

DAVID STRASHNOY LAW, PC

# Visa Options for International Entrepreneurs

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# OPT and STEM OPT

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- ▶ 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

# H-1Bs and Entrepreneurs

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- ▶ 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

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- ▶ 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

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- ▶ 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

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**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

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- ▶ 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

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- ▶ 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

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- ▶ 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.

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# Questions?

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