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USCIS Director Alejandro Mayorkas
Department of Homeland Security
U.S. Department of Homeland Security
Washington, D.C. 20528
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AN OPEN LETTER

Dear Commissioner Mayorkas,

Your August 2, 2011 initiative to promote start up enterprises and spur job creation in the U.S. is certainly commendable as is your August 16, 2011 blog post headlined "a Nation of Laws and a Nation of Immigrants."

I have been an immigration lawyer practicing business immigration for over forty years. I work with many young college and conservatory graduates with Bachelors, Masters, and PhD degrees. Many of whom are, as you stated, the "best and brightest from around the world..." who wish to "invest their talents, skills, and ideas to grow our economy and create American jobs."

The use of the EB-2 category with Labor Certification in the National Interest for entrepreneurs will be a valuable contribution to job creation, if it is adjudicated in an open and non restrictive manner.

However, the updated FAQs regarding H-1B beneficiaries who are the sole owners of petitioning corporations merely underlines that this course of job creation is dead on arrival.

It is unfortunate that the August 2nd FAQs regarding the very restrictive January 13th memorandum effectively did nothing to restore a job creating

open policy. One might think that the FAQs made positive changes. Effectively, they did not.

Over the last several years USCIS Headquarters has gotten into the habit of making substantive changes in regulatory requirements without formal rulemaking under the Administrative Procedure Act (APA), or even by informal notice but, as Headquarters would put it, by "Updated Guidance to Adjudication Officers to Clarify..." The APA requires that, a substantive change in regulations should be published, in the "Federal Register." However, mere updated "guidance" is not subject to the APA, but can appear any day without notice of any type. Such was the case with the "guidance" regarding "P" visas, which, after a major uproar and lobbying was issued on November 20, 2009. Such was also the case with H-1B numerical cap and fee exemption affiliation issues for petitions for medical residents by teaching hospitals which was eventually published as "guidance" on March 18, 2011. Again, in response to stakeholder lobbying and backlash/feedback regarding unpublished policy changes. None of these actions appear to conform with the agency's stated goal of transparency.

Unfortunately the young, best, and brightest do not have a lobby which can challenge the January 13th H-1B guidance or the subsequent FAQs.

Your August 2, 2011 release introduces an updated series of FAQs which supposedly "modifies" guidance originally published on January 13, 2010. The guidance turned more than fifty years of H-1B adjudications on its head by emphasizing the aspect of "control" of the beneficiary by the corporate executives, and ignoring the ancient common law concept that a corporation is a separate and distinct legal entity – a status which can only be challenged for fraud.

A corporation, LLC, or LLP is a separate and distinct legal entity from the individual who may be its sole shareholder, officer, or director. Service adjudications had long respected the fact that a corporation owned and controlled by one individual could act as the petitioner or sponsor for that individual, generally as its agent. All of a sudden, and without warning, the Service issued prospective and retroactive "guidance" emphasizing the "control" aspect to the point that an individual who owns all corporate shares cannot be a corporate employee/beneficiary because they are assumed to be controlling themselves.

Interestingly, the first question the revised August 2, 2011 Q&A asks is: "Does this memorandum change any of the requirements to establish eligibility for an H-1B petition." The answer stated is "no," that none of the requirements including that of "control" has been changed. The fact that this is the first question makes one wonder why the Service is being so defensive. Perhaps, it has reason to be defensive. If one hundred percent of affected petitions were approved prior to January 13th, and one hundred percent of all affected petitions were denied thereafter, the Services' statement that there had been no change might reasonably be considered to be questionable at best, and disingenuous at worst.

In fact, for many years this form of petition has been filed by corporations owned by individuals in the performing arts, the fine arts, and by university graduates in business programs. As the H-1B petition is employer specific, it is frequently the only way in which individuals in the fine arts, and sometimes in the performing arts can freelance their way to successful careers. It is also the only way in which a young business graduate can create a new business.

Whether in the fine arts, performing arts or new business context, all of these applicants will potentially hire Americans.

You should also be aware that the change in policy of January 13th regarding H-1B petitions has also been utilized in the O-1 context for non-immigrant individuals of extraordinary ability, although there is no published Service authority whatsoever for this position. The H-1B memorandum has apparently infected another nonimmigrant category – without even being published as "guidance" in the AFM.

Why did the Service make this sudden and serious change in policy? Perhaps, Headquarters simply did not like the fact that individuals can create a separate legal entity, which can then be the beneficiary of an H-1B petition filed by that entity. Are we in a situation where, with no hard evidence, the Service presumes fraud in every application and directs the elimination of that procedure as the only way to remedy the perceived fraud? After many years of experience with the Service one can only speculate. However, by using the issue of "control", the Service no longer has the need to carry its burden of proof in order to "pierce the corporate veil."

The timing of this change is also peculiar as, since 2005, the Service now collects a $500.00 "fraud detection fee" for each new H-1B petition. This fee has permitted the Service to hire a whole new coterie of fraud inspectors.

Unfortunately, the end result of this policy change is to prevent smart and talented young creative individuals from developing their careers in the United States and generating jobs. Smart, young, aggressive entrepreneurs must become employees of existing corporate entities, if they can even find a job. They are denied the opportunity to create a business which will hire Americans. The only people who are happy about this change live in other countries where the best and brightest young talent will be forced to migrate.

A "Notice of Proposed Rule Making" in the "Federal Register," as required by the Administrative Procedure Act, would force Service policy makers to provide

their rationalization for this change in policy. Denying that there is no change in policy, and publishing the change as a modification in the "Officers Field Manual" avoids any critical review of the change. The Administrative Procedure Act is one of America's defenses against capricious laws. It also serves to protect our American democracy.

You have sponsored a new era of USCIS transparency seeking stakeholder input and open discussion. Unfortunately, the pattern of policy changes through "guidance" is contrary to your stated goal of transparency and turns it into a mere public relations exercise.

There is a lot of talk about our broken immigration system. Implementing "guidance" rather than formal rule making through APA notice-and-comment process creates further fissures in the non-immigrant process.

These fissures have already appeared in the teaching hospital and performing arts industries, among others, robbing them of stability and a certain level of predictability that is invaluable to all businesses.

We both share the positive goals of job creation, as well as Service efficiency, and keeping our country "a nation of laws – and of immigrants." I hope that the above concerns will assist in bringing about these positive outcomes.

Very truly yours,

Eugene Goldstein

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