



## Capitalizing on the Economic Potential of Foreign Entrepreneurs

In the United States, the foreign-born have long been prominent among the nation's entrepreneurs, founding businesses large and small that fuel U.S. economic growth and create jobs.<sup>1</sup> An entrepreneur is someone who assumes a significant amount of financial risk to turn an innovative idea into a profit-making business and can often choose to take that risk in a range of countries.<sup>2</sup> Thus, it behooves a nation to set policies that attract and support entrepreneurship.

While some famous entrepreneurs came to the United States as refugees, students, or through either a family-based or employment based immigration visa, there is no specific class of temporary visa under U.S. law for a foreign entrepreneur who is trying to grow a U.S.-based business. As a result, many foreign entrepreneurs who find the United States closed off to them go on to establish their businesses in other countries with more expansive business immigration policies — nations that often compete economically with the United States.

This fact sheet describes the legal avenues in the United States available to promising entrepreneurs, as well as some of the barriers they face securing immigration status through these paths.

### **Global competition for entrepreneurs is growing.**

Although foreign entrepreneurs have consistently considered the United States a top destination, the U.S. immigration system often forces them to leave. Multiple studies have indicated that America is no longer the only go-to country for foreign entrepreneurs; a growing number of would-be entrepreneurs are choosing to start their businesses in countries that offer greater financial and social incentives.<sup>3</sup> As a result, the United States is losing out on the new businesses, jobs, tax revenue, and innovation that these entrepreneurs could be generating for the U.S. economy. Meanwhile, other countries (such as India and China) are implementing policies that persuade their own best and brightest to remain at home, while also attracting talent from other nations through new entrepreneurial programs.<sup>4</sup>

In short, entrepreneurs seeking the greatest opportunity for themselves and their families can choose from a range of countries. While job availability, wages, and working conditions are important in making this decision, so are a number of other considerations—such as how much red tape and bureaucracy is involved in the initial visa process, a possible future job change, the adjustment from a temporary to a permanent immigration status, and the process of bringing family members from the home country to the United States.

## **Opportunities for immigrant entrepreneurs in the United States are limited.**

There is no U.S. visa for immigrant entrepreneurs. As a result, would-be entrepreneurs come to the United States through many different channels, and from a wide range of backgrounds. Some immigrant entrepreneurs first came to the United States as foreign students or as well-educated foreign professionals on H-1B temporary visas. Others came on family-based visas, as the spouses or children of U.S. citizens or lawful permanent residents, for example. In other words, many immigrant innovators who positively contributed to the U.S. economy did not become successful entrepreneurs until years after their arrival in the United States through some other channel. Under these conditions, it is difficult to predict who will become a successful entrepreneur and who will not.

Legal avenues available to some entrepreneurs include both temporary and permanent paths, such as the following:

1. **Entrepreneurial Parole** is temporary and has yet to take effect.
2. **E visas and H-1B visas** are temporary and encompass only some future entrepreneurs.
3. **The EB-5 investor visa and EB-2 national interest waiver** are permanent and not well-suited for all entrepreneurs.

### **Entrepreneurial Parole**

In the final days of the Obama administration, the Department of Homeland Security (DHS) promulgated the “International Entrepreneur Rule” (IER), a regulation which allows for the “parole” into the country of entrepreneurs. Parole is a mechanism by which U.S. Citizenship and Immigration Services (USCIS) can, on a case-by-case basis, temporarily allow someone to be physically present in the United States if there is a “significant public benefit.” The purpose of the parole process in the case of entrepreneurs is to give promising start-up companies the chance to conduct research and development and expand job-creating operations in the United States.<sup>5</sup>

Under the IER—which has not been implemented—entrepreneurs who have received investments of capital totaling at least \$250,000 or at least \$100,000 in government grants, and own at least 10 percent of the start-up, can be granted parole for up to two years. Entrepreneurs can be re-paroled for no more than 30 months if they meet certain revenue, investment, and/or job creation thresholds. USCIS can revoke parole at any time, and persons with parole cannot adjust to permanent residency.<sup>6</sup> The entrepreneur’s spouse and minor children also can receive a grant of parole.

In July 2017, DHS delayed the effective date of this rule until March 2018. In doing so, DHS stated that it “will issue a Notice of Proposed Rulemaking soliciting public comments on the proposal to rescind the IE Final Rule. The delayed effective date will provide an opportunity for the notice and comment rulemaking to take place.”<sup>7</sup>

## E Visas

Some entrepreneurs may be eligible for temporary E visas for investors if they are from countries with which the United States has an appropriate treaty.

- An **E-1 treaty trader visa** is for foreign nationals who conduct “substantial trade” between the United States and the person’s country of nationality.<sup>8</sup>
- An **E-2 treaty investor visa** is for foreign nationals who come to the United States to develop and direct the operations of an enterprise in which they have invested, or are in the process of investing, a “substantial amount of capital.”<sup>9</sup>

E visas are renewable, but E visa holders cannot adjust to permanent resident status and must establish their intent to leave the United States as part of their visa application. Moreover, there are limitations on how much capital the E-2 visa holder can raise, given that the recipient must maintain at least 50 percent ownership of the company. This requirement makes it more difficult to find investors.<sup>10</sup>

## H-1B Visas

The H-1B is a temporary visa that allows employers to petition for well-educated foreign professionals to work in “specialty occupations” that require at least a bachelor’s degree or the equivalent.<sup>11</sup> The H-1B category may be approved for up to three years and can be extended for a maximum of six years.<sup>12</sup> There is an annual cap of 65,000 H-1B visas, and an additional 20,000 for graduates with a master’s or higher degree from U.S. universities that meet certain requirements.<sup>13</sup> This cap is generally reached in a matter of weeks or days, meaning that only a fraction of the H-1B petitioners receive visas.<sup>14</sup>

USCIS will accept petitions filed by a company formed and owned by the visa beneficiary (i.e., the employee-entrepreneur), assuming it is a U.S. company. However, there must be a valid employer-employee relationship between the company and the noncitizen. Since self-employed business owners are frequently their own employers, the entrepreneur cannot prove a valid employer-employee relationship. Instead, the entrepreneur must become an employee of the U.S. company and that company must have an independent board of directors that can exercise control over the entrepreneur’s employment.<sup>15</sup> In order for the entrepreneur to receive an extension of H-1B status, the board must demonstrate that it continues to exercise control over the entrepreneur. For entrepreneurs who need to be the final decision maker and have control over all aspects of what they do, the H-1B is not a suitable choice for them.

These are complex requirements to satisfy and, as a result, it is difficult for entrepreneurs to properly use the H-1B category.<sup>16</sup> Further, with demand for the H-1B visa far greater than the annual caps, even those that do qualify may be unable to receive an H-1B.

## **EB-5 Investor Visas**

Congress created the EB-5 visa category in 1990 as a path to permanent residency specifically for immigrant investors. Up to 10,000 visas are available each year for foreign investors, as well as their spouses and minor children.<sup>17</sup>

To qualify for an EB-5 visa, a foreign national must invest at least \$1 million to establish a “new commercial enterprise” or invest in a “troubled business” that directly employs 10 U.S. citizens (who may not be close relatives of the foreign investor) on a full-time basis. Foreign nationals may also qualify for a visa if they invest \$500,000 in a job-creating business that is located in a “targeted employment area” (locales that suffer unemployment at 150 percent of the national average) or in a rural area.

Once the initial petition is granted, the investor and immediate family members receive a temporary “green card.” After two years, the green card may become permanent if the investor proves that the full amount of funds has been invested and that 10 jobs have been created or saved.<sup>18</sup>

## **EB-2 National Interest Waivers**

While the EB-5 visa is specifically for immigrant investors, foreign-born entrepreneurs and investors may qualify for lawful permanent residence in the EB-2 category if they can demonstrate that the creation and operation of their business will produce significant benefits and is “deemed to be in the national interest.” As DHS recognized, this visa was underutilized due to limited guidance as to when it should be granted.<sup>19</sup>

In January 2017, the USCIS Administrative Appeals Office (AAO) issued a new standard that USCIS officers must follow when deciding whether to approve a national interest waiver.<sup>20</sup> With this new standard, a foreign national’s intended work can be in the national interest even when the business itself is limited to a particular geographic area. The new standard also considers the “potential prospective impact” of the foreign national’s intended work and gives greater consideration to the foreign national’s qualifications and what the individual seeks to accomplish. All of these changes will likely make the category more hospitable for entrepreneurs, but still quite challenging for those just starting out.

## **Conclusion**

Immigrants who one day become entrepreneurs enter the United States through a variety of channels. It is nearly impossible to predict which foreign student, temporary worker, or investor will become a successful business owner.

There are many steps which the U.S. government could take to maximize the economic contributions of businesses founded by immigrants, such as welcoming workers and students who possess skills that the U.S. economy most needs in order to grow.

## Endnotes

1. See Stuart Anderson, *American Made 2.0: How Immigrant Entrepreneurs Continue to Contribute to the U.S. Economy* (Washington, DC: National Venture Capital Association, 2013), <http://www.nfap.com/pdf/American%20Made%202.0.Final.pdf>; Robert W. Fairlie, *Estimating the Contribution of Immigrant Business Owners to the U.S. Economy* (Washington, DC: Small Business Association, Office of Advocacy, 2008), <https://people.ucsc.edu/~rfairlie/papers/published/sba%20final%20report%20immigrant%20business.pdf>; Robert Fairlie, *Open for Business: How Immigrants are Driving Small Business Creation in the United States* (New York, NY: The Partnership for a New American Economy, 2012), <http://www.renewoureconomy.org/open-for-business>; David Dyssegaard Kallick, *Immigrant Small Business Owners: A Significant and Growing Part of the Economy* (New York, NY: The Fiscal Policy Institute, 2012), <http://www.fiscalpolicy.org/immigrant-small-business-owners-FPI-20120614.pdf>.
2. "Entrepreneur," *Cambridge Business English Dictionary*, Cambridge University Press, 2011.
3. Anthony Luppino, John Norton, and Malika Simmons, *Reforming Immigration Law to Allow More Foreign Student Entrepreneurs to Launch Job-Creating Ventures in the United States* (Kansas City, MO: Ewing Marion Kauffman Foundation, 2012), 2, <http://www.kauffman.org/what-we-do/research/2012/08/reforming-immigration-law-to-allow-more-foreign-student-entrepreneurs-to-launch-jobcreating-ventures-in-the-united-states>; Vivek Wadhwa, "America is Bleeding Competitiveness," *VentureBeat*, April 28, 2011, <http://venturebeat.com/2011/04/28/brain-drain-or-brain-circulation-america-is-bleeding-competitiveness/9>; Vivek Wadhwa and Alex Salkever, *The Immigrant Exodus: Why America Is Losing the Global Race to Capture Entrepreneurial Talent* (Philadelphia, PA: Wharton Digital Press, 2012).
4. Vivek Wadhwa, "America is Bleeding Competitiveness," 2011; Wadhwa and Salkever, *The Immigrant Exodus*, 2012.
5. 82 Fed. Reg. 5238 (Jan. 17, 2017), <https://www.federalregister.gov/documents/2017/01/17/2017-00481/international-entrepreneur-rule>.
6. *Ibid.*
7. 82 Fed. Reg. 31887 (Jul. 11, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-07-11/pdf/2017-14619.pdf>.
8. 8 C.F.R. § 101(a)(15)(E)(i).
9. 8 C.F.R. § 101(a)(15)(E)(ii).
10. 22 C.F.R. § 41.51(b)(2)(ii).
11. 8 C.F.R. § 214.2(h)(2).
12. There is an exception for H-1Bs in the green card process who meet certain requirements. See §§ 104(c), 106(a)-(b) of the American Competitiveness in the Twenty-First Century Act ("AC21"), as amended by the 21<sup>st</sup> Century DOJ Appropriations Authorization Act.
13. American Immigration Council, *The H-1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy* (Washington, DC: April 1, 2016), <https://www.americanimmigrationcouncil.org/research/h1b-visa-program-fact-sheet>.
14. *Ibid.*
15. U.S. Citizenship and Immigration Services, "Questions and Answers: USCIS Issues Guidance Memorandum on Establishing the 'Employee-Employer Relationship' in H-1B Petitions," revised March 12, 2012, <https://www.uscis.gov/news/questions-answers-uscis-issues-guidance-memorandum-establishing-employee-employer-relationship-h-1b-petitions>.
16. Memorandum from Donald Neufeld, Associate Director, Service Center Operations, U.S. Citizenship and Immigration Services on Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third Party Site Placements, January 8, 2010, <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf>.
17. 8 C.F.R. § 204.6(f).
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