

IMMIGRANT ENTREPRENEURS, THE UNITED STATES VISA SYSTEM, AND THE STARTUP ACT

I. INTRODUCTION

A recent study indicated that five United States universities offer the top-ranked entrepreneurial graduate programs in the world.¹ As the country that provides the largest economy on the planet (in terms of nominal gross domestic product), this may not be much of a shock.² However, it is astonishing that between twenty-nine and fifty-three percent of each of the top-five schools' class profiles consist of international students.³ Understanding that American universities produce outstanding entrepreneurial talent and realizing that a significant portion of these programs are filled with international students makes one wonder if United States immigration policies lend a hand towards the immigrant entrepreneur who is attempting to achieve the American dream.

This Note will begin by examining three of the possible visa categories that immigrant entrepreneurs might attempt to fit into in hopes of establishing a business in America.⁴ The first category to be examined is the EB-5 visa category.⁵ Next, this Note will analyze the EB-2 visa category.⁶ Then, this Note will review the H-1B visa category.⁷ After working through the visa categories, this Note will ex-

1. Mark Marich, *US Schools Dominate Top MBA Programs for Entrepreneurship*, KAUFFMAN FOUNDATION (June 29, 2015), <http://www.kauffman.org/blogs/policy-dialogue/2015/june/us-schools-dominate-top-mba-programs-for-entrepreneurship>.

2. Prableen Bajpai, *The World's Top 10 Economies*, INVESTOPEDIA, Nov. 30, 2015, <http://www.investopedia.com/articles/investing/022415/worlds-top-10-economies.asp>.

3. See STANFORD GRADUATE SCHOOL OF BUSINESS, <https://www.gsb.stanford.edu/programs/mba/admission/evaluation-criteria/class-profile> (last updated Oct. 8, 2015) (stating that 40 percent of the Stanford School of Business class was from a foreign country); MIT SLOAN SCHOOL OF MANAGEMENT, <http://mitsloan.mit.edu/mba/admissions/class-profile2/> (last visited Jan. 27, 2015) (noting that 38 percent of the MIT: Sloan class was from a foreign country); BLOOMBERG BUSINESS, *Profile Data from 2014*, <http://www.sandiego.edu/business/programs/mba/admissions/class-profiles.php> (last visited Jan. 27, 2016) (determining that 53 percent of the San Diego School of Business Administration was from a foreign country); UNIVERSITY OF SOUTHERN CALIFORNIA MARSHALL SCHOOL OF BUSINESS, <https://www.marshall.usc.edu/mba/admissions/profile> (last visited Jan. 27, 2016) (iterating that 29 percent of the University of Southern California: Marshall was from a foreign country); HARVARD BUSINESS SCHOOL, <http://www.hbs.edu/mba/admissions/class-profile/Pages/default.aspx> (last visited Jan. 27, 2016) (indicating that 34 percent of the Harvard School of Business was from a foreign country).

4. See *infra* notes 18-89 and accompanying text.

5. See *infra* notes 18-40 and accompanying text.

6. See *infra* notes 41-72 and accompanying text.

7. See *infra* notes 73-89 and accompanying text.

amine failed attempts with prior versions of the Startup Act.⁸ Next, this Note will recognize that other foreign governments are taking legislative action to encourage foreign nationals to establish businesses in their respective countries.⁹ Then, this Note will discuss the historical impact immigrants have had upon the American economy.¹⁰ Finally, this Note will provide statistics which indicate that American schools produce the top entrepreneurial minds in the world and that a significant percentage of these individuals are foreign nationals.¹¹

The Argument section of this Note will suggest that current immigration laws do not provide an adequate path for immigrant entrepreneurs to remain in the United States.¹² Next, this Note will argue that United States universities offer many of the highest-ranked entrepreneurship programs in the world, and international students flock to these universities; however, legislative action needs to be taken to address the large portion of highly-educated foreign nationals who attain a top-ranked education and then must leave the country.¹³

This Note will assert that the Startup Act must be passed.¹⁴ This is of incredible importance because greater than forty percent of America's Fortune 500 companies in 2010 were founded either by immigrants or their children.¹⁵ This Note recognizes that opponents of business immigration reform typically urge a message that a greater number of immigrants in the United States results in lower wages and less jobs for Americans.¹⁶ However, this Note will conclude by expressing the positive impact immigrant workers have on the economy.¹⁷

II. BACKGROUND

A. WHERE CAN IMMIGRANT ENTREPRENEURS FIT IN THE UNITED STATES VISA SYSTEM?

1. *The EB-5 Immigrant Investor Visa*

The Employment-Based fifth preference ("EB-5") visa program exists to promote the immigration of foreign citizens who can assist in creating jobs for workers in the United States through investment of

8. See *infra* notes 90-92 and accompanying text.

9. See *infra* notes 93-101 and accompanying text.

10. See *infra* notes 102-109 and accompanying text.

11. See *infra* notes 110-117 and accompanying text.

12. See *infra* notes 122-141 and accompanying text.

13. See *infra* notes 142-150 and accompanying text.

14. See *infra* notes 151-166 and accompanying text.

15. PARTNERSHIP FOR A NEW AMERICAN ECONOMY, The "New American" Fortune 500 (June 2011), <http://www.renewoureconomy.org/sites/all/themes/pnae/img/new-american-fortune-500-june-2011.pdf>.

16. See *infra* notes 167-175 and accompanying text.

17. See *infra* notes 176-187 and accompanying text.

their capital into the economy.¹⁸ Generally, immigrants who invest, or are actively in the process of investing, \$1,000,000 into a new commercial enterprise and create at least ten new full-time positions for United States workers are qualified to receive an EB-5 visa.¹⁹ Approximately 10,000 EB-5 visas are reserved each year for immigrant investors.²⁰ In Fiscal Year 2014, the government issued 8,773 EB-5 visas with natives of Mainland China receiving 7,616 of such visas.²¹

To qualify for an EB-5 visa it is necessary that the immigrant investor seeks to enter the country for the reason of engaging in some new commercial enterprise.²² There are three methods by which an immigrant investor can engage in a new commercial enterprise: (1) creating an original business; (2) purchasing a business that already exists and subsequently reorganizing or restructuring said business, resulting in an entirely new commercial enterprise; or (3) expanding a business through investing so a substantial change in the number of employees or net worth actually results from the immigrant's investment.²³ There is also a minimum threshold for the amount of capital that the immigrant must invest into the new commercial enterprise.²⁴ The immigrant investor has an additional burden to present documentation that indicates the invested capital comes from a legitimate source.²⁵

The immigrant investor's capital invested into the new commercial enterprise must create at least ten full-time positions.²⁶ These

18. U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0083, EB-5 ADJUDICATION POLICY (2013). "This program is known as EB-5 for the name of the employment-based fifth preference visa that participants receive." U.S. CITIZENSHIP & IMMIGRATION SERVS., EB-5 IMMIGRANT INVESTOR PROGRAM, <https://www.uscis.gov/eb-5> (last visited Jan. 21, 2016).

19. 8 U.S.C. § 1153(b)(5) (2015).

20. *See id.* (stating that 7.1 percent of the worldwide level of employment-based immigrant visas will be made available to immigrants who enter the country for the reason of investing in a new commercial enterprise).

21. 2015 U.S. DEP'T OF ST. REPORT OF THE VISA OFFICE pt. 4, at tbl. VI.

22. 8 U.S.C. § 1153(b)(5).

23. *See* 8 C.F.R. § 204.6(h) (2012) (defining substantial change as "a 40 percent increase either in net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees.").

24. *See* 8 C.F.R. § 204.6(f) (determining that generally, a qualifying investment is \$1,000,000, however, in a targeted employment area, a qualifying investment is \$500,000).

25. *In re Soffici*, 22 I. & N. Dec. 158, 161 (B.I.A. 1998). The immigrant petition must be accompanied by evidence that identifies the source of the lawfully invested capital. *Soffici*, 22 I. & N. Dec. at 161. The court references examples including foreign business registration records, tax returns from a partnership, corporation, or an individual, or some evidence which identifies the source of the capital. *Id.*

26. 8 U.S.C. § 1153(b)(5)(A)(ii); *see also* 8 U.S.C. § 1153(b)(5)(D) (defining full-time employment as "employment in a position that requires at least 35 hours of service per week at any time . . .").

positions must be filled by United States citizens or other immigrants who are lawfully admitted to live in the United States permanently.²⁷ Examples of qualifying employees include United States citizens, legal permanent residents, conditional residents, temporary residents, asylum seekers, and refugees.²⁸ However, the immigrant investor cannot include himself, or his immigrant spouse or child towards the employment count.²⁹ Furthermore, the immigrant investor must indicate that these ten full-time employment positions will be filled within the two-year period while the immigrant maintains conditional residency status.³⁰

An immigrant investor has the option to invest \$500,000, but only if the new commercial enterprise he or she invests in is located in a Targeted Employment Area (“TEA”).³¹ An area can qualify as a TEA in one of two scenarios: (1) if at the time of the investment the area where the immigrant invests his or her money is a rural area; or (2) if at the time of the investment the area where the immigrant invests his or her money is in an area which has seen unemployment rates of at least 150 percent of the national unemployment rate.³² A rural area is defined as an area that is located outside of a metropolitan statistical area, or an area that is located outside of a town or city that has a population of more than 20,000 people, based on the most current United States census.³³ Alternatively, a state itself can make a designation concerning an area of high unemployment so long as the unemployment rate is at least 150 percent of the national unemployment rate.³⁴

Another avenue an immigrant investor can choose to pursue, which simplifies the job creation requirement, is to invest in a new commercial enterprise located in a regional center.³⁵ A regional

27. 8 U.S.C. § 1153(b)(5)(A)(ii).

28. 8 C.F.R. § 204.6(e).

29. *Id.*

30. See 8 C.F.R. § 204.6(j)(4)(i)(b) (stating that the immigrant’s business plan must show that “due to the nature and projected size of the commercial enterprise, the need for not fewer than ten (10) qualifying employees will result”); see also U.S. CITIZENSHIP & IMMIGRATION SERVS., *Conditional Permanent Residence*, <https://www.uscis.gov/green-card/after-green-card-granted/conditional-permanent-residence> (Jan. 14, 2011) (determining that an immigrant who receives conditional permanent residence maintains legal status for a two year period).

31. 8 C.F.R. § 204.6(f).

32. 8 C.F.R. § 204.6(e).

33. See 8 C.F.R. § 204.6(j)(6)(i) (expressing that the Office of Management and Budget designates which locations constitute metropolitan statistical areas).

34. See 8 C.F.R. § 204.6(j)(6)(i) (stating a state official may properly notify the Associate Commissioner for Examinations that the state is designating a particular geographical area as an area of high unemployment).

35. See 8 C.F.R. § 204.6(j)(4)(iii) (noting that under the Immigrant Investor Pilot Program, immigrants who invest in a new commercial enterprise that is located in a

center is any economic unit, private or public, involved in promoting *economic growth*.³⁶ The immigrant investor has the burden to produce supporting evidence indicating how the regional center will create jobs indirectly through increased exports.³⁷ These predictions regarding the regional center must be supported by statistically or economically valid forecasting tools, such as, feasibility studies, analyses of markets which will be purchasing the exported goods and services, and/or multiplier tables.³⁸

After the immigrant investor compiles the initial supporting documentation, he or she must file an I-526, Immigrant Petition by Alien Entrepreneur.³⁹ The petition must include information regarding the new commercial enterprise, the capital being invested, how the immigrant investor gained the necessary capital through lawful means, how the immigrant investor plans on creating ten new full-time jobs, the petitioner's plan of being engaged in day-to-day operations or policy formation, and also, information regarding the TEA or regional center, if applicable.⁴⁰

2. *The EB-2 Advanced Degree, Exceptional Ability, and National Interest Waiver Categories*

Immigrants who possess an advanced degree or have an exceptional ability in the arts, sciences, or business can qualify for the Employment-Based second preference ("EB-2") visa program.⁴¹ To

regional center must create at least ten full-time jobs directly or indirectly via revenues generated from increased exports from the Pilot Program.").

36. See 8 C.F.R. § 204.6(e) (stating that economic growth includes improved regional productivity, increased export sales, increased domestic capital investment, and job creation).

37. See 8 C.F.R. § 204.6(m)(3) (stating that the regional center which wishes to participate in the Immigrant Investor Pilot Program must submit, among other things, (1) a proposal which provides a description of the geographical region where the regional center will be located; (2) how the regional center will promote economic growth via increased export sales, increased regional productivity, increased amount of jobs, and increased regional capital investment; (3) a document which provides in detail how local jobs will be created indirectly because of these increased exports; (4) a detailed document which attests to the amount and source of the investment that has been committed to a regional center; and (5) a prediction regarding the regional center's positive impact on the economy as reflected by an increase in household earnings, increased demand for services, utilities, repair, and construction within the regional center).

38. 8 C.F.R. § 204.6(m)(3)(v).

39. See 8 C.F.R. § 204.6(a) (determining that the immigrant investor must file the correct petition, the petition must be coupled with the appropriate fee, and the petitioner must sign the petition).

40. 8 C.F.R. § 204.6(j).

41. 8 C.F.R. § 204.5(k) (2016); see also U.S. CITIZENSHIP & IMMIGRATION SERVS., EMPLOYMENT-BASED IMMIGRATION: SECOND PREFERENCE EB-2 (2015) <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-second-preference-eb-2> (stating that an Employment-Based second preference visa is known as an EB-2 visa).

receive an EB-2 visa, an immigrant must fit into one of three sub-categories: (1) advanced degree; (2) exceptional ability; or (3) National Interest Waiver (“NIW”).⁴² Depending upon which sub-category the immigrant seeks to fit into, there will likely be significant implications on the immigrant’s ability to immediately start a business.⁴³ In order for an immigrant to receive labor certification, the Department of Labor must certify that: (1) there is an insufficient amount of workers who are willing, qualified, available, and able at the time the application is submitted, at the location where the immigrant wants to perform the skilled or unskilled labor; and (2) the immigrant’s employment will not adversely affect working conditions and wages of United States workers employed in similar positions.⁴⁴ Labor certification also requires proving that the immigrant holds an advanced degree or exceptional ability, when such condition is a prerequisite for the offered position.⁴⁵

a. Advanced Degree Sub-Category

In order for an immigrant to fit into the advanced degree sub-category, the job that he or she is applying for: (1) must necessitate an advanced degree and (2) the immigrant must have earned an advanced degree or its equivalent.⁴⁶ The equivalent of an advanced degree is a United States baccalaureate degree or a degree from a foreign country above that of baccalaureate.⁴⁷ Similarly, a national or foreign baccalaureate degree followed by five years or more of progressive experience in that particular specialty is considered equivalent to earning a master’s degree.⁴⁸ The immigrant has the burden of producing documentation to prove attainment of an advanced degree.⁴⁹

Upon being granted certification by the United States Department of Labor, an employer is permitted to petition on the immi-

42. See 8 C.F.R. § 204.5(k)(4)(ii) (explaining that a National Interest Waiver refers to applicants whom are exempted from the requirement of possessing a job offer).

43. See VISA PRO, *EB-2 National Interest Waiver (NIW): Green Card Through Self Petition*, <http://www.visapro.com/Immigration-Articles/?a=1862&z=39> (last visited Feb. 4, 2016) (noting that generally, employment-based visas require a United States employer to petition on an international citizen’s behalf and present the immigrant an offer of employment). The EB-2 NIW sub-category allows an immigrant to be exempt from possessing a job offer and from going through labor certification. *Id.* The NIW allows international citizens to self-petition, thus offering a significantly quicker avenue for persons seeking permanent residence in America. *Id.*

44. 8 U.S.C. § 1182(a)(5)(A) (2015).

45. 8 C.F.R. § 204.5(k)(4).

46. U.S. CITIZENSHIP & IMMIGRATION SERVS., *EMPLOYMENT-BASED IMMIGRATION: SECOND PREFERENCE EB-2* (2015), <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-second-preference-eb-2>.

47. 8 C.F.R. § 204.5(k)(2) (2009).

48. *Id.*

49. *EMPLOYMENT-BASED IMMIGRATION: SECOND PREFERENCE EB-2*, *supra* note 46.

grant's behalf using a Form I-140, Immigrant Petition for Alien Worker.⁵⁰ In the I-140 it is necessary for the employer to provide evidence that it has the ability to afford the immigrant worker's salary and the employer must produce documents which confirm the immigrant worker is actually qualified for the position that requires an advanced degree.⁵¹ Thereafter, if the immigrant is already in the United States on a temporary visa, he or she must file an I-485, Application to Register Permanent Resident or Adjust Status.⁵² The only application the immigrant is responsible for filing on his or her own behalf is the I-485; the employer must pay all costs associated with both the labor certification process and the I-140 application.⁵³ From start to finish, this entire process can take several years.⁵⁴

b. Exceptional Ability Sub-Category

An immigrant can also fit into the EB-2 visa category if he or she has an exceptional ability in the arts, sciences, or business.⁵⁵ The immigrant has the burden to meet three of the following six requirements to show exceptional ability: (1) show an academic record indicating a degree, certificate, or similar award from a school, college, or university which relates to the exceptional ability; (2) provide letters from current or past employers showing a minimum of ten years of full-time work experience in the practice or industry which the immigrant is seeking work; (3) provide proof of a license to practice in the profession or occupation in which the immigrant is seeking work; (4) provide evidence that the immigrant has commanded a salary indicative of their exceptional ability; (5) provide evidence that the immigrant is a member in certain professional associations; or (6) provide evidence that the immigrant has been recognized for contributions or received achievements within the specified industry.⁵⁶ After the immigrant establishes exceptional ability, the remaining procedural steps are the same as those listed in the advanced degree sub-category.⁵⁷

50. U.S. DEP'T OF LABOR, <http://www.foreignlaborcert.doleta.gov/perm.cfm> (last visited Mar. 7, 2016).

51. NOLO LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/timeline-sponsoring-immigrant-worker-green-card.html> (last visited Jan. 24, 2016).

52. *Id.*

53. *Id.*

54. *Id.* "Due to the priority date backlog for nationals of India, China, Mexico, and the Philippines, these foreign workers often have to wait several years for USCIS to adjudicate and approve their petitions." *Id.*

55. 8 C.F.R. § 204.5(k)(3)(ii).

56. *Id.*

57. *See supra* notes 50-54 and accompanying text.

c. National Interest Waiver Sub-Category

The third and final sub-category provides a method for an immigrant to seek status without a job offer, so long as the immigrant's exceptional ability in the arts, business, or sciences would be in the interest of the United States.⁵⁸ In filling out the Form ETA-750B, Statement of Qualifications of Alien, the immigrant is able to seek an EB-2 visa without an employer petitioning on his or her behalf, and therefore is exempted from the otherwise necessary labor certification process.⁵⁹ Accordingly, immigrants under the NIW sub-category are able to self-petition.⁶⁰ When providing evidence that the immigrant is worthy of an NIW visa, he or she must satisfy three of the same six requirements established in the exceptional ability sub-category.⁶¹

One of the benchmark cases for NIW adjudication is *In re New York State Department of Transportation*,⁶² in establishing that the standard for NIW exemption must be set significantly higher than that which is required to prove exceptional ability, where the immigrant is required to prove *prospective* national benefit.⁶³ In *In re New York*, the criteria for granting an NIW exemption was determined to be the following: (1) the immigrant must be seeking employment in a field of substantial intrinsic merit; (2) the benefit to the United States must be national in scope; and (3) forcing labor certification would adversely affect the national interest.⁶⁴ It is also established that having exceptional ability alone is an insufficient reason to grant the waiver.⁶⁵ Additionally, the court in *In re New York* established that an NIW cannot be granted to fulfill a local shortage.⁶⁶

To understand that an immigrant can qualify under an NIW exemption, and therefore be self-employed, it is necessary to note the difficult process he or she must go through to attain this EB-2 visa,

58. 8 C.F.R. § 204.5(k)(4)(ii).

59. *Id.*

60. U.S. CITIZENSHIP & IMMIGRATION SERVS., EMPLOYMENT BASED SECOND PREFERENCE: EB-2 VISA-GENERAL REQUIREMENTS, <http://www.uscis.gov/eir/visa-guide/eb-2-employment-based-second-preference/employment-based-second-preference-eb-2-visa-general-requirements> (last visited Jan. 24, 2016).

61. EMPLOYMENT-BASED IMMIGRATION: SECOND PREFERENCE EB-2, *supra* note 46.

62. 22 I. & N. Dec. 215 (B.I.A. 1998).

63. *In re N.Y. State Dep't of Transp.*, 22 I. & N. Dec. 215, 216-17 (B.I.A. 1998).

64. *In re New York*, 22 I. & N. Dec. at 217; *see also* U.S. CITIZENSHIP & IMMIGRATION SERVS., NATIONAL INTEREST WAIVER (JAN. 30, 2016), <http://www.uscis.gov/eir/visa-guide/eb-2-employment-based-second-preference/national-interest-waiver> (asserting that in order to prove the immigrant's ability would benefit the United States on a national level, the immigrant must establish that the enterprise "will serve the national interest to a substantially greater degree than the work of others in the same field.").

65. *Id.* at 218.

66. *Id.*

which can take well over 1,000 hours of time to complete.⁶⁷ This process can take an extraordinary amount of time to properly complete, due to large amounts of evidence that must be submitted as support.⁶⁸ In one study spanning 2012 and 2013, it was found that 88.8 percent of immigrants who had an NIW exemption granted also held a Ph.D. degree.⁶⁹ Of the remaining immigrants who were granted an NIW exemption, 10.2 percent had a master's degree, and one percent had only a bachelor's degree.⁷⁰ Furthermore, on average, each immigrant who was granted an NIW exemption had written twelve journal articles, his or her work was cited 124 times, and he or she had submitted at least five letters of recommendation.⁷¹

3. *The H-1B Temporary Specialty Occupation Visa*

An H-1B visa is primarily used by an American employer seeking to hire an international student or professional to work in the United States for a period of time that cannot exceed six years.⁷² To qualify for an H-1B visa, it is necessary that: (1) the immigrant has an employer-employee relationship with the employer petitioning on his or her behalf; (2) the job must qualify as a specialty occupation; (3) the specialty occupation must be related to the immigrant's field of study; (4) the immigrant must be paid the actual or prevailing wage for that particular occupation, whichever is greater; and (5) an H-1B visa must be available at the time the petition is filed, unless the petition is not subject to the numerical limits.⁷³

67. EB2 NAT'L INTEREST WAIVER (NIW), <http://www.eb2niw.com/credentials-cases/our-eb2-niw-case-approved-2013/> (last visited Jan. 24, 2016).

68. *See id.* (stating that over 70 exhibits were submitted with the immigrant's petition).

69. EB2 NAT'L INTEREST WAIVER (NIW), <http://www.eb2niw.com/credentials-cases/average-approved-niw-case-basic-credentials/> (last visited Jan. 24, 2016).

70. *Id.*

71. *Id.*

72. H1 BASE, *H1B Visa Program Overview*, <http://www.h1base.com/visa/work/h1b%20visa%20overview/ref/1164/> (last visited Jan. 25, 2016); *but see* Patrick Thibodeau, *Anti-H-1B senator to head immigration panel*, COMPUTERWORLD.COM, Jan. 22, 2015, <http://www.computerworld.com/article/2873670/anti-h-1b-senator-to-head-immigration-panel.html> [hereinafter Thibodeau, *Anti-H-1B senator to head immigration panel*] (explaining that Sen. Sessions believes American information technology workers are replaced by immigrant workers under the H-1B program); Patrick Thibodeau, *Obama H-1B reform plan draws Grassley's ire*, COMPUTERWORLD.COM, Oct. 13, 2014, <http://www.computerworld.com/article/2825254/obama-h-1b-reform-plan-draws-grassleys-ire.html> [hereinafter Thibodeau, *Obama H-1B reform plan draws Grassley's ire*] (expressing that Sen. Grassley believes that businesses hiring H-1B workers should be required to verify that an immigrant is not replacing or displacing American workers).

73. U.S. CITIZENSHIP & IMMIGRATION SERVS., *Understanding H1-B Requirements*, <http://www.uscis.gov/eir/visa-guide/h-1b-specialty-occupation/understanding-h-1b-requirements> (last visited Jan. 25, 2016).

To prove that the immigrant has a valid employer-employee relationship, the employer must have the ability to hire, fire, pay, control, or supervise the work of the immigrant H-1B worker.⁷⁴ An immigrant entrepreneur can demonstrate that he or she has the necessary employer-employee relationship, even if he or she owns a company.⁷⁵ For the immigrant's job to qualify as a specialty occupation it is typical that the job must require a bachelor's degree or its equivalent, and the immigrant must prove his or her field of study is related to such a job by producing documents which indicate job duties and further indicate that the immigrant doesn't have the ability to hire, fire, and control work.⁷⁶ Determining the appropriate wage requires an examination of whether the actual wage or the prevailing wage is greater because the immigrant employees' wage must be the greater of the two.⁷⁷ The Foreign Labor Certification Data Center annually calculates prevailing wage rates by county.⁷⁸ USCIS is statutorily limited to issuing 65,000 H-1B visas per fiscal year, less the amount of free trade visas for citizens from Singapore and Chile, resulting in 58,200 H-1B visas per fiscal year.⁷⁹ However, an additional 20,000 immigrants who possess a master's degree or higher from a United States school are exempt from the cap.⁸⁰

Unfortunately for H-1B petitioners, the demand for these temporary specialty occupation visas far exceeds the supply.⁸¹ For example, the annual filing period begins each year on April 1, and in the first week of April 2014, 172,500 H-1B applications reached USCIS.⁸² Then, a computer decided the fate of each individual's petition based on a computer-generated lottery system.⁸³ Those who were lucky

74. *Id.*

75. *Id.* "If an immigrant owns a company he or she might be able to satisfy the employer-employee relationship, so long as the work the immigrant completes is controlled by others." *Id.*

76. *Id.*

77. See 20 C.F.R. § 655.731(a) (2009) (stating the actual wage is the rate the employer pays to all other employees with similar qualifications and experience, while the prevailing wage is the wage for the occupational classification for the intended type of employment at the time the labor condition application ("LCA") is filed).

78. FOREIGN LABOR CERTIFICATION DATA CTR., <http://www.flcdatacenter.com/> (last visited Mar. 7, 2016).

79. 8 U.S.C. §§ 1184(g)(1)(A), 1184(g)(8)(B)(ii) (2014).

80. 8 U.S.C. §§ 1184(g)(1)(A), 1184(g)(5)(C).

81. Kevin Casey, *H-1B Visa Program: 13 Notable Statistics*, INFORMATIONWEEK (Nov. 20, 2014), <http://www.informationweek.com/strategic-cio/team-building-and-staffing/h-1b-visa-program-13-notable-statistics/d/d-id/1317609>.

82. *Id.*; see also AM. IMMIGRATION COUNCIL, *The H-1B Visa Program: A Primer on the Program and its Impact on Jobs, Wages, and the Economy* (Apr. 1, 2015), <http://www.immigrationpolicy.org/just-facts/h-1b-visa-program-primer-program-and-its-impact-jobs-wages-and-economy> (explaining that by April 7, 2014, USCIS had exhausted all H-1B visas).

83. *Id.*

enough to have their H-1B petition granted were permitted to begin working for their sponsor employer on October 1, 2014.⁸⁴

One study issued in 2014 found that H-1B increases in science, technology, engineering, and mathematics (“STEM”) workers actually lead to an increase in wages and salaries paid to college-educated native-born Americans in STEM jobs.⁸⁵ Another study indicated that H-1B visa holders earn a higher salary than comparable native-born workers.⁸⁶ Factors such as marital status, ethnicity, and gender prove to play a more significant role than immigration status or citizenship for salaries and wages in the finance and tech industries.⁸⁷ Ultimately, unemployment rates are lower than national unemployment rates for occupations that hire large numbers of H-1B visa holders.⁸⁸

B. WHY MUST CONGRESS ADDRESS THE ISSUE OF IMMIGRANT ENTREPRENEURSHIP AS SOON AS POSSIBLE?

1. Congress’s Failed Attempts of Addressing This Issue

As of January 2015, Congress is taking a fourth stab at discussing the Startup Act, after they failed to act on other entrepreneurial legislation proposed in 2010, 2011, and 2013.⁸⁹ The Startup Act has a clear purpose, as Senator Moran (R-Kan.) explained, it is simply about creating jobs for United States citizens through the growth and creation of new businesses.⁹⁰ The Startup Act would create an entrepreneur’s visa, which would allow foreign-born entrepreneurs to legally remain in the United States in order to establish businesses and create jobs, and would create a science, technology, engineering, and

84. *Id.*

85. Giovanni Peri et al., *Foreign STEM Workers and Native Wages and Employment in U.S. Cities*, THE NATIONAL BUREAU OF ECONOMIC RESEARCH, (May 2014), <http://www.nber.org/papers/w20093>.

86. Jonathan Rothwell & Neil G. Ruiz, *H-1B Visas and the STEM Shortage*, BROOKINGS (May 10, 2013), <http://www.brookings.edu/research/papers/2013/05/10-h1b-visas-stem-rothwell-ruiz>.

87. Nicole Kreisberg, *H-1B Visas: No Impact on Wages*, AMERICAN INSTITUTE FOR ECONOMIC RESEARCH (Oct. 9, 2014), <https://www.aier.org/research/h-1b-visas-no-impact-wages>.

88. See U.S. CHAMBER OF COMMERCE, *Help Wanted: The Role of Foreign Workers In the Innovation Economy*, Information Technology Industry Council 2, <http://www.renewoureconomy.org/sites/all/themes/pnae/stem-report.pdf> (last visited Jan. 31, 2016) (“While the current national unemployment rate hovers around 8 percent, the unemployment rate for US citizens with PhDs in STEM is just 3.5 percent, and 3.4 percent for those with master’s degrees in STEM.”).

89. Startup Act, S. Res. 181, 114th Cong. (2015); S. 3029, 111th Cong. (2010); S. 565, 112th Cong. (2012); S. 189, 113th Cong. (2014).

90. JERRY MORAN U.S. SEN. FOR KAN. (Jan. 16, 2015), http://www.moran.senate.gov/public/index.cfm/news-releases?ContentRecord_id=ba8adcad-d189-4275-8195-872b3ca7a0b1.

math-related degree (“STEM”) visa.⁹¹ The Startup Act would also eliminate per-country caps for all employment-based visas, because the current caps hinder United States businesses from recruiting upper echelon employees. Additionally, the Startup Act would create a research and development tax credit used for startups in the initial stages of development, which would allow businesses to offset the burden of employee taxes, thereby freeing up capital to allow the company to expand and create jobs.⁹²

2. *Other Countries are Laying the Groundwork for Entrepreneurs to Enter Their Countries*

Although the United States lacks an entrepreneur visa program, countries like Canada and New Zealand are quickly making use of the world’s brightest minds to start businesses in their respective countries.⁹³ In 2013, Canada introduced its version of the Startup Act, promising immigrants permanent residency if they qualify under its entrepreneurial program.⁹⁴ So long as an immigrant entrepreneur who enters Canada secures an investment from a designated Canadian venture capital fund or angel investor, and has completed at least one year of post-secondary education, he or she has an opportunity for their application to be granted.⁹⁵ Canada offers a strong economic growth platform, especially considering *Forbes* magazine rated Canada as the top-ranked nation in the G-20 in which to do business.⁹⁶

New Zealand has similarly announced the creation of a startup visa, which is friendly to immigrant entrepreneurs.⁹⁷ Under the New Zealand system, within six months immigrants are able to apply for residence under a residency program.⁹⁸ In the New Zealand visa program, immigrant investors must: (1) invest 100,000 New Zealand dollars; (2) have a clear business plan; (3) earn a certain amount of points from a system regarding the likely success of the enterprise; (4) have a

91. See generally *Bill Information for S.181 - Startup Act*, CONGRESS.GOV (Apr. 9, 2016), <https://www.congress.gov/bill/114th-congress/senate-bill/181/all-info> (providing an overview of the provisions of the Startup Act, S. Res. 181).

92. MORAN, *supra* note 90.

93. EWING MARION KAUFFMAN FOUND., *THE ECONOMIC CASE FOR WELCOMING IMMIGRANT ENTREPRENEURS* (Mar. 27, 2014), http://www.kauffman.org/~media/kauffman_org/research%20reports%20and%20covers/2014/03/entrepreneurship_policy_digest_march_2014.pdf.

94. CITIZENSHIP & IMMIGRATION CAN., *Canada wants entrepreneurs!* (last updated Oct. 16, 2015), <http://www.cic.gc.ca/english/resources/publications/entrepreneurs.asp>.

95. *Id.*

96. *Id.*

97. N.Z. IMMIGRATION, *Entrepreneur Visas* (last updated Aug. 12, 2015), <https://www.newzealandnow.govt.nz/move-to-nz/new-zealand-visa/visas-to-invest/entrepreneur-visa>.

98. *Id.*

clean history of fraud, business failure, and bankruptcy; and (5) satisfy certain English-speaking requirements.⁹⁹

Canada and New Zealand each have their respective benefits they offer, but countries all around the world, aside from the United States, are stepping up and welcoming entrepreneurs into their borders, including: Australia, Chile, Denmark, France, Ireland, Italy, Netherlands, Singapore, Spain, and the United Kingdom.¹⁰⁰ Some countries do not require any minimum level of funding at all, while other countries allow the funding to come from anyone willing to support the startup, and still, numerous other countries allow an immigrant to apply for permanent residency after living in the country for two years.¹⁰¹

3. *What is the Impact of Allowing Immigrants to Start Businesses in the United States?*

To understand the impact immigrant entrepreneurs have on the United States, it is fitting to begin by examining California, where in 2011, 27 percent of the population was foreign-born, translating to more than ten million foreign-born people living in the state.¹⁰² Additionally, from 2007 to 2011, California's immigrants founded roughly 45 percent of the state's new businesses.¹⁰³ Moreover, in 2010, new immigrant-founded businesses generated \$34.3 billion in net income.¹⁰⁴ Lastly, 33 percent of business owners in California are immigrants.¹⁰⁵

While California is indicative of what our economy can expect from immigrant entrepreneurs going forward, it is also imperative to look at this issue from a past perspective, which is exactly what the bipartisan group, Partnership for a New American Economy, did in

99. *Id.*

100. Josephine Goube, *Entrepreneur Visas: A Comparison of the 12 Countries Where Entrepreneurs Are Welcomed*, MIGREAT BLOG, July 24, 2014, http://blog.migreat.com/2014/07/24/entrepreneur-visas-worldwide-a-comparison-of-the-7-countries-where-entrepreneurs-are-welcomedutm_sourceblogutm_mediumlinkutm_campaignaugustpush/.

101. *See id.* (expressing that Chile, France, the Netherlands, and Spain do not require any level of minimum funding; Ireland, Italy, the Netherlands, New Zealand, Singapore, and Spain all state that anyone can fund the startup; Chile, Ireland, Italy, the Netherlands, and Spain all allow immigrant entrepreneurs to apply for citizenship after living in the country for two years or less).

102. Hans Johnson, *Just the Facts: Immigrants in California*, PUB. POLICY INST. OF CAL. (May 2013), http://www.ppic.org/main/publication_show.asp?i=258.

103. AM. IMMIGRATION COUNCIL, *California: Immigrant Entrepreneurs, Innovation, and Welcoming Initiatives in the Golden State* (Jul. 24, 2013), <http://www.immigrationpolicy.org/just-facts/california-immigrant-entrepreneurs-innovation-and-welcoming-initiatives-golden-state>.

104. *Id.*

105. *Id.*

June 2011.¹⁰⁶ The study found that greater than 40 percent of the Fortune 500 companies in 2010 were founded either by immigrants or their children.¹⁰⁷ Of the Fortune 500 companies in 2010, an immigrant founded ninety of them, while the sons and daughters of immigrants founded 114 companies.¹⁰⁸ Seven of the ten most valuable global brands come from American businesses founded by immigrants: Apple, AT&T, General Electric, Google, IMB, Marlboro, and McDonald's.¹⁰⁹

4. *United States Schools are Educating the World's Brightest*

According to a recent study, five United States universities offer the top MBA entrepreneurial graduate programs in the world.¹¹⁰ A recent publication by the Financial Times described the following five schools as the top MBA programs in the world for entrepreneurship: (1) Stanford Graduate School of Business, (2) MIT: Sloan, (3) University of San Diego School of Business Administration, (4) University of Southern California: Marshall, and (5) Harvard Business School.¹¹¹ To calculate these rankings the study looked to: the percentage of MBA graduates from each program who had started a company; the percentage of entrepreneurs that raised all or a portion of their equity via non-family member investors; the percentage of businesses started in 2013 or earlier, and have continued to operate through 2014; and the extent to which their particular graduate program helped them start the company, among other factors.¹¹²

In the Stanford Graduate School of Business Class of 2017, 40 percent of the class hails from a foreign country, representing fifty-two other countries around the world.¹¹³ For the 2017 entering class at MIT: Sloan, 38 percent of the entering class includes international students.¹¹⁴ The University of San Diego School of Business Administration's most recent class profile is from 2014, where 53 percent of

106. P'SHIP FOR A NEW AM. ECON., *supra* note 15.

107. *Id.* at 2.

108. *Id.*

109. *Id.*

110. Marich, *supra* note 1.

111. Laurent Ortman, *MBA by numbers: Top programmes for entrepreneurship* (June 28, 2015), <http://im.ft-static.com/content/images/e676be3c-1b32-11e5-8201-cbdb03d71480.pdf>.

112. *Top 10 MBA programmes for entrepreneur*, FINANCIAL TIMES, <http://im.ft-static.com/content/images/e676be3c-1b32-11e5-8201-cbdb03d71480.pdf> (last visited Jan. 27, 2016).

113. STANFORD GRADUATE SCHOOL OF BUSINESS, <https://www.gsb.stanford.edu/programs/mba/admission/evaluation-criteria/class-profile> (last updated Oct. 8, 2015).

114. MIT SLOAN SCHOOL OF MANAGEMENT, <http://mitsloan.mit.edu/mba/admissions/class-profile2/> (last visited Jan. 27, 2015).

the full-time MBA students were international students.¹¹⁵ At the University of Southern California: Marshall, 29 percent of the 2016 entering class was comprised of international students, representing thirty-one other countries.¹¹⁶ Rounding out the top five, the Harvard Business School includes 34 percent of its 2017 class as international students.¹¹⁷

III. ARGUMENT

This Topic Note will now assert that current immigration laws hinder immigrant entrepreneurs from establishing business in the United States.¹¹⁸ First, this Argument will describe how current immigration laws do not provide an adequate path for immigrant entrepreneurs to enter and remain in the United States.¹¹⁹ Next, this Note will argue that United States universities offer many of the highest-ranked entrepreneurship programs in the world, and international students flock to these universities, but legislative action needs to be taken to address the large portion of highly-educated foreign nationals who attain a top-ranked education and then must leave the country.¹²⁰ Finally, this Argument will assert that Congress must take action to resolve this issue.¹²¹

A. CURRENT IMMIGRATION LAWS DO NOT PROVIDE A REASONABLE PATH FOR IMMIGRANT ENTREPRENEURS TO REMAIN IN THE UNITED STATES

1. *Immigrant Entrepreneurs do not fit in the Current Visa System*

An immigrant entrepreneur attempting to pinpoint his or her path into the United States is often faced with incredible hurdles that must be overcome to obtain legal status, such as making an investment of at least \$500,000.¹²² Under the employment-based fifth pref-

115. BLOOMBERG BUSINESS, *Profile Data from 2014*, <http://www.sandiego.edu/business/programs/mba/admissions/class-profiles.php> (last visited Jan. 27, 2016).

116. UNIVERSITY OF SOUTHERN CALIFORNIA MARSHALL SCHOOL OF BUSINESS, <https://www.marshall.usc.edu/mba/admissions/profile> (last visited Jan. 27, 2016).

117. HARVARD BUSINESS SCHOOL, <http://www.hbs.edu/mba/admissions/class-profile/Pages/default.aspx> (last visited Jan. 27, 2016); see also Claire Groden, *Dear International Students: Thanks For Your Tuition. Now Go Home. Love, Uncle Sam.*, NEW REPUBLIC, (Dec. 2, 2014), <https://newrepublic.com/article/120463/immigration-law-discourages-international-students-working> (asserting that American colleges “roll out the welcome mat for international student[s]” but United States immigration laws “usher[] [the international students] out soon after [graduation].”).

118. See *infra* notes 120-167 and accompanying text.

119. See *infra* notes 123-142 and accompanying text.

120. See *infra* notes 143-151 and accompanying text.

121. See *infra* notes 152-167 and accompanying text.

122. 8 U.S.C. § 1153(b)(5); see also Peter Elkind & Marty Jones, *The dark, disturbing world of the visa-4-sale program* (July 24, 2014), <http://fortune.com/2014/07/24/>

erence (“EB-5”) visa, which is also known as the immigrant investor visa, aspiring business owners are mandated to invest large amounts of money, and they are required to create at least ten full-time jobs for United States citizens or other authorized immigrant workers.¹²³ There are less than 10,000 EB-5 visas available in any given fiscal year, and in 2015, 87 percent of those visas were granted to citizens of Mainland China.¹²⁴ These stringent requirements benefit wealthy foreign internationals who would perhaps prefer to invest in a new commercial enterprise, or even invest in an existing enterprise, so long as the existing business is restructured or reorganized so a new commercial enterprise results.¹²⁵

Another visa category an immigrant entrepreneur might attempt to fit into is the employment-based second preference (“EB-2”) visa category, which typically requires that the immigrant has either an advanced degree or an exceptional ability.¹²⁶ However, two sub-categories of the EB-2 visas require an employer to petition on behalf of the immigrant, using a Form I-140.¹²⁷ Fortunately for foreign nationals, the third sub-category of the EB-2 visa allows an immigrant to obtain legal status if his or her exceptional ability benefits the national interest of the United States.¹²⁸ Under the national interest waiver sub-category (“NIW”) an immigrant is not required to have a job offer in the United States and accordingly, may self-petition.¹²⁹ An immigrant may not self-petition based on the other two EB-2 sub-categories, because an alien may not self-petition based on employment.¹³⁰

An immigrant faces an uphill battle when attempting to satisfy the NIW requirements because an immigrant has the burden to show that he or she is seeking employment in a field of substantial intrinsic merit and that the benefit he or she will provide to the United States

immigration-eb-5-visa-for-sale/ (determining that it is becoming more difficult to become a United States citizen, unless an immigrant has \$500,000 to “buy their way in” to the country).

123. *Id.*

124. *See* U.S. DEP’T OF STATE, *supra* note 21 (stating that 7,616 EB-5 visas were granted to citizens of Mainland China, while 8,773 total visas were issued in 2015).

125. 8 C.F.R. § 204.6(h); Alana Semuels, *THE ATLANTIC*, *Should Congress Let Wealthy Foreigners Buy Green Cards*, <http://www.theatlantic.com/business/archive/2015/09/should-congress-let-wealthy-foreigners-buy-citizenship/406432/>.

126. EMPLOYMENT-BASED IMMIGRATION: SECOND PREFERENCE EB-2, *supra* note 46.

127. *See* 8 C.F.R. § 204.5(k) (determining that if the alien holds an advanced degree or has an exceptional ability in the arts, sciences, or business then a United States employer may petition on behalf of the alien).

128. 8 C.F.R. § 204.5(k)(4)(ii).

129. U.S. CITIZENSHIP & IMMIGRATION SERVS., *GREEN CARD THROUGH SELF PETITION*, <https://www.uscis.gov/green-card/green-card-through-job/green-card-through-self-petition> (last updated Sep. 30, 2015).

130. *Id.*

is national in its scope.¹³¹ Assuming the immigrant has the ability to satisfy these strenuous national-based requirements, he or she also faces the likelihood of spending up to 1,000 hours completing necessary paper work.¹³² The immigrant must also be an extraordinary scholar just to have a chance at having his or her waiver request granted.¹³³ Nearly 90 percent of NIW applications that are granted involve immigrants who have earned a Ph.D. degree, while only 1 percent of those NIW applications that are granted involve immigrants who have earned only a bachelor's degree.¹³⁴ Additionally, on average, each immigrant who was granted an NIW exemption had written twelve journal articles, their work had been cited 124 times, and had submitted at least five letters of recommendation.¹³⁵

Finally, an immigrant may find himself or herself navigating the H-1B visa category, where, like the EB-2 categories, each immigrant is required to have a job offer from a United States employer.¹³⁶ Among other requirements, the immigrant and the United States employer must have a valid employer-employee relationship.¹³⁷ The immigrant has the burden to prove the relationship exists, and he or she must prove that the employer has the ability to hire, fire, pay, control, or supervise his or her work.¹³⁸ Additionally, immigrants seeking an H-1B visa have to be fortunate in the luck-of-the-draw scenario where, in 2014, less than one half of the immigrants who applied for an H-1B visa were granted legal status.¹³⁹ Therefore, under the H-1B visa category, an immigrant who aspires to establish a new enterprise must also substantiate that he or she could be fired by the employer at any time.¹⁴⁰ Finally, under the H-1B visa, the immigrant must under-

131. In re N.Y. State Dep't of Transp., 22 I. & N. Dec. 215, 217 (B.I.A. 1998).

132. See U.S. CITIZENSHIP & IMMIGRATION SERVS., NATIONAL INTEREST WAIVER (JAN. 30, 2016), <http://www.uscis.gov/eir/visa-guide/eb-2-employment-based-second-preference/national-interest-waiver> (asserting that in order to prove the immigrant's ability would benefit the United States on a national level, the immigrant "must show that [he or she] serve the national interest to a substantially greater extent than the majority of [his or her] colleagues and that [he or she] ha[s] a degree of influence on [his or her] field that distinguishes [him or her] from [his or her] colleagues.").

133. See EB2 NAT'L INTEREST WAIVER (NIW), *supra* note 69 (stating that from 314 approved NIW petitions studied, 99 percent of applicants earned a Ph.D. or Master's degree).

134. *Id.*

135. *Id.*

136. H1 BASE, *supra* note 72.

137. *Understanding H1-B Requirements*, *supra* note 73.

138. *Id.*

139. See Casey, *supra* note 81 (stating that the demand for the H-1B visa far exceeds the low supply, as evidenced by the 172,500 applications that reached USCIS over a five-day business period in April 2014).

140. *Understanding H1-B Requirements*, *supra* note 73.

stand that he or she may only receive legal status for a six-year period.¹⁴¹

2. *American Schools Produce the Top Entrepreneurial Talent in the World*

United States citizens can proudly claim that the future of the global business landscape is being molded within walls of American universities, as the top five MBA programs for entrepreneurship in the world are located in the United States.¹⁴² From coast to coast, future entrepreneurial minds are being molded to become the brightest and most cunning business owners in the world; this is evidenced by the fact that students can achieve world-class entrepreneurial education in California at the Stanford Graduate School of Business, the University of San Diego School of Business Administration, or the University of Southern California: Marshall, or if they prefer the east coast, they can seek this education from MIT: Sloan or Harvard Business School.¹⁴³ But, not surprisingly, as these United States universities are able to boast that they offer the top-level of entrepreneurial education, students from around the world are taking notice, such as at Stanford where the incoming class is represented by students from fifty-two other countries.¹⁴⁴

Stanford's class is not unique among the top five entrepreneurship programs, which include MIT: Sloan, the University of San Diego School of Business Administration, University of Southern California: Marshall, and Harvard Business School.¹⁴⁵ Unfortunately for these international students graduating from American schools, current immigration laws usher the students out of the country soon after graduation.¹⁴⁶ The students who have the patience and pockets to navigate complex immigration laws might stand a chance at working in the

141. H1 BASE, *supra* note 72.

142. Marich, *supra* note 1.

143. *Id.*

144. STANDARD GRADUATE SCHOOL OF BUSINESS, *supra* note 113.

145. See *supra* notes 113-117 and accompanying text (stating that 40 percent of the Stanford School of Business class was from a foreign country, 38 percent of the MIT: Sloan class was from a foreign country, 53 percent of the San Diego School of Business Administration was from a foreign country, 29 percent of the University of Southern California: Marshall was from a foreign country, and 34 percent of the Harvard School of Business was from a foreign country).

146. See Claire Groden, *Dear International Students: Thanks For Your Tuition. Now Go Home. Love, Uncle Sam.*, NEW REPUBLIC, (Dec. 2, 2014), <https://newrepublic.com/article/120463/immigration-law-discourages-international-students-working> (determining that "while universities roll out the welcome mat for international students, U.S. immigration law ushers them out soon after they graduate.").

United States permanently, but nothing is guaranteed.¹⁴⁷ This uncertain post-graduation process is a product of the fact that no direct path for permanent residence exists after graduating from an American university.¹⁴⁸ Congress must address this situation because American-educated international students in developing countries are returning to their home countries in high demand.¹⁴⁹ Therefore, foreign students are attending top-ranked American schools, eventually earning a highly-respected graduate degree, only to be told that America has no room for them, and the students then return to their respective countries to compete with America in the global marketplace.¹⁵⁰

B. THE FOURTH VERSION OF THE STARTUP ACT MUST BE PASSED

The Startup Act was created for the purpose of jump-starting economic recovery through creation and growth of new businesses.¹⁵¹ The Startup Act would modify the Immigration and Nationality Act, as amended, (“INA”) and would authorize the Department of Homeland Security (“DHS”) to grant conditional immigrant visas to 75,000 qualified immigrant entrepreneurs.¹⁵² To qualify as an alien entrepreneur, an immigrant must be lawfully present in the United States and either a resident of a foreign country who is temporarily in the United States to perform a service or labor, or a resident of a foreign country who is temporarily in the United States for the sole purpose of pursuing an education at a university, college, seminary, high school, or elementary school.¹⁵³ Furthermore, within one year of the visa being granted, an immigrant entrepreneur must register at least one new business enterprise in the United States, employ a minimum of two full-time employees in the new business enterprise who have no relation to the immigrant entrepreneur, and invest or raise capital in-

147. *See id.* (noting that “[i]nternational students who want to work permanently in America after graduation have to navigate a . . . maze of immigration law that demands incredible amounts of money, time, and uncertainty.”).

148. *Id.*

149. *Id.*

150. *Compare id.* (expressing that “foreign students keep on arriving, studying, and working hard—and then being turned away.”), *with* Marich, *supra* note 1 (determining that the top five programs, and seven of the top ten programs, in the world, for entrepreneurship are located at American universities).

151. Startup Act, S. Res. 181, 114th Cong. (2015).

152. *Compare* Startup Act, S. Res. 181, 114th Cong. § 210A (stating that the Secretary of Homeland Security may issue up to 75,000 conditional immigrant visas to qualified alien entrepreneurs), *with* 8 U.S.C. § 1153(b)(5) (2015) (expressing that 10,000 visas must be made available to qualified immigrants who seek to enter the United States to engage in a new commercial enterprise).

153. *Compare* Startup Act, S. Res. 181, 114th Cong. § 210A (explaining the requirements which allow an immigrant to be a qualified alien entrepreneur), *with* 8 C.F.R. 204.6(f)(1) (2015) (determining that generally, the amount of capital which must be invested into a new commercial enterprise under the EB-5 program is \$1,000,000).

vestment of at least \$100,000 for the new business enterprise.¹⁵⁴ Finally, within the following three years after the initial year in which the business is established, the new business enterprise must employ an average of a minimum of five employees who have no relation to the immigrant entrepreneur.¹⁵⁵

Congress made the following findings to substantiate the need to amend the INA to create an immigrant entrepreneur visa category: achieving economic recovery requires the establishment and growth of new businesses; between 1980 and 2005, businesses less than five years old constituted for almost all of the United States net job creation; new businesses in the United States generate an average of 3 million jobs annually; and to get Americans back in the work place, entrepreneurs ought to be free to create new companies, innovate, and hire new employees.¹⁵⁶

The Startup Act would provide a plethora of other needed changes to current immigration policies, including the elimination of per country numerical limitations for employment-based visas, research credit for newly established companies, and a capital gains tax exemption for newly established companies.¹⁵⁷ For example, the Startup Act would address the supply and demand issues currently present with H-1B visas, by eliminating per country numerical limitations for employment-based visas.¹⁵⁸ Additionally, the creation of a research and development tax credit for businesses younger than five years old would allow the businesses to offset employee taxes and allow for expansion and creation of jobs.¹⁵⁹

This proposed legislation has garnered support from many Republicans, Democrats, and entrepreneurial industry experts, such as Senator Moran who explained that the Startup Act would make certain the United States remains the land of opportunity for entrepreneurs and innovators from all around the world.¹⁶⁰ Senator Warner expounded that this legislation would ensure that the United States will be able to compete and win the global battle for talented

154. Compare Startup Act, S. Res. 181, 114th Cong. § 210A(e)(2)(B) (expressing the requirements which must be satisfied within one year of the date the immigrant is granted an entrepreneur visa), with 8 C.F.R. § 204.6(f)(1) (determining that under the EB-5 program, a qualifying investment is \$1,000,000, and in limited circumstances, is \$500,000).

155. Startup Act, S. 181, 114th Cong. § 210A.

156. *Id.* § 2.

157. *Id.* § 5.

158. Compare *id.* (determining that the Startup Act would eliminate per-country numerical caps on employment-based visa categories), with Casey, *supra* note 81 (noting that current H-1B applications far exceed the supply, as 172,5000 applications were submitted to USCIS in April 2014, but less than half of the applications were granted).

159. MORAN, *supra* note 90.

160. *Id.*

entrepreneurs and innovators.¹⁶¹ Senator Klobuchar added that this bipartisan effort would help ensure that future generations of entrepreneurs and innovators can establish their businesses in the United States.¹⁶²

A study was completed on a previous version of this bill, Startup Act 3.0, which is identical in many aspects to the Startup Act, and it was determined that the entrepreneur visa could generate nearly 1.6 million jobs over a ten-year period.¹⁶³ This study used United States Census Bureau data and figured a 49 percent survival rate of businesses to find a legislative baseline of nearly 500,000 jobs, which would be created by an entrepreneur visa.¹⁶⁴ Additionally, the study found an average United States company scenario, where typically, four-year old businesses from 2003 to 2010 employed 9.18 employees; accounting for survival rates, the study found that the entrepreneur visa could create just shy of 900,000 jobs.¹⁶⁵ Finally, taking into account the technology and engineering scenario, where these types of businesses hired an average of 21.37 people per business, the Kauffman Foundation found that an entrepreneur visa could create approximately 1.6 million jobs.¹⁶⁶

C. OPPONENTS OF BUSINESS IMMIGRATION REFORM

Critics of immigration reform, such as the Startup Act, typically argue that allowing immigrant workers to enter the United States would displace otherwise qualified Americans, driving up native-born unemployment and driving down salaries and wages.¹⁶⁷ Simple economics suggests that if millions of foreign-born people enter the American work force, then qualified Americans are forced to compete in a crowded work place for a finite number of employment opportunities.¹⁶⁸ These critics argue that because labor supply increases, then wages must fall, thereby affecting the economy.¹⁶⁹

161. *Id.*

162. *Id.*

163. See EWING MARION KAUFFMAN FOUND., *Employment Impact of an Entrepreneur Visa*, (Feb. 2013), http://www.moran.senate.gov/public/index.cfm/files/serve?File_id=d96346bc-2125-4439-99b3-23e7910114a5 (noting that “[a]mong technology and engineering companies founded between 2006 and 2012, one quarter were founded or cofounded by foreign-born individuals; these companies employed an average of 21.37 people per firm.”). Thus, in this projection, a total of 1,592,842 jobs could be created if the entrepreneur visa were to exist. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Timothy Kane, *Do Immigrants Drive Down Wages?*, NEWSWEEK, Feb. 27, 2015, <http://www.newsweek.com/do-immigrants-drive-down-wages-310100>.

168. *Id.*

169. *Id.*

Opponents to currently existing visa programs, like the H-1B program, vehemently oppose temporary worker immigration programs, specifically claiming that American information technology workers are replaced by immigrant workers.¹⁷⁰ Senator Sessions has accused tech industry leaders of perpetuating a false claim that there is a shortage of qualified American technology workers.¹⁷¹ Senator Sessions argues that this false claim has been driven by tech leaders' desire for young and cheap labor.¹⁷² For instance, Senator Sessions attacked Microsoft's actions because it laid off 18,000 employees, yet it pushed for a wider use of H-1B visas.¹⁷³

Senator Grassley echoed Senator Sessions' sentiments, stating that all employers should be required to extend a job offer to an American who is as qualified as the foreign national seeking a job in the United States.¹⁷⁴ Senator Grassley wants President Obama's administration to focus on protecting American workers, and he believes that businesses hiring H-1B workers should be required to verify the immigrant will not replace or displace American workers.¹⁷⁵

D. REALITY OF THE IMMIGRANT WORKER'S IMPACT ON THE UNITED STATES ECONOMY

Senator Grassley and Senator Sessions address a wide variety of issues, but proponents of immigration reform look to statistics to prove that immigrant workers, like H-1B visa holders, positively impact the United States economy and employment opportunities for native-born workers.¹⁷⁶ Despite partisan rhetoric, statistics prove that jobs filled using the H-1B visa program do not drive down salaries and wages for native-born workers.¹⁷⁷ A study issued in 2014 found that H-1B increases in science, technology, engineering, and mathematics ("STEM") workers facilitated significant growth in wages and salaries paid to college educated native-born Americans.¹⁷⁸ This study found

170. Thibodeau, *Anti-H-1B senator to head immigration panel*, *supra* note 72.

171. *Id.*

172. *Id.*

173. *Id.*

174. Thibodeau, *Obama H-1B reform plan draws Grassley's ire*, *supra* note 72.

175. *Id.*

176. *Compare id.* (stating that Sen. Grassley claims that American workers suffer because American businesses are not required to offer an otherwise H-1B job to an American citizen before they offer that position abroad), with AM. IMMIGRATION COUNCIL, *The H-1B Visa Program: A Primer on the Program and its Impact on Jobs, Wages, and the Economy* (Apr. 1, 2015), <http://www.immigrationpolicy.org/just-facts/h-1b-visa-program-primer-program-and-its-impact-jobs-wages-and-economy> (providing statistics which indicate that H-1B workers positively impact the United States economy as well as employment opportunities for native-born workers).

177. *Id.*

178. Peri et al., *supra* note 85.

that as a result of foreign STEM workers, there was a significant increase in total productivity in the average United States city between 1990 and 2010.¹⁷⁹

The often-heard argument that foreign STEM workers drive down wages was disproven when a Brookings study found that H-1B visa holders earn a higher salary than comparable native-born workers.¹⁸⁰ This study found that in 2010, H-1B workers with a bachelor's degree generally earned \$76,356 compared to native-born workers with a bachelor's degree who earned \$67,301.¹⁸¹ This study further established that H-1B workers earn a higher salary than American workers in the same age cohort and occupation.¹⁸² Furthermore, this study indicated that the H-1B visa program is alleviating acute shortages in multiple occupations throughout the United States.¹⁸³ In another study, it was determined that factors such as marital status, ethnicity, and gender play a more significant role than immigration status or citizenship for salaries and wages in the finance and tech industries.¹⁸⁴

The American Immigration Council found that H-1B workers complement American workers, fill gaps in numerous STEM occupations, and increase job opportunities for native-born workers.¹⁸⁵ For example, unemployment rates are lower than the national unemployment rate for occupations that hire large numbers of H-1B visa holders.¹⁸⁶ Thus, H-1B workers provide short-term relief to the economy, earn a higher salary than native-born workers in similar occupations, and the national unemployment rate for native-born workers in such occupations continues to stay below the overall unemployment rate.¹⁸⁷

179. *Id.*

180. Rothwell & Ruiz, *supra* note 86.

181. *Id.*

182. *Id.*

183. *Id.*

184. Kreisberg, *supra* note 87.

185. AM. IMMIGRATION COUNCIL, *The H-1B Visa Program: A Primer on the Program and its Impact on Jobs, Wages, and the Economy* (Apr. 1, 2015), <http://www.immigrationpolicy.org/just-facts/h-1b-visa-program-primer-program-and-its-impact-jobs-wages-and-economy>.

186. *See* U.S. CHAMBER OF COMMERCE, *supra* note 88 (noting that “[w]hile the current national unemployment rate hovers around 8 percent, the unemployment rate for US citizens with PhDs in STEM is just 3.5 percent, and 3.4 percent for those with master’s degrees in STEM.”).

187. *Compare* Rothwell & Ruiz, *supra* note 86 (determining that “H-1B workers are paid more than U.S. native-born workers with a bachelor’s degree generally (\$76,356 versus \$67,301 in 2010) and even within the same occupation and industry for workers with similar experience.”), *and* U.S. CHAMBER OF COMMERCE, *supra* note 88 (finding that “the unemployment rate for US citizens with PhDs in STEM is just 3.15 percent and 3.4 percent for those with master’s degrees in STEM[,]” and also that the unemployment rate is below 2 percent for petroleum engineers, computer network architects, nuclear

IV. CONCLUSION

Immigrant entrepreneurs have proven to be the bedrock of America's economy for decades. Of the Fortune 500 companies in 2010, an immigrant founded ninety of them and the sons and daughters of immigrants founded an additional 114 companies.¹⁸⁸ However, if an up-and-coming entrepreneur is interested in creating a business in America, he or she is forced to navigate a complex immigration system, which currently does not provide an entrepreneur visa. An immigrant may seek an Immigrant Investor visa, but he or she would need to invest \$500,000 into a new commercial enterprise and create at least ten full-time positions for American workers within a two-year period.¹⁸⁹ He or she may apply under the National Interest Waiver program, which does not require a job offer from a United States employer, but his or her business would have to benefit America in a national sense.¹⁹⁰ Another possible avenue, often used by science, technology, engineering, and mathematics ("STEM") professionals, would allow an immigrant entrepreneur to get his or her foot in the door, but the H-1B visa only provides temporary residence.¹⁹¹ These visa programs are extremely difficult for an immigrant entrepreneur to fit into.

American schools are producing the top entrepreneurial minds in the world.¹⁹² Accordingly, international students are flocking to these top programs in hopes of attaining a premier education.¹⁹³ However, soon after the international students graduate from these programs, immigration laws usher them out of the country.¹⁹⁴ As of the time of this writing, no direct path to permanent residence exists after gradu-

engineers, environmental scientists and geoscientists, database administrators, statisticians, engineering managers, and aerospace engineers), *with* Thibodeau, *Anti-H-1B senator to head immigration panel*, *supra* note 72 (explaining that Sen. Sessions accused technology industry leaders of promoting H-1B visas in part because of their "desire for cheap, young and immobile labor."), *and* Thibodeau, *Obama H-1B reform plan draws Grassley's ire*, *supra* note 72 (noting that Sen. Grassley believes that "[a]ll employers . . . should be required to offer the job to a U.S. worker who is equally or better qualified")

188. P'SHIP FOR A NEW AM. ECON, *supra* note 15.

189. *See supra* notes 18-40 and accompanying text.

190. *See supra* notes 58-72 and accompanying text.

191. *See supra* notes 73-89 and accompanying text.

192. Marich, *supra* note 1.

193. *See supra* notes 114-118 and accompanying text (stating that 40 percent of the Stanford School of Business class was from a foreign country, 38 percent of the MIT: Sloan class was from a foreign country, 53 percent of the San Diego School of Business Administration was from a foreign country, 29 percent of the University of Southern California: Marshall was from a foreign country, and 34 percent of the Harvard School of Business was from a foreign country).

194. Groden, *supra* note 146.

ating from an American university.¹⁹⁵ These American-educated students are returning to their home countries in high demand.¹⁹⁶ Essentially, American universities are teaching the rest of the world how to compete in the global market, while current immigration laws fail to recognize the benefit these immigrant entrepreneurs could have on the United States economy.

In order to stay competitive in the global market place, Congress must pass the Startup Act.¹⁹⁷ Passing the Startup Act would do much more than create an entrepreneur visa, as its passage would also: (1) create a new STEM visa; (2) eliminate per-country caps for all employment-based visas; and (3) create a research and development tax credit used for startups in the initial states of development.¹⁹⁸ Should no action be taken on this issue, at a minimum, a discussion needs to be had regarding college admission policies around the United States. No matter which side of the aisle an individual may like to call home, this issue can be solved from many angles, and Congress needs to react accordingly.

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195. *Id.*

196. *Id.*

197. Compare MORAN, *supra* note 90 (asserting that one of the core purposes of the Startup Act is to create an entrepreneur visa that would allow foreign-born entrepreneurs to remain in the United States in order to establish their businesses), with Goube, *supra* note 100 (indicating that 11 other countries around the world have created entrepreneur visas).

198. MORAN, *supra* note 90.

