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United States Senate

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20510-6275

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February 25, 2016

**VIA ELECTRONIC TRANSMISSION**

The Honorable Leon Rodriguez  
Director  
U.S. Citizenship and Immigration Services  
Washington, DC 20529

Dear Director Rodriguez:

I write to express concerns about the manner in which the integrity of the H-1B visa program is being openly undermined by immigration lawyers, universities, and even state and city governments, and about your agency's apparent indifference to this problem.

According to recent press reports, there is now a growing movement amongst some U.S. employers and institutions to "hack" the H-1B visa program in order to open up the program to more foreign workers.<sup>1</sup> The concept is aimed at opening up the visa program to more foreign workers by using novel, and seemingly unlawful, interpretations of the law to shoehorn workers into existing cap exempt categories and otherwise make H-1B visas available through cynical exploitation of loopholes in the law.

One way in which some high-tech industry advocates and immigration lawyers, at times in cooperation with state universities, have teamed up to "hack" the H-1B program is by setting up entities that "employ" foreign nationals in some nominal fashion in H-1B status, thereby giving the worker lawful immigration status that he can use as cover for the true purpose of his presence in the United States: establishing and working for his own start-up company. Such arrangements are a backhanded attempt to evade the prohibition on self-employment by H-1B workers. For example, Unshackled, a \$4.5 million venture capital fund, helps foreign nationals seeking to start and work at a business in the United States by sponsoring them for an H-1B visa as an "employee" with Unshackled, and helping the foreign nationals establish their start-up

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<sup>1</sup> See, e.g., Ellen Huet, "How Tech Startup Founders Are Hacking Immigration," Bloomberg Businessweek (Feb. 10, 2016), available at <http://www.bloomberg.com/news/articles/2016-02-10/how-tech-startup-founders-are-hacking-immigration>.

company, in exchange for an equity share – usually 5 percent – in the start-up companies.<sup>2</sup> To date, Unshackled has reportedly sponsored a dozen H-1B visas in this manner.<sup>3</sup>

Other instances of H-1B “hacking” designed to let self-employed business owners work in H-1B status include collusion with state universities. The Global Entrepreneur in Residence Coalition, a non-profit entity that matches foreign nationals seeking to establish and work for their own business, colludes with universities, including the University of Massachusetts at Boston and the University of Colorado at Boulder, who agree to sponsor the foreign national for a cap-exempt H-1B visa.<sup>4</sup> The university appears to then employ the foreign national in H-1B status as an “entrepreneurial mentor” to students at the university, while the foreign national is simultaneously setting up and working at his own business.<sup>5</sup> The group says it has arranged for H-1B sponsorship in this manner for about 10 foreign nationals so far.<sup>6</sup>

More troubling examples of this undermining of the H-1B program involve some city and state governments. For example, the New York City Economic Development Corporation (NYCEDC) announced earlier this month a new program, developed in coordination with the City University of New York (CUNY), intended to secure H-1B status for foreign nationals seeking to open a business in the United States.<sup>7</sup> The plan, called IN2NYC, calls for 80 such foreign nationals to “set up shop on CUNY campuses, advising professors and students while working to build companies — in exchange for a special temporary work visa that is exempt from the quotas.”<sup>8</sup> Specifically, under the program, the NYCEDC will:

- Partner foreign nationals seeking to start and work at a business in the U.S. with CUNY schools that will sponsor the foreign national for an H-1B visa. Because the schools are institutions of higher education, they are exempt from the H-1B cap, “thus allowing the entrepreneur to ... avoid the H-1B lottery process,” and apply for a cap-exempt H-1B visa as an “employee” of his start-up company at any time during the year.<sup>9</sup>

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<sup>2</sup> Id.; Unshackled website: <http://unshackled.co/>; “Unshackled, A New Angel Fund, Forms to Back Immigrant Entrepreneurs,” Wall Street Journal (Nov. 13, 2014), available at <http://blogs.wsj.com/venturecapital/2014/11/13/unshackled-a-new-angel-fund-forms-to-back-immigrant-entrepreneurs/>; Kia Kokalitcheva, “Unshackled’s \$3.5M fund could help immigrant entrepreneurs get a foot in the American door,” VentureBeat (Nov. 13, 2014), available at <http://venturebeat.com/2014/11/13/unshackleds-3-5m-fund-could-help-foreign-entrepreneurs-get-a-foot-in-the-american-door/>.

<sup>3</sup> Huet, supra note 1; Global Entrepreneur in Residence Coalition website: <http://www.globaleir.org/>.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Liz Robbins, “CUNY Schools to Lure Foreign Entrepreneurs With New Visa Program,” The New York Times (Feb. 17, 2016), available at [http://www.nytimes.com/2016/02/18/nyregion/cuny-schools-to-lure-foreign-entrepreneurs-with-new-visa-program.html?\\_r=1](http://www.nytimes.com/2016/02/18/nyregion/cuny-schools-to-lure-foreign-entrepreneurs-with-new-visa-program.html?_r=1); “NYCEDC and CUNY Launch IN2NYC Program For International Entrepreneurs,” New York City Economic Development Corporation (Feb. 18, 2016), available at <http://www.nycedc.com/press-release/nycedc-and-cuny-launch-in2nyc-program-international-entrepreneurs>.

<sup>8</sup> Robbins, supra note 6.

<sup>9</sup> “NYCEDC and CUNY,” supra note 7.

- Provide sponsored foreign nationals “with the support to form an independent board of directors, which establishes an employer-employee relationship between the company and the entrepreneur so that the company can sponsor an H-1B petition on behalf of the entrepreneur.

NYCEDC will begin accepting applications for IN2NYC this spring, with the first group of entrepreneurs expected to be in place by the fall.<sup>10</sup> Funding for a similar program proposed by Massachusetts Governor Deval Patrick in 2014 was cut from the Commonwealth’s 2015 budget by the new Governor, Charlie Baker.<sup>11</sup>

United States Citizenship and Immigration Services (USCIS) has turned out to be one of the biggest facilitators of these twisted interpretations of the law and, though these ventures have been publicly discussed for months, refuses to openly admonish such efforts to undermine U.S. worker protections. The law requires that an H-1B worker be coming to the U.S. to work for an employer; self-petitioning to work for one’s own company is not allowed.<sup>12</sup> Nevertheless, in guidance to the public, your agency actually offers foreign nationals *a roadmap* for how to evade the H-1B self-employment prohibition:

**Q12: The memorandum provides an example of when a beneficiary, who is the sole owner of the petitioning company or organization, would not establish a valid employer-employee relationship. Are there any examples of when a beneficiary, who is the sole owner of the petitioning company or organization, may be able to establish a valid employer-employee relationship?**

*A12.* Yes. In footnotes 9 and 10 of the memorandum, USCIS indicates that while a corporation may be a separate legal entity from its stockholders or sole owner, it may be difficult for that corporation to establish the requisite employer-employee relationship for purposes of an H-1B petition. However, if the facts show that the petitioner has the right to control the beneficiary’s employment, then a valid employer-employee relationship may be established. For example, if the petitioner provides evidence that there is a separate Board of Directors which has the ability to hire, fire, pay, supervise or otherwise control the beneficiary’s employment, the petitioner may be able to establish an employer-employee relationship with the beneficiary.<sup>13</sup>

This is clearly the path being followed by the NYCEDC in the IN2NYC program in setting up the foreign national’s start-up enterprise: the foreign national simply has to create a phony board

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<sup>10</sup> “NYCEDC and CUNY,” supra note 7.

<sup>11</sup> Galen Moore, “Charlie Baker Is Right: Deval’s Immigrant EIRs Have No Place in the Mass. Budget,” BostInno (Feb. 5, 2015), available at <http://bostinno.streetwise.co/2015/02/05/startup-visa-h-1b-immigration-reform-cut-from-ma-budget/> (“Spending millions to subsidize immigrant entrepreneurs makes no sense when we are neglecting the potential entrepreneurs in our own neighborhoods. Boston right now can’t afford to keep its schools open, let alone provide summer jobs for kids.”).

<sup>12</sup> Section 101(a)(15)(H)(i)(b), Immigration and Nationality Act.

<sup>13</sup> “Questions & Answers: USCIS Issues Guidance Memorandum on Establishing the ‘Employee-Employer Relationship’ in H-1B Petitions,” United States Citizenship and Immigration Services (published Jan. 13, 2010; revised Aug. 2, 2011 and March 12, 2012), available at <https://www.uscis.gov/news/questions-answers-uscis-issues-guidance-memorandum-establishing-employee-employer-relationship-h-1b-petitions>.

of directors for the company in which the foreign national does not have a controlling interest and the foreign national is able to be sponsored for an H-1B visa as an “employee” by the company he created. Yet, it’s pretty clear that these foreign nationals would be running the company on a day to day basis.

USCIS is also on the verge of publishing final regulations that would greatly liberalize the interpretation of which employers are covered by the H-1B cap exemption for non-profit entities affiliated with a college or university, a development that would substantially facilitate the sorts of arrangements contemplated by the NYCEDC in the IN2NYC program, and more generally increase the number of H-1B workers entering the country outside the 85,000 cap. Section 214(g)(5) of the Immigration and Nationality Act specifically exempts from the H-1B cap those H-1B nonimmigrant workers who are employed (1) “at an institution of higher education . . . , or a related or affiliated nonprofit entity,” or (2) “at a nonprofit research organization or a governmental research organization.” Current regulations require the “affiliated” non-profit entity to be controlled by the same entity that controls the university, be operated by the university, or have some sort of corporate relationship with the university.<sup>14</sup> However, in a proposed rule published in December 2015, USCIS states that “the current definition for ‘affiliated or related nonprofit entities’ does not sufficiently account for the nature and scope of common, bona fide affiliations between nonprofit entities and institutions of higher education.”<sup>15</sup> USCIS proposes “to expand on the current definition by including nonprofit entities that have entered into formal written affiliation agreements with institutions of higher education,” have an active working relationship with the institution of higher education “for the purposes of research or education” and can establish that one of their primary purposes “is to directly contribute to the research or education mission of the institution of higher education.”<sup>16</sup> In other words, USCIS will be departing from the common-sense interpretation of the meaning of “a related or affiliated nonprofit entity” that USCIS has held for years – i.e. that the university and the affiliated entity have an actual structural, corporate, or control relationship – and allowing any sort of affiliation *agreement* to count for purposes of the H-1B cap exemption.

In light of the foregoing, please answer the following questions:

1. How many H-1B petitions have been approved so far for cases—
  - a. filed by Unshackled?
  - b. facilitated by the Global Entrepreneur in Residence Coalition?
2. Please clarify the circumstances under which the beneficiary of an H-1B petition filed by one employer (e.g. Unshackled) may work part time for that employer and also work part time for a second employer (e.g. the start-up enterprise established by the alien) that has *not* filed a separate H-1B petition on behalf of the alien.

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<sup>14</sup> 8 CFR 214.2(h)(19)(iii)(B).

<sup>15</sup> Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, Proposed Rule, United States Citizenship and Immigration Services, 80 Fed. Reg. 81,900 (Dec. 31, 2015).

<sup>16</sup> Id. at 81,919.

3. One media report describing Unshackled's business model states this concern about the legality of what Unshackled is doing:

The legality of Mehta's immigration hack is questionable, said Peter Roberts, an immigration lawyer who works with Y Combinator. H-1B workers are only supposed to be paid by a single employer, and stock in the founder's own startup could be considered a second source of compensation. "It's a legal gray area," he said. Mehta said Unshackled founders' equity in their companies doesn't start vesting until later to avoid running afoul of this rule.<sup>17</sup>

If a foreign national who is the beneficiary of a petition filed by an employer (e.g. Unshackled) receives stock in the alien's own start-up company, which has not filed an H-1B petition on behalf of the company founder, would the receipt of such stock in fact constitute prohibited remuneration to the alien founder from a second employer (the start-up)?

4. Since the publication in 2010 of the USCIS guidance referenced above, how many H-1B petitions have been filed in 2010 and each subsequent fiscal year by companies on behalf of the company's founder? How many of such petitions were approved in 2010 and in each subsequent fiscal year?
5. One media report describes how some foreign nationals seeking to establish start-up companies are doing so in "B" visa status:

For now, some founders have remained in the U.S. on tourist or business tourist visas, which forbid working or earning money while in the country. Deferring compensation is doable, but what constitutes work isn't well-defined. "Is talking to investors work?" said Bastian Lehmann, CEO and co-founder of the San Francisco courier startup Postmates Inc. "If it is, you're not supposed to do it. But it's not a rule. It's in the opinion of the border guard that you happen to talk to."<sup>18</sup>

- a. May a foreign national in B visa status establish a business enterprise while in such status?
  - b. May a foreign national in B visa status lawfully work without remuneration for or at a business enterprise he or she founded?
6. The Department's proposed rule described above attempts to justify the proposed new interpretation of "affiliated or related" entities by pointing out that "under federal statute, Veterans Affairs (VA) hospitals are considered affiliated with a medical school or

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<sup>17</sup> Huet, supra note 1.

<sup>18</sup> Id.

institution of higher learning based on ‘a contract or agreement . . . for the training or education of health personnel.’” 80 Fed. Reg. 81,900, 81, 919 (Dec. 31, 2015).

- a. Please explain why broadening the interpretation of cap-exempt “affiliated or related” entities to include agreements for the training or education of health personnel is lawful as a matter of statutory construction, in light of the rejection by Congress of a provision in the Kennedy Amendment to S. 2045 (the bill that eventually became the American Competitiveness In The Twenty-First Century Act) that would have created an H-1B cap exemption for “a nonprofit entity that engages in established curriculum-related clinical training of students registered at any such institution [of higher education].”<sup>19</sup>
  - b. Please explain why broadening the interpretation of cap-exempt “affiliated or related” entities to include agreements for the training or education of health personnel is lawful as a matter of statutory construction, in light of the exemption from the job training fee for “a nonprofit entity which engages in established curriculum-related clinical training of students registered at any such institution [of higher education]” that was explicitly *included* in section 214(c)(9) of the Immigration and Nationality Act, as amended by P.L. 106-311, but was explicitly *rejected* for inclusion as a basis for cap exemption in section 214(g)(5) of the Immigration and Nationality Act – noting that both of the bills that ultimately became P.L. 106-311 and P.L. 106-313 (the American Competitiveness In The Twenty-First Century Act) were passed by Congress on the same day (Oct. 17, 2000).
7. It would appear that many of the ventures and programs described above that seek to “hack” the H-1B laws for the benefit of foreign nationals seeking to start and work at a business in the U.S. first arrange for the alien to be sponsored by a cap-exempt entity that will give cover “employment” of some sort to the alien while the alien establishes his or her own start-up company.
- a. If a foreign national who is the beneficiary of a part-time H-1B petition filed by a cap-exempt entity under section 214(g)(5)(A) of the Immigration and Nationality Act establishes a start-up company that also files an H-1B petition on behalf of the alien, would the subsequent petition filed by the start-up company also be cap-exempt (e.g. under section 214(g)(6) of the Immigration and Nationality Act)?
  - b. If so –
    - i. Would the alien’s employment for the start-up company remain cap-exempt even if the alien’s employment with the initial H-1B petitioner were terminated or if the initial petition were withdrawn or revoked?

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<sup>19</sup> Kennedy Amendment No. 4185 to S. 2045 (146 Cong. Rec. S9205) (Sep. 25, 2000).

- ii. In such circumstances does USCIS approve the petition by the second [cap-exempt] employer for the same period of validity as the initial cap-exempt employer?

We ask that you respond to our concerns and the questions included in this letter by March 17, 2015. If you have any questions, please contact Kathy Nuebel Kovarik of the Senate Committee on the Judiciary at 202-224-5225. Thank you for your attention to this important matter.

Sincerely,



Charles E. Grassley  
Chairman