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# 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

## 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
- 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

# 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.

# 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



## **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.

# H-1Bs and Entrepreneurs

- 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

# H-1B Adjudication Issues

- 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



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## Questions?

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