IMMIGRATION ISSUES FOR ENTREPRENEURS AND START-UPS

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Biography

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Emory University (B.A.) 1984
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Eric S. Bord counsels clients on corporate immigration issues involving the recruitment, hiring, transfer, and retention of personnel worldwide. His clients include Fortune 50 industry leaders as well as promising start-ups. He also advises businesses on compliance and risk management in connection with their global immigration programs. This includes representing clients during immigration investigations, and conducting immigration due diligence for corporate transactions. Eric heads Morgan Lewis’s immigration compliance and risk management practice.
The Case for Immigrant Entrepreneurs

- 46 percent of America's top venture-funded companies have at least one immigrant founder.
- 74 percent have at least one immigrant holding a top-level management position (CEO, CTO, and VP were most common).
- Each company founded by an immigrant has already created, on average, about 150 jobs, and the companies in the study are still in their high-growth stage.
- The most common country of origin for immigrant founders is India, followed by Israel, Canada, Iran, and New Zealand.

Challenges for Immigrant Entrepreneurs

- No entrepreneur visa exists
- Available nonimmigrant work visas have limitations and constraints
- Most work visas require an employer-employee relationship
- Green cards generally take a long time to obtain
- Political stalemate on immigration reform
BRIDGING THE GAP

19th century immigration rules in a 21st century global economy

The world may be flat, but there are a lot of bumps on the immigration highway!

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Tonight’s Conversation

- Not looking to turn you into immigration experts
- Obstacles and challenges
- Get a sense of various options
- Begin to think about how you can achieve your goals in the current immigration environment
Overview of U.S. Immigration Structure

Types of Immigration to the U.S.

**PERMANENT**
("Permanent Resident" or "Green Card Holder")
- Employment
- Family
- Humanitarian

**TEMPORARY**
("Nonimmigrant Visa Holder")
- Visits
- Study
- Work
- Other
Immigration Jargon for Entrepreneurs

• Understanding Immigration Terms and Processes
  – Nonimmigrant Visas
    – NIV
    – Temporary
    – H-1B, F-1, TN, B-1
  – Extension of stay or extension of status (EOS)
  – Change of status (COS)

– Immigrant Visas
  – IV
  – Permanent Resident
  – Green Card
  – Adjustment of status (AOS)
What Is a Visa?

• Just a travel document.
  – Needed to board an aircraft or to cross the border
  – Permission to apply for admission at the border and request entry in a certain visa category

• NOT a guarantee of admission
• Once in the door, it’s the I-94!
  - A visa is not the same thing as an I-94
  - For nonimmigrants, I-94 is issued after visa is “inspected” at entry
  - Shows class of admission and period of admission
  - The I-94 is the “work-permit” and residence document for most nonimmigrants
Nonimmigrant Visas (NIV)

• Visas are an “Alphabet Soup”

• Categories arranged according to proposed activities in the U.S., from A (diplomats) to V certain relatives of green card holders)

• Temporary intent a key factor in many visa categories, including B, F and J, but not H-1B or L-1.
Basic Visa Classifications for an Entrepreneur

- Visitor visa (B-1) or Visa Waiver Program (VWP)
- F-1 OPT
- E-2 Treaty Investor
- H-1B Specialty Occupation
- TN, H-1B1 or E-3 Treaty-Based Professional
- L-1 Intracompany Transferee
- O-1 Extraordinary Ability
The F-1 Student Visa

• Reality Bites:
  – “There are no obviously efficient paths for F-1 students to start, own an
interest in, and actively participate in a start-up venture in the United States
for an extended period of time. As we have described, there are some steps
that may be pieced together with some limited success (such as CPT, OPT, or
OPT-STEM, with the possibility of both OPT and OPT-STEM transitioning into
the H-1B visa), but each option may be time-consuming and expensive to
achieve, and all currently suffer from uncertainty about the implications of a
foreign student entrepreneur being an active founder of a venture, as opposed
to someone else’s employee. To make matters worse, the level of complexity
and grey area determinations involved in the current state of the law create
an acute need for such entrepreneurs to obtain guidance from a licensed
attorney specializing in immigration law to help analyze these matters.
Unfortunately, such legal help often is beyond the resources of most students
and new graduates.”

• Source: Reforming Immigration Law to Allow More Foreign Student Entrepreneurs to Launch Job-Creating Ventures in
the United States; Anthony Luppino, John Norton, Malika Simmons; University of Missouri—Kansas City; August 2012
Scenario: Business Visitor (B-1)

- Visa Waiver Program
  - 37 participating countries
  - Admitted for up to 90 days
  - Requires ESTA registration

- B-1 Visa for Visitors
  - Admitted for up to 180 days and can be extended
  - Visas often valid for five years, sometimes up to ten
  - Not allowed to work
Scenario: Business Visitor (B-1)

- Permissible business visitor activities include:
  - engaging in commercial transactions that do not involve gainful employment in the United States;
  - negotiating contracts, typically for products or services manufactured or delivered abroad;
  - consulting with business associates;
  - litigating;
  - short-term training not involving productive labor or compensation;
  - participating in scientific, educational, professional, or business conventions, conferences, or seminars; or,
  - undertaking independent research.
Scenario: Business Visitor (B-1)

• Situations that may suggest “work” include:
  – an individual U.S. office or workstation;
  – the presence in the United States of individuals whom the person directly supervises or manages;
  – engaging in activities directly related to generating revenue for or otherwise directly benefiting a U.S. entity;
  – visiting clients on a billable basis;
  – receiving any wages or salary from a U.S. source; or
  – a pending or approved work visa petition (e.g., H-1B, E, L-1).
Scenario: F-1/OPT

- Current OPT Rules
  - Limited to 12 months post-completion
  - Possible extension beyond 12 months for 17 additional months for STEM graduate and E-Verify employer
  - Current STEM/OPT program in transition based on court decision and pending regulation
  - Current 17-month extension available through May 10, 2016
- New regulation expands STEM extension to 24 months; includes prior STEM degree even if current OPT is based on a different degree
- OPT runs out of time and needs to be followed by an H-1B or another type of employment-authorized status
Scenario: H-1B

• Criteria:
  – professional-level workers who are coming to work for a specific U.S. employer in a “specialty occupation”
  – Two key elements:
    – the job reasonably requires a specific 4-year degree
    – the person has the relevant degree or the equivalent
  – Limited to a total of 6 years, with possible exceptions
  – Additional rules including a prevailing wage requirement

• Issues:
  – Requires an actual employer; ownership interest can be a problem
  – Prevailing wage requirement
  – Annual H-1B quota
Scenario: H-1B

• Issue: Employer-Employee Relationship
  – Right to control must reside in others
  – Need to report to someone who can fire the H-1B worker, e.g., a Board
  – Preferred shareholders; investors who exercise control over H-1B worker
  – Not for self-employment
  – Requires payment of wages at prevailing wage
  – Cannot volunteer or work for equity

• Issue: Annual H-1B Cap
  – Capped at 65,000 new visas per year, plus an additional 20,000 for beneficiaries who earned an advanced degree from a U.S. institution
  – Fiscal year runs from October 1; may file 6 months in advance
  – Cap-exemption for higher education and work “at” a government research organization
  – Only “new” H-1Bs are cap-subject;
    – extension, of employer, or H-1B where worker previously held H-1B status are typically not cap-subject
Scenario: H-1B

- Tough for entrepreneurs
- Right to control must reside with others
  - Avoid immediate equity interest
  - Equity interest complicates future potential green card case
- Bona fide job opportunity
- Wage requirement doesn’t contemplate alternative compensation structures
- Consider setting up the business on the side, with no compensation, while engaged in another type of authorized employment

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Scenario: L-1 Intra-Company Transferee

- L-1 is an intra-company transfer visa
- Need to start the company overseas and then expand it into the United States
- Overseas entity needs to continue to do business while the U.S. office is also doing business.
- Nice platform for an eventual green card
Scenario: E-2 Treaty Investor

- Citizen of a treaty country
- Moderate investment
- Solid business plan with initial funding
- Viable commercial enterprise
- Not just for the foreign national’s employment
- Permissible to lay the groundwork for the investment while in visitor status
- Can be an employee or the owner of a qualifying entity
- No reliable path to a green card
Scenario: E-2 Treaty Investor

- State Department Assesses:
  - Requisite treaty exists (see 9 FAM 402.9-4(A) and 402.9-10);
  - Individual and/or business possess the nationality of the treaty country (see 9 FAM 402.9-4(B));
  - Applicant has invested or is actively in the process of investing (see 9 FAM 402.9-6(B));
  - Enterprise is a real and operating commercial enterprise (see 9 FAM 402.9-6(D));
  - Applicant's investment is substantial (see 9 FAM 402.9-6(E));
  - Investment is more than a marginal one solely for earning a living (see 9 FAM 402.9-6(F));
  - Applicant is in a position to "develop and direct" the enterprise (see 9 FAM 402.9-6(G));
  - Applicant, if an employee, is destined to an executive/supervisory position or possesses skills essential to the firm's operations in the United States (see 9 FAM 402.9-6(B) and (C)); and
  - Applicant intends to depart the United States when the E-2 status terminates (see 9 FAM 402.9-4(C)).
O-1: Extraordinary Ability

- The O-1A visa is for people who are recognized as being at the very top of their field and who are coming to the United States to continue work in that field.

- To establish eligibility for an O-1A visa you must either have received a major, internationally recognized award, similar to a Nobel Prize, or submit evidence that affirmatively answers at least 3 of the 8 questions below:
  - Have you received a lesser nationally or internationally recognized prize or award for excellence in the field of endeavor?
  - Are you a member of any associations which require outstanding achievements of their members as judged by recognized national or international experts?
  - Is there published material in professional or major trade publications or major media about you which relates to your work in the field?
  - Have you participated on a panel or individually as a judge of the work of others in the same or in an allied field of specialization?
  - Have you made original scientific, scholarly or business-related contributions of major significance?
  - Have you authored scholarly articles in professional journals or other major media?
  - Have you been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation?
  - Have you or will you command a high salary or other remuneration for your services?
Green Card Options

- Diversity lottery
- EB-5 job creation immigrant visa
- Family-based sponsorship
- Employment-based sponsorship but not self-employed
- Green Card:
  - Extraordinary Ability
  - Outstanding Researcher
  - National Interest Waiver
  - PERM through an Employer
Your Internet Presence

• The Internet
  – A tool for you, and for USCIS
    – unauthorized employment
  – Google
  – LinkedIn
  – Facebook
  – Online articles

• Make sure your web presence only has authorized work!
### Our Global Reach

- Africa
- Asia Pacific
- Europe
- Latin America
- Middle East
- North America

### Our Locations

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