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INDIVIDUAL ENTREPRENEUR STATUS OF FOREIGN CITIZENS AS A FORM OF REALIZATION OF THE CONSTITUTIONAL RIGHT TO ENTREPRENEURSHIP

Topical issues of the economic rights realization by foreign citizens, one of the ways for which is the status of individual entrepreneur in Ukraine, were explored in the article. Practical problems of the economic rights realization by foreign citizens in modern conditions were analyzed.

Keywords: individual entrepreneur, foreign citizen, entrepreneurial activity, investments.

Problem statement. The questions of rational and effective management of small business have a significant place in modern conditions of global changes in the economy of Ukraine, emergence of new economic structures of ownership, various forms and expansion of market boundaries in the context of economic relations. In turn, small business formation in the country particularly depends on the access of foreign citizens to such an organizational-legal business form like an individual entrepreneur.

The analysis of major studies and publications. In scientific literature the question concerning the acquisition of individual entrepreneur's status by foreigners is covered sufficiently poorly. In the writings of such prominent scholars and practitioners as L. I. Glowyyuk [1], B. O. Dudkovskiy [2], A. O. Michalska [3] the attention is focused on the issue of procedure regulation for registration of a foreign citizen as an individual entrepreneur. However, in these works, the acquisition of the status of individual entrepreneur by foreigners from the position of realization of their constitutional right to entrepreneurial activity that is not prohibited by law and the state of this right observance in Ukraine are not considered.

Paper purpose. In this publication it is offered to investigate on the basis of the analysis of provisions of the current legislation separate aspects of realization

by foreign citizens of the constitutional right on entrepreneurial activity in Ukraine, in particular on registration as an individual entrepreneur.

Paper main body. Implementation of any citizen's rights is impossible without the active participation of the state: constitutional right on entrepreneurial activity is implemented by the means established by law, with appropriate instruments and compliance with regulatory conditions. Thus, the law implementation order is a whole procedural-legal mechanism. That is why the realization of the right on entrepreneurial activity is not limited only to securing this right for the subject, but it means the use of the right in procedural legal order which is regulated by law [4, p. 100].

The determination of subjects' range of this right is an important issue studying the conditions of realization of person's and citizen's constitutional right on entrepreneurship [5, p. 213]. It is necessary to distinguish such legal categories as "subject of entrepreneurial activity" and "subject of the right to entrepreneurial activity" because they are not identical in content. If the person becomes subject of entrepreneurial activity from the moment of its registration in this status, each subject is potentially endowed with the right to entrepreneurial activity since birth, and the institute of "registration" is a stage of realization of this right, which occurs in the presence of certain conditions established by the law. So, the legalization of subject's entrepreneur activity should be considered as the basic and indispensable condition of realization of the right for entrepreneur activity. The legalization of entrepreneurs is belonged to the administrative measures, as it is consists in state registration, licensing, patents, etc., that is in the procedures which are provided normatively, are mandatory for the entrepreneur and implemented through the activities of state bodies. In legal aspect the "legalization of businesses" should be seen as the state confirmation of legality of participation of subjects in the relations in the sphere of entrepreneurship [6, p. 88]. Below we'll have a look at the specifics of the "legalization" of foreign citizens' entrepreneurial activity.

According to Article 26 of the Constitution of Ukraine [7] foreign citizens and stateless persons residing in Ukraine on legal grounds enjoy the same rights and

freedoms and also bear the same duties as citizens of Ukraine, with the exceptions established by the Constitution or laws or international treaties of Ukraine. Herewith, the Constitution of Ukraine doesn't establish exceptions in the form of a ban to the foreign citizen to be engaged in entrepreneur activity, and consequently it can be an economic agent under the one condition – legality of stay in the territory of Ukraine.

Article 50 of the Civil Code of Ukraine (hereinafter – CC of Ukraine) [8] provides the right of individuals to engage in entrepreneurial activities, which it carries out under the condition of its state registration in the manner prescribed by law.

Thus, the Law of Ukraine “About State Registration of Legal Entities and Individual Entrepreneurs” [9] does not set (compared with citizens of Ukraine) the procedure for state registration of foreign citizens as individual entrepreneurs.

Article 2 of the Law of Ukraine “About Legal Status of Foreigners and Stateless Persons” [10] and Article 129 of the Commercial Code of Ukraine [11] also found that foreign citizens and stateless persons in the exercise of economic activity in Ukraine enjoy the same rights and have the same responsibilities as citizens of Ukraine, unless otherwise stipulated by this code, other laws.

According to Article 3 of the Law of Ukraine “About Legal Status of Foreigners and Stateless Persons” foreign citizens and stateless persons in the prescribed manner are able to immigrate to Ukraine for permanent residence or to arrive for employment for a fixed term and temporary stay in its territory.

Foreign citizens and stateless persons, who has immigrated for permanent residence or arrived for temporary employment, receive certificate for permanent or temporary residence. The procedures for granting an immigration permit and a permanent residence permit are determined by the Law of Ukraine “About Immigration” [12]. Foreign citizens and stateless persons residing in Ukraine on other legal basis are considered as such who are temporarily in Ukraine. They must in the procedure determined by the Cabinet of Ministers of Ukraine register their

passport documents in the State Border Service and to leave Ukraine after the expiration of the stay period.

According to the Law of Ukraine “About Freedom of Movement and Free Choice of Residence’s Place” [13] the legal basis of stay on the territory of Ukraine for foreign citizens and stateless persons is the passport registration on the territory of Ukraine or a permit for permanent or temporary residence in Ukraine, or documents certifying the refugee status or asylum in Ukraine.

In accordance with the Procedure for Extension of Stay Period and Prolongation or Reduction of Temporary Stay Period of Foreigners and Stateless Persons on the Territory of Ukraine (hereinafter – the “Procedure”) [14], foreign nationals can immigrate to Ukraine for permanent residence or to arrive for employment for a specified period in the order established by the legislation of Ukraine. Foreign citizens and stateless persons, who moved in for temporary stay, can receive residence permit in accordance with the established procedure. However this form is issued only to the immigrants. According to Article 1 of the Law of Ukraine “About Immigration” immigrant is a foreign national or a stateless person who has received an immigration permit and arrived in Ukraine for permanent residence, or staying in Ukraine on legal grounds, has received the permission to immigrate and stay in Ukraine for permanent residence.

However, technically, under the Law of Ukraine “About State Registration of Legal Entities and Individual Entrepreneurs” the registration of residence’s place or place of person’s stay or the lack of it cannot be a condition for the realization of the right to entrepreneurial activity.

According to Article 3 of the Law of Ukraine “About Freedom of Movement and Free Choice of Residence’s Place” the place of residence is an administrative unit in whose territory the person resides for a period of more than six months per year; and the registration is a data fixation in the passport document of the domicile or residence place indicating the living address of person and the introduction of these data for registration control. A Ukrainian citizen and a foreign citizen or a stateless person residing in Ukraine on legal grounds, shall be obliged

within ten days after arrival to a new place of residence to register the place of residence.

So despite the abolition of the registration, the law requires from foreign citizens who arrived in Ukraine on legal grounds to register their place of residence. In addition, registration of residence is actually the only opportunity to confirm the fact of residence of a foreign citizen at a particular address for the purpose of registration as an individual entrepreneur.

The Law of Ukraine “About Freedom of Movement and Free Choice of Residence’s Place” requires from non-residents to give the certificates of permanent or temporary residence. In this case you should refer to the norms of Part 1 and 2 of Article of the Law of Ukraine “About Legal Status of Foreigners and Stateless Persons”, from which follows the conclusion that for foreign citizens who temporarily arrived to the territory of Ukraine on other bases (except for permanent residence or temporary employment), it isn't obligatory to make out a permit of temporary or permanent residence. The Procedure allows foreign citizens to obtain a residence permit in the manner prescribed by law. However, such a “procedure prescribed by law” provides for the issuance of residence permit only to immigrants.

In addition, as it was noted, the Law of Ukraine “About Legal Status of Foreigners and Stateless Persons” provides for the issuance of temporary or permanent residence permit only on certain grounds, such as: to immigrants (issued for permanent residence) and to foreign nationals for temporary residence in connection with employment (issued for temporary permit). Thus, the procedure of issuance of residence permit, and also the basis (except employment of the foreign citizen) for issuance of the document aren't established by the legislation.

From the above we can come to the conclusion that despite the abolition of the registration, the law obliges foreign nationals, who are in Ukraine on legal grounds, to register their place of residence within 10 days.

Herewith, as according to the law, the registration of the foreign citizen as an individual entrepreneur on the territory of Ukraine is carried out at a residence

place of the last, and it is possible to confirm such residence place only by registration of the passport document, the nonresident can be registered as an individual entrepreneur only after documentary confirmed accommodation at the place with a certain address within 6 months.

In spite of the fact that the law for registration of the residence's place provides the submission of a permanent or temporary residence permit, the legislation of Ukraine doesn't provide the issuance, in particular, of a temporary residence on another basis than obtaining permission to temporary employment.

Thus, only after 6 months from the date of residence place registration on the territory of Ukraine, foreign citizen has the right to be registered as individual entrepreneurs according to the law. It follows that actually by this time the sources of the law of Ukraine significantly limit, declared by the highest of them – the Constitution of Ukraine, the right of everyone on legal grounds to carry out entrepreneurial activity, because the real person's opportunity to realize the constitutional right on implementation of entrepreneurial activity allows to have a legal source of the income which, including, could become object for the taxation and fill up the state budget of Ukraine, inducing to creation by foreign citizens of legal entities as alternative forms of entrepreneurial activity.

Despite the fact that Article 8 of the Constitution stipulates that laws and other normative-legal acts must be adopted on its basis and must conform to it, the Law of Ukraine “About Freedom of Movement and Free Choice of Residence Place” and other above listed regulations restrict the constitutional right of foreign citizens to carry out business activities, which in turn may be a reason for numerous appeals to the authority of constitutional jurisdiction – the Constitutional Court of Ukraine. This situation in turn may negatively affect the investment attractiveness of the state, despite the fact that entrepreneurial activity of foreign citizens in Ukraine is a form of their investment activity.

Thus, the barriers to the foreign citizens' registration as individual entrepreneurs is a violation of the principle of national treatment of investment and

economic activity, specified in Article 7 of the Law of Ukraine “About the Regime of Foreign Investments”.

Conclusions. Based on the above we believe that the order of registration as an individual entrepreneur for foreign nationals should be reformed and as close to the procedure established for the citizens of Ukraine, and to allow the registration of an individual entrepreneur immediately after registration by place of residence.

Therefore, we propose to amend the Law of Ukraine “About Freedom of Movement and Free Choice of Residence Place” or the Law of Ukraine “About State Registration of Legal Entities and Individual Entrepreneurs”, abolishing the six-month criterion of the foreign citizen’s place of residence determination for the purpose of his registration as an individual entrepreneur, i.e. to provide the national treatment of such a registration for foreign citizens.

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