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Startup Visa Act (2011)

New Proposals Designed to Attract and Retain Foreign National Entrepreneurs

The Startup Visa Act of 2011 is designed to attract and keep foreign-born startup founders with venture capital and strong entrepreneurial spirits in the United States rather than sending them overseas. The Startup Visa Act was first introduced in the Senate on February 24, 2010, and again on March 14, 2011. The original Act was amended and reintroduced in the Senate by Sen. John Kerry (D-MA), Sen. Richard Lugar (R-IN) and Sen. Mark Udall (D-CO) under the title of Startup Visa Act of 2011 – Senate Bill 565.[1] As of 2012, the Startup Visa Act of 2011 is awaiting review with the Judiciary committee and the Immigration subcommittees of the Senate and the House.

Currently, there are only a few immigrant visa categories offering permanent residency options to foreign nationals, and none of them really fit the bill for entrepreneurs. These options include:

- Employment-Based First Preference (EB-1) Category: Reserved for "Outstanding Professors and Researchers," "Multinational Executives or Managers" or immigrants with "Extraordinary Ability." This category was not designed for startup entrepreneurs, as it requires either an existing record of high achievement, or an affiliation with an existing enterprise outside of the U.S.
- Employment-Based Second Preference (EB-2) and Employment-Based Third Preference (EB-3) Categories: The EB-2 category is reserved for immigrants holding an advanced degree, and the EB-3 is reserved for professional and skilled/unskilled immigrant workers, neither of which are viable options for entrepreneurs given that these categories require a U.S. entity to sponsor the individual.

[1] Bill Text 112th Congress (2011-2012) S.565.IS (http://thomas.loc.gov/cgi-bin/query/z?c112:S.565:)

- Employment-Based Fifth preference (EB-5) Category: Reserved for immigrant investors who contribute at least $1 million (or $500,000 in high unemployment or rural areas) and create ten or more full-time jobs for qualifying U.S. workers. This option is also not feasible for startup entrepreneurs who often have new and innovative concepts that require venture capital as well as additional time than is currently allowable under this category to create the requisite 10 jobs.

The Startup Visa Act proposes new ways for the U.S. to attract and retain innovative and bright entrepreneurs who could qualify for the Startup Visa under one of the following scenarios:

Option 1:

An immigrant entrepreneur living outside of the U.S. who finds a qualified U.S. investor (venture capitalist, super angel or government entity) that agrees to financially sponsor the entrepreneurial venture with a minimum investment of $100,000. After two years, the business must have created five new jobs and raised not less than $500,000 in additional capital investment, or have generated not less than $500,000 in revenue.

Option 2:

An immigrant entrepreneur currently in the U.S. who is either on an unexpired H-1B visa, or has completed a graduate-level degree in science, technology, engineering, math, computer science or other relevant academic discipline from an accredited United States college, university, or other institution of higher education who also meets the following requirements: annual income of not less than roughly $30,000; or assets of not less than roughly $60,000; and has found a qualified U.S. investor (venture capitalist, super angel or government entity) that will financially back the entrepreneurial venture with a minimum investment of $20,000. Within two years, the business must have created three new jobs and raised not less than $100,000 in additional capital investment, or have generated not less than $100,000 in revenue.

Option 3:

An immigrant entrepreneurs living outside the U.S. who has a controlling interest in a company outside of the U.S. that has generated, during the most recent 12-month period, not less than $100,000 in revenue from sales in the U.S. Within two years, the business must have created three new jobs and raised not less than $100,000 in additional capital investment or have generated not less than $100,000 in revenue.

Entrepreneurs who qualify based on one of the options listed above would be granted conditional residency in the U.S. for a two-year period, after which, if the startup venture meets the statutory requirements, they could petition to remove the conditions on their permanent residence status.

The Startup Visa Act of 2011 does not propose to add new immigrant visa numbers to the 140,000 annual cap currently available. Rather, it proposes to allocate visa numbers unused from the EB-5 category, which is limited to 9,940 annually.

This amended bill also includes provisions designed to prevent possible fraud and abuse, and, unlike its predecessor, lowers the investment threshold to a more realistic level of $100,000 — an amount more in line with initial investments in the average startup venture.

This current version of the bill has won broad support among many groups including the U.S. Chamber of Commerce's Center for Entrepreneurship, the Silicon Valley Leadership Group, the American Bar Association, the National Venture Capital Association and the Partnership for a New American Economy, as well as major players

in venture capital and angel investing who have faced reductions in U.S.-based startup activity since the economic downturn, such as Y Combinator's Paul Graham and Foundry Group's Brad Feld.

Despite critics' arguments that the Startup Visa program would be too small to have a significant economic impact, the current bill does propose high rewards for the U.S. economy at large, with the added benefit of being low risk to the current immigration system.

The B-1 Business Visitor Visa/Visa Waiver Program

The Useful, Controversial Visa

The B-1 Visa

The business visitor visa, or B-1 visa, allows a foreign national to come to the U.S. for a temporary period to conduct business activities. Coming to the U.S. to conduct business means participating in limited activities that do not benefit a U.S. employer and/or would not require payment in the U.S.

Determining whether an activity is permissible for an individual in B-1 status can be complicated, and may often merit a review by immigration counsel. The following discussion highlights some of the more clear-cut examples of permissible and impermissible business visa activities.

Permissible B-1 activities include:

1. Engaging in commercial transactions which do not involve gainful employment in the U.S. (such as a merchant who takes orders for goods manufactured abroad);
2. Negotiating contracts;
3. Consulting with business associates;
4. Litigating;
5. Participating in scientific, educational, professional or business conventions, conferences, or seminars; or
6. Undertaking independent research.

After-Sales Service

Foreign nationals coming to the U.S. to install, service or repair machinery or equipment purchased from a company outside of the U.S. or to train U.S. workers to perform such services may also qualify if certain conditions are satisfied. The provisions allowing for this does not apply to foreign nationals seeking to provide building or construction work.

Observation

It is permissible for foreign nationals coming to U.S. on a B-1 visa to merely and exclusively observe the conduct of business or other professional or vocational activity. However, foreign nationals who seek to gain practical experience through long-term (more than three months) on-the-job-training or clerkships must qualify for the appropriate work visa (H, L or J).

Training

A foreign national may enter the U.S. on a B-1 visa to receive short-term (three months or less) classroom and/or on-the-job training in connection with his or her foreign employment. The foreign national should remain on

foreign payroll and should not receive any salary or remuneration from a U.S. entity during his or her training in the U.S., and the individual's training activities should not result in work product or services.

Business vs. Labor

A foreign national coming to the U.S. to perform skilled or unskilled labor cannot enter the U.S. as a business visitor. The B-1 visa is not intended for the purpose of obtaining and engaging in employment. A B-1 is not appropriate for activities for which persons are regularly employed, even if the foreign national remains on foreign payroll.

As stated above, it is often difficult to determine the difference between B-1 appropriate activities and activities that constitute skilled or unskilled labor. If the scenario does not clearly fit into any of the above situations, the safest course of action is to consult with immigration counsel for guidance.

Visa Waiver Program (VWP)

Citizens of certain countries can enter the U.S. for business under the Visa Waiver Program (VWP) without applying for a B-1 visa. The requirements and permitted activities are the same as for those entering with the B-1 visa stamp, the only difference being that those entering under the VWP are not required to obtain a B-1 visa stamp. The 36 countries currently participating in the VWP include: Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, and the United Kingdom. Canadian nationals are also able to enter the U.S. for business or pleasure without applying for a visa. From 2005 to 2010, 98 million people visited the U.S. using the VWP.

Although VWP participants do not need to apply for visas at the consulate, they must submit biographical information and answer eligibility questions through the Electronic System for Travel Authorization (ESTA) before traveling to the U.S. Travelers whose ESTA applications are denied must apply for and obtain a U.S. visa before traveling to the U.S.

Business Visitor Visa: Politics and Controversy

The use of the business visa has also been highlighted in recent years leading to increased and ongoing scrutiny of visitor visa applicants at U.S. embassies and of those seeking entry to the U.S. A suit filed against one technology company in February of 2010 prompted many questions at the agencies and from politicians. The suit was brought by an employee of Infosys Technologies Limited, Inc. The employee alleged that the company was misusing the visitor visa category. The allegations caught the attention of Senator Charles Grassley who wrote a letter to the Department of State Secretary Hilary Clinton and the Department of Homeland Security Secretary Janet Napolitano expressing concern about how Infosys Technologies Limited, Inc., a subsidiary of an Indian company, was alleged to have used the B-1 visa program to bring its foreign workers into the U.S. from India under the pretext of attending meetings, but may have instead come to the U.S. to work for the U.S. company.

Following the press the lawsuit and Senator Grassley's letter received, there have been increasing reports of stringent consular reviews of visitor visa applications, in particular at the U.S. consulates in India. Given this higher lever of scrutiny, it has become imperative that B-1 visa applications be meticulously prepared with information and documentation confirming the valid, legal reasons for the trips.

Fighting for the DREAM

States get involved, students organize, Federal gridlock continues

After being reintroduced into the Senate last year by Senator Harry Reid, The DREAM Act, which would provide conditional legal permanent resident status and a path to citizenship to certain qualifying undocumented individuals who came to the U.S. as children and who wish to attend college or join the military, has yet to become law — although politicians continue to weigh in on it while advocates continue to fight for it.

In its latest form as introduced in 2010, the DREAM Act would provide a six-year grant of conditional legal permanent residence to individuals between the ages of twelve and thirty-five at the time of enactment, who are of good moral character, graduated from U.S. high schools, came to the U.S. as minors, have continuously resided in the U.S. for the five years prior to enactment, and who then go on to complete a minimum of either two years of military training or two years of education at a U.S. institute of higher learning. Moreover, the Act would provide the added benefits of enabling qualifying college students who are currently undocumented to take advantage of certain opportunities for which they are now ineligible, such as internships, study abroad programs and greater access to financial assistance.

Upon removal of the conditions on their legal permanent resident status, DREAM Act beneficiaries would be full legal permanent residents or green card holders and eligible to apply for U.S. citizenship. The Act in its current form would impose strict evidentiary requirements, with the burden of proof of eligibility falling on the applicants.

Of the estimated eleven million individuals living in the U.S. without legal immigration status, The DREAM Act would help an estimated 1.1 million to legalize. In 2010, the Congressional Budget Office issued a highly anticipated cost estimate for the latest version of the legislation, in which it found that by permitting a path to legalization for this portion of the undocumented population, the deficit would be reduced by $1.4 billion over ten years, and that revenues, owing to an increase in tax-paying authorized workers, would be increased by $2.3 billion over ten years. Another study was conducted by the UCLA North American Integration and Development Center, in which it was found that the DREAM Act cohort, over the course of their working lives, would generate an estimated $1.4 trillion to $3.6 trillion over the course of forty years.

Despite its estimated benefits for a narrow demographic within the undocumented population, the DREAM Act remains controversial. It failed to pass in 2010 after passing in the House but failing to garner the votes to move it to the Senate; it failed to pass as part of failed efforts at comprehensive immigration reform in 2007 and 2006; it failed to pass in 2003; and its earliest incarnation (not yet called the DREAM Act), failed to pass in 2001. Its lengthy history shows that the politically charged issues preventing its passage mirror those that have to date prevented comprehensive immigration reform.

In the meantime, faced with the practical everyday issues of undocumented residents seeking to attend school, to the extent that they can, states are taking matters into their own hands. While they cannot legislate a path to legalization, they can pass laws pertaining to education.

For example, in California, two bills collectively called the “California Dream Act” were signed into law in 2011, effective in 2012, aimed at making it easier for undocumented students to pay tuition by enabling them to apply for private financial aid. In a similar vein, two other bills were passed in California to make it easier for undocumented individuals to attend school: AB 176, which allows high school students to show certain unofficial

forms of identification to get into college entrance exams, and AB 207, which allows parents to show different types of documents to schools to prove their children's residency such as pay stubs and property tax receipts. Moreover, similar bills have been passed in Illinois and Texas, and are circulating in Florida, Pennsylvania, and New York, with a recent failed effort in Virginia.

Additionally, growing numbers of students across the U.S. have been coming out publicly as undocumented, advocating for passage of the DREAM Act and hoping to raise awareness about their need for legalization. Given that these individuals are undocumented, the question obviously arises as to whether, by coming out publicly, they are jeopardizing their ability to remain in the U.S. Under the Obama administration, ICE maintains that it concentrates its removal efforts on criminals as opposed to those who are lacking legal status but are otherwise law abiding. With an election year and a potential change in administration however, this policy could change quickly and drastically.

U.S. Expands USCIS Expertise, Promotes Investment & Tourism,

USCIS Entrepreneurs in Residence Summit and EB-5 Initiatives

In October 2011, USCIS Director Mayorkas announced the "Entrepreneurs in Residence" (EIR) initiative to bring in "industry expertise to strengthen USCIS policies and practices surrounding immigrant investors, entrepreneurs and workers with specialized skills, knowledge, or abilities." Director Mayorkas has noted that the goal of the initiative and introduction of expert views from the private and public sectors is to "help us [USCIS] to ensure that our policies and processes fully realize the immigration law's potential to create and protect American jobs."

The initiative was launched with a series of informational summits with industry leaders to gather strategic input so that the agency may create a tactical team that includes entrepreneurs and experts working with USCIS personnel "to design and implement effective solutions." The first information summit took place on February 22, 2012, in Silicon Valley, California. At this time, EIR will focus on assessing current policies, practices and training across the following nonimmigrant visa classifications: B, Temporary Visitors for Business; H-1B, Specialty Occupations; E-1, Treaty Traders; L-1, Intracompany Treansferees; and O-1 Extraordinary Ability.

The EIR initiative builds on USCIS's recent efforts to promote startup enterprises and spur job creation, including enhancements to the EB-5 immigrant investor visa program. The EB-5 program enjoys increasing success and is widely supported by many in Congress from both sides of the aisle, however USCIS continues to face criticism for its administration of the program due to its fluid interpretations of EB-5 requirements, inconsistencies in adjudications and lack of understanding of business realities. In response to these criticisms, USCIS has taken steps to address some of the issues with timing and unpredictability. Director Mayorkas has expressed his interest in the program and is leading the Agency in taking steps toward providing a more transparent and predictable decision making process. Director Mayorkas has noted that "[a]s part of our broad review, and echoing President Obama's call to promote immigrants' entrepreneurial spirit, we have focused on the Immigrant Investor Program, commonly referred to as the EB-5 Program. It is a program designed to attract investors and entrepreneurs from around the world to create jobs in America. In the two decades since its creation, the EB-5 Program has never met the annual cap of 10,000 visas." With his direction, the USCIS is taking steps that are expected to help improve the timing and adjudication of these petitions. Some reforms already in progress include:

- The introduction of direct e-mail contact between the Regional Center petitioners and the USCIS adjudication team.
- The introduction of accelerated process and premium processing for certain applicants and petitions, expected in the Spring of 2012.

- The use of an expert Decision Board to assist adjudicators in rendering final adjudication decisions on Regional Center petitions.
- Hiring economists with business analysis expertise to help guide and support the USCIS adjudication team.
- Hiring a consulting firm to help further reengineer the EB-5 adjudication process to deliver greater efficiencies.

White House Initiatives to Increase Visitor Travel to U.S.

On January 19, 2012, President Obama signed an executive order for the dual purposes of streamlining the visitor visa process for certain foreign nationals while boosting the domestic economy and creating jobs through promoting increased international travel and tourism to the U.S.

The executive order, entitled "Establishing Visa and Foreign Visitor Processing Goals and the Task Force on Travel and Competitiveness," acknowledges that post-911 security measures imposed upon the nonimmigrant visa process have in part slowed international travel to the U.S., and thus calls for multiple agencies to work quickly together to implement the new policies in order to jump-start a boom in travel.

On the visa side, the order requires the Secretaries of State and Homeland Security to develop an implementation plan within 60 days of the order to establish a new visa pilot program with the goal of accomplishing a variety of tasks including increasing nonimmigrant visa processing in the key tourist markets of Brazil and China by 40 percent within the year, ensuring that 80 percent of nonimmigrant visa applicants are interviewed within three weeks of submitting their visa applications and augmenting efforts to encourage travel by foreign nationals of Visa Waiver participant countries.

Other key components of the new visa pilot program include establishing more cost-effective, efficient nonimmigrant visa processing procedures for individuals who are not deemed to be national security risks and who are reapplying for the same type of visa previously granted to them by permitting them to bypass the interview process, as well as the possibility of streamlined options for certain first-time child and elderly applicants. In keeping with national security goals, consular officers will retain their discretion to subject possible high-risk applicants to increased scrutiny.

On the tourism side, the order provides for the set up of a "Task Force on Travel and Competitiveness" composed of multiple agencies including the Departments of State, Treasury, Agriculture and Labor and Transportation, to develop a “National Travel and Tourism Strategy” within ninety days of the order with the goal of promoting international tourism to the U.S. and garnering a greater market share of worldwide travel coming from Brazil, China and India, by, among other things, developing strategies to promote travel to parks, monuments and "iconic American destinations," as well as the possible expansion of tourism promotion efforts to rural areas.

You may view the full contents of the Executive Order on the White House website.

CONSULAR CORNER & TRAVEL TIPS

U.S. Embassy in Damascus, Syria Suspends Operations

Effective February 6, 2012, the U.S. Embassy has suspended operations and is not open for normal consular services. Neither U.S. passports nor visas to the United States will be issued in Damascus. The Polish Embassy in

Damascus has agreed to assist U.S. citizens remaining in Syria by providing limited consular services. http://damascus.usembassy.gov/

In response to the current situation in Syria, the U.S. Embassy is no longer accepting I-130 petitions for immediate relatives of U.S. citizens. The Immigrant Visa (IV) Unit at the U.S. Embassy in Amman, Jordan, will be the designated processing post for Syrian visa cases until further notice. All I-130 petitions that do not fall into the immediate relative category must be filed with the U.S. Citizenship and Immigration Services in the United States. There are no exceptions. http://damascus.usembassy.gov/visas.html

Embassy of the United States, China- Important Changes

Due to an executive order signed by President Obama earlier this year, there are important change to U.S. visa procedures in China. These changes will benefit many thousands of Chinese visa applicants and significantly reduce wait times for interviews in China. As of February 2012, wait times at all posts in China are less than six days.

A quick look at some of the changes include:

- Assigning 50 new consular officers.
- In a few months, the former Embassy consular facility located in the first Diplomatic Neighborhood of Beijing will re-open. Reopening this facility will increase interviewing capacity in Beijing by 50 percent.
- In select circumstances, some qualified foreign visitors who were interviewed and thoroughly screened in conjunction with a prior visa application may be eligible to renew their visas without undergoing another interview. This new pilot program permits consular officers to waive interviews for some qualified nonimmigrant applicants worldwide who are renewing their visa within 48 months of the expiration of their previously held visa, and within the same classification as the previous visa.

While this new initiative will open as many as 100,000 appointments for first time visa applicants, consular officers continue to have the authority to interview any applicant who they determine requires a personal interview.

Greenberg Traurig Events and Speaking Engagements

GT Attorneys Speak at Overseas Funding (EB-5 & FDI) Workshop in Orlando, Florida

USAdvisors hosted an EB-5 seminar in Orlando, Fla., called the Overseas Capital Funding & Capital Raise Workshop. The workshop was an intense one-week course for those interested in learning how to raise funds from overseas investors, both private and institutional; how to structure EB-5 offering packages and securities documents; and how to put together the best EB-5 team to raise funds within the regulations imposed by both U.S. and foreign securities laws. Dawn Lurie, Kate Kalmykov and Steve Anapoell took part in two panels:

- "EB-5 Investments Through a Broader Lens." This panel discussed the ethical considerations involved in EB-5 offerings from both an immigration and securities perspective. Other topics addressed by the panel included the reasons behind EB-5 projects being considered securities offerings, investor qualifications issues, securities law exemptions and disclosure requirements. The ethics portion advised participants on avoiding and managing potential conflicts of interest, best practices for navigating the EB-5 landscape and finder's fees.

Mahsa Aliaskari, Shareholder
aliaskarim@gtlaw.com

Nataliya Binshteyn, Associate
binshteynn@gtlaw.com

Jennifer Blloshmi*, Assistant Director
bloshmij@gtlaw.com

Kristin Bolayir*, Assistant Director
bolayirk@gtlaw.com

Patricia A. Elmas*, Assistant Director
elmasp@gtlaw.com

Kate Kalmykov, Of Counsel
kalmykovk@gtlaw.com

Oscar Levin, Shareholder
levino@gtlaw.com

Dawn M. Lurie, Shareholder
luried@gtlaw.com

Christina Pitrelli, Associate
pitrellic@gtlaw.com

Laura Foote Reiff, Shareholder
reiffl@gtlaw.com

Rebecca B. Schechter, Associate
schechterr@gtlaw.com

Martha J. Schoonover, Shareholder
schoonoverm@gtlaw.com

Adelaida Vasquez, Associate
vasqueza@gtlaw.com

**Not admitted to the practice of law*

- "Marketing Your EB-5 Project - Where Immigration Practicalities and Securities Laws Intersect." This panel discussed the realities of bringing an EB-5 offering through the stages of formation, USCIS designation and delivery to the market. It offered participants practical advice on how to spot and deal with a number of issues surrounding the program as well as regional centers.

In January of 2012, Greenberg Traurig held an Informational Seminar Series on EB-5s in Las Vegas, Nevada, and in Orange County and Los Angeles, California. These lively roundtable discussions featuring GT's immigration and corporate securities attorneys, provided important details on the issues impacting businesses seeking alternative financing through the use of the EB-5 Foreign Investor program, specifically through the use of EB-5 Regional Centers. Public and private entities considering using the EB-5 program to finance commercial and public projects were encouraged to participate. Future dates and locations will be announced.

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General Information

Questions or comments? Please send an e-mail to Mahsa Aliaskari at: aliaskarim@gtlaw.com.