



Teleconference Recap: Small & Start-Up Business Immigration Issues

Overview

On October 25, 2011, the Citizenship and Immigration Services Ombudsman's Office (Ombudsman's Office) hosted a public teleconference regarding immigration issues connected with small and start-up businesses. This teleconference is one in a series of events hosted by the Ombudsman's Office to focus on immigration issues that affect small and start-up businesses. The first event was a listening session in Los Angeles, California on August 31, 2011 and included the SBA Ombudsman and a representative from the Department of Commerce's SelectUSA program.

During this teleconference, the Ombudsman's Office interviewed two officials from the Small Business Administration (SBA) Office of Advocacy, an independent office that provides a voice for small businesses to comment on the development of federal regulations. Dr. Winslow Sargeant leads the Office of Advocacy as Chief Counsel and Janis Reyes is Assistant Chief Counsel for labor, employment, and immigration law.

This teleconference also provided an open forum for listeners to discuss USCIS policies and practices impacting small and start up businesses. Leadership from USCIS Office of Policy and Strategy and Service Center Operations also listened in on the call to hear the public's questions and comments.

Questions and Answers

Can you explain the work of the Office of Advocacy?

Dr. Sargeant explained that the Office of Advocacy advances the views and concerns of America's 27.5 million small businesses before Congress, the White House, the federal agencies, the federal courts and state policy makers. Dr. Sargeant explained how his work with start-ups and small businesses helps him amplify the collective voice of small businesses around the country. He also emphasized the importance of recognizing that small businesses are the backbone of the economy. Dr. Sargeant also noted the intersection between small and start-up businesses and immigration.

Ms. Reyes explained that Congress created the Office of Advocacy in 1976 to ensure federal agency compliance with the Regulatory Flexibility Act (RFA). It currently has 12 attorneys who review proposed federal regulations. The Office of Advocacy is dependent upon information provided by small businesses in order to determine whether a proposed rule may unnecessarily burden small and start-up companies. Ms. Reyes noted that input from the small business community is crucial.

What is your role as Assistant Chief Counsel for labor, employment, and immigration law?

Ms. Reyes said that as Assistant Chief Counsel, she reviews federal regulations and legislation that relate to labor, employment and immigration issues. She also conducts outreach to small businesses, drafts public comment letters, and engages in interagency discussions on rules before they become public. For immigration-related regulations, the Office of Advocacy may work with DHS, the U.S. Departments of Labor, or, the U.S. Department of State.

How does the Office of Advocacy decide which regulations to focus on?

The Office of Advocacy relies upon input from the public on how a rule may impact a particular industry. Ms. Reyes emphasized that the Office of Advocacy is always interested in getting the perspective from small employers and their attorneys or agents. For regulatory issues listeners are concerned about, they may contact her via email at janis.reyes@sba.gov.

What is the difference between SBA, the SBA's Ombudsman's Office, and SBA's Office of Advocacy?

SBA provides a variety of programs to assist small businesses. The SBA Ombudsman's Office helps small businesses when they deal with existing laws, already on the books including those with excessive or unfair federal regulatory enforcement actions. The Office of Advocacy, an independent office within the SBA, helps small businesses with *proposed* federal regulations rather than existing laws. The Office of Advocacy does not deal with SBA programs, and cannot, for example, help with a small business loan. Rather, the Office of Advocacy provides the small business

community with a voice in the wider federal rulemaking process, ensuring that the concerns of the small business community are considered when federal agencies enact regulations that will affect small and startup companies.

What type of information does the Office of Advocacy need from small businesses regarding proposed rules?

Ms. Reyes responded that her office needs data on and concrete examples of the impacts that proposed rules have on the small business community. This information includes key points such as the number of small business that may be affected; the potential costs a small business may incur attempting to comply with the proposed rule; and how a proposed rule might change the way small organizations currently do business. Also, Ms. Reyes indicated that it is important to determine if there are ways that the agency could still accomplish its objectives while simultaneously minimizing the cost of the rule for small businesses .

How will the public know if a proposed rule is out for public comment?

Each Federal agency publishes a regulatory agenda twice a year listing rules that the agency plans to issue. Individuals may sign up for daily updates on new regulations from the Federal Register.

The Office of Advocacy's website also provides many tools for small businesses to obtain information about new regulations, including: regulatory alerts, list serves, newsletters, and a blog.

The Ombudsman's Office often hears from stakeholders regarding items that are not rules, such as policy statements, guidance, etc. Can someone contact the Office of Advocacy regarding those matters?

The Office of Advocacy generally deals with proposed rules affected by the RFA. However, people with questions about policy statements, guidance, etc should contact the Office of Advocacy regarding these items. It is possible that agency policy guidance should undergo notice and comment rulemaking. The Office of Advocacy always encourages agencies to analyze the impact of their guidance and policy on small businesses, even though they might not be subject to the RFA.

What are some examples of immigration regulations that the Office of Advocacy has been involved with recently?

Ms. Reyes shared the example of the H-1B visa program regulation for a lottery and registration phase. Under the proposal, employers would register for H-1B visas early, and winners of the early lottery could petition for an H-1B visa in April, when numbers become available for the following fiscal year. The Office of Advocacy hosted a roundtable of small businesses using H-1B visas, and, based on their feedback, the Office of Advocacy submitted a comment letter to USCIS expressing concerns that the registration process would cause administrative burdens and uncertainty for small businesses. The Office of Advocacy recommended that USCIS evaluate the potential impact of the rule upon small business and consider regulatory alternatives that might produce better outcomes. Ultimately, USCIS decided to postpone the issuance of a final rule.

Ms. Reyes also noted that the Office of Advocacy has been involved with the U.S. Department of Labor (DOL) H-2B regulations. The Office of Advocacy is concerned that DOL will finalize a rule that makes the process to hire H-2B workers more difficult. In addition, Ms. Reyes stated that the Office of Advocacy has worked on other immigration regulations such as the H-2A program (for temporary agricultural worker) and the J-1 visa program (for foreign exchange students).

Listeners also had an opportunity to call-in and ask questions or share their comments related to USCIS and SBA policies and practices that impact small and start-up businesses.

How small is a "small business" under the RFA?

The SBA's size standards define whether a business is "small" and thus eligible for government programs and preferences reserved for "small business" concerns based upon on the type of business and the location of the business, among other factors.

Have there been recent changes to USCIS regulations or policies for certain statuses like H-1B? Are there any exceptions made for small and start-up businesses?

Multiple callers noted concerns with current USCIS adjudications and shared that while their cases have not changed, they are now receiving more Requests for Evidence (RFEs) and denials. One caller noted that the amount of evidence requested in RFEs is often difficult to pull together for a small or start-up business that lacks expansive operations or a broad public profile. Another caller expressed concern that appeals made to the USCIS Administrative Appeals Office (AAO) take so long, they are not worthwhile for small businesses to pursue. Often, small businesses cannot afford to leave a position open for the lengthy period of time required to receive an AAO decision.

Has USCIS evaluated the impact of the Neufeld Memo when applied to small and start-up businesses?

Several callers expressed their frustration with USCIS guidance released January 08, 2010 titled, “Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements: Additions to Officer’s Field Manual (AFM) Chapter 31.3(g)(15)(AFM Update AD 10-24)” (Neufeld memo). One caller stated that it is particularly difficult for self-petitioning H-1B workers to qualify as an employer under the Neufeld memo. The caller explained that this forces H-1B employees to continue to work for other companies in lieu of starting their own.

Another caller explained that the application of the Neufeld memo is often inconsistent and confusing, because some decisions focus on a couple of factors, yet wholly discount others. Many callers were frustrated by what they deemed a lack of consistency and accountability in USCIS adjudications for employment petitions.

What type of guidance do USCIS adjudicators receive on the different types of business plans that may accompany a business immigration filing?

The Ombudsman’s Office referenced some of the initiatives that USCIS has recently announced including the Entrepreneurs in Residence initiative, which is described as, “leveraging the expertise of industry leaders, to inform policy and adjudicator training, in order to better address the realities and needs of the business community.” Also, USCIS announced specialized training for L-1B adjudicators to reinforce the principles set forth in existing L-1B policy guidance. Many callers applauded these efforts, but expressed concern about realizing the goals of these initiatives.

If you have additional comments or questions to share on small and start-up business immigration issues, please email us at cisombudsman.publicaffairs@dhs.gov.

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The Ombudsman's Public Teleconference Series

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The Ombudsman's Office hosts public teleconferences to share information on specific topics and to hear your comments and suggestions regarding your interactions with the [U.S. Citizenship and Immigration Services \(USCIS\)](#).

Upcoming Teleconferences

Small & Start-Up Business Immigration Issues: A Conversation with the Small Business Administration (SBA) Office of Advocacy Chief Counsel

Tuesday, October 25, 2011

2:00 – 3:30 p.m. EDT

The Ombudsman's Office will interview representatives from SBA to discuss issues affecting small and start-up business immigration issues and their governmental role. This teleconference is an opportunity for the public to share their suggestions on promoting businesses and economic development in the U.S. through immigration. The Department of Homeland Security (DHS) and United States Citizenship and Immigration Services (USCIS) leadership have [recently announced](#) efforts to "fuel the nation's economy and stimulate investment by attracting foreign entrepreneurial talent of exceptional ability or who otherwise can create jobs, form startup companies, and invest capital in areas of high unemployment."

We will reserve time for your questions, comments, and suggestions.

To participate, please RSVP to cisombudsman.publicaffairs@dhs.gov and reference "Small and Start-Up Business Immigration Issues Teleconference" in the subject line of your email.

Participation in these teleconferences is anonymous for callers.

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