Using Existing Immigration Categories Creatively to Support Immigrant Entrepreneurs

Bender's Immigr. Bull.

May 15, 2021

Cite: 26-10 Bender's Immigr. Bull. 01 (2021)

Section: Vol. 26; No. 10

Byline: By Dan Berger, Stephen Yale-Loehr, Michael Serotte, Jeff Goldman, and Megan

Body

USING EXISTING IMMIGRATION CATEGORIES CREATIVELY TO SUPPORT IMMIGRANT ENTREPRENEURS

BY DAN BERGER, STEPHEN YALE-LOEHR, MICHAEL SEROTTE, JEFF GOLDMAN, AND MEGAN KLUDT

Introduction

The United States lacks a specific visa category for international entrepreneurs. While we hope Congress will add a startup visa, for now we must work within the existing immigration framework.

The U.S. immigration system is a patchwork of categories. Some are based on a lottery, some allow spouses to work, some are more or less flexible about side projects, etc. These categories were not created with entrepreneurs in mind. This article summarizes nine categories and how international entrepreneurs

might creatively use those to remain in the United States to pursue their ventures. Each person's situation must be carefully analyzed to determine which category is the closest fit.

Before discussing potential immigration strategies for international entrepreneurs, we take a step back and review the idea of "employment" in immigration law. It is important to review this definition first, as violations can lead to severe consequences for an applicant's status. Many activities, for example, that students undertake in school are not considered employment, such as "working" to produce a campus newspaper or "working" on a new invention in an engineering class. For immigration purposes, "employment" generally refers to a relationship where an individual provides services or labor and is compensated for these services. Remuneration can include housing, clothing, food, or other benefits. Accepting any kind of benefit for service is a violation of immigration status if done without official work authorization.

8 C.F.R. § 274a.1(h) defines employment for immigration purposes. Subsection (12) lists the immigration categories that provide work authorization. Consider the following situations that arise regularly for international entrepreneurs:

Volunteer work: Work authorization is not required for volunteer work. However, just because a startup is willing to allow a foreign national to "volunteer" does not mean that the activity has no risk for that individual's immigration status. Moreover, state labor and worker's compensation laws generally do not allow someone to "volunteer" in a position that is usually paid.

Self-employment: The Board of Immigration Appeals (BIA) has held that "employment" includes self-employment. Thus, running a business violates a foreign national's status, absent work authorization. See *Matter of Tong*, 16 I. & N. Dec. 593 (BIA 1978), in which a student was running his own used car dealership.

Investments: A noncitizen can invest *passively* in the United States without work authorization. Visa holders may manage their own investments and may even purchase a running business, as long as they do not provide any labor or services and are not actively running the business.

Examples include:

- *Bhakta v. Immigration & Naturalization Service*,[1] in which the court found a foreign national had not engaged in "unauthorized employment" when he owned a motel chain.
- *Wettasinghe v. United States Department of Justice*, *Immigration & Naturalization Service*,[2] in which the court found a violation of status where a student purchased ice cream trucks and ice cream and leased them to vendors to sell, while also assisting where needed.

In *Wettasinghe*, the court emphasized that Mr. Wettasinghe was active in running the business, while the owner of the motel chain in *Bhakta* was not.

Working in the United States online for a foreign company: Any work done while in the United States, even if for a foreign company and even if paid to a foreign bank account, will likely be considered "employment" in the United States. Immigration laws regulate what someone does while physically in the

[1] Bhakta v. Immigration & Naturalization Service, 667 F.2d 771 (9th Cir. 1981).

[2] Wettasinghe v. United States Department of Justice, Immigration & Naturalization Service, 702 F.2d 641 (6th Cir. 1983).

United States, and do not apply if someone is physically out of the United States. There is little direct guidance on this, and the line for employment for example on a B-1 visa is "ill defined."[3]

Planning ahead to start a business: There is a chicken and egg problem with starting a new business without work authorization. You may need the business to sponsor the visa, but you cannot work for the business to get it started without a visa. Planning in advance is key, and perhaps having an employment authorized business partner who can get the project off the ground.

International entrepreneurs often ask us: Even if I am not work authorized, how would I get caught for doing some of the activities mentioned above? The risk is significant. Violations can result in loss of immigration status, and the need to apply for any new visas at the U.S. consulate in the home country.

The U.S. government can find out about unauthorized work through tax returns (for example, if used to support a green card application), through a seemingly friendly conversation with an international adviser at a college or university, or through a resume or a sentence in a visa support letter that is not carefully reviewed. The U.S. government also uses the internet as a simple way to screen applications. If the business has a website or a web presence, U.S. Citizenship and Immigration Services (USCIS) may think the foreign national is working without authorization.

Similarly, a newspaper article or social media mention about an entrepreneur's activities may cause problems. Custom and Border Protection (CBP) officers can simply do a Google search and find a name on a company website, or a LinkedIn entry. The officers can also.search cell phones at ports of entry to look for evidence of "work," and some courts approve warrantless searches.[4]

Overall then, there is no bright line test for what kind of activity constitutes "unauthorized" employment. The government would consider the following factors:

- Was the individual active in the investment or a startup company?
- Was the individual engaged in any "service" or "labor"?
- Was the activity inconsistent with the purposes of the person's immigration status?
- If the person had not done the work, would it have been done by a U.S. worker who was paid for the work?

Although doing just a little work on the side may seem minor, there is no tolerance in U.S. immigration law. International entrepreneurs should plan ahead and move toward an immigration status that clearly supports the activity or venture. We now review nine current immigration categories that may provide creative options for international entrepreneurs.

---

[3] Under U.S. tax law, income from a foreign employer earned by a foreign national present in the United States is considered to be U.S. source income. Internal Revenue Service Pub. 519, U.S. Tax Guide for Aliens, https://www.irs.gov/forms-pubs/about-publication-519. *See also* 9 FAM 402.2-5(A). Each U.S. temporary immigration status has specific requirements and operating outside those requirements would be considered a violation of status. *See also* Cyrus Mehta, The-B-1-Visa: Trap for the-Tailor, Bricklayer and Tesla Motors, http://blog.cyrusmehta.com/2016/05/the-b-1-visa-trap-for-the-tailor-bricklayer-and-tesla-motors.html (work in B-1 status in the United States for a foreign employer is subject to shifting interpretations).

[4] Alasaad v. Mayorkas 988 F.3d 8 (1st Cir. 2021).

1. E-2 Visas for Entrepreneurial Investors

The United States has business treaties with various countries that provide E-2 status, which is probably the closest thing we have to a "startup visa."

The basic requirements for E-2 status are:

- The applicant must be a citizen of a treaty country;
- The investment must be substantial;
- The enterprise must be real and operating;
- The investor must have control of the funds, and the investment must be "at-risk;"
- The investor must have a controlling interest of at least 50% and intends to develop and direct the enterprise; and
- The enterprise must be more than marginal.

We discuss these requirements in more detail below.

Citizen of a treaty country: An E-2 applicant must be a citizen of a country that has a qualifying treaty with the United States. The Department of State maintains a list of countries with such treaties.[5] Some major countries, including Brazil, Russia, India, and mainland China, do not have investor treaties.

The investment must be substantial: One of the biggest hurdles in obtaining an E-2 visa is making a "substantial" investment. While setting up a factory requires significant capital, creating a startup to produce a computer app may need little more than a good computer and some space in the developer's apartment. Substantiality can be met by demonstrating that: (i) the amount invested is substantial in proportion to the total value of the enterprise for similarly established enterprises; or (ii) the amount invested is the normal amount necessary to establish a viable enterprise for new businesses.

If the actual "at risk" investment is more than half the value of the enterprise, it should meet the substantiality test. For example, an investment of $80,000 in a motel valued at $440,000, where the remainder is secured by a mortgage, is not substantial. However, if the investment is $150,000 in a $250,000 business, it will meet the substantiality test. If the investment is $1 million, where the business costs $10 million, including debt, the investment may be substantial even though the amount invested is only ten percent of the business.

Service industry companies generally require less money to start than manufacturing companies. Therefore, a substantial investment in a tech startup may be met if the amount invested is necessary to establish a viable enterprise. For example, a Silicon Valley startup might only need $100,000 to open an office, buy necessary office equipment, and have enough working capital to hire a few software engineers before raising a large seed round. However, while an investment of $25,000 into a start-up that requires $25,000 to open and start doing business seems to meet the "substantial" requirement, the reality is that

[5] The Department of State maintains the list at https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html.

most immigration officers have little interest in approving an E-2 investment that is under $50,000, and six figures is considered a stronger case.

In the tech start-up world, most important in the eyes of an E-2 adjudicating officer is the amount of money that has been spent (committed) at the time of investment. Even during more recent tougher adjudications, $40,000 (out of, say, $100,00 total investment) spent has been adequate for E-2 approvals provided such money has been spent on U.S workers or contractors. That can include retainers paid to corporate lawyers (fees paid to immigration lawyers do not count), accountants, graphic designers, and most important, software developers and engineers who have signed contractor or employment agreements.

The enterprise must be real and operating: Proof of a real and operating business enterprise may include licenses and permits, incorporation documents, receipts and invoices of customers and suppliers, leases, deeds and closing statements, bank statements and phone bills, letters from customers or suppliers or lenders doing business with the company, business promotional literature, or product inventory brochures. The number of employees or independent contractors is critical to the approval of an E-2 visa for a startup with a small amount of invested capital. Evidence of employment contracts, third party service contracts, and a business plan that demonstrates employment growth will be persuasive. For example, for a tech startup, the contracting of at least two U.S. citizens at a monthly cost of $5,000 each paid for at least 3 months contributes to meeting this criteria.

The investor must have control of the funds and the investment must be "at-risk." The money invested must be "at risk" and subject to loss. Collateral for a loan must be from personal assets or with a personal guarantee on a loan. Mortgage debt or a commercially secured loan (e.g., a loan secured by the business's assets) is not sufficient. The E-2 investor must demonstrate that the money is "at risk." For example, an international entrepreneur may not have personal funds for his initial $100,000 investment, but has some family members willing to provide the capital. If the E-2 investor borrows the money from a family member and uses that as the investment capital, it would qualify as being "at risk," provided they sign a personal guarantee. An irrevocable gift from the family member also qualifies. However, the U.S. business cannot be a passive investment like stocks or undeveloped land.

The investor must have a controlling interest and be able to develop and direct the enterprise: The investor must have control over the U.S. enterprise, and be actively involved in running the business. Having fifty percent control is sufficient, even where the fifty percent ownership is in a joint venture. This of course, provides an opportunity for two entrepreneurs (presumably friends) from two different treaty countries to apply for E-2 visas based upon 50/50 ownership or a "joint venture" arrangement.[6] Thus, co-founders from France and the United Kingdom, each owning fifty percent of the E-2 company, can apply for E-2 visas from both France and the UK.

With many startups, dilution occurs as more money is raised. If an E-2 investor's control drops below fifty percent, the E-2 is no longer valid. However, the E-2 investor's U.S. citizen co-founder could provide a voting proxy or voting trust agreement to keep the E-2 investor's control at or above fifty percent.[7]

---

[6] 9 FAM 402.9-6(F)(b).

[7] 22 C.F.R. § 41.51(b)(2)(ii); 9 FAM 402.9-4(B)(c).

Spouses and children: The applicant's spouse and children under twenty-one may apply for derivative E-2 visas. They may attend school, but children cannot work. An E-2 spouse is eligible for independent work authorization. This gives rise to some creativity as well. For example, the United States does not have a E visa treaty with India. But if the Indian entrepreneur is married to a treaty citizen (e.g., the United Kingdom), the spouse can apply for the E-2 visa, and the Indian entrepreneur can get independent work authorization and be an executive of a startup.

A qualifying E-2 company can also apply for E-2 visas for specialized essential employees, executives, or managers who are nationals of the treaty country and whose services are required in the United States. In this case, the actual investment may come from any legal source and does not need to come from the treaty country, as long as at least 50% of the U.S. enterprise is owned by citizens of the treaty country.

The enterprise must be more than marginal: "Marginality" means that the investment cannot exist solely to support the E-2 investor and her family. In essence, the investment must create jobs, either directly (employees, either full or part-time), indirectly (contractors), or induced (third party employment). For example, an E-2 entrepreneur may contract with a vendor to provide information technology services, and help create jobs at the vendor. Best practice is to already have at least one employee or contractor in place prior to filing the E-2 application.

E-2 investments are not formulaic. There is no minimum investment or number of employees, and no required size or type of business. If there is a treaty in place for the investor's country of citizenship, an idea and the entrepreneurial drive to execute, and access to capital, the E-2 may work.[8] U.S. consulates and USCIS officers vary quite a bit in their view of creative E-2 arrangements. The E-2 investment concept is based on a traditional model. More typical investment strategies for start-ups may not qualify, such venture capital or angel investors.

A strong E-2 case tells a compelling story. The business plan must convey the entrepreneurial spirit of the investor and the positive local, regional, or national economic impact to demonstrate that the business is more than marginal. Presentation is important. The business plan and cover letter must be concise and organized to convince the adjudicating officer of the strength and potential success of the business idea.[9]

E-2s can be a valuable tool for international entrepreneurs, whether connecting with an existing company of treaty nationality or by investing in a new company directly by the entrepreneur or by his or her family. If an international entrepreneur has U.S. citizen partners, it is sometimes possible to split the business into two separate companies to support an E-2 visa application.

2. F-1 Visas for Entrepreneurial Students

Over 1 million international students study in the United States. Many of them are catching the entrepreneurial spirit, and are actively encouraged by their school. We focus here on the limits on

[8] *See generally* http://www.newatlanticmanagement.com/e-visas-webarticle-reprint2010.pdf.

[9] For an audio discussion of business plans, see https://soundcloud.com/curranandberger/aila-practicing-law-abroad.

employment for international students and strategies for nonimmigrant entrepreneurs holding the most common type of student visa: the F-1.[10]

Historically, the U.S. government has discouraged using student status as a vehicle for working. The concern was that a student could sign up for classes, but really the primary goal is to work in the United States. In the past, common situations involved jobs that had nothing to do with academics - working in a restaurant, etc.

F-1 students are limited to on-campus employment (often research, library or dining hall jobs), work that is required as part of the academic course of study (called curricular practical training, or CPT), and employment directly related to the major after graduation (called optional practical training, or OPT). Students who want to pursue entrepreneurial ventures must limit their activities to one of these categories, or change to another kind of visa that is less restrictive.

After graduation, students are eligible for twelve months of OPT and may apply for a twenty-four month extension if they graduate with a qualifying degree in Science, Technology, Engineering, or Mathematics (STEM).

It is generally easier to study on a work visa than work on a student visa. However, leaving the F-1 student category to pursue a speculative entrepreneurial venture can mean losing an F-1 visa's CPT and OPT benefits, or sometimes the ability to return to F-1 status if the business fails.

Consider a student with an idea for a startup business. While in F-1 status, the student cannot work for an outside business unless there is specific work authorization from the foreign student adviser. The groundwork for a new company can be laid while in F-1 status. The F-1 student can talk to potential investors, meet with a tax advisor and corporate attorney, own part, or all of the company, be on the Board, do market research, develop a business plan, look for office space, etc., as long as these activities do not interfere with the student's primary educational interests.

Unless there are CPT options at the school to do an internship for credit with the company, post-graduation OPT work authorization may provide the only window of opportunity to open the business – as long as the business is related to the student's degree. During OPT, the student can explore options for other types of working or investment immigration categories. One year of OPT can be a short time to set up a longer term immigration plan, so careful planning is essential.

STEM OPT rules issued in 2016[11] make it more difficult for an international entrepreneur to operate his or her own startup. The only open and secure window is the first twelve months of OPT, where self-employment is still clearly allowed. The additional twenty-four months available under the new STEM OPT rules require a written training program, an employer/employee relationship with the company, additional reporting requirements to schools, compensation that is comparable to that of U.S. workers at

[10] *See generally* https://usaie.org/f-1-visas-for-entrepreneurial-students/; *see also* this report on how to reform the F-1 category to support student entrepreneurs: https://www.kauffman.org/wp-content/uploads/2012/08/kauffmanimmigrationreform.pdf.

[11] Department of Homeland Security, Final Rule, Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,039 (Mar. 11, 2016).

the company who perform similar duties and have similar educational and professional experiences, and possible government site visits.[12]

However, some creativity may allow F-1 students to start or continue their entrepreneurial endeavors. For example, the employer/employee relationship could be addressed by creating a corporate structure similar to what is done now with H-1B international entrepreneurs who own a significant stake in their U.S. startup, including independent board members with voting rights to fire the H-1B; employment contract; intellectual property (IP) assignment; etc., consistent with guidance for entrepreneurs issued by USCIS. The employer training and reporting obligations cannot be done by the foreign national employee,[13] but it may be done by a qualified board member or even outsourced to a qualified advisor. Entrepreneurs considering this kind of arrangement may benefit from consulting an immigration attorney, as international advisers may not be able or trained to assist.

3. H-1B Visas for Entrepreneurs and Startup Companies[14]

H-1B status requires an employer-employee relationship. That makes it difficult for investors who want to run their own companies, although entrepreneurs can work around this requirement by having the company's bylaw or operating agreement clearly state that the entrepreneur does not control his/her own employment. Moreover, there is a limit of 85,000 on the number of new H-1Bs available each year, and USCIS regularly receives over 200,000 petitions, with a lottery held in the spring. That means less than half of applicants are successful in the lottery, so it is important to first consider which types of employers are exempt from the lottery.

Institutions of higher education and affiliated nonprofits, as well as research organizations, are exempt from this quota.[15] In addition there are three other types of H-1Bs that fall outside the lottery, (1) H-1Bs for work physically taking place on the premises of a cap exempt employer where the work furthers the essential mission of the school, (2) concurrent H-1Bs (where there is one H-1B for a cap exempt employer and another to work for the startup), and (3) H-1Bs for a nonprofit that has a written affiliation agreement with a institution of higher education.[16] This is a complicated and ambiguous area of law, so each situation should be discussed carefully.

Some universities such as the University of Massachusetts have formalized the concurrent H-1B process for a small number of entrepreneurs each year, and some private foundations have built on this model.[17]

---

[12] *Id*. at 13,079.

[13] *Id*. at 13,072.

[14] U.S. Alliance for International Entrepreneurs, H-1B Visas for Entrepreneurs & Sartup Companies, https://usaie.org/h-1b-visas-for-entrepreneurs-startup-companies/.

[15] See USCIS, Final Rule, Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82938 (Nov. 18, 2016, eff. Jan. 17, 2017).

[16] 8 C.F.R. § 214.2(H)(8)(iii)(F). For more about the history of H-1B cap exemptions, see Dan Berger et al., *Thinking Outside the Box: Business Visas for Nonprofits*, *in* Am. Immigr. Law. Ass'n, Immigration Law Today 12 (May/June 2007), *available at* http://www.aila.org/infonet/immigration-law-today-mayjune-2007.

[17] *See* Venture Development Center, University of Massachusetts Boston, *Global Entrepreneur-in-Residence Program*, https://vdc.umb.edu/about/, *and* Open Avenues Foundation, https://www.openavenuesfoundation.org/.

U.S. Senator Charles Grassley wrote a letter to USCIS a few years ago expressing concerns about such a program,[18] but these programs are now operating in several states.[19]

However, there are some advantages to the H-1B. It allows "dual intent" (the legal fiction of having temporary intent now but a longer-term plan to stay in the United States). Most temporary immigration categories such as the F-1 student require a strict temporary intent. The H-1B also permits concurrent employment - very helpful for entrepreneurs who want to have a "day job" but also nurture a start up on the side.

Because the H-1B requires a U.S. employer/petitioner, entrepreneurs who are also majority or sole owners of U.S. startup companies historically have been discouraged from applying for H-1B status.[20] Over the past few years, USCIS has been more open to demonstrating the qualifying employer-employee relationship in the context of H-1B entrepreneurs.

To meet this requirement, the H-1B petition must establish a distinction between the foreign national's company ownership and control over employment, which may be established through a board of directors or other external factors (for example, other investors/shareholders) showing the right to control the terms and conditions of employment. Executing a restricted stock purchase agreement giving IP ownership to the company along with an employment agreement and a periodic performance review conducted by the board can strengthen the employer-employee argument. For these reasons, planning ahead is vital for any entrepreneur considering H-1B status. In the past, USCIS had information on its website for entrepreneurs, and while that has been removed, we hope it will return to provide guidance for those in H-1B status.

In addition to proving a legitimate employee-employer relationship exists, an H-1B visa petition must demonstrate that the sponsored employment is in a "specialty occupation" that requires the skills and knowledge of an individual holding at least a bachelor's degree or equivalent in a specialized field. Given that a startup company may not have evidence of prior hires in the same or similar positions requiring a bachelor's degree or equivalent in the specialized field, as well as possibly a cloudy picture of the actual job duties, it may be a challenge to meet the specialty occupation requirement. People working in startups often wear many hats, making it difficult to tie the job duties to a particular academic degree. It is critical to frame the job duties as absolutely requiring the specialized degree.

The H-1B visa also includes wage and worksite requirements to protect both the H-1B worker and U.S. workers. Many entrepreneurs may want to forgo a salary while developing their business. If they are in H-1B status, however, they must receive market rate compensation as a regularly paid salary. The employer must also maintain documentation of continued pay and employment.

---

[18] Senator Chuck Grassley, *Grassley Concerned about H-1B "Hacking" to Circumvent Laws while USCIS Enables the Practice* (Mar. 1, 2016), https://www.grassley.senate.gov/news/news-releases?month=03&year=2016&pagenum_rs=4.

[19] *See, e.g.*, University of Colorado, *Global Entrepreneurs in Residence*, https://www.colorado.edu/venturepartners/commercialization-network/entrepreneurs-residence.

[20] *See generally* Peter F. Asaad & Angelo A. Paparelli, *Entrepreneur and Start-up H-1B Petitions: Avoiding and Overcoming the Dreaded Request for Evidence*, *in* Am. Immigr. Law. Ass'n, Immigration Practice Pointers 266 (2015-16 ed.), *available at* https://www.ailadownloads.org/agora/pubs/pointers/2015_Practice_Pointers_TOC.pdf, and https://cyrusmehta.com/blog/2009/12/13/uscis-grappling-with-the-right-of-a-corporation-to-petition-for-its-owner-for-an-h-1b-visa-3/.

4. J-1 for Exchange Visitors[21]

The J-1 is used for a variety of purposes, ranging from au pairs to exchange students to professors. One J-1 subcategory allows eligible international professionals or interns to receive training at U.S. companies for a select length of time. International trainees and interns have the opportunity to gain valuable career training while at the same time learning about life in the United States.

J-1 trainees and interns return home with new career skills and a greater appreciation for American people and culture. The U.S. employer gains greater knowledge and appreciation for the J-1's foreign national's business practices, country and culture. Unlike the H-1B visa, there is no cap on the number of J-1 visas that can be issued each year, although the J-1's validity is typically a maximum of two years, with renewals possible.

In addition to the relatively short initial period of stay, a J-1 visa poses several other challenges for an entrepreneur. It is generally for a training position, not to run a company. Also, some J visas require returning to the home country for two years before pursuing an H-1B visa or permanent residence. (Although sometimes a waiver of the two-year rule is possible.)

For the enterprising foreign national, a J-1 visa may be useful as a way to gain experience and incubate ideas at an established U.S. company in the entrepreneur's field of interest as part of a program of practical learning. The utility of a J-1 visa for an entrepreneur depends heavily on the nature of the sponsoring organization, the host employer, and the programs the employer is authorized to offer. Given that a startup company may be unlikely to have its own exchange visitor designation, it is not uncommon to apply via an umbrella sponsoring organization. For example, the French-American Chamber of Commerce, in partnership with several Pennsylvania organizations, including East Stroudsburg University, recently began sponsoring international entrepreneurs to participate in ESU's Business Accelerator Program and establish startup companies.[22]

Spouses of J-1s can obtain independent work authorization. That may create opportunities for entrepreneurial endeavors.

5. L-1 for Intracompany Transferees[23]

An L-1 visa is available to someone who is an executive or manager or who has specialized knowledge and is being transferred from a foreign company to a U.S. branch, affiliate, or subsidiary. The person must have been working for a qualifying organization abroad for one continuous year within the three years immediately preceding his or her admission to the United States.

---

[21] U.S. Alliance for International Entrepreneurs, *J-1 Visas for Exchange Visitors*, https://usaie.org/j-1-visas-for-exchange-visitors/.

[22] ESU Insider, *ESU First in Pennsylvania to Offer Innovative New J-1 Visa Program to Attract International Business to Region* (June 19, 2015), http://quantum.esu.edu/insider/esu-first-in-pennsylvania-to-offer-innovative-new-j-1-visa-program-to-attract-international-business-to-region/.

[23] U.S. Alliance for International Entrepreneurs, *L-1 Visas for Intracompany Transferees*, https://usaie.org/l-1-visas-for-intracompany-transferees/.

An L-1 visa is initially valid for one year if establishing a new office in the United States. Other L-1 visa holders may stay initially for up to three years, and can receive extensions. L-2 spouses may apply for independent work authorization. This sets up an interesting option, where a spouse on an L-1 visa may allow the other spouse to pursue an entrepreneurial venture.

Since this part of the article focuses on the L-1 for entrepreneurs and startups, we focus on the strategies for executives and managers, including those managing one or all aspects of a business. Many people mistakenly think that the L visa is limited to executives from multi-million-dollar multinational corporations. Not so. The L-1 category is also useful for small and medium sized businesses whose owners, executives, and managers may want to come to the United States to start a business.

The L-1 category has no minimum investment or capital requirements and no set number of U.S. employees that must be hired. In fact, USCIS will grant a one-year period to foreign nationals to open an office and start operations of the U.S. business. Before the end of that initial one-year period, the foreign national must demonstrate that the U.S. business is operating and moving forward on its business strategy. Employment of U.S. employees is a plus, but not an absolute requirement, provided the L-1 visa holder is actually working in an executive or managerial capacity. That may include managing direct employees, independent contractors, or individuals working at other companies holding executive, managerial or professional positions. A well-prepared petition is a necessity, especially with the scrutiny given to L-1s for startups.

The basic requirements for a L-1 petition for an executive or manager are:

- *Qualifying relationship* - The foreign company must have a "qualifying relationship" with the U.S. company. The qualifying relationship consists of parent/subsidiary, affiliate, 50/50 joint venture, or branch office.
- *Continuing foreign operations* - The foreign company must continue to conduct business outside the United States for the duration of the L.
- *Foreign employment capacity* - The employee must have held an executive or managerial position with the foreign company for one year within three years preceding the L-1 application date.
- *U.S. employment functions* - The employee must perform executive or managerial functions in the United States.
- *Temporary transfer to the United States* - The U.S. transfer must be intended as temporary, although permanent immigrant intent does not preclude obtaining L visa status.
- *U.S. physical premises* - The U.S. employer must have U.S. physical premises.

Below is a scenario in which we discuss creative solutions to address international entrepreneurs in the L-1 context. Assume Ajit, a citizen of India, co-founded a company in India called XYZ Software four years ago. He worked for XYZ Software for two years as the chief information officer. Ajit then left India and came to the United States on an F-1 visa for a one-year MBA program. He is now finishing his OPT.

Ajit recently started a U.S. company. He owns fifty percent of the U.S. company and has raised $500,000 in seed funding. Ajit has a U.S. partner who owns the other fifty percent of the U.S. startup. They are in the process of hiring two engineers.

Ajit tells you that he still owns eight percent of XYZ Software and remains friends with XYZ's chief executive officer (CEO) and majority shareholder. XYZ Software is a fully operational, stand-alone company with over twenty employees and good financials. Could Ajit qualify for an L-1 visa?

Maybe. For example, you might consider asking Ajit to reach out to his CEO friend at XYZ Software to see if the CEO would take a fifty percent interest in the U.S. startup. This arrangement would meet the L-1 requirements for a qualifying relationship because XYZ Software would be, at the time of filing the L-1 petition, controlled by the same individual who controls the U.S. startup (the Indian CEO would own fifty percent of both companies). This corporate restructuring would also work if XYZ Software controlled fifty percent of the U.S. startup.

Under these facts, Ajit would also meet the "one year employed abroad out of the prior three years" requirement. Ajit has been in the United States for two years: one as an MBA student and one in OPT status. At the time of filing, when you count back three years, Ajit was working in India as an executive for XYZ Software. When he left to go to school in the United States, he had worked for XYZ Software for at least one year.

6. TN for Canadian and Mexican Entrepreneurs[24]

The TN visa is well suited for Canadian and Mexican citizens seeking to work in one of the professional occupations listed in the USMCA (Agreement between the United States, the United Mexican States and Canada).[25] Professionals in various fields, including information technology, engineering, finance, marketing, and consulting, frequently use the TN to work in the United States. The TN is also quick to obtain. If you're Canadian, all you need is a brief letter, with supporting evidence, outlining the company, the position, and your qualifications, and within an hour or so at the border you can get your TN. If you're Mexican, you need the same qualifying evidence and in addition you'll have to schedule a visa appointment at a U.S. consulate. The fee is only $56.00 (compared to thousands of dollars to file an H-1B petition), there is no annual limit on the number of TN visas, and you get up to a three-year work permit that can be renewed pretty much indefinitely.

TNs are straightforward if you have a job offer from a U.S. company and you have a bachelor's degree in one of the fields listed in the USMCA regulations at 8 C.F.R. § 214.6.[26] It gets trickier if:

- You don't have a bachelor's or higher degree specifically listed in the USMCA occupations;
- You haven't completed college;
- You only have work experience since graduating from high school; or
- You are or will be an owner of a startup.

---

[24] U.S. Alliance for International Entrepreneurs, *TN Visas for Canadian & Mexican Entrepreneurs*, https://usaie.org/tn-visas-for-canadian-mexican-entrepreneurs/.

[25] The USMCA, entered into force on July 1, 2020, is the successor to NAFTA (North American Free Trade Agreement) which had been in force since 1994.

[26] As of May 2021, 8 C.F.R. § 214.6 still references NAFTA rather than the USMCA.

An "employer" under the USMCA can either be a U.S. company or a Canadian or Mexican company that has a written agreement to provide professional services to a U.S. entity. For example, a Canadian consulting company can be the "employer" of a Canadian TN applicant, provided he or she is working in the United States pursuant to a written agreement between the Canadian employer and a U.S. entity.

Some USMCA occupations require the minimum of a bachelor's degree to qualify. Other positions require a specific degree or post-secondary diploma plus experience (e.g., interior designer, hotel manager, or computer systems analyst). While it appears USMCA may limit individuals who possess a specific formal educational degree that is not on the list (e.g., visual arts degree), USMCA regulations provide for expanded opportunities for both degreed and non-degreed applicants to obtain TN status.

The USMCA allows an applicant possessing a degree in an allied field to qualify for TN status under certain circumstances. For example, a Canadian professional may seek to fill a graphic designer position for a U.S. company. However, she has a visual arts degree, not a graphic design degree. The visual arts degree is not specifically listed in the USMCA occupations. However, an evaluation of the person's transcript may disclose classes taken where the knowledge gained could be used to perform graphic design work. Consequently, a TN application could be prepared and presented as a graphic designer.

The USMCA specifically prohibits "self-employment" for TNs. That poses problems for entrepreneurs or recent graduates from a U.S. university who want to start a business in the United States. The USMCA regulations do not define "self-employment."

However, the USMCA allows TNs to work in the United States who are employed by a Canadian entity, provided they are entering the United States pursuant to a contract with a U.S. customer. For example, a Canadian entrepreneur may co-found a U.S. startup with U.S. citizens. Here, the entrepreneur would form an Ontario corporation, own it, and have it enter into a professional services contract (e.g., to provide software consulting services) with the U.S. startup. The contract would be presented as part of the standard TN application, including the job offer letter on Canadian company letterhead, information about the Canadian company, and the applicant's educational and work experience evidence.

If forming the Ontario entity is not feasible, the Canadian entrepreneur should avoid having shares in the U.S. startup issued to him. If they want some level of formal corporate interest, the use of restricted stock, stock options, warrants and voting trusts offer viable strategies.

The prohibition against self-employment for TN entrepreneurs may also be addressed through:

- A formal board of directors, where the applicant has only one of at least three board seats (the more board seats overall the better);
- An executed employment agreement where a majority of the board can fire the TN applicant; or
- An intellectual property assignment agreement is in place.

These strategies have been generally accepted by USCIS as it relates to H-1B entrepreneurs. While USCIS is a different agency than Customs and Border Protection, which handles TN applications at the Canadian border and airports, and the State Department, which decides TN applications at its consulates in Mexico, a colorable argument can be made that entrepreneurs with similar employer/employee arrangements should qualify for TN status.

7. O-1 for Entrepreneurs with Extraordinary Ability[27]

Unlike the H-1B category, the O-1 visa category lacks annual numerical restrictions and salary requirements. There are also no citizenship requirements, like the E-2 visa. There are no prior employment requirements, like L-1 visas. And O-1 visas are not restricted to Canadians or Mexicans, like the TN. However, O-1 visa applicants must demonstrate extraordinary ability in their field.

To establish extraordinary ability the individual must either demonstrate a one-time international achievement at the caliber of an Olympic medal, an Oscar or Nobel prize, or satisfy at least three of the following eight criteria:

- Receipt of lesser nationally and internationally recognized prizes or awards for excellence in the field of endeavor;
- Membership in associations in the field that require outstanding achievements of their members, as judged by experts in the field;
- Published materials about the individual in professional or major trade publications, or appearance/published materials about the individual in other major media;
- Participation, either individually or as part of a panel, as a judge of the work of others in the field (including requests to serve as a reviewer/referee for articles to be published, invitations to serve on discussion and advisory panels, etc.);
- Original scientific, scholarly, artistic, athletic or business-related contributions of major significance in the field;
- Authorship of scholarly articles in the field, as published in professional or major trade publications or in other major media;
- Serving in a critical or essential capacity for organizations or establishments that have a distinguished reputation; and/or
- Commanding a high salary or other significantly high remuneration for services, as compared to others in the field.

While establishing extraordinary ability can be difficult, startup entrepreneurs' resumes should be carefully reviewed to determine if they are currently eligible for an O-1 visa or if they might become eligible over the next few years. For example, starting a business in the United States based upon a new technology, and the demonstrated ability to create jobs in the United States, may meet two criteria for O-1s. During the OPT timeframe, an F-1 entrepreneur can write articles that are published, give speeches, present at conferences, be a judge of the work of others, and secure media coverage that is all about the F-1 entrepreneur. All these encompass criteria needed to meet the extraordinary ability test for an O-1.

O-1 visas are granted for the duration of an "event" (i.e. a grant, project, tour, etc.) and for an initial period of no longer than three years. There is no limit on extensions for the O-1 visa, which are granted in increments of one year at a time if the extension is with the same employer and for the same event.

---

[27] U.S. Alliance for International Entrepreneurs, *O-1 Visas for Entrepreneurs of Extraordinary Ability*, https://usaie.org/o-1-visas-for-entrepreneurs-of-extraordinary-ability/.

However, the O-1 can be extended for a three-year period if it is for a different employer of a different event.

There are a number of benefits to the O-1 visa:

- There is no prevailing wage issue, as with the H-1B. This can be a great advantage for a startup that does not yet have a revenue stream.
- J visa holders who are subject to the two-year home residency requirement are eligible for an O visa. They cannot change status in the United States, however, and must consular process.
- Unlike the H-1B visa category, there is no annual limit on the number of O visas that may be granted in any fiscal year.
- There is no minimum degree requirement.
- Dual intent is essentially allowed. An individual does not have to keep a foreign residence and filing for permanent residency does not disqualify them from obtaining an O visa.
- If an individual qualifies for an O-1 visa, he or she may qualify to petition for permanent resident status based on extraordinary ability in the employment-based first (EB-1) category. That category does not require a permanent job offer and also bypasses the lengthy labor certification process. An EB-1 applicant can self-petition without the need for an employment offer or an employer sponsoring them. Travel outside the United States while pursuing a green card may be problematic for O-1s, and must be well thought out in advance.

The O-1 regulations do not allow for self-employment. As such, and in the case of a foreign entrepreneur owning part of the company he or she will be working at, some creativity in creating a separation between the company and the foreign entrepreneur through an agent petitioning company may allow an entrepreneur to work at her startup while keeping a valid employer-employee relationship.

The O-1 visa is a high standard and is not usually the first option to consider. But for those with significant, documented experience or academic credentials (such as a Ph.D. graduate or postdoc or junior researcher who wants to try an entrepreneurial venture), the O-1 is worth considering.

8. B-1 for Visiting Entrepreneurs[28]

The B-1 visa is designed for business visitors to the United States who plan on staying a maximum of six months. A B visa is easy to apply for and is inexpensive compared to other nonimmigrant visas. It also provides a possible avenue for an international entrepreneur to engage in startup activities, such as forming a company, owning stock, being a member of the board of directors, attending board meetings, conducting market research, negotiating for funding with angel investors and venture capitalists, negotiating contracts, establishing office space, attending networking activities, and discussing ideas for new business products and services. B visa holders, however, must maintain their residence abroad. Moreover, a B visa does not provide work authorization or allow an entrepreneur to manage a U.S. business.

---

[28] U.S. Alliance for International Entrepreneurs, *B-1 Visas for Visiting Entrepreneurs*, https://usaie.org/b-1-visas-for-visiting-entrepreneurs/.

For example, participating in day-to-day activities of the business is not allowed. The question is whether the activities you perform for the business are activities generally performed by an employee in an "employer-employee" relationship. It is irrelevant for immigration whether you get paid or not; the activity that you perform is key for immigration status. The key to avoiding unauthorized B-1 activity is to create a level of separation between the daily activities of the company and the board/shareholder level decisions. B-1 visitors should avoid business activities that are more "active" than "passive." Hiring and managing workers located in the United States is definitely unauthorized. As a principal shareholder and board member however, you can elect an officer, who could then hire and direct U.S. workers. Furthermore, major decisions concerning day-to-day activities could be presented to the board by the officer (your U.S. business partner) for approval. These business activities should not jeopardize B-1 status.

If the B-1 entrepreneur has an established foreign company as well as a U.S. startup, and may be waiting for approval of an H-1B visa, they may be able to enter on the B-1 and perform work under the "B-1 in lieu of H-1" strategy. To meet the B-1 in lieu of H-1B requirement, the B-1 entrepreneur must reside and work abroad in some professional capacity and enter the United States to perform H-1B-level tasks over a short time, not to exceed six months. They must be paid only by the foreign company.[29]

9. International Entrepreneur Parole

The Obama administration used discretionary remedies in several ways. Best known was the DACA program for undocumented students who were brought to the United States as children. The Obama Administration also created an international entrepreneur option through its discretionary parole authority. International Entrepreneur Parole (IEP) launched in 2016, but the Trump Administration quickly acted to cancel it. As with many immigration issues over the past few years, litigation ensued, with the National Venture Capital Association leading the charge to save IEP.[30]

Now in 2021, IEP has survived but is little used because of the past uncertainty. Several articles and reports call on the Biden Administration to strengthen IEP as part of economic recovery from the pandemic.[31]

---

[29] For an annotated list of resources on the B visa, see https://cbkimmigration.com/wp-content/uploads/2017/07/article-5-b-1-annotated-bibliography.pdf.

[30] National Venture Capital Ass'n v. Duke, 291 F. Supp. 3d 5 (D.D.C. 2017).

[31] *See* Caleb Watney, Doug Rand and Lindsay Milliken, Long Live the International Entrepreneur Rule: An Opportunity to Boost Jobs and Economic Growth is Hiding in Plain sight, (PPI Feb. 2021), https://progressivepolicy.org/publication/long-live-the-international-entrepreneur-rule-an-opportunity-to-boost-jobs-and-economic-growth-is-hiding-in-plain-sight/; Vivek Wadhwa and Alex Salkever, *A "startup visa" will help Biden jump-start the economy*, Fortune (Feb. 5, 2021), https://fortune.com/2021/02/05/biden-economic-plan-startup-visa-immigration-entrepreneurs/; Letter from National Venture Capital Assocation to Alejandro Mayorkas, Secretary of the Department of Homeland Security (Feb. 5, 2021), available at https://nvca.org/pressreleases/innovation-coalition-calls-on-president-biden-to-implement-the-international-entrepreneur-rule/; Yuliya Chernova and Michelle Hackman, *Venture Capitalists, Startup Founders Push to Revive Obama-Era Immigration Program*, Wall Street J. (Mar. 10, 2021), https://www.wsj.com/articles/venture-capitalists-startup-founders-push-to-revive-obama-era-immigration-program-11615372202?mod=search results_pos2&page=1. *See generally* U.S. Alliance for International Entrepreneurs, *Getting Ready for Entrepreneurial Parole*, https://usaie.org/getting-ready-for-entrepreneurial-parole/ for more details and updates.

IEP relies on a relatively simple principle that has been floated in Congress for a possible "startup" visa: assume an entrepreneurial idea is good if professionals back the idea. There is no magic formula for evaluating the likelihood of success in business, but if established angel investors or venture capital firms, or government agencies put a significant amount of money behind the project, then USCIS should give it a chance.

Specifically, IEP requires the applicant-entrepreneur to demonstrate:

- The entrepreneur holds at least a 10% ownership stake in the start-up entity.
- The entrepreneur holds a central and active role in the operations of the start-up.
- The entrepreneur's knowledge, skills, or experience will substantially assist with the growth and success of the start-up.
- The start-up's formation occurred in the last five years.
- The start-up will have a significant public benefit such as (a) evidence of investments from any investors, government awards, or grants, (b) evidence of revenue generation, (c) letters from government agencies, qualified investors, or established business associations attesting to how the start-up's research, products, or services, or the entrepreneur's knowledge, skills, or experience will advance the start-up's business, (d) media coverage of the start-up, (e) evidence of participation in a reputable start-up accelerator, or (f) patent awards.
- The start-up received substantial capital investment or awards as follows: (a) Within the last 18 months, received an aggregate of $100,000 in government grants or (b) $250,000 from qualified investors.
    - A government grant must be from a U.S. federal, state, or local entity. The grant must be for economic development, research and development, job creation, or another similar monetary award directed at start-ups. The grant may not be part of a contract for goods or services, and must come from an entity or agency with a track record of granting funds to start-ups.
    - A qualified investor must have a significant track record of successful investments in other start-ups ($600,000 in the last five years. Those investments must have resulted in two start-ups creating five full-time qualified jobs each, not including independent contractors, or $500,000, revenue with an average of 20% annualized revenue growth in at least two start-up entities). If the funding criteria is only partially met, the entrepreneur may provide compelling evidence that the entity has substantial potential for rapid growth and job creation.

Conclusion

Because no visa category exists specifically for international entrepreneurs, they must figure out how to navigate the current immigration system. This problem is unfortunate, since immigrants are almost twice

as likely as native-born Americans to start new businesses.[32] We have reviewed nine existing temporary immigration categories that may provide creative solutions. These should be considered as part of a full screening to look for all immigration options, such as a work permit as a spouse, self-petition green card, etc. International entrepreneurs must depend on advance planning, careful and expert immigration advice, and creative solutions to realize their dreams in the United States.

****

The coauthors are founding members of the U.S. Alliance for International Entrepreneurs (USAIE), https://usaie.org/, which provides comprehensive services and advice to international entrepreneurs, including immigration, tax, corporate, intellectual property, and banking. USAIE represents the range of entrepreneurial activities in the United States, from startups to more established companies looking to expand by accepting international capital or hiring foreign nationals.

The co-authors thank Amherst College student Sophia Heisman-Gibbons and Curran, Berger & Kludt Case Manager Emily Hindle for their help in updating and editing this article.

Dan Berger (dhb@cbkimmigration.com) is a partner at the law firm of Curran, Berger & Kludt in Northampton, MA, wwwcbkimmigration.com, and a frequent speaker, editor and writer on entrepreneur issues at universities. Dan has edited Immigration Options for Academics and Researchers (2005, 2011 and now the upcoming 2021 editions), the International Adoption Sourcebook (also new edition on the way this year), and the Diplomatic Visa Guide. Mr. Berger is an Honorary Fellow (and co-Chair of the International Committee) of the American Academy of Adoption Attorneys, and on the Legal Advisory Board of the Presidents' Alliance on Immigration and Higher Education.

Stephen Yale-Loehr (syl@millermayer.com) is co-author of *Immigration Law and Procedure*, the leading 21-volume immigration law treatise, published by LexisNexis Matthew Bender. He is also Professor of Immigration Practice at Cornell Law School, and is of counsel at Miller Mayer in Ithaca, NY, where he advises entrepreneurs, investors, and businesses. He is a member of AILA's business immigration committee. He graduated from Cornell Law School in 1981 *cum laude*, where he was Editor-in-Chief of the *Cornell International Law Journal*. He received AILA's Elmer Fried award for excellence in teaching in 2001, and AILA's Edith Lowenstein award for excellence in the practice of immigration law in 2004.

Rita Georges (rgeorges@serottelaw.com) is the managing partner at Serotte Law Firm, LLC (https://www.serottelaw.com). Her practice focuses on business and investment related immigration law, which allows her to help corporate clients, entrepreneurs, foreign investors and others achieve their U.S. business goals.

Michael Serotte (mserotte@serottelaw.com) is the founder and senior partner of Serotte Law Firm, LLC. His practice focuses on developing creative solutions for corporations and individuals facing U.S.

---

[32] Dane Stangler & Jason Wiens, *The Economic Case for Welcoming Immigrant Entrepreneurs,* Entrepreneurship Policy Digest (Sept. 8, 2015), *available at* http://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/the-economic-case-for-welcoming-immigrant-entrepreneurs.

immigration challenges. He serves as immigration counsel for Stanford Universities Entrepreneurial Incubator Company: StartX; Unshackled; and numerous other universities and incubators.

Jeff Goldman (jeff@gpimmigration.com) is the founder of Goldman & Partners Immigration Law, with offices in Boston and San Mateo. For 30 years Jeff has practiced exclusively in the area of business immigraiton law, with pro-bono political asylum matters as a specialty as well. Jeff is nationally recognized as a leader in advising entrepreneurs regarding all immigration matters, and has founded two H-1B cap-exempt organizations to help U.S. employers who require alternative options for key foreign national employees.

Megan Kludt is Managing Partner at Curran, Berger & Kludt. She has given numerous presentations at academic institutions and on national panels, and co-authored an article on federal litigation ion DOL labor certification. Megan was selected by AILA to provide emergency legal aid to children at the U.S./Mexico border, and in 2016 was honored as one of AILA New England's Pro Bono Champions. She holds a BS in Foreign Service from Georgetown University, a Master of International Relations from Boston University, and a JD with an international concentration from Boston University School of Law.

End of Document