

**AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION**

**RECOMMENDATION AND REPORT
TO THE ASSEMBLY OF THE YOUNG LAWYERS DIVISION**

RECOMMENDATION

RESOLVED, that the American Bar Association urges Congress to enact laws that provide for a Startup Visa, whereby foreign citizens forming businesses are provided a mechanism under which they can enter the United States and obtain permanent residency to build such business; and

FURTHER RESOLVED, that the American Bar Association recommends that the Startup Visa program provide for an appropriate duration to allow such foreign citizen to determine whether such business will be a success; and

FURTHER RESOLVED, that the American Bar Association recommends that the Startup Visa program be designed to be available only to those foreign citizens that build bona fide businesses that spur innovation and employment in the U.S.; and

FURTHER RESOLVED, that the American Bar Association recommends that the Startup Visa program is incorporated as part of comprehensive reform of the U.S. immigration system being advocated by the American Bar Association.

REPORT¹

We continue to have the best universities in the world, the best innovation and technologies in the world. We continue to have some of the best workers in the world, the most productive workers in the world. We have the kind of dynamism and entrepreneurship in our economy that's going to serve us well in the long term.

President Barack Obama²

November 23, 2009

Yahoo! would not be an American company today if the United States had not welcomed my family and me almost thirty years ago. We must do all that we can to ensure that the door is open for the next generation of top entrepreneurs, engineers and scientists from around the world to come to the U.S. and thrive. Whether they arrive as children, students, or professionals, we want the best and the brightest here. Our immigration policy should reflect that or these talents will go elsewhere.

Jerry Yang³

Co-Founder, Yahoo!

The purpose of this report is to recommend the creation of a mechanism within the U.S. immigration regime to allow foreign citizens forming certain types of businesses (collectively, “**Immigrant-Founders**”) to obtain legal status within the United States. This report recommends the creation of a new immigration program for these Immigrant-Founders appropriately titled the “Startup Visa.” In particular, this report urges Congress to enact laws that provide for a Startup Visa, whereby foreign citizens forming businesses are provided a mechanism under which they can enter the United States and obtain permanent residency to build such business. A Startup Visa program should provide for an appropriate duration to allow such foreign citizen to determine whether such business will be a success and should be designed to be available only to those foreign citizens that build bona fide businesses that spur innovation and employment in the U.S.

The report will address three key areas: **(1)** a background on the role immigration plays in innovation; **(2)** an understanding of the current limitations under the existing U.S. immigration regime for Immigrant-Founders; and **(3)** an explanation of the key criteria of a modified U.S. immigration regime for Immigrant-Founders.

¹ The primary authors of this report were Eric Koester and Bryn Weaver. We are grateful for the collaboration and support of Representative Jared Polis and his staff, including Daniel Palugyai. In addition, the authors would like to thank the following individuals for their support and assistance: Brad Feld, Paul Kedrosky, Michael Lincoln, Michael Platt, Jerry Erickson and Ethan Tidmore.

² <http://www.quote.com/news/story.action?id=RTT911231653001869> (last accessed: November 23, 2009).

³ “American Made: The Impact of Immigrant Entrepreneurs and Professionals on U.S. Competitiveness,” by Stuart Anderson and Michaela Platzer, 2007.

INNOVATION & IMMIGRATION: THE IMPORTANT INTERRELATION

Innovation and entrepreneurship are hallmarks of the American economy. Businesses from Amazon and Microsoft to Amgen and Genentech to FedEx and Starbucks to Staples and Home Depot have all been founded in the last forty years and grown to become major contributors to society. Each of these businesses began as a small business or a small concept and grew into a market leader. And, perhaps most importantly, each of these businesses was spurred by the American economic engine which drives innovation and promotes entrepreneurship and in turn, has been a catalyst for innovation and development of the U.S. economy.

IMPORTANCE OF INNOVATION IN THE UNITED STATES

- Scientific innovation has produced roughly half of all U.S. economic growth in the last 50 years.⁴
- Based on the model of Robert Solow (who won a Nobel Prize in Economics for his theory of economic growth), nearly four fifths of the economic growth of the U.S. is the result of technological progress.⁵
- 78% of Americans surveyed believe that innovation will be more important to the U.S. economy in the next three decades than it was in the last three.⁶

Innovation is driven by the very workers President Obama described as “some of the best workers in the world, the most productive workers in the world.”⁷ Those workers continue to build small businesses. Tomorrow’s Microsoft, Amgen, FedEx and Home Depot are being created right now in cities across the country. And many of those innovative startups are being formed by immigrants. In fact, immigrants are more likely to engage in entrepreneurial activities – over 25% more likely than the rest of the population according to a report by the Ewing Marion Kauffman Foundation. Only a few short years ago, immigrants founded companies including Intel Corp., Solectron Corp., Sanmina-SCI Corp., Sun Microsystems Inc., eBay Inc., Yahoo Inc., Life Time Fitness Inc., Tetra Tech Inc., UTStarcom Inc. and Google Inc. Today, those ten immigrant-founded companies have revenues nearing \$100 billion.⁸

Immigrant-Founded Businesses and Numbers of Employees⁹

1. **Intel Corp.** - Andy Grove (Hungary) 99,900 employees

⁴ Task Force on the Future of American Innovation cited by Rick Weiss, The Shrinking Frontiers of Research, Washington Post.

⁵ <http://hallingblog.com/2009/07/08/is-innovation-the-key-to-growing-the-u-s-economy/> (last accessed: December 4, 2009).

⁶ <http://www.newsweek.com/id/222979> (last accessed: December 4, 2009).

⁷ <http://www.quote.com/news/story.action?id=RTT911231653001869> (last accessed: November 23, 2009).

⁸ <http://money.cnn.com/magazines/fortune/fortune500/> (last accessed: November 23, 2009).

⁹ Anderson at 14.

2. **Solelectron Corp.** (*acquired by Flextronics International, Ltd. in 2007*) - Winston Chen (Taiwan) 53,000
3. **Sanmina-SCI Corp.** - Jule Sola/Milan Mandaric (Bosnia/Croatia) 48,621
4. **Sun Microsystems Inc.** - Andreas Bechtolsheim/Vinod Khosla (Germany/India) 31,000
5. **eBay Inc.** - Pierre Omidyar (France) 12,600
6. **Yahoo Inc.** - Jerry Yang (Taiwan) 9,800
7. **Life Time Fitness Inc.** - Bahram Akradi (Iran) 9,500
8. **Tetra Tech Inc.** - Henri Hodara (France) 7,200
9. **UTStarcom Inc.** - Ying Wu (China) 6,300
10. **Google Inc.** - Sergey Brin (Russia) 5,680

It is without question that immigrants are intrinsically interwoven into the fabric of U.S. innovation. Over the past 15 years, immigrants have started 25 percent of U.S. public companies that were venture-backed, a high percentage of the most innovative companies in America.¹⁰ The current market capitalization of publicly traded immigrant-founded venture-backed companies in the United States exceeds \$500 billion.¹¹ Immigrant-founded venture-backed public companies today employ an estimated 220,000 people in the United States and over 400,000 people globally.¹²

THE IMPACT OF IMMIGRANTS ON U.S. INNOVATION

- American universities grant 50 percent of doctoral degrees in computer science to foreign born students working in industry,¹³ while doctoral degrees in engineering exceed 50 percent.¹⁴
- Twenty-two percent of science and engineering jobs in the U.S. are now held by the foreign born.¹⁵
- The Council of Graduate Schools found in a 2004 survey that the number of foreign students in U.S. science programs is down 24% and engineering programs is down 20%.¹⁶

Yet, in spite of the successes of prior immigrant-entrepreneurs in building highly successful businesses, today's immigrant-entrepreneur faces a much greater difficulty in obtain legal status in the United States. Today options are being restricted to obtain a visa in order to form or build a business and visa quotas have fallen precipitously over the past 10 years. As a result, immigrant-entrepreneurs currently residing in America

¹⁰ Anderson at 6.

¹¹ *Id.*

¹² *Id.*

¹³ National Science Board, *The Science and Engineering Workforce, Realizing America's Potential*, page 8.

¹⁴ Task Force on the Future of American Innovation cited by Rick Weiss, *The Shrinking Frontiers of Research*, Washington Post.

¹⁵ National Science Board, *The Science and Engineering Workforce, Realizing America's Potential*, page 9.

¹⁶ Mary Beth Marklein, "Fewer Foreigners Enrolling in Grad School," USA Today, September 7, 2004.

overwhelmingly believe that today's immigration policies have simply made America less competitive.¹⁷ In particular, foreign citizens that wish to build their business in the United States do not have options for doing so unless they have family located here, have sizeable amounts of money, or can devote only part of their time to their startup.

UNDERSTANDING THE CURRENT IMMIGRATION REGIME FOR IMMIGRANT-FOUNDERS

United States visas were issued to 6.6 million foreign nationals visiting the United States and to 470 thousand immigrants in 2008.¹⁸ There are nearly 75 different categories of visas issued to foreign citizens intending to gain entry into the United States.¹⁹ There are two main types of U.S. visas:

- **Immigrant visas** – For travel to live permanently in the U.S.
- **Nonimmigrant visas** – For travel to the U.S. on a temporary basis.

Foreign citizens that desire to permanently immigrate to the United States will need to apply for an immigrant visa to immigrate to the United States. In general, to apply for an immigrant visa, a foreign citizen must be sponsored by a U.S. citizen relative(s), U.S. lawful permanent resident, or by a prospective employer, and be the beneficiary of an approved petition.²⁰

Nonimmigrant visas are for international travelers (citizens of other countries), coming to the U.S. temporarily. A nonimmigrant visa will allow a foreign citizen to travel to a U.S. port-of-entry and request permission of the Department of Homeland Security immigration inspector to enter the U.S. Different types of nonimmigrant visas will be issued depending on the purpose of the foreign citizen's travel to the United States, including tourism, business, medical treatment and certain types of temporary work. Nonimmigrant visas are, by definition, temporary, and are not intended to be a mechanism for immigration to the United States.²¹

Certain types of visas, including the H-1B visa category, are described as dual-intent visas, whereby the recipient may be a holder of a nonimmigrant visa, but has the intention to live permanently in the U.S.²²

The following sections are designed to provide a summary of certain immigration programs that currently exist and are commonly used in certain circumstances relevant to this report, and are not intended to be an exhaustive description of immigration matters. The following sections may discuss certain options that Immigrant-Founders may look to in order to obtain legal status within the United States.

¹⁷ *Id.*

¹⁸ http://travel.state.gov/visa/frvi/statistics/statistics_1476.html (last accessed: November 30, 2009).

¹⁹ http://travel.state.gov/visa/visa_1750.html (last accessed: November 30, 2009).

²⁰ http://travel.state.gov/visa/immigrants/immigrants_1340.html (last accessed: November 30, 2009).

²¹ http://travel.state.gov/visa/temp/temp_1305.html (last accessed: November 30, 2009).

²² http://travel.state.gov/visa/temp/types/types_1271.html (last accessed: November 30, 2009).

IMMIGRANT VISAS

Nearly every newly-minted immigrant that has obtained a permanent residency status in the United States will confirm that the immigration process is both challenging and time-consuming. The process is not meant to be easy, but is designed to provide a system to allocate access to the United States based on factors such as family relationships, employer sponsorships and historical imbalances of immigration to the United States. In any case, an immigrant (known as the alien beneficiary) will typically go through a three-step process to gain permanent residency:

1. First, an immigrant petition must be submitted on behalf of the applicant to the U.S. Citizenship and Immigration Services (USCIS). The USCIS will approve the immigrant petition based on the proper submission of the petition by a qualifying relative, an employer, or the applicant himself.
2. Second, a visa number will be assigned to the applicant once one is available (unless the applicant is an “immediate relative,” as discussed below). A visa number might not be immediately available even if the USCIS approves the petition, because the amount of immigrant visa numbers is limited every year by quotas and further limitations based upon the applicant’s country of birth.
3. Third, once an immigrant visa number is available and assigned to the applicant, applicants residing in the U.S. will request the USCIS to adjust their current status to permanent resident status and applicants that are not currently residing in the U.S. will apply to the U.S. Department of State for an immigrant visa at the consulate before entering the United States.

The whole process to obtain permanent residency may take several years, depending on the type of immigrant category and the country of birth. There is no limit on the number of immediate relatives (spouses, minor children & parents) of U.S. citizens that can receive visa numbers each year. In addition, up to 226,000 family-sponsored visa numbers will be given annually to non-immediate family petitioners, based on quotas for certain family-sponsored categories.²³ Outside of family-sponsored petitions, many applicants will attempt to obtain residency under employer-sponsored petitions – nearly 140,000 visa numbers are available annually in this category based on current quota figures.²⁴ Employer-sponsored petitions fall within a number of categories including petitions based on factors including educational backgrounds, high-need skills, and other categories. For applicants from countries that have not historically provided large numbers of immigrants to the United States, up to 55,000 additional diversity-based visa numbers are available.²⁵

Application process for employer-sponsored visa

²³ http://travel.state.gov/visa/frvi/bulletin/bulletin_4252.html (last accessed: November 30, 2009).

²⁴ *Id.*

²⁵ *Id.*

Many foreign citizens will elect to have an employer “sponsor” a potential applicant in connection with a presumed future job. For this employer-sponsored approach, the employer will submit a petition to the USCIS on behalf of the foreign citizen, in a similar manner as discussed previously. For employer-sponsored petitions, the employer will be asked to submit a labor certification obtained from the Department of Labor.²⁶ In connection with the labor certification, the employer must legally prove that it has a need to hire an alien for a specific position and that there is no minimally qualified U.S. citizen or permanent residents available to fill that position. In order to prove the need for hiring an alien, the employer will be asked to provide evidence of advertising for the specific position, details on the specific skill requirements particular to the job, a verification of the prevailing wage for the position, and the employer’s ability to pay that prevailing wage to the alien.

After the process is complete and the alien has obtained a visa number and permanent residency status, the alien is expected to take the certified job offered by the employer to substantiate his or her immigrant status, since the application ultimately rests on the alien’s employment with that company in that particular position.

EB-5 Immigrant Investor Visa

One particular type of employer-sponsored visa, the EB-5 immigrant investor visa category, was enacted in the Immigration Act of 1990 in order to attract foreign capital to the U.S. and create jobs for American workers in the process.²⁷ To obtain an EB-5 immigrant investor visa, the following requirements must be met: (1) the alien must establish a business or invest in an existing business that was created or restructured after November 19, 1990; (2) the alien must have invested \$1 million (\$500,000 in certain circumstances) in the business; and (3) the business must create full-time employment for at least ten U.S. workers.²⁸

The EB-5 visa category allows a recipient to participate or develop any type of commercial enterprise the recipient chooses in any location within the United States (subject for certain recipients to restrictions to certain targeted areas). Annually, 10,000 EB-5 visa numbers are available, with half reserved for recipients that elect to participate in the pilot program option aimed to target investments into certain regional areas.

NONIMMIGRANT VISAS

Nonimmigrant visas are for international travelers (citizens of other countries) coming to the U.S. temporarily. Different types of nonimmigrant visas will be issued depending on the purpose of the foreign citizen’s purposes for the travel to the United States, including tourism, business, medical treatment and certain types of temporary work.²⁹

²⁶ <http://www.foreignlaborcert.doleta.gov/> (last accessed: November 30, 2009).

²⁷ http://travel.state.gov/visa/immigrants/types/types_1323.html (last accessed: November 30, 2009).

²⁸ *Id.*

²⁹ http://travel.state.gov/visa/temp/temp_1305.html (last accessed: November 30, 2009).

The following nonimmigrant visa programs are currently being utilized in connection with foreign citizens engaging in business activities on their travels to the United States.

E-2 Nonimmigrant Visa

A foreign citizen can obtain an E-2 visa, or a treaty investor visa, if the foreign citizen is a citizen of any of the approximately 65 countries with commercial treaties with the United States. An E-2 visa must be renewed every other year, but there is no limit to how many times one can renew.

In order to obtain an E-2 visa, a foreign citizen must actively manage the business and make a substantial investment in it. There is not a codified definition of a substantial investment, but there are various rules of thumb by experts in the field. Depending on the percentage ownership of the business, an investment of between \$40,000 and \$1,000,000 may be deemed to be “substantial.”^{30 31 32}

B-1 Nonimmigrant Visa

A B-1 visa allows a foreign citizen to travel to the United States “to consult with business associates, travel for a scientific, educational, professional or business convention, or conference on specific dates, settle an estate, or negotiate a contract.”³³ The standard length of entry under a B-1 visa varies depending on the purpose of entry – so is oftentimes between three and six months in length, but can be shorter or longer depending on a determination by the granting authority.

H-1B Nonimmigrant Visa

The H-1B visa permits certain U.S. employers to temporarily employ foreign workers in specialty occupations. The duration of an H-1B visa is three years, which may be extended for up to six years. The term “specialty occupation” is limited to occupations that require theoretical and practical application of a body of highly specialized knowledge in a field of human endeavor³⁴ including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, biotechnology, medicine and health, education, law, accounting, business specialties, theology, and the arts, and requiring the attainment of a bachelor’s degree or its equivalent as a minimum.³⁵ The recipient of an H-1B visa must hold at least a bachelor’s degree or its equivalent and state licensure, if required to practice in that field.

H-1B work-authorization is strictly limited to employment by the sponsoring employer, which limits the ability of an individual to work for another company in addition to or other than the sponsoring employer. If a foreign worker in H-1B status quits or is

³⁰ http://e2visalawyer.net/substantial_investment.htm (last accessed: November 30, 2009).

³¹ http://www.inteconlaw.com/e-2_visa.htm (last accessed: November 30, 2009).

³² <http://www.usimmhelp.com/id91.html> (last accessed: November 30, 2009).

³³ http://travel.state.gov/visa/temp/types/types_1262.html (last accessed: November 30, 2009).

³⁴ 8 U.S.C. 1184(i)(1)(A).

³⁵ 8 U.S.C. 1184(i)(1)(B).

dismissed from the sponsoring employer, the worker can find another employer, apply for a change of status to another non-immigrant status, or must leave the U.S.

THE CHALLENGE FOR IMMIGRANT-FOUNDERS IN THE CURRENT IMMIGRATION SYSTEM

The current immigration regime does not provide a clear and consistent approach whereby an Immigrant-Founder can obtain legal status in the United States. While certain Immigrant-Founders may be able to identify a unique set of facts under which they can obtain legal status and build their business in the United States, these facts are dependent upon the Immigrant-Founder having family connections, obtaining other full-time employment in the United States, or having substantial personal resources to invest into a business in the United States. As a result, a founder that does not have the necessary connections or resources may have the concept for the next Amgen, FedEx or Google, and have identified investors willing to help build and support the enterprise, but will be unable to gain legal status in the United States. Under our current immigration system, businesses that stand ready to help our economy (and in fact create jobs) are oftentimes being forced to locate in other countries around the globe.

In particular, foreign citizens that are educated in U.S. colleges and universities may be unable to apply their education, knowledge and resources into the development of a business that benefits the U.S. economy. For those foreign citizens that attend public collegiate institutions, U.S. tax dollars are being used to educate someone that will ultimately add value to another country's economy. Additionally, tax-exempt donations are made to our higher educational system, benefiting these individuals that are unable (although many times willing) to build a business in the U.S. In any case, many of the current immigration options favor individuals that have substantial personal financial resources, which may not be the case for many of the best and brightest young entrepreneurs coming from foreign countries.

As discussed in the previous section, there are numerous visa categories. However, this report identifies certain commonly-used categories that have been discussed as options for an Immigrant-Founder. The sections below discuss the key limitations and obstacles to the use of each of these categories for Immigrant-Founders.

Immigrant Visas

Family-based sponsors. The obvious limitation of the family-based sponsor is that not all Immigrant-Founders have immediate family members who can provide them an immediate immigrant visa, and for non-immediate family, the time delay may be substantial.

Employer-based sponsors. In the event an Immigrant-Founder is able to obtain an employer-based sponsor, the Immigrant-Founder may only be able to engage with or work on the startup business part-time, which may eliminate the possibility of the business becoming successful.

EB-5 immigrant investor visas. The limitation for an Immigrant-Founder is the requirement that \$1,000,000 (or in certain cases \$500,000) of capital investment by the Immigrant-Founder.

Nonimmigrant Visas

In the case of all nonimmigrant visas, the Immigrant-Founder is limited in his or her ability to build the business with any certainty. Many customers, investors, employees or other partners will be hesitant or even unwilling to work with an organization that has no certainty that the key employees will be able to stay and work in the United States.

E-2 Nonimmigrant Visa. To the extent an Immigrant-Founder is able to invest the necessary capital into a business; this may be a viable option. However, many Immigrant-Founders do not have the necessary capital and/or intend to obtain capital from outside investors including private individuals and institutional investors. Some have suggested that it may be possible for the Immigrant-Founder to argue that deferred salary and cash invested into the Immigrant-Founder's business is in fact substantial.³⁶ While this approach may work in certain circumstances, we are unable to locate a ruling or other evidence that this approach is itself sufficient or applicable in the case of typical Immigrant-Founders.

B-1 Nonimmigrant Visa. The B-1 visa typically allows only a three- to six-month maximum stay and is inapplicable for forming or building a business.

H-1B Nonimmigrant Visa. In the event an individual who is legally in the United States pursuant to an H-1B visa wishes to start a new enterprise while continuing his or her full-time employment at the sponsor, there are material limitations to and restrictions on an Immigrant-Founder. The recipient of the H-1B visa may start or form the business and may even be allowed to have a role on the board of directors, but is unable to "work" for his or her startup company. Additionally, a corporation or limited liability company could, in certain circumstances, file an H-1B visa for the employer/owner. However, the Immigrant-Founder would be required to immediately perform services in a specialty occupation, and in the event the startup is not viable for the Immigrant-Founder to immediately perform services, the petition may be rejected.

PROPOSED REFORMS TO IMMIGRATION REGIME FOR IMMIGRANT-FOUNDERS

Due to the inadequacies described in the foregoing section, it is necessary to create a type of visa that will be effective in the context of an Immigrant-Founder starting a new business backed by significant investment, or in other words, a Startup Visa. An effective Startup Visa requires several key characteristics to be effective. The Startup

³⁶ <http://answers.onstartups.com/questions/379/in-lieu-of-an-h-1b-visa-what-other-visas-can-be-a-founders-visa> (last accessed: November 30, 2009). In addition, attempting to use an Immigrant-Founder's contribution of technology or other startup property to the new business in order to meet the necessary investment levels might result in the Immigrant-Founder incurring prohibitive tax liability.

Visa should provide an effective mechanism for an Immigrant-Founder to enter the U.S. and remain in the U.S. for an appropriate time in order to give the entrepreneur and the investors the necessary comfort that a successful business is a reasonable possibility. The Startup Visa should also be designed to be available only to those non-residents that build bona fide successful businesses that spur innovation and employment in the U.S.

These concerns are principally addressed by (1) making sure the Startup Visa can be issued in a timely manner according to clear, objective criteria that are reasonably calculated to select those businesses that are likely to meet the goals of the program, and (2) ensuring the entrepreneur can maintain and renew the Startup Visa or obtain permanent residency when operating a successful business that continues to meet the goals of the program.

FOR MORE INFORMATION ON THE STARTUP VISA

For more information and links to articles and additional materials on the startup founder visa initiative, visit www.startupvisa.com.

Timing and Criteria for Issuing the Startup Visa

The timing and criteria for issuing a Startup Visa should be calibrated to permit the visa to be used in the context of an investment by U.S. investors into a new business that is likely to spur innovation and employment in the U.S. To do this, the application process should be quick, easy to understand and should identify and select Immigrant-Founder based on appropriate criteria that are as objective as possible.

The Startup Visa should be available through a clear application process that leads to issuing a visa in a timely manner. As discussed above, the timing and complexity of the current visa process are reasons that existing visas are inadequate to meet the needs of immigrant founders seeking investment. For example, even assuming an Immigrant-Founder could overcome the other inherent limitations of the H-1B Visa, the process would be unwieldy in the context of founding a business. H-1B Visa submissions can (and often must) be submitted beginning on April 1 of a particular year, but they are only effective for employment beginning on October 1.³⁷

Procedures that yield uncertain or delayed results prevent investments. Investors in an early stage startup company are likely to invest in a particular founder or group of

³⁷ See http://travel.state.gov/visa/temp/types/types_1271.html (indicating that non-immigrant visa applications may be filed no earlier than six months prior to the date the proposed employment will begin)(last accessed: December 5, 2009). The H-1B Visa cap resets at the beginning of the U.S. Federal Government's fiscal year on October 1. Historically, the H-1B visa cap has been reached very quickly, so application as early as possible is requisite. See Anne Broache, "Does H-1B Surge Mean Cap Should Be Raised," http://news.cnet.com/Does-H-1B-surge-mean-cap-should-be-raised/2100-1022_3-6173386.html (describing the recent history of the H-1B cap)(last accessed December 5, 2009).

founders in addition to the business plan or technology.³⁸ Also, startup companies often derive a significant portion of their potential from their ability to move quickly and adapt flexibly. It is impracticable to put a new business on hold for several months while the founder waits for a visa to become effective or to rely on a process that may or may not ever provide a long-term visa. Having a quick, clear application process with criteria that are as objective as possible will reduce uncertainty and delay for investors and founders and allow the visa process to proceed at a speed that meets the timing of the investment process.

The requirements for obtaining the visa should also help ensure that it is being used by the founder of a real business that is likely to spur innovation and employment. Some mechanism should exist for vetting the proposed business. One method would be to provide for review by a government or government selected panel, but this would be costly or lead to back-log.

Another method would be to rely on the “invisible hand” of the market to select high potential businesses. For example, the program can designate specific types of investors that can “sponsor” the Startup Visa by making an investment of an appropriate size. Acceptable investors could include repeat investors such as venture capital funds and frequent private, individual investors (referred to as “angel” investors). As repeat investors in early-stage, private businesses, such investors are likely to have the sophistication and investment discipline necessary to identify businesses that can grow, innovate and create jobs. Requiring significant investment amounts helps make sure bona fide investment is occurring.³⁹

Initial Duration and Renewal and Scope of the Visa

The Startup Visa should also be designed to encourage Immigrant-Founder and investors to take the risk of investing time and money into the business. The visa should give the Immigrant-Founder adequate time to prove the value of a new business, and to allow for the Immigrant-Founder’s continued involvement if the business is meeting the goals of the program. The initial duration and availability of renewal and transition to permanent residency should be calibrated with those goals in mind.⁴⁰

The Immigrant-Founder and the investors will want to know that the Immigrant-Founder will have enough time to reasonably overcome the challenges to which new businesses are subject, or they will not be willing to make the commitment to proceed with the investment of time and money in the business. Many businesses, especially those in high technology fields, require extended periods of time to grow and adapt to challenges. The

³⁸ “More than one venture capitalist has said that the three most important factors in making an investment are ‘people, people, and people.’” The Entrepreneur’s Guide to Business Law, 3rd Ed., Constance E. Bagley and Craig E. Dauchy, p.440 (Thompson, West, 2008).

³⁹ Unless the type of investor and investment are properly defined, several “founders” could funnel money through a related investment entity and effectively buy a visa.

⁴⁰ The scope of the visa should also include the immediate family of the founder, which will make possible a long-term personal investment of time by the founder to grow the new business in a permanent manner.

Immigrant-Founder must be able to remain in the U.S. to be involved in the company long enough to have a reasonable chance to meet and adapt to those challenges.⁴¹

The initial duration and possibility of renewal and transition to permanent residency should all be designed to encourage the Immigrant-Founder and investors to commit to the business. They should allow an Immigrant-Founder who is furthering the program's goals to stay in the U.S. in order to continue to build the business. At the same time, the time periods and renewal criteria should give incentive to the Immigrant-Founder to quickly develop the business and spur innovation and employment. Once the initial period expires, clear criteria that are as objective as possible should be used to determine whether to extend the visa. If a business is not meeting those goals, renewal should not be allowed.

The Startup Visa should also be designed to provide a path to permanent residency for the Immigrant-Founder that meets appropriate criteria. This will provide added security to the Immigrant-Founder and investors that an Immigrant-Founder achieving the program's goals will not be arbitrarily required to leave the country and will serve as a strong incentive for persons willing to make a long term investment in growing a business to consider doing so in the United States. As an immigrant visa, the EB-5 visa already provides the concept of transitioning from conditional to permanent residency status. The Startup Visa could use concepts similar to those already in place with other visa programs.

For example, an initial period of one to two years would be likely to give an Immigrant-Founder the opportunity to prove a business concept while giving incentive to grow the business aggressively. Once the initial period has expired, criteria such as number of full time employees, additional significant equity investments by appropriate investors and revenues or profitability could be used to identify businesses that remain likely to spur innovation and employment. Reasonably clear criteria such as these would both provide the founder and investor with confidence that the founder could stay involved in a viable business while encouraging the founder to meet the goals of the program and helping ensure that Startup Visas would only be maintained if acceptable progress is made. Similar criteria could be used to determine when to transition to permanent residency.

One Potential Proposed Solution

One example of a proposal that would meet the requirements described above is a bill soon to be proposed by U.S. Congressman Jared Polis of Colorado (the "***Polis Bill***"). The Polis Bill provides for amendments to the EB-5 Visa program in order to allow

⁴¹ Indeed, the common practice of imposing two- to four-year vesting on founder equity (either on the founders' own initiative or at the request of investors) is specifically designed to ensure that founders are available for the extended time that is usually necessary to make a startup venture succeed. *See* Bagley and Dauchey, at 93 (discussing founder equity vesting).

Immigrant-Founder to obtain an EB-5 Visa in connection with specified investments from qualified investment companies or qualified angel investors.⁴²

The Polis Bill seeks to provide a quick, clear application process that gives Startup Visas in situations where the Immigrant-Founder's business is likely to create innovation and new jobs. The bill as currently discussed will provide a process for quickly issuing a visa to qualified applicants, which avoids delays that might prevent a successful investment. The bill would allow the Immigrant-Founder to pay a \$2,500 fee to expedite review and have a determination of the application within 60 days, which would help meet the needs of obtaining the visa in the context of an impending investment in the new business.

The Polis Bill also uses criteria based on investor identity and investment size to select Immigrant-Founders proposing appropriate businesses for the Startup Visa. The bill extends the EB-5 visa to immigrants that can show they are receiving an investment of \$250,000 from a "qualified venture capital operating company" or \$100,000 from a "qualified angel investor" for the purpose of engaging in a new commercial enterprise.

A qualified venture capital operating company is defined as a registered or unregistered investment company that is organized or incorporated and domiciled in the United States of which a majority of the managing directors are citizens or permanent residents of the United States.⁴³ A qualified angel investor is defined as a private individual or married couple that are U.S. citizens or permanent residents investing personal assets for their own account either in their individual names or an entity wholly owned by such private individual or couple and that have made at least five angel investments totaling at least \$250,000 in the three years preceding the qualified angel investor's sponsorship of an alien entrepreneur seeking permanent residency status. An "angel investment" is defined as an investment made into an entity (a) not previously controlled or owned by the investor or any of the investor's immediate family and (b) that employs on a full time basis 4 or more U.S. citizens or permanent residents within the 1 year period following the investment. Specifying the required investment size and requiring sophisticated investors would help ensure that the founder's business is of the type likely to spur innovation and create jobs.

The Polis Bill also seeks to give the Immigrant-Founders and investors comfort that the visa will extend to an appropriate scope and will remain in place for businesses that meet the program's goals and the Immigrant-Founder's visa will not be removed prematurely or arbitrarily. The bill allows for the spouse and children of the immigrant founder to receive visas at the same time as the founder. Under the EB-5 visa regulations (as amended by the Polis Bill) the visa may be extended or made permanent if, among other things, the Immigrant-Founder's business creates at least 5 new full-time jobs, raises at least \$1,000,000 in capital or generates a profit and at least \$1,000,000 in total revenue during the first two years. These criteria are designed to identify businesses that are

⁴² As of the date of this draft, the bill in question has not yet been finalized and submitted by Congressman Polis, but is anticipated to be formally proposed to Congress in the near future.

⁴³ The bill currently refers to unregistered investment companies that are unregistered by virtue of exemptions provided in Sections 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940. Most traditional venture capital funds are unregistered investment companies by virtue of these exemptions.

innovating (as shown by attracting additional investment or revenue generation) and creating employment. This is intended to help insure to Immigrant-Founders and investors that the visa may be continued for successful businesses, while preventing founders that have not made significant progress from renewing the visa.⁴⁴

In addition, the EB-5 visa provides for transition to permanent residency status, which gives further assurance to the Immigrant-Founder and investors that the founder can continue to serve the company in an uninterrupted manner if the business is successful.

The Polis Bill is one example of how to provide a Startup Visa that accommodates the timing needs of an investment in a new company and to provide a proper scope and confidence that the visa will remain available for founders that have started appropriate businesses. Its provisions regarding criteria for issuance, renewal and transition to permanent residency are designed to ensure these things. The bill also uses objective criteria based on the type of investor and size of investment in order to select Immigrant-Founders that are creating businesses that will spur innovation and employment.

⁴⁴ The Polis Bill also provides for an extension beyond the two years “if the applicant demonstrates that he has attempted to follow his business model in good faith, provides an explanation for the delay in filing the petition that is based on circumstances outside of his control, and demonstrates that such circumstances will be able to be resolved within the specified period.” Section 7.

**ABA/YLD RECOMMENDATION
GENERAL INFORMATION FORM**

SUBMITTING ENTITY: [*]
SUBMITTED BY: Eric Koester

1. SUMMARY OF RECOMMENDATIONS:

The ABA supports full implementation of legislation by Congress to provide for the reformation of the EB-5 Visa Program (or similar creation, reformation and/or restructuring of the current U.S. immigration regime) to provide for a mechanism whereby immigrant-founders of businesses can obtain legal status in the U.S.

2. DATE OF APPROVAL BY SUBMITTING ENTITY:

[*].

3. HAS THIS OR A SIMILAR RECOMMENDATION BEEN SUBMITTED TO THE ASSEMBLY OR ABA PREVIOUSLY?

No.

4. ARE THERE ANY DIVISION OR ABA POLICIES THAT ARE RELEVANT TO THIS RECOMMENDATION AND, IF SO, WOULD THEY BE AFFECTED BY ITS ADOPTION?

In 2006, the House of Delegates adopted eight policies to improve the current immigration system (recommendations 107A-G and 300). The recommended resolution is consistent with the 2006 policies and can be included as a component of the comprehensive immigration reform proposed in such policies. This recommendation does not conflict with the aforementioned policies of the ABA.

5. DOES THIS RECOMMENDATION REQUIRE IMMEDIATE ACTION AT THE NEXT ASSEMBLY? IF SO, WHY?

The 2010 Congressional legislative agenda is anticipated to address immigration reform, which provides a unique window of opportunity for the ABA to take a position in support of a reform of immigration for individuals involved in business creation.

6. STATUS OF LEGISLATION (IF APPLICABLE):

The recommendation supports full implementation of the H.R. _____ which provides for the reformation of the EB-5 Visa, or a similar reformation legislative approach.

7. COST TO THE ASSOCIATION:

None.

8. DISCLOSURE OF CONFLICT OF INTEREST (IF APPLICABLE):

None.

9. REFERRALS:

Referred to the following:

10. CONTACT PERSON (WHO WILL PRESENT THE REPORT TO THE EXECUTIVE COUNCIL AND/OR ASSEMBLY)

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