Visa Options for International Entrepreneurs

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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
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

USCIS has issued guidance recently suggesting that entrepreneurs that have raised some funding may be qualified

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
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.
Self-Petition Green Card Options

- **EB-2 - National Interest Waiver**
  - Proposed endeavor has both substantial merit and national importance
  - Well positioned to advance the proposed endeavor
  - Beneficial to the U.S. to waive the labor certification
  - Good option for start-up entrepreneurs with advanced degrees

- **EB1A – Extraordinary Ability**
  - Similar to O visa but higher evidentiary threshold

- **EB5 – Investor**
  - $800,000 minimum investment
  - Creation of 10 jobs
International Entrepreneur Parole

- Regulation specifically tailored to realities of international entrepreneurs starting up venture capital backed/high growth potential businesses. This has been newly revived by Biden administration.

- Not a visa category, but discretionary parole

- Must possess substantial ownership interest (10%) and have a central role in the start-up (i.e. co-founder executive)

- Significant public benefit as evidenced by receipt of qualifying private investments and/or public grants, or other evidence of start-up’s potential for growth

- 2.5 year initial parole period
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
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.
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. As CEO then you may have to set up a board with ability to terminate.
- Concurrent H1-B is possible
- **New Process As of 2020**
  - Lottery registration is in March every year. $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?

While 85,000 numbers are available; the number submitted each year is much higher.

- 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)
- 2021 - ~308,000 registrations
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
Questions?

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