Greg Siskind of Siskind Susser PC.

"There really wasn't any appropriate category for the entrepreneur," Siskind said, adding that "this is pretty good news for the startups out there, that they now have a green card category that's viable for them."

As George Lester of Fragomen, Del Rey, Bernsen & Loewy LLP succinctly noted, when it comes to startup founders, it's "impossible to do labor certification."

To use the labor certification process, attorneys said, foreign startup founders must try to recruit U.S. workers for the job, and the U.S. Department of Labor takes a skeptical view of startup founders' abilities in that area.

"You have to basically define your own job, and then offer it to the world through ads in the newspaper," Lester explained. "And then, Department of Labor would come back and say, 'This is not a true job opportunity because it's just your job, and you're the company founder.'"

The national interest waiver offers a pathway to an EB-2 visa and green card. But under the old waiver test now overturned by the AAO, the petitioner had to show that the

"national interest" would be negatively impacted if a labor certification was required for the would-be immigrant.

"They put forth this third prong, which was a nightmare," David Nachman of NPZ Law Group PC said of the 1998 ruling that created the old waiver test. "They basically said that you had to prove that the individual's interest in getting the green card fast outweighed the country's interest in the labor certification process. And that is such a high standard."

Now, under the new waiver standard unveiled late last month, USCIS can provide a national interest waiver if the applicant shows that "on balance, it would be beneficial to the United States to waive the job offer and labor certification requirements," along with other stipulations.

"This new decision clarifies that you don't have to show harm to the national interest from doing the labor certification," Lester said. "You just have to show that on balance it would be beneficial to wave the job offer and labor certification requirements. So, that makes it much easier."

Of course, people who are subject to visa backlogs for the EB-2 classification will still need to wait, Lester noted, but having a waiver will at least allow them to extend their status in a temporary, high-skilled visa category.

"By having the approval of the national interest waiver, they would be able to keep extending H-1B status, essentially indefinitely, until their priority date is current," Lester said.

Notably, the AAO's decision came just days before USCIS **sent the final version** of a rule for international entrepreneurs to the Office of Management and Budget for review. That regulation most likely focuses just a temporary stay in the U.S. for entrepreneurs, judging by the contents of the **proposed rule**, and could be released before Donald Trump is sworn in as U.S. president later this month.

But together, the national interest waiver decision and entrepreneur regulation may create a more hospitable immigration landscape in the U.S. for foreign startup founders. Both of the developments come roughly two years after President Barack Obama **unveiled** executive actions on immigration, which included calling on USCIS to "clarify the standard" for national interest waivers for startup founders, and allow parole to certain inventors and entrepreneurs.

The AAO's late-December ruling is also already having ripple effects, as the case, known as Matter of Dhanasar, has been cited in at least four nonprecedential AAO decisions since.

Overall, the decision was a positive way to ring out 2016 for skilled immigrants, according to Siskind.

"I think that it was sort of a happy way to end the year, particularly for high-skilled workers out there who have had a lot of bad breaks over the last couple years," he said. "And I think this was certainly good news for them."

--Editing by Katherine Rautenberg and Edrienne Su.