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U.S. Immigration Pathways 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

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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; preference for those with STEM fields
- 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

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International Entrepreneur Parole

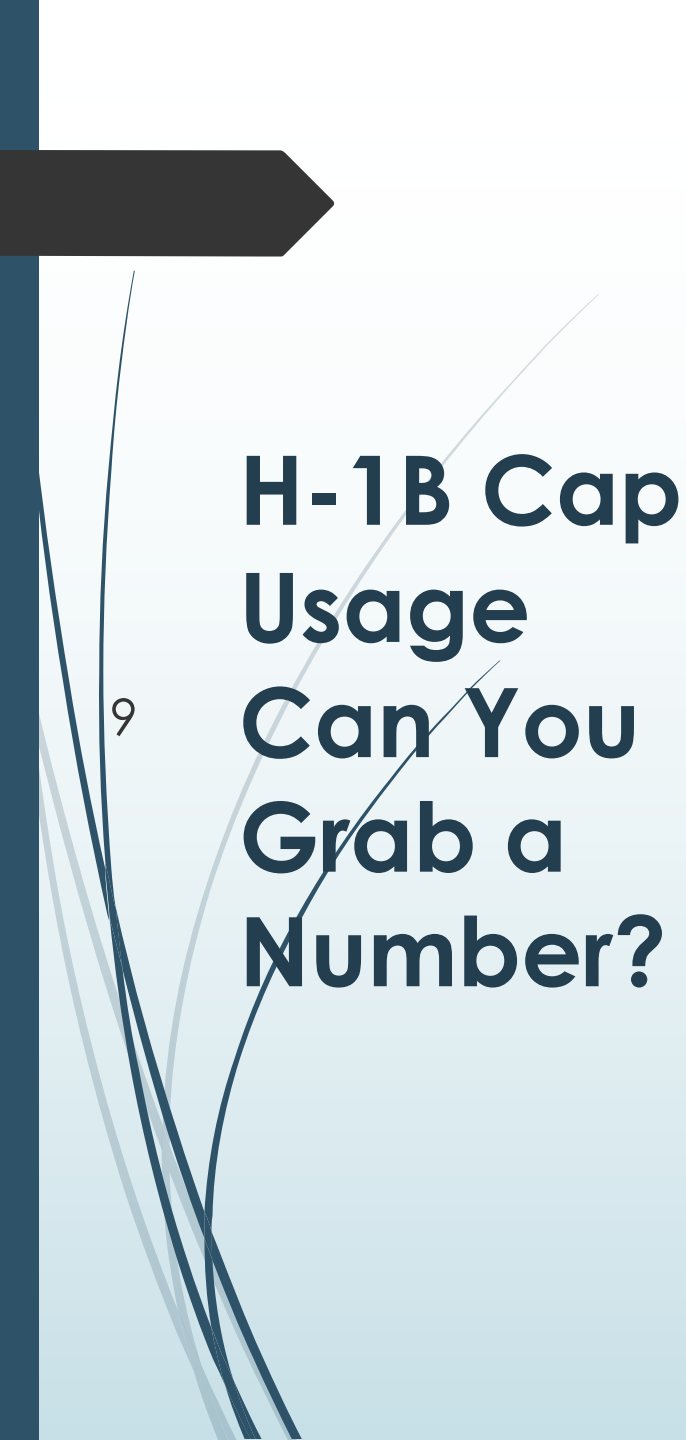
- ▶ Regulation specifically tailored to realities of international entrepreneurs starting up venture capital backed/high growth potential businesses. This has been newly revived by Biden administration. Could be reversed in potential Trump Administration.
- ▶ Not a visa category, but discretionary parole
- ▶ 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, renewable after that

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

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
 - ❑ Recent H1-B rule changes allow for H1-B sponsorship for beneficiaries that own a controlling share of the company. Initial authorization period is 18 months as well as first extension. Usual H1-B is for 3 years.
 - ❑ **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
- **2021** - **~308,000** registrations
- **2022** - **~484,000** registrations
- **2023** - **~780,000** 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

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.



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Questions?

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Free 15 min Consultation:
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Disclaimer:

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