

“If You Want Something New, You Have to Stop Doing Something Old”^{*} – Innovative Visa Options for Immigrant Entrepreneurs

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Introduction

The United States lacks a specific visa category for international entrepreneurs. Thus, such individuals must work within the existing visa framework. No one option is ideal for all international entrepreneurs, so each person's situation must be carefully analyzed to determine which option may work best. This article summarizes eight nonimmigrant visa categories and how they might apply to international entrepreneurs.

As background, U.S. immigration laws bar foreign nationals from engaging in activities inconsistent with the purpose of their visa. In this sense, even passive investments and volunteer work can be problematic if they become a central part of a foreign national's life in the United States. Each visa is issued for a particular purpose, and visa holders are expected to spend the majority of their time engaged in the activities for which the visa was issued. Even individuals who hold visas that grant specific work authorization should avoid activities outside the scope of employment authorized under their visa category.

Before discussing potential immigration strategies for international entrepreneurs, we take a step back and review the idea of “employment” in immigration law. Many activities 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 paid for these services. Remuneration can include housing, clothing, food, or other benefits. Accepting

any kind of remuneration for service can result in a violation of visa status if done without work authorization. The definition of employment for immigration purposes is at 8 C.F.R. § 274a.1(h). Subsection (12) lists the classes of visas that provide work authorization.

Volunteer work: Work authorization is not required for volunteer work. However, state labor and worker's compensation laws generally do not allow someone to “volunteer” in a position that is usually paid. The federal government is concerned about unauthorized foreign workers taking jobs away from U.S. workers. Just because an employer is willing to allow a foreign national to volunteer does not mean that the activity has no risk for that individual's visa status.

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:

- In *Bhakta v. Immigration & Naturalization Service*, 667 F.2d 771 (9th Cir. 1981), the court found a foreign national had not engaged in “unauthorized employment” when he owned a motel chain.
- In *Wettasinghe v. United States Department of Justice, Immigration & Naturalization Service*, 702 F.2d 641 (6th Cir. 1983), the court found a violation of status where a student purchased

^{*} Peter Drucker, *Austrian-born entrepreneur, quoted in Peter Shore, These 10 Peter Drucker Quotes May Change Your World* (Sept. 16, 2014), <https://www.entrepreneur.com/article/237484>

ice cream trucks and ice cream and leased them to vendors to sell, while also assisting where needed.

In the *Wettasinghe* decision, 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: This is not allowed. Any work done while in the United States, even if for a foreign company and even if paid to a foreign bank account, still counts as "employment" in the United States. Immigration laws regulate what someone does while physically in the United States, and do not apply if someone is physically out of the United States. This is one of the few bright line rules in this gray area.

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.

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

The U.S. government can also find out about unauthorized work through tax returns (for example, if used to support a green card application), or through a resume or a sentence in a visa support letter that is not carefully reviewed. The U.S. government is also increasingly using the Internet to search for unauthorized work. If the business has a website or a web presence, the 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 potential problems.

In summary, there is no bright line to delineate 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 visa?

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 allows working.

1. E-2 Visas for Entrepreneurial Investors

The basic requirements for an E-2 visa are:

- The applicant must be a citizen of a treaty country;
- The investment must be substantial based on the market value of the existing business or the market assessment of the capital needed to establish and launch the business;
- 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 fifty percent or more in the investment and intends to develop and direct the enterprise; and
- The enterprise must be more than marginal.

These requirements are detailed 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. See <https://travel.state.gov/content/visas/en/fees/treaty.html> for a list of countries with visa treaties. Some major countries, including Brazil, Russia, India, and mainland China, do not have such treaties.

The investment must be substantial: One of the biggest hurdles in obtaining an E-2 visa is whether the applicant is making a "substantial" investment. 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.

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.

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 also 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. 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. 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.

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 an 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.

The enterprise must be more than marginal: "Marginality" means that the investment cannot exist solely to allow the E-2 investor to make a living. In essence, the investment must create jobs for Americans. Those jobs can be direct (employees, either full or part-time), indirect (contractors), or induced (third party employment). For example, an E-2 entrepreneur may contract with a third party to provide information technology services, where an annual payment might exceed \$100,000. Arguably, that third party has employees doing the work.

E-2 investments are not formulaic. As demonstrated above, there is no minimum investment or number of employees, and no required size or type of business. While some requirements can be very restrictive (the applicant must be a citizen of a treaty country and the company must be at least fifty percent owned by nationals of the treaty country), if you have an idea and the entrepreneurial drive to execute, along with access to capital and are a national of an E-2 treaty country, you can potentially build an E-2 case.¹

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

¹ See generally <http://www.newatlanticmanagement.com/e-visas-webarticle-reprint2010.pdf>.

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.²

E-2s can be a valuable tool for international entrepreneurs if there is a treaty with the country of citizenship, 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 1.1 million international students are studying in the United States. Many of them are catching the entrepreneurial spirit. This section of the article discusses the limits on employment for international students and strategies for nonimmigrant entrepreneurs holding the most common type of student visa: the F-1.

Historically, the U.S. government has discouraged using student status as a vehicle for working. The concern was that a student could nominally sign up for classes, but really the primary purpose for being in the United States was to make money. In most cases, such students were involved with jobs that had nothing to do with their academics - working in a restaurant, etc. Therefore, students are now 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. 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).

Making a change can be a difficult decision. It is generally easier to study on a work visa than work on a

student visa. However, leaving a student visa for a speculative entrepreneurial venture can mean losing an F-1 visa's CPT and OPT benefits.

A student with a good idea for a startup business makes a useful example. While on the F-1 student visa, the student cannot work for an outside business unless there is specific work authorization from the foreign student adviser. F-1 employment rules are quite strict. There are limited situations where this kind of work might be authorized. However, 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, 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.

Then, post-graduation OPT work authorization may provide a good window of opportunity to open the business, work on developing it, and receive revenue - 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 visas, and use the OPT time to set up the other visa as the company grows. This may be a challenge, but it is always easier if visa options are considered from the time the idea for a new business is first discussed.

New STEM OPT rules issued in March 2016³ make it difficult for a foreign co-founder to actively manage and direct his or her startup. The only open and secure window is the first twelve months of OPT, where self-employment is still allowed. During that time an F-1 student can work for his or startup and develop a visa strategy after OPT ends. The additional twenty-four months available under the new STEM rules are more restrictive. They require a written training program, employer and employee attestations, additional reporting requirements to schools, possible government site visits, and an employer/employee relationship.

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

² For an audio discussion of business plans, see <https://soundcloud.com/curranandberger/aila-practicing-law-abroad>.

³ 81 Fed. Reg. 13,039 (Mar. 11, 2016), available at <https://www.federalregister.gov/articles/2016/03/11/2016-04828/improving-and-expanding-training-opportunities-for-f-1-nonimmigrant-students-with-stem-degrees-and>.

rights to fire the H-1B; employment contract; intellectual property (IP) assignment; etc., consistent with guidance for entrepreneurs issued by USCIS.⁴ This is discussed in more detail below.

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

An H-1B visa requires an employer-employee relationship. That makes it difficult for investors who want to run their own companies. Moreover, there is a limit of about 85,000 on the number of new H-1B visas that can be issued each year. USCIS received 236,000 petitions for new H-1B visas in the first week of April 2016, effectively making this category a lottery system. However, an H-1B allows for "dual intent," which eases travel restrictions for those applying for immigrant visas. An entrepreneur also has the flexibility of holding concurrent H-1Bs. Importantly, spouses and other dependent family members do not receive work authorization in H-4 status, but they may study. An H-1B visa is initially valid for up to three years, and can be extended for up to six years.

Because the H-1B requires a U.S. employer/petitioner to sponsor a beneficiary, entrepreneurs who are also majority or sole owners of U.S. startup companies historically have been discouraged from applying for H-1B status.⁵ Only recently has USCIS suggested solutions for demonstrating the qualifying employer-employee relationship in the context of potential 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 her employment. The company's controlling interest over the entrepreneur's employment may be established through evidence of a separate board of directors or other external factors (for example, other investors/shareholders) showing the right to control the terms and conditions of that 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 addition to proving a legitimate employer-employee 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 a bachelor's degree or equivalent. Given that the entrepreneur of a startup company may not have evidence of prior hires in the same or similar positions requiring a bachelor's degree or equivalent, as well as possibly a cloudy picture of her actual job duties, it may be a challenge to meet the specialty occupation requirement.

The H-1B visa also includes wage and worksite requirements to protect both the H-1B worker and similarly employed U.S. workers. For some entrepreneurs, these requirements may be quite expensive for the first few years of business growth. Many entrepreneurs may want to forgo a salary while developing their business. If they are in H-1B status, however, they must receive remuneration of a minimum standard. The employer must also maintain documentation of continued pay and employment.

As stated above, most new H-1B petitions are subject to an annual cap. For the past few years well under half of H-1B petitions have resulted in H-1B status. Institutions of higher education and affiliated nonprofits, as well as research organizations, are exempt from this quota. In some cases, entrepreneurs have obtained a "cap-exempt" H-1B through a university or research institution and then, based on USCIS guidance, have obtained a concurrent cap-subject H-1B to also work for an entrepreneurial venture.⁶ The concurrent H-1B must be for employment in furtherance of the cap-exempt employment. For example, a student working at a university as a post-doctorate research graduate in big data may obtain a concurrent cap-subject H-1B with a company working on big data or a related field.

Some universities such as the University of Massachusetts have formalized the concurrent H-1B process

⁴ U.S. Citizenship and Immigr. Servs., *Entrepreneur Pathways*, <https://www.uscis.gov/eir>.

⁵ 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 http://www.aila.org/downloads/aila_pubs/pinters/2015_Practice_Pointers_TOC.pdf.

⁶ For more about avoiding the H-1B cap, 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>. This is a complicated and ambiguous area of law, so each situation should be discussed carefully.

for a small number of entrepreneurs each year.⁷ U.S. Senator Charles Grassley wrote a letter to USCIS earlier this year expressing concerns about such a program,⁸ but to date there has been no follow-up, and these programs are operating in several states.⁹

USCIS has proposed a rule that would update and codify the H-1B cap exemption guidelines.¹⁰ As of the date of this article, that rule has not been finalized.

4. J-1 Visas for Exchange Visitors

The J-1 visa 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 a nonimmigrant to leave the United States for two years before pursuing an H-1B visa or permanent residence. 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.¹¹

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

5. L-1 Visas for Intracompany Transferees

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.

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.

⁷ See Venture Development Center, University of Massachusetts Boston, *Global Entrepreneur-in-Residence Program*, <http://vdc.umb.edu/geir/>.

⁸ Senator Chuck Grassley, *Grassley Concerned about H-1B "Hacking" to Circumvent Laws while USCIS Enables the Practice* (Mar. 1, 2016), <http://www.grassley.senate.gov/news/news-releases/grassley-concerned-about-h-1b-%E2%80%9Chacking%E2%80%9D-circumvent-laws-while-uscis-enables>

⁹ See, e.g., University of Colorado, *Global Entrepreneurs in Residence*, <http://www.colorado.edu/entrepreneurship/resources/global-entrepreneurs-residence>.

¹⁰ 80 Fed. Reg. 81,899 (Dec. 31, 2015) (proposed rule).

¹¹ 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/>.

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, cofounded 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 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 out of 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 Visas for Canadian and Mexican Entrepreneurs

The TN visa is well suited for Canadian and Mexican citizens seeking to work in one of the professional occupations listed in the North American Free Trade Agreement (NAFTA). 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 still only need the same information, but you'll have to schedule an 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 NAFTA regulations at 8 C.F.R. § 214.6. It gets trickier if:

- You don't have a bachelor's or higher degree specifically listed in the NAFTA 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.

An “employer” under NAFTA 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 NAFTA 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 NAFTA may limit individuals who possess a specific formal educational degree that is not on the list (e.g., visual arts degree), NAFTA regulations provide for expanded opportunities for both degreed and non-degreed applicants to obtain a TN visa.

NAFTA 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 NAFTA 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.

NAFTA 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 NAFTA regulations do not define “self-employment.”

However, NAFTA 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 Visas for Entrepreneurs with Extraordinary Ability

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, and be a judge of the work of others. 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. 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 residency, 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.

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 Visas for Visiting Entrepreneurs

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.

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 be 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.¹²

Conclusion

Because no visa category exists specifically for international entrepreneurs, they must figure out how to navigate the current immigration system. Legislation has been introduced in the U.S. Congress to establish a visa category specifically for investors. It is unlikely those bills will pass, however, until Congress enacts comprehensive immigration reform. The Obama administration is working on using its discretionary parole authority to support international entrepreneurs, but it is unclear when that will happen or what the parole guidelines will be.

As shown above, none of the nonimmigrant visa options discussed are straightforward for an international entrepreneur. Given this deficiency, some foreign nationals are unable to obtain a visa as the founder of a new enterprise in the United States. This problem is unfortunate, since immigrants are almost twice as likely as native-born Americans to start new businesses.¹³ As a result, international entrepreneurs must depend on advance planning, careful and expert

immigration advice, and creative solutions to realize their dreams in the United States.

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¹² For an annotated list of resources on the B visa, see <http://curranberger.com/images/article%205%20b-1%20annotated%20bibliography.pdf>.

¹³ Dane Stangler & Jason Wiens, *The Economic Case for Welcoming Immigrant Entrepreneurs* (Sept. 8, 2015), available at <http://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/the-economic-case-for-welcoming-immigrant-entrepreneurs>.

The coauthors are founding members of the U.S. Alliance for International Entrepreneurs (USAIE), 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 USAIE website is at <http://www.usaie.org>.

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