The U.S. Legal Landscape for Foreign Investors
Thursday, January 27th, 2022
Presented by Nathalie Bougenies, Jonathan Bench, and Akshat Divatia

Nathalie Bougenies 00:01
Hi, everybody. Thanks for joining us for this webinar on foreign direct investment in the US, we're going to wait just a few more seconds to give attendees a chance to connect, I know many of you signed up, which I think shows the significant interest surrounding this issue. As you may already know, the US has been the biggest recipient of FDI. These past two decades, and now more than ever, thanks to the US labor shortage caused by the pandemic. They're greater opportunities that are available to corporate and individual investors that wish to enter this market. So in light of this exciting moment in time, I along with my esteemed colleagues, Akshat Divatia and Jonathan Bench, we will talk through some of the key issues that foreign companies and individuals should consider in establishing a US presence. Specifically Jonathan, who is one of our most experienced international attorneys, and the chair of our corporate practice group will talk about the legal framework of selling goods and services in the US. But he will also go over how to choose a business structure and how to protect your investment. Then we'll turn to Akshat, who is our lead immigration attorney, and he will provide an overview of the US immigration system with a particular emphasis on visas you should apply for us. For me, my name is Nathalie Bougenies. I'm a corporate and regulatory attorney with an international background, and I'll be your moderator today. But as the chair of the home practice group in Harris Bricken, I'll be available to answer any questions you might have regarding FDI in this particular space. So without further ado, let's start this conversation. Jonathan, can you talk to us about the main corporate issues you have worked on when helping clients and establish a presence in the US?

Jonathan Bench 02:02
Sure, and I'll give you a little background on some clients I've worked with recently. I call these my favorite clients, because they come to us with no no little or no experience in the US market. And so they look to us as really trusted advisors, and helping them understand what the US market is like. So some of the first questions I get, I'll have on my slides, but the number one question I get is where should we set up our business? And as you know, as business owners, this is a very complicated question. And it's got a complicated answer as well, because the US has 50 states we have additional territories, or different legal structures. And we have the federal regulatory structure on top of all of that, and so it can be very overwhelming. A lot of international people know about Delaware, because Delaware is a, we call it a very business friendly jurisdiction. And most of the public companies that are listed on US stock exchanges are Delaware companies. And most companies that are in the US that are trying to raise capital from venture capital firms, private equity, will also end up settling in Delaware. Because the investors know what to expect, the board of directors and the officers know what to

expect from a governance perspective. And so it gives a lot of certainty. And as you know, the business environment, especially international business, it needs to be on a strong foundation of certainty. And so as you see things changing, you know, gee, I'll discuss geopolitical issues that have arisen. We know what's going on right now in, in Eastern Europe, with Ukraine. And so all of us think about these issues quite a bit. We're not living them day to day, because I'm not in Europe. But I know that Europeans are in Europe, and I know that they're keeping a very close watch on that kind of situation. The Middle East has its own Southeast Asia has its own issues. So the geopolitical terms that lay on top of this always factor in now in the US, we tend to be pretty well settled. I know that sometimes international folks who I talked to want to understand what's going on in the US from a political perspective, what's happening, what laws are going to get passed, the laws ever get passed in the US those kinds of questions, because they I know, I know what is on the international news about the United States. So back into where do we set up? Wyoming has risen as a popular alternative to Delaware because it has no state income tax. It's very pro business. It's a very small state by population size, it's only about half a million. And so the political will to get things done quickly has contributed to that. So if any of you are involved in web three businesses, cryptocurrency, NFTs, anything like that, Wyoming, you will hear Wyoming more and more in those industries. Nevada tends to be very popular as well. Because Nevada has low taxes and has a great population base. It's very close to California, but it's not in California. And so you see a mixture. And I actually had an international friend who asked me to explain the US response to COVID and how it works. And I described it based on coastal states versus inland states, you know, more conservative versus more liberal states. And you really need someone who understands the nuances. And this all dovetails into what kind of business you're doing. If you're doing a business where it Nathalie, and I've worked on a client together from Switzerland that was coming to the US, and it was a hemp business, but even in the US, where hemp was legalized in 2018. Federally, the states each have their opportunity to roll it out. And so it's not a clear cut thing for by any standpoint. The bottom right of my screen, I, I'm leaving a choice, right, because there are lots of inputs as business owners to figuring out what US state do I want to be in, I'm looking for, if you're coming from Spain, if you're coming from Saudi Arabia, you may want a strong immigrant community that speaks your language that understands your culture that understands your values. And so my next slide, I'm going to show you a little bit of a demographic breakdown of the United States because that often factors into business owners deciding where do we set up to hire employees that we like and that know us? And where do we go to sell to our optimal customer base as we're trying to get a foothold in the United States. And often, a lot of companies that are outside the US

have already been selling into the United States, and so they have a customer base. And that customer base may dictate where they set up in the US. So whether you have whether you're looking for a large consumer market footprint, or whether you're looking for employees, or whether you need to be close to shipping ports, these will all factor in. Now, this was my favorite slide put together for this presentation, because I love maps, and I love demographics. And I love foreigners, which is why I work in international business. So if we go around, let's start with California, on the top left, California has the largest population of any US state, even the minority languages that are spoken. You see I have at the bottom here I've got Korean, Persian, Armenian, Arabic, all of those minority languages are spoken by over 50,000 people in the state. So you know, massive Spanish population, massive Chinese population, a lot of Filipino speaking to a lot of Vietnamese, and then all of these others that we consider brothers, they're a minority, but they're significant enough, I included them included them on there, because I wanted all of you wherever you are in the world to be able to look and say, okay, of these five most populated United States, which of them have languages where we might have an affinity group. So Spanish, as you see, Spanish is overwhelmingly the number two language in the US. There are a lot of Chinese, Asian languages. And of course, there are a lot of Europeans that have retained their language, group and culture. And so you may, depending on where we have these slides available to you, so you don't have to memorize this now. But there is an opportunity for you to connect your business needs with a community that you're comfortable with in the United States. Now, the second question I get after, where do we set up our businesses? What kind of business do we set up in the United States, part one on the left talks about a direct entry. So in order to do business in the United States, you can sell from outside into the US without having to do any registration. That doesn't mean you won't, you won't have to report US tax, because you will probably need to report US tax depending on the tax treaty situation. And I'm going to talk about tax treaties in a little bit. But we have what's called a direct entry as a foreign company, you can directly register to do business in the United States without setting up a US entity. Most companies do not do that. Because you don't get the US liability, you don't get protection from the US liabilities. A lot of times when we set up a parent subsidiary structure, one, one company above the other. And we do that because we want to keep the risks, the risks from each of these companies separate from each other. That's the same and especially true across international borders. So rather than doing a direct entry, most companies look at options two and three, which is do we form a corporation to form a limited liability company in the United States. Now this slide is a little bit busy, but I'll try and break it down for you. Because there's a lot of useful information here. As we go across the top, I talked about liability if you have a business, and really I have never met a foreigner

who is not concerned about this. So every international company that is coming to the United States is concerned number one about US litigation. They know that the chances of getting sued is very strong, but they don't want to expose their parent company at home and all of those assets to a US judge to the US legal system. So usually we do not advocate for direct entry. We'll choose a C corporation or an LLC. Based on tax reasons, and I probably won't go into the deep tax reasons here. But as a shortcut, if you're a corporation, your corporation will pay the taxes in the US and then send the profits home. If you're an LLC, then the parent company at home has to recognize all of those profits and deal with those. So it's a, it's very much a two edged sword, right, you have to decide which of those you're more comfortable with. And I would say that 90%, maybe 95% of my international business clients choose to go with a C corporation rather than an LLC, because of the taxation liability. Now, the nice thing about United States are going down to minimum capital investment is that there is no minimum capital investment in the United States, you can set up a company for you don't have to capitalize it, you can set it up. And other than paying your legal fees, and maybe your accounting fees initially, there, there is no other capital layout. So you can form a company in the United States for very, very cheap compared to other countries that have minimum capital requirements. On the third, the third row down for an ownership, whether you're a C Corp or an LLC, you can have one 100% foreign ownership, there is no no requirement that you have any kind of domestic owners, or even domestic officers or domestic directors, so you can have all of your leadership, all your decision making back home, and just have employees in the United States. And that's very appealing to a lot of companies, especially when they're starting in the US. Now income tax is going to be paid no matter what, what I said, we'll talk about tax treaty shortly. Because I have a nice amount though put together showing which countries have a tax treaty in place with the US. But as a shortcut, you will have to pay sales tax, which is the equivalent kind of a VAT tax in Europe, and other parts of the world. And you will have to pay income tax, you have to at least recognize the income tax. The next last item, the tax ID number, that is actually one of the hardest things is one of the longest pieces of this of this puzzle, one of the one of the law, this piece of the puzzle takes the longest to put in place, and they put it that way. And so if you're a foreign company that has never come to the US before, and you need to get a tax ID number, which you will if you want to do banking in the United States, then the timeframe is stretched out. If someone comes to me and says I want to form an entity in the US, how long will it take, I can usually form it in a matter of days. But getting the tax ID number, it's more complicated and often will take a matter of weeks, usually not months, but usually several weeks at least. I mentioned tax treaties. If you are watching this, and you see the name of your country on here, then then your nation has a tax treaty with the United States. There are not a

lot of Middle Eastern countries here. A lot of Central Asia, I was surprised, I really am surprised every time I look at this list from the IRS, which countries we have treaties within which we don't. And so as a workaround, you may want to think about forming an entity in an intermediary country. So if your country is not on this list, but your country is friendly with one of the countries that is on this list, then you may want to form a subsidiary in that country and then use that country as your springboard to get into the United States. Now, when we're talking about investment, you may have heard about this in 2018, this group called CFIUS. That's how this was pronounced CFI US. This is the Committee on Foreign Investment in the US. Cepheus became much more important. It had existed before there were laws in place to monitor foreign investment in the United States. But many people attribute this to China's increasing role on the world stage. And so this Committee on Foreign Investment in the US was enhanced by the budget was increased the number of people on the committee and working for the committee in the Department of Treasury was increased. And the purpose of this is to monitor foreign investment into the United States. There are and it's not just China focus. So I know that a lot of you who may be watching say, Well, you know, this is because of the US China trade war to see because the US doesn't agree with the way that China is doing business around the world. And because of China's increasingly belligerent standpoint with the US. But I mean, I would say that's absolutely true. Right? There's certainly no question about that. But at the same time, the US is generally concerned about making sure that foreign investments that come to the United States are not are not causing us companies to deliver intellectual property, any other trade secrets when they shouldn't, too and not just to China to other countries too. So you'll be a little shocked when I show you the safe harbor country list, but that'll be coming up so if you are in really, when you're coming to the United States, you're going to do this one of two ways, you're either going to acquire a target or invest in a target company that already exists in the United States, I'm actually working on one of these right now with a company from Europe that is looking to acquire a certain type of manufacturer in the US. So you can do that by direct acquisition investment, or you can do a greenfield investment. And so I want to focus first on and buy greenfields investment, if you're not familiar with that. That is where you bring your own capital, your own intellectual property, your everything into the United States, and you're not relying on any competitors in the United States as a step up to get into the US market. So if you are a foreign company in the United looking to invest in the United States, this can include real estate, and then this can include any kind of controlling or non controlling interest, so any monetary investment into any kind of company in the US, it may need to be reported to this committee for review. Now, these by way of controlling interest we're talking about could be a stock purchase, or an asset purchase or a merger, if it's a non

controlling interest that you're purchasing that it's, you know, even something as small as 1% interest may still need to be disclosed. Real estate matters when it's nearby sensitive US real estate, so you can picture US government installations, military, anything like that. And, there are certainly, you know, airfields, their whole counties in the United States, where foreign investors cannot purchase real estate. And there's a map, a very user friendly map that you can look at. And I can point you to that if you want to email me afterward, if you're curious about where these locations are in the United States. Last thing is, even if your investment doesn't result in you buying a controlling interest, but you get some extra perk in the investment, say that you're a private equity or venture capital group, and you're a limited partner. But as a limited partner, you're able to put someone on the board of directors of a US company, or maybe you are able to enter into a management contract so that you can provide services to this company, that may also need to be disclosed. So the rule of thumb is, if you are looking to invest in the United States, talk to a lawyer who is familiar with these CFIUS requirements. And then we can decide whether or not you need to do that. And just in the last year and a half, I have helped an Indian company and a Chinese company go through this analysis. One of them we had to submit to the CFIUS and one we did not. So industries matter when the committee is looking at the type of investment you want to make if your business is in critical US critical technology, critical infrastructure, and sensitive personal data. And I've given some examples here. So under critical technology, and there are lists for all of these, okay, so you don't have to worry about memorizing it. But the list is quite extensive, as far as what the US government considers its critical technology, critical infrastructure, and sensitive personal data. So under critical technology, it could be something like wireless communications. And these are all actual examples, by the way. So I wanted to include this because this is not just China focus. This first example was a Singapore company. So wireless communications. Semiconductors, of course, we know are very hot right now, especially since COVID, has impacted the semiconductor supply chain quite a bit. Under critical infrastructure, think of this as the underlying communications infrastructure in the United States. So phone, internet, satellite, anything else that gets developed beyond that. And then personal data is things like health care information, sexual preference. So this is Grindr was a social networking app, and also a hotel software because the US government did not want this was a Chinese company that was looking to acquire company in the US did not want the this Chinese company that access to all the data about where people were coming and going, when they were staying in various hotels. So the ultimate question is, if we're looking to come to the US, I know what I want to do I want to acquire a target of event identified a good company, do I need to declare this investment ahead of time, and the way this law is set up?

Either you figure out the best case scenario is before when you're in the LOI stage, when you're just sending NDAs back and forth. You're just having initial conversations, that's the best time to call your lawyer to find out if this is the type of transaction that needs to be declared as my investment in a US company need to be declared because that will push the timeframe for the investment now, and I know business owners want to move quickly. And so this is not optimal. But but it is entirely possible that when you decide when you find a company that you want to hire, or you want to buy, or want to invest in, that you will be able to call your lawyer get an answer in a week and then you will know either yes, we have to extend the closing by 30 or 45 days or maybe longer. Or no, we think we're in a safe space, we should need to declare this. And so that's the analysis you need to do initially. Then once you've decided whether or not you need to declare, if you're going to declare, you can decide whether you want to do it on a declaration or a notice filing. And these are based on how important the businesses and really the size of the transaction as well. So the risks of not going through with this is that there is no limit to what CFIUS can do. So even if a transaction happens now, or happened five years ago, if it was not declared, If it was not approved by CFIUS and and CFIUS has a problem with it later, it can force the parties to unwind, it can inject itself into the process and say, well, now we need a separate management company to deal with this. So that the foreign company does not have access to certain technology or to certain management decisions. And the only safe company only safe harbor only safe countries from CFIUS perspective are Canada, UK, and Australia. And if you're thinking about perhaps send your company in Spain, and you want to set up a UK subsidiary and UK subsidiary will do the investment. So you'll be a safe harbor country, CFIUS is still going to look all the way back through all of the chain of companies until it gets to individuals, right. And so it will not approve the transaction until you get from through all of the company structure to the underlying beneficial owners. So as I mentioned, this last bullet point, the only safe harbor investments are Greenfield investments. So like I said earlier, where you take your money, your infrastructure, your intellectual property, and come to the United States, rent real estate, buy real estate, and set it up. That's the safe harbor. So if you're trying to decide between acquiring a company and doing a greenfield investment in the US this should factor into your analysis. I think I've got a couple minutes left to discuss this. And I think there are questions that are coming in too. So I'm happy to field questions at the end of this right after Akshat, let's turn to speed because I want to make sure I give him enough time to speak. So final things to consider. There are always government incentives, when you're trying to decide which US state to set up in. There are a lot of states in the central corridor, we call them the Midwest or the Upper Midwest or the West. Before you get to the coast, there are a lot of these states that are willing to offer pretty healthy

government incentives, tax breaks, the kinds of things that US companies, when they're looking abroad to try to decide where to do business, and the kinds of things that matter to them too. Right? Do you get tax breaks? Do you get tax breaks for employee costs? Do you get subsidized real estate? Can you situate in a place where the real estate will be very, very cheap or free for a little while there are all of these options. And so if you are a sizable company, if you have a pretty good brand already in your home country and you want to come to the United States, it's very good to get connected to each state will have an economic development office and often an office focused on international trade, you will want to connect with with the people in the state. And they will be able to tell you all about all the government settings that are available to you as a foreign company coming to the United States. Second point down here, your employees, your employees matter if you and I run into this quite a bit with companies that are in the US and outside. Many companies before they hire employees, we'll hire independent contractors and independent contractors are okay in the United States. But there are a lot of criteria that you need to fit for someone to be considered an independent contractor versus an employee. And so if you misclassify someone who should be an employee as an independent contractor, that can be very problematic for the employee, but especially for you as the employer. So it's often something that you can fix. It's not something that you need to stress about, but it is something that you need to pay attention to. If you have people and especially if it's a single individual and not a company that you're contracting with, to provide services in the US, then often you will need to treat these people as employees and and do your filing set up the right way. There'll be tax withholdings, there'll be employment insurance payments, all of this will need to happen if you have employees in the US. The US infrastructure the third point is very important. Whether you're if you're a services company and you're dependent on the internet, you may want to go somewhere to a state or a city where you have lightning fast internet. If you are a goods company, if you're a manufacturing company, you're going to be worried about having strong employee base talented workforce depending on the type of manufacturing you're doing. And you also want to have good infrastructure so that you can get your products from your manufacturing facilities to your customers. So considering the infrastructure is very important. Many things in the US are shipped by truck So you can get them anywhere, but it's not the most cost effective way to ship goods, either rail is very good. And the US continues to build out rails, including rails that are connected to coastal ports. There are also a lot of free trade zones. And close by ports, we even have free trade zones in your inland ports like we have in my home state of Utah. And then last year intellectual property, this, this is something that we could spend a whole hour talking on. But your intellectual property should be for at the forefront of your mind, especially if you think you're going to be able

to take your very successful homegrown brand, and bring it to the United States. And working through this right now with a Russian company that's coming to the States for the first time. And I'm not sure that the brand that they've been using in Russia and elsewhere in the world will be able to work for them in the United States. So just something to keep in mind, whether you're dealing trademarks, whether you're dealing with your more science focused IP like patents, it's all something to talk about in terms of what assets are you going to be using in the United States? What assets do you want to send to the United States and have owned by your subsidiary? And a lot of this matters? I often ask my clients, what is your five to 10 year plan for the company? Do you plan to come to the United States as part of a bigger plan, so that you can then list on a public exchange and sell everything? Do you want to go public, you want to get us investment? And so these questions all matter. All matter to you? And should it be a part of the initial conversation you have with counseling? Nice, it can be the United States.

Nathalie Bougenies 26:35
That's great, Jonathan. Yeah, I think we should, we should move over and talk more about the immigration aspect of FDI. But um, first, before I give this platform to Akshat, I just want to remind our attendees that you can submit your questions during the presentation via the chat box. And also, you can access the PowerPoint. On the sidebar, it's available and downloadable in a PDF form. So actually, why don't you give us an overview of the main US visas? And can you tell us if and how the pandemic is affected visa processing? I mentioned the pandemic earlier. And I think that's an interesting thing to discuss today.

Akshat Divatia 27:26
Yes, thank you very much, Natalie. It's my pleasure to be here. Thanks, everybody, for joining. Let me start off by just mentioning who I am and what I do. I lead the immigration section here at Harris Bricken. I call myself a business attorney who helps employees and their families in their immigration and mobility needs. And, you know, what I'd like to do is, essentially, I'd like to kind of provide you with an overview of the, you know, what this presentation will be about? And I'll get to your question, Nathalie, because I think it's an excellent question. In some ways, I'll mention, I'll respond to it partially during my presentation. And then once I'm done with all of my slides, at that point, I think I can kind of give an overarching view of what the pandemic has meant. As far as, you know, the visa visa categories in the immigration system, we call it an alphabet soup of visas there from A to T. And you can think of them as being in two big buckets. The two biggest buckets are the family bucket and the business bucket in the

family bucket, you have visas for fiance's for immediate relatives, and these are parents, spouses and children under the age of 21. Of US citizens, you have victims of trafficking in crime. And then you also have visas for individuals from those countries that do not have a large history of immigration to the US. So those are diversity visas. Our focus today is going to be on the business visa. And I've lumped in the students and exchange visitors in the business category as well, because the way that they're regulated by the immigration agencies is very similar to how a business would be regulated. So if a university is issuing I 20s to students to study in the US well, that university is going to be treated like a business entity and it will have regulatory criteria that it will need to comply with. From a structure perspective, I would say that, you know, this presentation rather than kind of list everything at you, I prefer to do it in the form of case study. And you know, the goal is that if you can see a real scenario, or real individual and his background and his family, and then look at different scenarios as to what he may be contemplating. I think it gives you a little bit more substance than just throwing the laws at you. Before I get started on that, I do want to talk about the visitor visa B-1, esta visits for business. And I get this question a lot, you know, can I come to the US as a visitor and start working? And the answer to that question is, is a categorical No. In the criteria for admission into the US, as it says here on the slide the residents in employment outside the US, so you have to have ties outside the US, the visit has to be specific, it has to be short term, while in the US, the visitor may not engage in any productive work. And certainly the fear there is that individuals will come in as visitors and supplant the jobs from US workers. And then lastly, you know, the foreign national, the B-1 visitor cannot get compensated from any entity in the United States Well, in the US as a visitor. So what is permitted? Well, essentially, you know, it involves negotiating contracts, meeting with business associates, you can participate in conferences and conventions, in meetings. And you can also invest, sorry, evaluate the potential investment opportunities, scope out office space for new investment, the idea being that you are, you know, here on a limited mission, doing things in furtherance of something in the future, where you will have visa status to be able to engage in activities. And I'll just mention, you know, the, the, the mindset with which immigration authorities, whether it's the US Consulate, or the port of entry, where the Customs and Border Protection determines whether a person can or cannot be admitted, the mindset that they use is that of a tailor from Hong Kong. And this is from a case in the 1950s, where the tailor was sent by a company in Hong Kong to take the measurements of its customers. The visit was appropriate for B-1 purposes, because this individual, this tailor was employed in Hong Kong, he was there for a very limited purpose, he was there to take measurements of the customers, once he got the measurements, he would fax that information over to the company in Hong Kong, the suits would be made

in Hong Kong. So the productive work would not take place in the US it would take place in Hong Kong. And then the payment for those services would be made directly by the customers in the US to the company in Hong Kong. So even though that's an old case, it's often cited by the immigration authorities to say this is what is appropriate under B-1 rules. Okay, so now, let's jump in and meet our case study. And this is an individual that that is made up is not real. But the profile very much fits many of the clients that I counseled and that I have worked on cases for. So I have tried to make this as real as possible. Let's learn a little bit about Paolo. He's 37 years old. He's a citizen of Italy. He lives in Milan, he is married. His wife is a professional, she's a microbiologist by training. And a couple has two children 10 And seven. His educational profile shows that he has both an undergraduate and a graduate degree. He has a technical undergraduate bachelor's degree, and he has a master's in management. Essentially, you know, making him both well versed in technical things and in management. And on the professional side, he's been a software engineer for various companies in Europe over the last six years. And then specifically in the last five years. So a total of 11 years of experience in the last five years. He's been a senior manager at a software company in Milan, and he has experience in you know, onshore and offshore projects and managing those projects. So what I'd like to do is kind of propose some scenarios. And I'll talk about you know, what that would mean for Paolo and his family. So the first particular scenario is, let's say that Paulo's Italian company wants to open up a subsidiary in Austin, Texas. The company knows that the tech scene in Austin is a really good opportunity to enter and establish itself in the US market. It was followed by a transfer to the new office and then to help it grow by hiring local staff, engineers, sales staff, administrative staff to grow the company's footprint in the US. And Paulo, of course, when he goes he's open To the idea, but he'd also like his wife and children to accompany him. So in a situation like this, you know, it requires planning, and it requires some foresight. But the appropriate option here is an L-1, a intercompany transfer visa. This is a visa for essentially executives and multinational managers, the companies have to have a relationship. So the US company can be either the parent company, or the subsidiary, or it can be an affiliate where they have a common ownership. And I see the structure quite often, where you have a holding company in the Netherlands that owns both the European entity and the US entity. So that would make the Italian entity and the US entity affiliates for the purposes of L-1, the visa allows for the individual to stay in the US for up to seven years. And that's broken down by initially one year if it's a new office, which it will be in the case of Paolo, initially, the visa is granted for one year. And the increments in increments of two years that the visa can be extended for a total of seven years. One great thing about this visa, unlike let's say the visitor visa or student visa, or an exchange visitor visa is that it recognizes dual intent, meaning that the

individual does not have to say, Oh, I'm definitely going back, I'm not going to stay in the US for a long time, I don't want to immigrate to the US, they don't have to say that. By recognizing dual intent, essentially, the individual is saying currently, I'm in the US as a non immigrant, but I may change my mind in the future. And I may apply for permanent residence. And in that connection, it's also possible for the spouses and children to do the same. And to get green cards as a result of you know, this conversion that's possible from L-1, a two to a green card. As non immigrants, of course, the spouses and children are eligible both to study and if they want to work in the US. So it's a very flexible, very permissive visa. Now, let's say in another scenario, Paolo really decides to leave his company next year, he's not sure if he wants to stay in Europe, if he wants to come to the US, you know, he's, he has an offer from a leading company in Seattle. The company's willing to wait for him until next year, until he makes up his mind and his wife and children are not going to come with him right away, but they will eventually want to come in once the academic year is completed in the children's schools. So, under that particular scenario, you know, the most common option I see is that of the H1-B specialty occupation visa, now, this requires the US company. Now keep in mind, this is not Paulo's company, this is a large company, this is you know, an established US company will petition for a specialty occupation worker with the US Citizenship and Immigration Services. And that essentially means a specialty occupation is one where the position itself requires a bachelor's degree or higher. And the individual also has to have possessed that degree at the time that the petition is filed. So, you know, let's say you hypothetically have a PhD visa, PhD degree holder wants to come here and work as a mechanic and in an auto shop. Well, that position will not qualify for each one of the purposes because even though the individual possesses at least a bachelor's degree, the job is not one where you can show that across the board, all mechanics in the US hold bachelor's degrees or their equivalent. So that's important to keep in mind. The other thing to keep in mind is that there is a lottery for this particular reason. It's a hugely popular visa category. And there can only be 65,000 New visas that can be issued every year. So you know, there are an additional 20,000 visas. That is for individuals who, you know, were graduates of US institutions and have at least a master's or higher degree, but bylo will not qualify for that because both of his bachelor's and master's are from Europe or from Italy. So he would be put in the bucket along with 65,000 other applicants. In fact, the demand for this particular visa is typically three or four times the supply. So it's truly a lottery. In that sense. The employer registers the individual electronically. The registrations are then you know, put into a lottery. And if the individual is selected, then the count company is invited to petition for the individual within a three month window. Once the H1-B status is granted, the individual can hold that status for up to a total of six years. And it is in three year

increments. So the initial H1-B will be for three years. And there will be three more years granted and there is no limit as to the number of times a person can change companies once he or she obtains H1-B status in the US. So you could hypothetically have 100 different H1-B's, but of course, the cap is typically six years. So within that six year period, Paulo might be able to change, you know, multiple employers and and he would not each time he does that he would not be counted against the lottery, he would have been counted once, and that he's liberated from that particular cap in the future. Like the old one, the H1-B recognizes dual intent, there is the you know, the tool used most often by most employers is to test the labor market and to do a labor certification, essentially paving the way for the individuals to get a green card. So dual intent is permitted. But unlike the L1, the spouses and children have H1 visa holders who are called H4 visa holders. Typically, for people in Paulo's situation, they're not going to be able to get any work authorization in the US. There is an exception, it's a very limited, narrow exception for individuals born in India and China. And because the backlogs for people from those countries is much higher because of the per country caps that are imposed on immigration, spouses and children of Indian and Chinese H1-B visa holders can get work authorization in the future, depending on how many steps are completed in their overall green card process. So I'll leave it at that there's a lot more to say. But I'm happy to entertain questions offline, or if we have time remaining at the end of this, this presentation of mine. Alright, let's switch gears now. And let's talk about you know, Pablos follows entrepreneurial spirit. So let's say that he wants to leave his company and instead of working for anyone he wants to be at the heart of innovation in Silicon Valley, he wants to start his own company. He's going to team up with somebody who, you know, who's a US citizen who's based in the US, and who can help contribute to the startup costs. And, and in that setting, you know, Paulo will be the chief technical officer and his friend will be the chief executive officer and even if the friend did not want to be the Chief Executive Officer, so long as you know, Paulo is maintains at least 50% control of the company, he would be eligible for the visa that I'm going to talk about in the next slide. So essentially, so you know, Paulo wants to come in, he wants to invest, he wants to grow. And, and he can, you know, his family can come here as well. Alright, so I want to be mindful of time, I'm going to quickly you know, talk about the E2 visa is based on treaties of friendship, commerce and navigation between us and Italy and there are many countries that have those treaties, the there is substantial investment requirement, it has to be at least 50% equity by the foreign nationals, Paulo has to have 50% equity in the company, he has to develop and direct the company. So he cannot just passively invest the funds, he has to be actively involved in the operation of the enterprise, the investment must be active, it must be at risk. And, you know, the spouses and children are eligible to get work, work authorization and study in the US.

So it is a permissible category. In that sense. And then lastly, excuse me, the E two allows for the individual to keep extending his E2 status indefinitely. But, you know, the criteria for E2 have to be met, meaning the company has to exist, the ownership equity has to be at least 50%. And, as long as the company is profitable. etoos can be extended, but there is no mechanism automatically to convert Eetu status into an immigrant visa. Okay, so skipping to the international entrepreneur rule, I'm not going to talk about I'm going to I'm going to mention the points here so that you can see them there in the handouts as well. This is a relatively new program. It was you know, initially proposed in 2017. It was supposed to be implemented at that time, but because of, you know, litigation and political issues, it just wasn't put into effect until May of 2021. So, it allows for, you know, individuals to invest smaller amounts, or to get government grants and government awards, and invest in the US and get a visa as a result of that. But because it doesn't permit spouses and children to qualify, so qualify for this, automatically kind of as dependents, it's not really a good option for Paolo, you know, so his wife have, will have to do the same thing, and his children will have to do the same thing independently qualified. So it does not work out for Paolo, but it would for some other, some other investors who are single. Let's quickly talk about the fourth scenario, this is let's say, Paolo, and his wife decide to, you know, follow their passion to invest in a winery, they have their life savings, they want to invest, they find an up and coming winery in Sonoma Valley. And they want to, you know, they want to manage the overall operations, but they want to hire professionals to run it on a day to day basis. So for them, the option is the EB-5 immigrant investor visa, some of you may have heard about this, it is a controversial visa. And, you know, the slides mentioned a threshold amount of $900,000. But since then, you know, the threshold amount has actually been lowered because of litigation. So the actual threshold amount right now is $500,000, it's essentially a 50% discount, they could invest in a rural area, you know, kind of like what Jonathan mentioned, about the companies being traced, the funds must also be lawful and traced all the way to their origin. So if you've got a gift from somebody, then you know, the funds would have to show how the person who gave that gift, and how the person acquired the funds to give that gift, also, is really important before an EB-5 can be issued. The requirement also is that you know, once you invest, you get a conditional green card. And then to remove the conditions within two years, you have to show that the entity created at least 10 full time, US jobs. So that, you know, is a very quick rundown of the EB-5 and the E-2. And I, you know, I leave open some questions if we have time for them. And happy to see, you know, also talk offline.

Nathalie Bougenies 47:28
Yeah, I think that's a good segue, actually. And we've been getting quite a few questions from the attendees. So maybe since we are on an immigration topic, let me ask you one immigration question. Are these some states that are more fair, favorable for investors or entrepreneurs from an immigration perspective?

Akshat Divatia 47:48
Yeah, so I would say that, you know, the short answer to that question is no, you know, unlike what Jonathan shared, as far as some states in their, you know, their setup makes it easier for new companies. The only requirement from an immigration perspective is that you have a profitable business. And so when you come to open up a company in the United States, you want to make sure that that you will be able to grow, and you will be able to hire the talent, and you'll be able to, you know, to be profitable, because ultimately, your ability to get the visa in an extended visa really does depend on you know, how legitimate you are, you know, you may have a business plan. And you may be given a visa based on a business plan. But then when you go to renew your visa, the US government will compare your performance against that business plan and see if the metrics that you anticipated, were you able to comply with them or not. And this is a great way to, you know, great point to talk about, you know, how the pandemic has affected. The, the immigration side of things is that, you know, companies that came out with the idea that they would be successful, and it'd be profitable, they've had to kind of, you know, push back their dreams of expansion in the US because the pandemic has most definitely affected their ability to find talent to retain talent, and of course, to sell their products. So until the pandemic is truly and fully done, you know, I think that it's important for companies to kind of evaluate their options, line up the requirements, you know, and strengthen their ability to enter the US market, but be flexible as well. Right?

Nathalie Bougenies 49:28
I think since we have 10 minutes until the end of this webinar, we should really just focus on questions. And what I propose we do is go back and forth between corporate and immigration questions. So Jonathan, why don't you answer this next one, can you tell us how difficult it is to set up a US bank account?

Jonathan Bench 49:48
Bank accounts are the bane of my existence. Whenever I try to explain to companies how the US banking system works and of course, you know, the US has very strong anti Money Laundering and compliance hurdles for the banks, it's very difficult. So what I

found is that big banks, you know, you're talking Chase Bank, US Bank, big international banks, they are only interested in you if they have an existing relationship with you. And if they know that the compliance hurdles that they will have to go through with your company will be worth it. So if you have substantial deposits, you have big cash flow coming through, and then maybe go in the bank you in the United States. The other option is to go with go with smaller what I consider boutique international banks, these are banks that are, they're small, some of them are online, only, that they have a very strong ability to research, they have partners abroad, and so they can do the anti money laundering and know your customer compliance research very well. So that's what I found is that the big banks really don't want you unless you're a big fish. And the smaller banks, most of the regional small banks in the United States, smaller and regional banks in United States won't bank you because they don't understand your business. They don't know where you come from, they don't have resources in your home country to understand who you are. And so you have to find the it's this very small sweet spot of banks who will work with with them work with companies coming from from abroad. The other thing to consider is that the banking takes a little while, right? If we're Remember, I mentioned that getting a US Tax ID Number often takes quite a while when you're an international company, and you can't open a US bank account until you have a tax ID number for your new entity. So it can be problematic, it's often the longest piece of the formation puzzle. And so it's not something that you should leave to the last minute. Certainly, if you think you're going to be able to come to the United States and start doing business after a week or two, it is most likely not going to happen. And the banking will be your big hurdle.

Nathalie Bougenies 51:53
Thanks for that. Actually, we got a question about whether or not it's a wise idea to consider us as a visitor and then apply for a work or an investment visa. What are your thoughts on that?

Akshat Divatia 52:06
Yeah, that is also a great question. The answer to that is, you know, generally no, you know, it might be legally possible. But practically speaking, it creates a lot of hurdles. And the main reason is that when a person comes in as a visitor, and does not disclose the intention to change status down the road, officers at the time that they do apply for a change of status, we'll look and try and see if, if there were any signs that show that shortly after entry into the US, the individual did things that show that, you know, the intent was something different than what was manifested at the port of entry. So practically speaking, it results in officers kind of scrutinizing the case and looking for

ways to deny that case. And most importantly, you know, when you come on an esta, which is the travel permission that most Europeans qualify for, you get a maximum of 90 days. And and if you come in from any other country that requires a B-1 visa, then you then you're given up to six months, but in the first 90 days, any actions taken that show that you know you either enrolled in school or you set up the company, or you put your kids in preschool or daycare or enrolled them somehow, that would show that you know, you had the intent to stay here for a longer time. So those actions even though you're not actually applying in those first 90 days, those actions show your intention. And officers can use that to deny the visa it's much safer to return after that temporary trip, to do things right, apply for the visa at the consulate and then come in lawfully in a status that allows for work. Hey, thanks for that Akshat.

Nathalie Bougenies 53:49
And we have a few more minutes for questions. Jonathan, the next question pertains to other service providers. Besides attorneys, can you give us a list of providers that foreign clients should connect with in order to enter this get?

Jonathan Bench 54:08
Yes, whenever I work with international companies, I always ask them first if they have a CPA, an accounting firm that they're working with, if they have an accounting firm a home that they're working with, that does international work and has an office in the US or some familiarity with US laws, or they understand the implications of the tax treaties between the home country in the US, then I will ask them to put me in contact with the CPA right away so that we can we can make sure the structure we're setting up in the US fits the fits the company's model fits with what needs to happen. Like I said before, we may have to form a country or form a company in an intermediary country and then decide to use that to come into the United States. So your accountant is your best friend. I like to consider that your lawyer is your second best friend when you're a business owner but your accountant is always your best friend. Other than that bankers are always helpful if You're looking to acquire real estate or even to rent real estate, you want to find a good real estate agency that you can work with. And then also the the development. I mean, I would say, if you have a web presence, which most companies do these days, then you you want to get in contact with a good us marketing company that understands how to how to do business in the States. And if you're doing e-commerce, that's an extra burden on top of it. Even if you do e-commerce very well at home, it's going to be a different model in the United States, in large part because of the 50 different states and their and their taxes that you need to be paying, depending on where you're selling products or services. And, then the last persons probably see we

covered marketing, real estate, probably an employment agency, right, if you're looking for employees, you haven't identified them yet, you may want a headhunting firm looking for talented people for you. Or you may just want to make sure that your first hire is the absolute right person to help you to do, you know, the technical setup of your business in the US, but also to help recruit and, and train new employees. So it's a whole suite of people. I also mentioned government agencies, if you know where you want to go, because you have a good reason. I had a company that was an outdoor company. And they had identified Montana as a desirable place because Monterey is a very rugged western state. And the Montana governor was very interested in helping them come to Montana. So as early as you can get plugged into the international trade centers in those states, or at least talking to someone like your attorney, or your accountant that might have those connections, those are all very good places to start, depending on exactly what your business model is going to be.

Akshat Divatia 56:42
If I could add something to what Jonathan said, if we have time, you know, from an immigration perspective, it does matter how you capitalize the company. So you may have, you know, very minimal capitalization requirements from an entity structure, perspective and setup. But for your ability to then transfer employees to the US, it does depend on how serious you are, you know, you don't want to send in a whole bunch of executive chefs, if you don't have a restaurant, if you don't have the staff, that's going to be the you know, sous chefs, dishwashers, etc, you want, you know, you want to be able to have presence and be doing business in the US before you decide to transfer that individual over. So, you know, companies that are here for the long haul, you know, recognize that those are investments in the true sense of the word they have to be made. Because without that the company is not likely to be found credible by the immigration authorities to say, look, we're gonna go out on a limb and give you a visa for one year. But you know, what is the promise what, you know, show us that you're going to put the money in, you're going to grow the entity so that you can end up paying the particular salary and and you know, that you're going to be here for the long haul.

Nathalie Bougenies 57:56
And speaking of investment, we have time for one last question, and one of our attendees is wondering if you can take a loan to apply for an investment visa.

Akshat Divatia 58:05
Yeah, that is not a common question. But in the EB-5 context, that comes up a lot. It applies both in E-2 and EB-5 context, generally speaking, yes, there's no restriction on

the loan that can be taken. what does happen is that the officers, whether it's at the consulate, or the US Citizenship and Immigration Services, what they want to make sure is that the, you know, the loan is secured by the investors, personal assets, they can, it cannot be secured by the business, let's say for example, you can't have a loan in the name of an of a new company in the US. And then and then use those funds to transfer to the US, you know, you have to have those funds essentially tied to you personally so that if things go sour, you know, you have, you're going to be personally liable. And so that's, that's kind of the reason why most individuals, you know, they're going to do a loan structure, you know, we are involved, we want to make sure that that, you know, the banks or whoever the lending institutions are recognized that it has to be the personal assets of the investor. So loans are possible, but, you know, attached to personal assets.

Nathalie Bougenies 59:14
All right, well, we are at the hour mark, which means that we have to end this webinar, but thank you everybody for attending. And just as a reminder, the recording of this webinar will be available in a few days on the HB Canna Law Blog. So if you want to rewatch this or if you're interested in watching who couldn't attend to them, or couldn't attend today, then let them know that they can do so in a few days. All right, well, see you later. Bye.

Jonathan Bench 59:41
Bye, everybody.

Akshat Divatia 59:42
Bye bye.