Visa Options for International Entrepreneurs

DAVID STRASHNOY
ATTORNEY AND FORMER CONSULAR OFFICER

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OPT and STEM OPT

- There is no U.S. visa category specifically for international startup founders, especially venture-backed. All existing categories are imperfect.

- F-1 Post-Completion OPT (and STEM OPT) is the most flexible visa status for graduating student entrepreneurs, and provides a runway to qualify for another visa type once the OPT period expires.

- OPT: Granted for one year, very flexible with type of work arrangements as long as related to area of study, can’t be unemployed more than 90 days

- STEM OPT: 24 month extension of OPT for STEM degree holders, E-verify for employer, bona fide employer-employee relationship and training program
Nonexempt H-1B petitions for industry are subject to an annual quota

- **65,000** H-1B slots available each fiscal year
- Plus **20,000** for applicants who earned a Master degree or higher from an accredited U.S. university
- Must show employer-employee relationship, so as start-up founder/exec you must show that you can be terminated. If you are CEO then you may have to prematurely set up a board with ability to terminate. Not ideal situation if CEO position is essential.

**New Process As of 2020**

- Lottery registration is March 1 to March 20. $10 to register.
- If picked in lottery, then submit petition.
- Work start date is **October 1**
H-1B Cap Usage
Can You Grab a Number?

- **85,000** numbers available
- Lottery makes H1-B option a non-ideal option for international entrepreneur
  - 2014 – **172,500** petitions submitted
  - 2015 – **233,500** petitions submitted
  - 2016 – **236,000** petitions submitted
  - 2017 – **199,000** petitions submitted
  - 2018 – **190,098** petitions submitted
  - 2019 – **201,011** petitions submitted
  - 2020 - ~**275,000** registrations (second lottery occurred)
H-1B Adjudication Issues

- Restrictive climate on all H-1 processing under Trump, we’ll soon find out if there are changes under Biden
- Position must be a “specialty occupation,” where there is a nexus between academic coursework and job duties. One must apply theoretical knowledge to the performance of job duties.
- Very detailed job duties are required; enhanced complexity
- Prevailing Wage
- Tough scrutiny on:
  - Level 1 Wages
  - Degree appears unrelated to the occupation – could be problematic for technical founder encumbering executive position without business degree or experience
O-1A - Extraordinary Ability – Science, Education, Business, Athletics

- Extraordinary ability means a level of expertise indicating that you are one of the small percentage who have arisen to the very top of the field.

- Must file a petition with USCIS containing extensive documentation

- Challenging for students right out of OPT but not impossible, need to start early on satisfying criteria

- Must have an employer
  - Cannot self-petition (although a company you own can serve as petitioner)

- Duration:
  - 3 year period
  - May extend beyond 3 years
O-1A - Extraordinary Ability

Major award (such as Nobel) or Three of the following criteria:

- Nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- Membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- Published material in professional or major trade publications or major media about the beneficiary, relating to the beneficiary’s work in the field;
- Participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization;
- Original scientific, scholarly, or business-related contributions of major significance in the field;
- Authorship of scholarly articles in the field, in professional journals, or other major media;
- Employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation; or
- Beneficiary has either commanded a high salary or will command a high salary or other remuneration for services, as evidenced by contracts or other reliable evidence.
E-2 Treaty Investor

- Available to citizens of certain countries that have treaties of commerce and navigation with the U.S.: (https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html)
- Investment Must be “Substantial” and “At Risk”
- Company can be Start-Up or Purchase of Existing Business
- Investor Must “Develop and Direct” a “Real and Operating” Company
- Company typically must have minimum 50% ownership by citizen or entity of treaty country for E-2
- May also qualify as employee of E-2 Company
- Spouse can obtain EAD
E-1 Treaty Trader

- E-1 Treaty Exists
- Includes trade in “services,”
- Volume of Trade is “Substantial”
- Over 50% of International Trade is Between U.S. and Treaty Country
- Company typically must have minimum 50% ownership by citizen or entity of treaty country for E-1
- May also qualify as employee of E-1 Company
- Spouse can obtain EAD
L-1A New Office – Intracompany Transferee

- For foreign employers seeking to send an employee to the United States as an executive or manager to establish a new office, the employer must also show that:
  - The employer has secured sufficient physical premises to house the new office;
  - The employee has been employed as an executive or manager for one continuous year in the three years preceding the filing of the petition; and
  - The intended U.S. office will support an executive or managerial position within one year of the approval of the petition.
Possible Legislation/Regulations

- International Entrepreneur Parole: Established at the end of Obama administration and then reversed during Trump administration. May come back during Biden administration.

- Regulation specifically tailored to realities of international entrepreneurs starting up venture capital backed businesses

- This was not a visa category, but a form of Parole, which is a discretionary benefit. Creation of new visa category would require legislation.
Questions?

david@strashnoylaw.com
https://strashnoylaw.com/
818-646-7350

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