

12-18-2019

U.S. Immigration Policy: A Barrier to Immigrant Entrepreneurs, Innovation, and Startup Growth?

Courtney Kaiser

Follow this and additional works at: <https://repository.law.miami.edu/umialr>



Part of the [Immigration Law Commons](#), and the [Law and Economics Commons](#)

Recommended Citation

Courtney Kaiser, *U.S. Immigration Policy: A Barrier to Immigrant Entrepreneurs, Innovation, and Startup Growth?*, 51 U. Miami Inter-Am. L. Rev. 141 (2019)

Available at: <https://repository.law.miami.edu/umialr/vol51/iss1/7>

This Notes and Comments is brought to you for free and open access by University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

U.S. Immigration Policy: A Barrier to Immigrant Entrepreneurs, Innovation, and Startup Growth?

Courtney Kaiser*

I.	INTRODUCTION.....	142
II.	BACKGROUND.....	145
	<i>A. Problems with Researching Immigrant Entrepreneurship Trends in the U.S.</i>	146
	<i>B. Origins</i>	147
	<i>C. General Business Trends</i>	149
	1. Employees	149
	2. Sources of Funding.....	150
	3. Common Business Sectors	150
	4. Location	151
	<i>D. Business Success</i>	152
	<i>E. Economic Contributions</i>	152
III.	THE UNITED STATES' IMMIGRATION POLICY & IMMIGRANT ENTREPRENEURS: AN OVERVIEW.....	153
	<i>A. E-2: Temporary Treaty Investors</i>	154
	1. Requirements & Eligibility.....	154
	2. Conditions.....	156
	3. Statistics.....	156
	<i>B. EB-5: Permanent Immigrant Investors</i>	158
	1. Requirements & Eligibility.....	158
	a. Changes to EB-5 Program Beginning November 2019	160
	2. Statistics.....	161

* Courtney A. Kaiser received her B.S. in Public Relations with highest honors from the University of Florida in 2016. Courtney is currently the Executive Editor of the University of Miami Inter-American Law Review and a J.D. Candidate for the class of 2020 at the University of Miami School of Law. Special thank you to Professor Dan Ravicher for his guidance in creating this note.

C. <i>L-1A: Intracompany Transferee Executive or Manager</i>	162
D. <i>Application and Implementation Problems</i>	163
IV. LEGISLATIVE ATTEMPTS TO REFORM IMMIGRATION POLICY ..165	
A. <i>International Entrepreneur Rule</i>	166
1. Requirements & Eligibility.....	167
2. Conditions.....	167
3. Delay of Rule & Legal Action.....	168
i. Issue.....	168
ii. Holding.....	168
4. Elimination of the IE Rule.....	169
5. Compare to Current Policy	169
B. <i>Startup Act</i>	170
1. Eligibility & Conditions	171
2. Compare to E-2, EB-5 and the IE Rule.....	172
C. <i>Attracting and Retaining Entrepreneurs Act (2016)</i>	173
1. Entrepreneur Nonimmigrant Visa	174
2. Entrepreneur Immigrant Visa	175
V. RECENT IMMIGRATION REFORM IN NEIGHBORING	
COUNTRIES TO INCREASE IMMIGRANT ENTREPRENEURSHIP ..176	
A. <i>Canada</i>	177
B. <i>Chile</i>	179
C. <i>Brazil</i>	181
D. <i>Mexico</i>	182
VI. CONCLUSION.....	183

I. INTRODUCTION

The United States is known as both the birthplace and the dominant location for modern, high-tech startups.¹ Each year, startups

¹ Richard Florida & Ian Hathaway, *Rise of the Global Startup City: The New Map of Entrepreneurial and Venture Capital*, CENTER FOR AMERICAN ENTREPRENEURSHIP (Oct. 2018), http://startupsusa.org/global-startup-cities/global_cities_report.pdf [hereinafter *Rise of the Global Startup City*] (*Rise of the Global Startup City* is a report prepared by the Center for American Entrepreneurship examining the new global geography of global startup hubs. The research analyzes data from more than 100,000 venture capital deals, across 300 global cities between 2005 and 2017. The report focuses on tracking venture capital investment and deals by location to assess the globalization of startups.).

in cities across the U.S. raise an astonishing amount of venture capital. However, despite its longstanding status, the U.S.'s global dominance over venture capital activity has diminished significantly as entrepreneurial activity has increased globally.² In the 1990s, the U.S., alone, accounted for more than 95% of global venture capital investment.³ By 2000, this amount declined to 80%.⁴ By 2012, 71%.⁵ Finally, by 2017, the U.S. accounted for just more than half of all global venture capital.⁶

As the U.S.'s dominance declines,⁷ the amount of global venture capital investments has surged. In 2010, approximately \$52 billion was raised.⁸ In 2017, that amount rose to \$171 billion.⁹ Despite this, the U.S. still remains the forefront location for startup financing. San Francisco and Silicon Valley account for 13.5% of global start up deals and roughly a fifth of global venture investment, remaining the world's dominant hubs for startup activity.¹⁰

However, it is clear that the U.S. has competition and that competition is increasing at an accelerating rate. The U.S. no longer dominates the global venture capital market and startup hubs are flourishing across the world.¹¹ Some economists worry the U.S. cannot gain back its status.¹² Additionally, an increase in the globalization of startup activity has led to entrepreneurs remaining in their home countries or looking to countries with a more favorable

² See generally *id.*

³ *Id.* at 10.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 26. Since 2005, U.S. cities have lost control of the global list of leading cities for venture capital investment. From 2005 to 2007, eight of the top eight leading cities, and 32 of the top 50 leading cities were in the U.S. By 2015, the U.S. was home to only five of the top eight, and 21 of the top 50 cities.

⁸ *Id.* at 10.

⁹ *Id.* at 6.

¹⁰ *Id.* at 18.

¹¹ See generally *Rise of the Global Startup City*, *supra* note 1.

¹² See generally Robert J. Samuelson, *The U.S. has lost its entrepreneurial advantage*, THE WASHINGTON POST (Oct. 24, 2018), https://www.washingtonpost.com/opinions/the-us-has-lost-its-entrepreneurial-advantage/2018/10/24/98996cb0-d7a3-11e8-aeb7-ddcad4a0a54e_story.html?utm_term=.ffd76724613d (quoting "The U.S. monopoly on entrepreneurship has been broken and almost certainly can't be restored.").

immigration policy to grow their companies.¹³ The long-held belief that a startup must launch and scale in Silicon Valley or the U.S. in order to be successful is becoming less convincing.¹⁴

Throughout the last decade, economists, entrepreneurs, and elected officials have searched for a way to maintain the U.S.'s status as the dominant place for startups and venture capital investments. An often-cited problem is the U.S.'s immigration policy. Specifically, that the U.S. lacks a specific visa dedicated to immigrant entrepreneurs.¹⁵

People who come to the U.S. to learn at the university and graduate level “add significantly to the pool of residents who have a reasonable chance of creating high-impact, high-tech companies.”¹⁶ However, the U.S. immigration system currently lacks a clear pathway for these people to remain in the U.S. and thrive. Obtaining admission to the U.S. as a student is not particularly difficult, but their future ability to remain in the U.S. post-graduation can be quite uncertain.¹⁷ There appears to be a disconnect between nonimmigrant visa status and legal permanent residence,¹⁸ leading to mixed signals among foreigners. Scholars worry that the uncertainty inherent in the U.S.'s immigration policy regarding nonimmigrant status might lead to immigrant entrepreneurs leaving be-

¹³ See generally *id.*

¹⁴ See generally Sonia Paul, *The Trump Administration Is Driving Away Immigrant Entrepreneurs*, THE ATLANTIC (June 7, 2018), <https://www.theatlantic.com/business/archive/2018/06/trump-immigrant-entrepreneurs/561989/> (quoting Natalie Novick, sociologist and ethnographer at the University of California, “Silicon Valley may have written the script for how to build a startup, but those practices are now global.”).

¹⁵ See generally David Jolley, *America Needs Immigrant Entrepreneurs*, BUSINESS INSIDER (Sept. 5, 2017), <https://www.businessinsider.com/america-needs-immigrant-entrepreneurs-2017-9>.

¹⁶ David M. Hart & Zoltan J. Acs, *High-Tech Immigrant Entrepreneurship in the United States*, 25(2) ECON. DEV. Q., 116, 125 (2011) [hereinafter Hart & Acs].

¹⁷ *Id.* at 126 (stating that “[t]he availability of nonimmigrant visa slots to graduating students and employers who desire them is spotty at best.”).

¹⁸ See generally *E-2 Visa Improvement Act of 2019*, H.R. 2124, 116th Cong. (2019) [hereinafter *E-2 Visa Improvement Act of 2019*]. The E-2 Visa Improvement Act of 2019 was introduced to the House on April 8, 2019 to amend the INA to permit certain E-2 nonimmigrant investors to adjust status to lawful permanent residence status.

fore they take “the entrepreneurial plunge.”¹⁹ As a result, there is significant support for reforming the current immigration policy as well as support for more research regarding immigrant entrepreneurship trends in the U.S.

This note analyzes the effects of U.S. immigration policy on immigrant entrepreneurs, the contributions of immigrant entrepreneurs in the U.S., and recent calls for related legislative reform. This note begins by offering background regarding immigrant entrepreneurship. This part acknowledges the setbacks and difficulties in measuring immigrant entrepreneurship in the U.S. but attempts to discuss its impacts and contributions on U.S. business ownership, economy, and job creation. Part III includes an assessment of the U.S.’s current immigration policy, as it applies to immigrants looking to invest or start a business in the U.S., specifically the E-2 and EB-5 visa options. Part IV introduces recently proposed regulations, including the IE Rule, Startup Act 4.0, and the Attracting and Retaining Entrepreneurs Act, that directly address immigrant entrepreneurs in the U.S. This part compares those proposals to each other and current visa options. Part V looks outside the U.S. to neighboring country’s immigration policy toward foreign entrepreneurs. Finally, Part VI offers concluding statements.

II. BACKGROUND

Immigrant entrepreneurs now account for almost 30% of all new entrepreneurs in the U.S., up from 13.3% in 1996, according to the Kauffman Index of 2017.²⁰ This percentage reflects the increasing population of immigrants in the U.S.²¹ The Index also concludes that immigrants are twice as likely as native-born Americans to become entrepreneurs.²² According to the 2018 Global

¹⁹ Hart & Acs, *supra* note 16, at 125.

²⁰ Robert Fairlie, Sameeksha Desai & A.J. Hermann, *2017 National Report on Early-Stage Entrepreneurship*, Ewing Marion Kauffman Foundation: Kauffman Indicators of Entrepreneurship, (Feb. 2019), <https://indicators.kauffman.org/wp-content/uploads/sites/2/2019/02/2017-National-Report-on-Early-Stage-Entrepreneurship-February-20191.pdf> [hereinafter *Kauffman Report 2017*].

²¹ *Id.* at 11.

²² *Id.* at 4.

Entrepreneurship Index (GEI 2018)²³ the U.S. remains the most entrepreneurial ecosystem.²⁴

However, “[e]ntrepreneurship can be hard to quantify” and attempting to quantify “the entrepreneurial energy of a community is particularly challenging.”²⁵ This part begins with an overview of the problems with researching immigrant entrepreneur activity in the U.S. Using available data from surveys, journals, and studies, this part also discusses the impacts of immigrant entrepreneurs and their businesses on the U.S.

A. Problems with Researching Immigrant Entrepreneurship Trends in the U.S.

Measuring “entrepreneurship” on its own is often cited as “difficult,” and available government data does not include a specific entry for “entrepreneurs.”²⁶ Literature studying the effects of immigrant entrepreneurs in the U.S. has increased in the last decade as it has become an important socioeconomic phenomenon,²⁷ but the topic still remains relatively under-researched. Measuring the extent of immigrant entrepreneurs’ impact on the U.S. requires a comprehensive analysis into many different areas.²⁸ Furthermore, summarizing the contributions of these immigrants based on one or

²³ Zoltan Acs, Laszlo Szerb & Ainsley Lloyd, *The Global Entrepreneurship Index 2018*, GLOBAL ENTREPRENEURSHIP & DEV. INST., (2018) at 5 [hereinafter *GEI 2018*].

²⁴ *Id.* at 4-5. The Index takes in account entrepreneurial attitudes, abilities, and aspirations, across 14 pillars to assess how individual countries allocate their resources to promote entrepreneurship. However, the study does not include a pillar reflective of immigrant entrepreneurship or factors in the ease of doing business in the U.S. as a foreigner.

²⁵ Chris Jackson, *Lessons from the Kauffman Index: Immigrants are Infused with Entrepreneurial Energy*, EWING MARION KAUFFMAN FOUND. (June 26, 2015), <https://www.kauffman.org/currents/2015/06/lessons-from-the-kauffman-index-immigrants>.

²⁶ Ryan Decker, John Haltiwanger, Ron Jarmin & Javier Miranda, *The Role of Entrepreneurship in U.S. Job Creation and Economic Dynamism*, 28(3) J. OF ECON. PERSPECTIVES, 3, 4 (2014).

²⁷ See Rocio Aliaga-Isla & Alex Rialp, *Systematic Review of Immigrant Entrepreneurship Literature: Previous Findings and Ways Forward*, 25(9) ENTREPRENEURSHIP & REGIONAL DEV. 819 (2013).

²⁸ *Id.* at 822.

a few statistics has the potential to lead to potentially inaccurate conclusions.

Additionally, there are often inconsistencies as to a study's definitions of "immigrant" and "entrepreneur." Some studies focus solely on first-generation immigrants in the U.S., whereas others refer to all immigrants, including second-generation immigrants.²⁹ This further adds to the difficulty in tracking immigrant entrepreneur activity in the U.S. The Ewing Marion Kauffman Foundation (Kauffman Foundation) has cited an additional problem in immigrant entrepreneur research as the "lack of large, national panel data sets" that follow firms and individuals over time.³⁰ Further, research and studies reflecting the impact of immigrant entrepreneurs by native country on American economy, job growth, and business formation are understudied.³¹

Despite the research shortcomings, this part seeks to focus on the impacts and trends of immigrant entrepreneurs in the U.S. by looking at available data from some of the following sources and surveys: The Kauffmann Index of Entrepreneurial Activity, U.S. Census Bureau (including the Survey of Business Owners, American Community Survey, and Business Dynamics Statistics), The Global Entrepreneurship and Development Institute, National Bureau of Economic Research, The EB-5 Investment Coalition, and the Global Entrepreneurship Monitor. This part uses this available data to discuss U.S. immigrant entrepreneurs' origins, where they are concentrated in the U.S., common business sectors, startup funding options, and other trends.

B. Origins

The American Community Survey (ACS) includes an analysis of business ownership by looking at self-employed individuals in incorporated businesses (SE-I).³² The sample used "is restricted to

²⁹ Sari Kerr, *Immigration*, EWING MARION KAUFFMAN FOUND. (Jan. 10, 2018), <https://www.kauffman.org/microsites/state-of-the-field/topics/background-of-entrepreneurs/demographics/immigration>.

³⁰ *Id.*

³¹ *See generally id.*

³² Sari Kerr & William Kerr, *Immigrant Entrepreneurship in America: Evidence from the Survey of Business Owners 2007 & 2012* 22 (Nat'l. Bureau of Econ. Research, Working Paper No. 24494, 2018) [hereinafter Kerr & Kerr].

individuals who report their place of birth and are aged between 25 and 55.”³³ A working paper by the National Bureau of Economic Research (NBER) briefly summarizes the findings from 2001 to 2015 to assess where SE-I in the U.S. are from.³⁴ The report found that “[t]here is an increasing share in the number of SE-I entrepreneurs . . . “ that are immigrants, from 17% in 2001 to 24% in 2015.³⁵ Although no country accounts for more than 4% of the total share in 2015, studies show the biggest origin countries are Mexico, India, and China.³⁶

According to the Report of the Visa Office with respect to issued EB-5 visas, which will be further discussed in detail later in this note, approximately 80 to 90% of the 10,000 visas allocated each year between 2015 and 2018 were issued to Asian nationals.³⁷ Behind Asia, is the South American region.³⁸ The number of EB-5 visas issued to South American nationals has increased from 130 in 2015 to 730 in 2018.³⁹

Treaty investor visas, or E-2 classifications, have a slightly more diverse issuance pool compared to EB-5 visas. In 2017, the United States Citizenship and Immigration Services (USCIS) issued 43,673 E-2 visas.⁴⁰ Of the total, 18,267 visas were issued to

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 22, n.22.

³⁷ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE V (PART 3) (2015); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE V (PART 3) (2016); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE V (PART 3) (2017); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE V (PART 3) (2018).

³⁸ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE V (PART 3) (2015); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE V (PART 3) (2016); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE V (PART 3) (2017); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE V (PART 3) (2018).

³⁹ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE V (PART 3) (2015); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE V (PART 3) (2018).

⁴⁰ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, NONIMMIGRANT VISA ISSUANCES BY VISA CLASS AND BY NATIONALITY (2017).

Asian nationals, 17,532 to Europeans, 5,442 to North Americans, and 1,942 to South Americans.⁴¹

C. General Business Trends

The NBER paper also summarizes results from the 2007 and 2012 Survey of Business Owners (SBO), provided by the Federal Statistical Research Data Centers.⁴² An immigrant-owned firm is defined as having one or more immigrant owners.⁴³ When looking at all firms, the percentage of immigrant-owned firms rose from 16.4% in 2007 to 17.8% in 2012.⁴⁴ Conversely, firms with no immigrant owners, or native-owned firms, made up 83.6% of firms in 2007 and 82.2% in 2012.⁴⁵

However, immigrant-owned firms are more prevalent when looking at the data for “new” firms, defined as those firms created in the five years prior to the survey.⁴⁶ In 2007 and 2012, immigrant-owned firms make up 23.7% and 26% of all firms, respectively.⁴⁷ Native-owned firms accounted for 76.3% in 2007, and 74% in 2012.⁴⁸

1. Employees

Additionally, when looking at “new” firm data, the mean number of employees appears to be even across immigrant-owned and native-owned firms.⁴⁹ The data also shows that immigrant-owned firms are less likely to offer benefits such as health insurance, 401K, or paid leave to their employees compared to native-owned businesses.⁵⁰ However, both ownership types saw a decline in the

⁴¹ *Id.* (E-2 visas are only available to treaty country nationals. Therefore, China and India nationals are not eligible for these visas.).

⁴² Kerr & Kerr, *supra* note 29, at 11.

⁴³ *Id.* at 12.

⁴⁴ *Id.* at Table A1a.

⁴⁵ *Id.*

⁴⁶ *Id.* at Table 1b (combining the “Immigrant only” and “Mixed” percentages for this conclusion).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at Table 1a (The mean number of employees across immigrant-owned new firms was 5.26 in 2007 and 5.03 in 2012. The mean number of employees across native-owned new firms was 5.45 in 2007 and 5.88 in 2012.).

⁵⁰ Kerr & Kerr, *supra* note 32, at Table 1a.

percentage that offer each of these benefits from 2007 to 2012.⁵¹ These trends persist in “new” firm data, pointing to a potentially lower job quality in immigrant-owned firms.⁵² Both ownership types are comparable in the tendency of hiring full-time workers as opposed to temporary workers, with both increasing the percentage of full-time workers in 2012.⁵³

2. Sources of Funding

The SBO data from 2007 to 2012 concludes that roughly 70-75% of all immigrant and native-owned firms are most likely to fund their startups with personal savings.⁵⁴ Native-owned firms are more likely to use bank loans, credit, or assets to help fund their firms.⁵⁵ Family loans are also more common in immigrant-owned businesses.⁵⁶

Additionally, immigrant firms with a first-generation immigrant owner average more startup capital than native-owned firms.⁵⁷ The SBO concluded, when looking at all firms, the mean startup capital for these immigrant-owned firms was \$156,000 in 2007, and \$136,200 in 2012.⁵⁸ Native-owned firms recorded less mean startup capital, \$136,000 in 2007, and \$110,700 in 2012.⁵⁹ When looking at “new” firms, those created within five years of each survey, the mean startup capital for first generation immigrant-owned firms was \$162,900 in 2007 and \$143,500 in 2012.⁶⁰ Non-immigrant new firms averaged \$137,400 in 2007 and \$127,500 in 2012.⁶¹

3. Common Business Sectors

The ACS findings show that immigrant SE-I shares are higher for those with a science, technology, engineering, or mathematics

⁵¹ *Id.*; *see id.* at 14.

⁵² *Id.* at 12.

⁵³ *Id.* at 14; *id.* at Table 1a.

⁵⁴ *Id.* at Table 3.

⁵⁵ *Id.* at 16.

⁵⁶ Kerr & Kerr, *supra* note 32, at 16.

⁵⁷ *Id.* at Table A7.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at Table 8.

⁶¹ *Id.*

(STEM) degree, making up 27%.⁶² Despite this statistic, the SBO results show that the most common sector for immigrant-owned firms, when looking at all firms, was in accommodation and food (16.3% in 2007 and 16.2% in 2012).⁶³ In 2007, the following sector shares were retail trade (15.5%), health care and social (12.3%), and professional, technical services (11.9%).⁶⁴ In 2012, health care and social increased (from 12.3% to 14.3%), professional, technical services increased (from 11.9% to 12.8%), and retail trade declined (from 15.5% to 12.5%).⁶⁵ Comparatively, in 2007, in order of share of market, native-owned firms focused on professional, technical services, construction, and retail trade.⁶⁶ In 2012, professional, technical services increased, construction decreased, and health care and social increased.⁶⁷

4. Location

According to the SBO's 2012 findings for all firms, California (33.4%), District of Columbia (29.7%), New York (29.1%), New Jersey (28.3%), and Florida (25.9%) have the highest number of immigrant-owned businesses.⁶⁸ When looking at the findings for "new" firms, the five states remain the same, but the percentages of the market for immigrant-owned firms increase in each: California (41.9%), District of Columbia (32.2%), New York (43.1%), New Jersey (44.5%) and Florida (33%).⁶⁹ These results among new firms are consistent with findings that immigrant entrepreneurs "tend to locate their businesses in places that have larger immigrant populations . . ." ⁷⁰ Historically, "concentrations in gateway locations are a common feature of immigrant populations" in the U.S.⁷¹

⁶² *Id.* at 22 n.22.

⁶³ Kerr & Kerr, *supra* note 32, at Table 2.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at Table 4.

⁶⁹ Kerr & Kerr, *supra* note 32, at Table 4.

⁷⁰ Hart & Acs, *supra* note 16, at 126.

⁷¹ *Id.*

D. Business Success

According to a National Foundation for American Policy (NFAP) report, 51% of U.S. startups valued at one billion U.S. dollars or more have been launched by immigrants.⁷² Companies with a valuation of one billion U.S. dollars or more are commonly referred to as “unicorns.”⁷³ These firms represent fifty of the ninety-one unicorn startups in the U.S. and have created an average of 760 jobs.⁷⁴ These unicorn startups have at minimum one immigrant owner;⁷⁵ however, it is not clear whether “immigrant owner” is defined as a first- or second-generation immigrant. Additionally, the NFAP reported that twenty of the ninety companies had a founder who first came to the U.S. as an international student.⁷⁶ These entrepreneurs come from twenty-five different countries and thirty-three of the fifty entrepreneurs have their headquarters in California.⁷⁷ At the top of the list are the following companies and each’s net worth: Uber (\$72 billion U.S. dollars), SpaceX (\$21 billion U.S. dollars), and WeWork (\$20.2 billion U.S. dollars).⁷⁸ The report also notes that successful immigrant entrepreneurs in America are “almost always refugees or family-sponsored and employer-sponsored immigrants.”⁷⁹ However, there is little to no factual support in the report defending this statement.

E. Economic Contributions

In March 2019, the EB-5 Investment Coalition, acknowledging “the limitations of one kind or another” of previous studies, released an assessment attempting to track the economic benefits and

⁷² STUART ANDERSON, IMMIGRANTS AND BILLION- DOLLAR COMPANIES, NAT’L. FOUND. FOR AMER. POLICY 2 (Oct. 2018), <https://nfap.com/wp-content/uploads/2018/10/2018-BILLION-DOLLAR-STARTUPS.NFAP-Policy-Brief.2018.pdf>.

⁷³ *Unicorn*, INVESTOPEDIA (Oct. 15, 2019), <https://www.investopedia.com/terms/u/unicorn.asp>.

⁷⁴ *Id.* at 5.

⁷⁵ *See generally id.* at 1.

⁷⁶ *Id.* at 9.

⁷⁷ *Id.* at 3, 10.

⁷⁸ *Id.* at 8.

⁷⁹ *Id.* at 3.

job creation of the EB-5 Regional Center Program.⁸⁰ The study claims to represent a “more geographically robust and therefore a more complete estimate of the economic contributions . . . for the federal fiscal year 2014 and 2015 period.”⁸¹ The study found that a total of \$10.98 billion in capital investment was made through the EB-5 Regional Center Program during FY2014 and FY2015.⁸² Nearly two-thirds, or \$7.07 billion, of those investments were in the construction sector.⁸³ The study also reported that the level of investment supported more than 355,200 total jobs for U.S. workers, accounting for roughly 6% of all private sector job growth in the U.S. within those years.⁸⁴ The study also assessed the resulting public sector job growth.⁸⁵ The study additionally breaks down the EB-5 Investment and job creation by region.⁸⁶

III. THE UNITED STATES’ IMMIGRATION POLICY & IMMIGRANT ENTREPRENEURS: AN OVERVIEW

Exploring the U.S.’s immigration options for immigrant entrepreneurs requires an analysis of the current U.S. immigration policy. Although there are more than 100 nonimmigrant and immigrant visa categories, this part focuses mainly on the E-2 and EB-5 visas. Both of these options are available to immigrants specifically looking to invest in or start a U.S. business. Briefly discussed is the L-1A visa classification, as it applies to starting affiliate foreign businesses in the U.S.

⁸⁰ JEFFREY CARR & ROBERT CHASE, ECONOMIC & POLICY RESOURCES, ASSESSMENT OF THE ECONOMIC VALUE AND JOB CREATION IMPACTS OF PROJECT CAPITAL INVESTMENT ACTIVITY UNDER THE EB-5 PROGRAM 1 (March 13, 2019), <http://eb5coalition.org/wp-content/uploads/2019/03/Final-Report-03.13.19.pdf> [hereinafter EB-5 Assessment].

⁸¹ *Id.* at 2.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 3. The total number of jobs referenced includes jobs directly created as a result of the investment of the EB-5 investor and also those jobs created indirectly.

⁸⁵ *Id.*

⁸⁶ *EB-5 Assessment, supra* note 80, at Table 1.

A. *E-2: Temporary Treaty Investors*

The E-2 nonimmigrant classification is available only to nationals of treaty countries, those countries that have a treaty of commerce and navigation agreement with the U.S.⁸⁷ The E-2 visa holder's employees may also be eligible for E-2 classification.⁸⁸ From 2008 to 2017, the U.S. Citizenship and Immigration Services (USCIS) issued 85,317,016 nonimmigrant visas.⁸⁹ Of these issued, 339,483 were E-2 visas.⁹⁰ Unlike some nonimmigrant visa options, including the H-1B visa, there is no quota for E-2 visas.⁹¹

1. Requirements & Eligibility

There are three main requirements for E-2 classification. First, the treaty investor must be a national of a country with which the U.S. maintains a treaty of commerce and navigation.⁹² There are currently eighty-two treaty countries eligible for E-2 classification.⁹³ Brazil, China, India, and Russia are not treaty countries and,

⁸⁷ 8 C.F.R. § 214.2(e)(2)(2019).

⁸⁸ U.S. CITIZENSHIP AND IMMIGRATION SERVICES, E-2 TREATY INVESTORS (2014), <https://www.uscis.gov/working-united-states/temporary-workers/e-2-treaty-investors> [hereinafter E-2 TREATY INVESTORS].

⁸⁹ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING CREWLIST VISAS AND BORDER CROSSING CARDS) FISCAL YEARS 2008-2012 (2012); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING BORDER CROSSING CARDS) FISCAL YEARS 2013-2017 (2017).

⁹⁰ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING CREWLIST VISAS AND BORDER CROSSING CARDS) FISCAL YEARS 2008-2012 (2012); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING BORDER CROSSING CARDS) FISCAL YEARS 2013-2017 (2017).

⁹¹ E-2 TREATY INVESTORS, *supra* note 88.

⁹² *Id.*

⁹³ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, TREATY COUNTRIES, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html>. (The most recent additions to the list include Israel, as of May 1, 2019, and New Zealand, as of June 10, 2019.)

therefore, nationals from these countries are ineligible for E-2 classification.⁹⁴

Second, the investor must have invested or be in the process of investing a substantial amount of his or her own capital in a bona fide enterprise in the U.S.⁹⁵ The investor must also prove that the capital investment was not obtained from criminal activity.⁹⁶

Third, the investor must be seeking classification solely to develop and direct the enterprise.⁹⁷ The investor must have at least 50% ownership of the enterprise or have operational control of the enterprise through a managerial position.⁹⁸ The enterprise must also not be marginal, and it must have the present or future capacity to generate more than enough income to provide a minimum living for the treaty investor and his or her family.⁹⁹

There are also three general qualifications for an employee of a treaty investor to qualify for E-2 classification. First, the employee must be the same nationality of the employer or the treaty investor.¹⁰⁰ Second, the employee must meet the definition of “employee” under relevant law.¹⁰¹ Third, the employee must engage in the duties of an executive or have special qualifications if employed in a lesser capacity.¹⁰² Special qualifications are defined as skills that make the employee’s services essential to the enterprise.¹⁰³ These qualifications vary but include an analysis of the employee’s degree of expertise and whether the skills and qualifications are readily available in the U.S.¹⁰⁴

⁹⁴ *Id.*

⁹⁵ 8 C.F.R. § 214.2(e)(2)(i). According to USCIS, a bona fide enterprise is a business with a “real, active commercial or entrepreneurial undertaking which produces services or goods for profit.” To qualify, the enterprise cannot be an idle investment where the investor has no intent to direct the enterprise.

⁹⁶ 8 C.F.R. § 214.2(e)(12).

⁹⁷ E-2 TREATY INVESTORS, *supra* note 88.

⁹⁸ 8 C.F.R. § 214.2(e)(16).

⁹⁹ 8 C.F.R. § 214.2(e)(15). An applicant must also demonstrate that his or her business is non-marginal through a detailed business plan, tax returns, financial statements or payroll summaries.

¹⁰⁰ 8 C.F.R. § 214.2(e)(3).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ E-2 TREATY INVESTORS, *supra* note 88.

¹⁰⁴ 8 C.F.R. § 214.2(e)(18).

2. Conditions

Upon receiving classification, the investor or employee is allowed a maximum initial stay of two years.¹⁰⁵ Requests for extension of stay may be granted in two-year increments and there is no maximum limit to the number of extensions.¹⁰⁶ The E-2 nonimmigrant must maintain the intention to depart the U.S. when his or her status expires.¹⁰⁷

There are additional conditions for E-2 nonimmigrants. The treaty investor or employee may only work for the activity in which he or she was approved for at the time E-2 classification was granted.¹⁰⁸ The nonimmigrant must notify the USCIS of any substantive changes, including mergers, acquisitions, or major events to the enterprise.¹⁰⁹

Family members, spouses, and unmarried children under the age of twenty-one, may accompany treaty investors and employees to the U.S.¹¹⁰ However, once a child of an E-2 visa holder reaches the age of twenty-one, his or her visa will automatically expire, and the child must depart the U.S. or seek another visa option.¹¹¹

3. Statistics

As shown in Table 1 below, from 2009 to 2015, there was a gradual increase in the total number of nonimmigrant visas issued.¹¹² The total number of nonimmigrant visas issued jumped from 9,932,480 in 2014, to 10,891,745 in 2015.¹¹³ However, since

¹⁰⁵ 8 C.F.R. § 214.2(e)(19).

¹⁰⁶ 8 C.F.R. § 214.2(e)(20).

¹⁰⁷ *Id.*

¹⁰⁸ 8 C.F.R. § 214.2(e)(8)(i).

¹⁰⁹ 8 C.F.R. § 214.2(e)(8)(iii).

¹¹⁰ 8 C.F.R. § 214.2(e)(4).

¹¹¹ *See generally* E-2 TREATY INVESTORS, *supra* note 88.

¹¹² U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING CREWLIST VISAS AND BORDER CROSSING CARDS) FISCAL YEARS 2008-2012 (2012); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING BORDER CROSSING CARDS) FISCAL YEARS 2013-2017 (2017).

¹¹³ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING CREWLIST VISAS AND BORDER CROSSING CARDS) FISCAL YEARS

2015, there has been a steady decline in the number of nonimmigrant visas issued. In 2016, 10,381,491 were issued, in 2017, 9,681,913 were issued, and most recently in 2018, 9,028,026 were issued.¹¹⁴

Despite the decline in total nonimmigrant visas since 2016, the number of E-2 visas issued have gradually increased from 2009 (24,033 visas) to 2016 (44,243 visas).¹¹⁵ In 2017, despite the increase in total applications (57,753 applicants), there was a slight decrease from the previous year in the number of E-2 visas issued (43,673 visas).¹¹⁶ Of these visas, 18,267 were issued to Asian nationals, 17,532 to Europeans, 5,442 to North Americans, and 1,942 to South Americans.¹¹⁷ The refusal amount of 14,080 applicants in 2017 was the highest since its implementation.¹¹⁸

Table 1. Non-immigrant and E-2 Visas Issued from 2009 to 2018

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Total Non-immigrant Visas Issued	5,804,182	6,422,751	7,507,939	7,507,939	9,164,349	9,932,480	10,891,745	10,381,491	9,681,913	9,028,026
E-2 Visas Issued	24,033	25,500	28,245	31,942	35,272	36,825	41,162	44,243	43,673	41,181

2008-2012 (2012); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING BORDER CROSSING CARDS) FISCAL YEARS 2013-2017 (2017).

¹¹⁴ *Id.*

¹¹⁵ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING CREWLIST VISAS AND BORDER CROSSING CARDS) FISCAL YEARS 2008-2012 (2012); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING BORDER CROSSING CARDS) FISCAL YEARS 2013-2017 (2017).

¹¹⁶ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING BORDER CROSSING CARDS) FISCAL YEARS 2013-2017 (2017).

¹¹⁷ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, NONIMMIGRANT VISA ISSUANCES BY VISA CLASS AND BY NATIONALITY (2017).

¹¹⁸ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, NONIMMIGRANT WORLDWIDE ISSUANCE AND REFUSAL DATA BY VISA CATEGORY (2017).

Data provided by: U.S. Dep't of State, Bureau of Consular Affairs, Report of the Visa Office ¹¹⁹

B. *EB-5: Permanent Immigrant Investors*

The EB-5, or employment-based fifth preference, immigrant visa category program was created by Congress in 1990 to stimulate the U.S. economy through job creation and capital investments by foreign investors.¹²⁰

No more than 10,000 of these visas are made available for qualified immigrants each year.¹²¹ Additionally, not less than 3,000 of the visas made available each year shall be reserved for qualified immigrants investing in a new commercial enterprise in a target employment area.¹²² Since 2008, 67,218 EB-5 visas have been issued.¹²³

1. Requirements & Eligibility

The EB-5 Visa, also referred to as the Permanent Immigrant Investor Visa, contains three main requirements.¹²⁴

First, all EB-5 investors must invest in a new commercial enterprise, established after November 29, 1990.¹²⁵ A commercial

¹¹⁹ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING CREWLIST VISAS AND BORDER CROSSING CARDS) FISCAL YEARS 2008-2012 (2012); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING BORDER CROSSING CARDS) FISCAL YEARS 2013-2017 (2017).

¹²⁰ 8 U.S.C. § 1153(b)(5)(A).

¹²¹ 8 U.S.C. § 1153(b)(3)(B).

¹²² 8 U.S.C. § 1153(b)(3)(B)(i).

¹²³ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE V (PART 3) (2008-2018).

¹²⁴ See generally U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ABOUT THE EB-5 VISA CLASSIFICATION (last updated Oct. 15, 2019), <https://www.uscis.gov/working-united-states/temporary-workers/e-2-treaty-investors> [hereinafter ABOUT THE EB-5 VISA]; But see U.S. CITIZENSHIP AND IMMIGRATION SERVICES, NEW RULEMAKING BRINGS SIGNIFICANT CHANGES TO EB-5 PROGRAM, (July 23, 2019), <https://www.uscis.gov/news/news-releases/new-rulemaking-brings-significant-changes-eb-5-program> [hereinafter EB-5 Program News Release].

enterprise may consist of any for-profit activity formed for the conduct of lawful business.¹²⁶ A commercial enterprise for this purpose may not consist of any noncommercial activity including owning and operating a personal residence.¹²⁷

Second, an EB-5 investor must invest enough of his or her own capital into the commercial enterprise to create full-time positions for at least ten qualifying employees.¹²⁸ The immigrant investor, spouse and children do not qualify as qualifying employees.¹²⁹ If the enterprise is not located within a regional center, the new commercial enterprise or its subsidiaries must be the direct employer of the qualifying employees.¹³⁰ If the enterprise is located within a regional center, the full-time positions may be direct jobs but may also be indirect jobs, those created as a result of the enterprise.¹³¹

Lastly, prior to November 21, 2019, when the new rule governing EB-5 visas is in effect,¹³² the EB-5 investor is generally required to contribute a minimum investment of one million U.S. dollars to the enterprise.¹³³ If the area of investment is considered a

¹²⁵ 8 U.S.C. § 1153(b)(5)(A). If the enterprise was established on or before November 29, 1990, the investor may still qualify if the enterprise was restructured or reorganized into a new commercial enterprise or expanded through the investment so that at least a 40 percent increase in the net worth of employees occurs.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ 8 U.S.C. § 1153(b)(5)(A)(ii). A qualifying employee is a U.S. citizen, lawful permanent resident, or immigrant authorized to work in the U.S. H-1B nonimmigrants do not qualify as a qualifying employee.

¹²⁹ *Id.*

¹³⁰ ABOUT THE EB-5 VISA, *supra* note 124.

¹³¹ *Id.*

¹³² *EB-5 Program News Release*, *supra* note 124. As of November 21, 2019, the standard minimum investment is to increase from \$1 million to \$1.8 million. In Target Employment Areas the minimum investment amount will increase from \$500,000 to \$900,000, maintaining the original 50% differential to attract investments to these areas. Both these increases were made to account for inflation and the amounts will automatically be adjusted for inflation every five years.

¹³³ *Id.*

targeted employment area¹³⁴, the contribution requirement is \$500,000.¹³⁵

a. Changes to EB-5 Program Beginning November 2019

On July 24, 2019, the USCIS published a final rule that brought substantial changes to the EB-5 Immigrant Investor Program.¹³⁶ This final rule will become effective on November 21, 2019.¹³⁷ This is the first significant revision of the program since 1993.¹³⁸ USCIS Acting Director Ken Cuccinelli explained the reasons for the change:

Since its inception, the EB-5 program has drifted away from Congress's intent. Our reforms increase the investment level to account for inflation over the past three decades and substantially restrict the possibility of gerrymandering to ensure that the reduced investment amount is reserved for rural and high-unemployment areas most in need. This final rule strengthens the EB-5 program by returning it to its Congressional intent.¹³⁹

In addition to the increase of the standard minimum investment,¹⁴⁰ the final rule also addresses the gerrymandering of high-unemployment areas by eliminating "a state's ability to designate certain geographic and political subdivisions as high-unemployment areas."¹⁴¹ Additionally, the final rule clarifies USCIS procedures for removing conditions on permanent residence and allows petitioners with a current EB-5 visa the ability to retain their priority date when refiling.¹⁴²

¹³⁴ *Id.* A targeted employment area includes an area that experiences high unemployment, of at least 150 percent of the national average rate or any rural area having a population less than 20,000.

¹³⁵ *Id.*

¹³⁶ *EB-5 Program News Release*, *supra* note 124.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See supra* note 132, accompanying text.

¹⁴¹ *EB-5 Program News Release*, *supra* note 124.

¹⁴² *Id.*

2. Statistics

Since 2016, the total number of immigrant visas being issued have declined.¹⁴³ Of the 617,752 immigrant visas issued in 2016, 9,947 were EB-5 visas.¹⁴⁴ In 2017, USCIS exceeded its quota for the first time since implementation, and 10,090 of the 559,536 immigrant visas issued were EB-5.¹⁴⁵ In 2018, 9,602 of the 533,557 immigrant visas issued were EB-5 visas.¹⁴⁶

Of the EB-5 visas issued each year between 2015 to 2018, at least 80% of the total EB-5 visas were issued to Asian nationals (9,072 visas in 2015; 8,852 visas in 2016; 8,878 visas in 2017; and 7,705 visas in 2018).¹⁴⁷ In 2018, there was an increase in the num-

¹⁴³ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, REPORT OF THE VISA OFFICE, IMMIGRANT AND NONIMMIGRANT VISAS ISSUED AT FOREIGN SERVICE POSTS, FISCAL YEARS 2012 – 2016 (2016).

¹⁴⁴ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, REPORT OF THE VISA OFFICE, IMMIGRANT AND NONIMMIGRANT VISAS ISSUED AT FOREIGN SERVICE POSTS, FISCAL YEARS 2012 – 2016 (2016); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, REPORT OF THE VISA OFFICE, IMMIGRANT VISAS ISSUED AND ADJUSTMENTS OF STATUS SUBJECT TO NUMERICAL LIMITATIONS FISCAL YEAR 2016 (2016).

¹⁴⁵ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, REPORT OF THE VISA OFFICE, IMMIGRANT VISAS ISSUED AND ADJUSTMENTS OF STATUS SUBJECT TO NUMERICAL LIMITATIONS FISCAL YEAR 2017 (2017); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, REPORT OF THE VISA OFFICE, IMMIGRANT AND NONIMMIGRANT VISAS ISSUED AT FOREIGN SERVICE POSTS FISCAL YEARS 2013 – 2017 (2017).

¹⁴⁶ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, REPORT OF THE VISA OFFICE, IMMIGRANT VISAS ISSUED AND ADJUSTMENTS OF STATUS SUBJECT TO NUMERICAL LIMITATIONS FISCAL YEAR 2018 (2018); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, REPORT OF THE VISA OFFICE, IMMIGRANT AND NONIMMIGRANT VISAS ISSUED AT FOREIGN SERVICE POSTS FISCAL YEARS 2014 – 2018 (2018).

¹⁴⁷ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, REPORT OF THE VISA OFFICE, TABLE V (PART 3), IMMIGRANT VISAS ISSUED AND ADJUSTMENTS OF STATUS SUBJECT TO NUMERICAL LIMITATIONS, FISCAL YEAR 2015 (2015); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, REPORT OF THE VISA OFFICE, TABLE V (PART 3), IMMIGRANT VISAS ISSUED AND ADJUSTMENTS OF STATUS SUBJECT TO NUMERICAL LIMITATIONS, FISCAL YEAR 2016 (2016); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, REPORT OF THE VISA OFFICE, TABLE V (PART 3), IMMIGRANT VISAS ISSUED AND ADJUSTMENTS OF STATUS SUBJECT TO NUMERICAL LIMITATIONS, FISCAL YEAR 2017 (2017);

ber of EB-5 visas issued to all global regions except Asia.¹⁴⁸ While Asia saw a decline in the number of EB-5 visas, South America saw a slight increase, but is still significantly behind Asia.¹⁴⁹ In 2015, only 130 EB-5 visas, or .01% of total EB-5 visas issued were issued to South American nationals.¹⁵⁰ Most recently, in 2018, South American nationals received 730 EB-5 visas or .07% of total EB-5 visas.¹⁵¹ For the second year in a row, South America has received the second most EB-5 visas, behind Asia.¹⁵²

C. *L-1A: Intracompany Transferee Executive or Manager*

Although not applicable to entrepreneurs looking to start their company in the U.S., the L-1A option provides foreigners with the ability to expand their company to the U.S.¹⁵³ The L-1A nonimmigrant visa allows a U.S. employer to transfer an executive or manager from a foreign office to one of its offices in the U.S.¹⁵⁴ Most relevant to this paper, this classification also allows foreign companies that do not yet have an affiliated U.S. office to send an executive or manager to the U.S. to establish one.¹⁵⁵

In order to send an employee for the purpose of creating a U.S. office the employer must qualify for L-1 classification with the

U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, REPORT OF THE VISA OFFICE, TABLE V (PART 3), IMMIGRANT VISAS ISSUED AND ADJUSTMENTS OF STATUS SUBJECT TO NUMERICAL LIMITATIONS, FISCAL YEAR 2018 (2018).

¹⁴⁸ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, REPORT OF THE VISA OFFICE, IMMIGRANT NUMBER USE FOR VISA ISSUANCES AND ADJUSTMENTS OF STATUS IN THE DIVERSITY IMMIGRANT CATEGORY FISCAL YEARS 2009-2018 (2018).

¹⁴⁹ *Id.*

¹⁵⁰ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, REPORT OF THE VISA OFFICE, IMMIGRANT NUMBER USE FOR VISA ISSUANCES AND ADJUSTMENTS OF STATUS IN THE DIVERSITY IMMIGRANT CATEGORY FISCAL YEARS 2006-2015 (2015).

¹⁵¹ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., REPORT OF THE VISA OFFICE, TABLE V (PART 1) IMMIGRANT VISAS ISSUED AND ADJUSTMENTS OF STATUS SUBJECT TO NUMERICAL LIMITATIONS FISCAL YEAR 2018 (2018).

¹⁵² *Id.*

¹⁵³ FTC Nonimmigrant Classes Rule, 8 C.F.R. § 214.2(l)(1)(ii) (2016) [hereinafter *L-1A Visa*].

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

following criteria.¹⁵⁶ First, the employer has secured a physical premise to house the new office.¹⁵⁷ Second, the employee seeking classification has been employed as an executive or manager for one continuous year within the three years preceding the filing of the petition.¹⁵⁸ Lastly, he or she must show proof the intended U.S. office will support the executive within one year of the approval of the petition.¹⁵⁹

Qualified employees to establish a new office will be allowed a maximum initial stay of one year.¹⁶⁰ Request for extension of stay may be granted in increments of up to two additional years, with a maximum limit of seven years.¹⁶¹ Family members of L-1 employees may seek admission under L-2 nonimmigrant classification.¹⁶²

D. Application and Implementation Problems

Applying for a U.S. visa can be a lengthy and complicated process.¹⁶³ Additionally, recent calls for a merit-based immigration system under the Trump administration have led to delays in visa application decisions and heightened levels of denials.¹⁶⁴ Reasons for denial have included some of the following: lack of finances, failure to show income, criminal record, bad communication, and fake documents.¹⁶⁵

With regards to the E-2 visas, a commonly cited reason for denial is failure to show proof of funding.¹⁶⁶ The INA requires proof

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *L-1A Visa, supra* note 153.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See generally* *What are the most common reasons for US Visa Rejections?*, Y AXIS (Feb. 5, 2009), <https://www.y-axis.com/news/what-are-the-most-common-reasons-for-us-visa-rejections>.

¹⁶⁴ *See generally* Alana Semuels, *Tech Companies Say it's Too Hard to Hire High-Skilled Immigrants in the U.S. — So They're Growing in Canada Instead*, TIME (July 25, 2019), <https://time.com/5634351/canada-high-skilled-labor-immigrants/>.

¹⁶⁵ *What are the most common reasons for US Visa Rejections?*, Y AXIS (Feb. 5, 2009), <https://www.y-axis.com/news/what-are-the-most-common-reasons-for-us-visa-rejections>.

¹⁶⁶ *See generally* *Nice v. Turnage*, 752 F.2d. 431 (9th Cir. 1985).

with respect to investments and will deny applicants with insufficient investments.¹⁶⁷ The USCIS has the discretion to deny an applicant based on one error in the application.¹⁶⁸ In 2017, a Canadian investor was denied an E-2 visa and sought legal action.¹⁶⁹ The court affirmed the denial and discretion of the USCIS to deny a visa on the grounds the applicant could not prove the funds to be invested were not made through criminal methods.¹⁷⁰ The USCIS will also deny investor visas for failure to show that the investor's business plan has the potential to financially provide for its employees.¹⁷¹ Additionally, the USCIS has the discretion to deny extension of E-2 classification and revoke classification early if the employee's business is terminated.¹⁷²

Additionally, upon successful application and approval, visa holders and their families still face issues and uncertainty with regards to their children's futures. When a child with E-2 status under a parent reaches 21, he or she automatically loses E-2 status and is no longer a dependent of the parent.¹⁷³ Even if the parent's visa has an additional year, the child must return home or apply for another visa. On April 8, 2019, the E-2 Visa Improvement Act was presented with the purpose of solving this uncertainty by raising the age requirement to 26 and implementing a pathway to permanent residency for E-2 holders.¹⁷⁴ However, reforming current visa implementation policies or creating new classifications requires congressional and executive action. Therefore, the futures of each proposed act are quite uncertain. As discussed in the following part, many legislators and politicians have recently made significant efforts to reform the immigration policy in favor of immigrant entrepreneurs.

¹⁶⁷ *Id.*

¹⁶⁸ *See generally* Tocara Investments v. Johnson, No. 2:15-CV-00787-JAD-PAL, 2017 WL 985644 (D. Nev. Mar. 14, 2017) (denying a Canadian national E-2 classification for multiple reasons, one of which being that the individual could not establish the source of the investment or use of personal funds).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Spencer Enters., Inc. v. United States, 229 F. Supp. 2d 1025, 1034 (E.D.Cal. 2001).

¹⁷² Patel v. Johnson, 2 F. Supp. 3d 108, 126 (D. Mass. 2014).

¹⁷³ E-2 TREATY INVESTORS, *supra* note 88.

¹⁷⁴ *E-2 Visa Improvement Act of 2019*, H.R. 2124, 116th Cong. (2019).

IV. LEGISLATIVE ATTEMPTS TO REFORM IMMIGRATION POLICY

In 2011 U.S. President Barack Obama said, “[e]ntrepreneurs embody the promise of America: the idea that if you have a good idea and are willing to work hard and see it through, you can succeed in this country. And in fulfilling this promise, entrepreneurs also play a critical role in expanding our economy and creating jobs.”¹⁷⁵

That same year President Obama launched “Startup America”, a White House initiative to inspire and accelerate high-growth entrepreneurship throughout the U.S.¹⁷⁶ The entrepreneur-focused policy initiatives included unlocking access to capital, educating entrepreneurs, reducing barriers, accelerating innovation, and unleashing market opportunities.¹⁷⁷ The initiatives and calls for change aimed to “ensure that America can out-innovate and out-compete the world in a global economy.”¹⁷⁸

The reducing barriers initiative includes a focus on attracting and retaining immigrant entrepreneurs by supporting congressional action to make the U.S. most attractive to foreign entrepreneurs.¹⁷⁹ The initiative included clarifying and strengthening current visa programs, including the EB-5 and the H-1B.¹⁸⁰ Also included was the creation of policies that streamline the visa process and improve online resource centers to allow immigrant entrepreneurs easier access to information regarding opportunities to start and grow businesses in the U.S.¹⁸¹ There was also a call to embrace and offer government support for native and foreign STEM graduates looking to start businesses.¹⁸²

¹⁷⁵ *Startup America*, THE WHITE HOUSE PRESIDENT BARACK OBAMA, (<https://obamawhitehouse.archives.gov/economy/business/startup-america>) [hereinafter *Startup America*].

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Press Release, Dep’t of Homeland Security, Napolitano Announces Initiatives to Promote Startup Enterprises and Spur Job Creation (Aug. 2, 2011) (available at <https://www.dhs.gov/news/2011/08/02/secretary-napolitano-announces-initiatives-promote-startup-enterprises-and-spur-job>).

¹⁷⁹ *Startup America*, *supra* note 175.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*; See generally Press Release, Dep’t of Homeland Security, DHS Reforms to Attract and Retain Highly Skilled Immigrants (Jan. 31, 2012) (available

The increase in support of immigrant entrepreneurship in the U.S. has subsequently led to an increase in legislative attempts to help retain but also welcome foreign-born entrepreneurs into the U.S. This part focuses on analyzing three proposed immigration reform policies: the International Entrepreneur Rule, the Startup Act (2015), and the Attracting and Retaining Entrepreneurs Act (2016). Each of these rules seeks to amend the current immigration law to increase the number of immigrant entrepreneurs in the U.S.

A. International Entrepreneur Rule

The International Entrepreneur Rule (IE Rule) was proposed by the Department of Homeland Security (DHS) and passed by executive action under the Obama administration in 2016.¹⁸³ The IE Rule was created to fill the void present in U.S. immigration policy of a startup visa. The goal was to “encourage international entrepreneurs to create and develop startup entities with high growth potential in the US.”¹⁸⁴

Additionally, the IE Rule was proposed to attract foreign investors for the purpose of benefiting the U.S. economy through increased business activity, innovation, and dynamism.¹⁸⁵ The DHS proposed the rule with the belief that it would encourage entrepreneurs to pursue business opportunities in the U.S. rather than abroad.¹⁸⁶

The IE Rule amended the DHS’s regulations, allowing the Secretary of Homeland Security discretionary parole authority to increase and enhance entrepreneurship, innovation, and job creation in the U.S.¹⁸⁷ Each use of the authority would be evaluated on a case-by-case basis.¹⁸⁸

at <https://www.dhs.gov/news/2012/01/31/dhs-reforms-attract-and-retain-highly-skilled-immigrants>).

¹⁸³ International Entrepreneur Rule, 82 Fed. Reg. 5238 (Jan. 17, 1017).

¹⁸⁴ *Id.* at 5261.

¹⁸⁵ *Id.* at 5262.

¹⁸⁶ *Id.* at 5242.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 5243.

1. Requirements & Eligibility

An individual seeking this discretionary grant of parole would need to demonstrate several criteria. First, the applicant must have recently formed a new entity (within the last five years) in the U.S. that has substantial potential for rapid growth and job creation.¹⁸⁹

Second, the applicant must be an entrepreneur of the entity with at least ten percent ownership interest at the time of the initial grant of parole and he or she must maintain an active role in the future growth of the entity.¹⁹⁰ The applicant cannot merely be an investor in the startup.

Third, the applicant must show a “qualified” investment, significant U.S. capital investment, or government funding in the entity.¹⁹¹ This can be established by demonstrating that the startup has received investments of capital totaling \$250,000 or more from U.S. investors, government grants totaling \$100,000 or more, or by alternative criteria.¹⁹² Additionally, the investment must come from a U.S. source for purposes of establishing the entrepreneur’s eligibility and to allow for the appropriate screening for potential fraud or abuse.¹⁹³

2. Conditions

Parole may be extended to the applicant’s spouse and minor unmarried children based on the significant public benefit of the applicant’s parole.¹⁹⁴ All in all, the applicant must demonstrate that his or her parole as the entrepreneur of a startup in the U.S. would provide significant public benefit and the potential for rapid growth and job creation.

If granted, parole would provide the applicant a temporary initial stay of up to thirty months to grow his or her startup in the U.S.¹⁹⁵ At the end of the parole, the entrepreneur may be granted an additional period of parole upon satisfying additional require-

¹⁸⁹ International Entrepreneur Rule, 82 Fed. Reg. at 5239.

¹⁹⁰ *Id.* at 5245

¹⁹¹ *Id.* at 5239.

¹⁹² *Id.*

¹⁹³ *Id.* at 5251.

¹⁹⁴ *Id.* at 5255.

¹⁹⁵ International Entrepreneur Rule, 82 Fed. Reg. at 5288.

ments.¹⁹⁶ The DHS would retain the authority to revoke any grant of parole at any time as a matter of discretion.¹⁹⁷

3. Delay of Rule & Legal Action

i. Issue

On July 11, 2017, six days prior to the rule taking effect, the DHS, under the Trump Administration, issued a delay of rule until March of 2018.¹⁹⁸

The National Venture Capital Association (NVCA) brought action on the ground that the DHS failed to comply with the Administrative Procedure Act (APA) requirements in delaying implementation of the IE Rule.¹⁹⁹ Plaintiffs alleged that the agency delayed the rule without providing notice or comment from the public, as the APA generally requires.²⁰⁰ The plaintiffs also alleged the agency lacked good cause in not following the APA's rules and that the delay should be invalid.²⁰¹

ii. Holding

The opinion, written by district judge James Boasberg, found for the plaintiffs, finding standing under Article III.²⁰² The plaintiffs successfully showed the lack of ability to apply and obtain parole status as a cognizable injury.²⁰³ On the issue of whether the defendant had good cause to delay the rule's implementation, the court was unconvinced.²⁰⁴ In the past, the court has approved an agency's decision to bypass notice and comment where delay would imminently threaten life or physical property.²⁰⁵ However, the court found that was not the case here, and the government

¹⁹⁶ *Id.* at 5241.

¹⁹⁷ *Id.* at 5243.

¹⁹⁸ International Entrepreneur Rule: Delay of Effective Date, 82 Fed. Reg. 31887 (July 11, 2017).

¹⁹⁹ National Venture Capital Ass'n. v. Duke, 291 F.Supp.3d 5, 10 (D.D.C. 2017).

²⁰⁰ *Id.* at 13.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 16-18.

²⁰⁵ National Venture Capital Ass'n., 291 F. Supp. 3d. at 17.

failed to prove its argument that fiscal peril could constitute good cause.²⁰⁶ On December 1, 2017, the court held that vacating the delay rule was the appropriate remedy.²⁰⁷

4. Elimination of the IE Rule

On May 25, 2018, the DHS announced its proposal to eliminate the IE Rule in accordance with the Executive Order issued the prior year by President Trump.²⁰⁸ The DHS concluded “that the [IE Rule] created a complex and highly-structured program that was best established by the legislative process rather than relying on an unorthodox use of the Secretary’s authority to ‘temporarily’ parole . . .”²⁰⁹ The DHS claimed the IE Rule “represents an overly broad interpretation of parole authority, lacks sufficient protections for U.S. workers and investors, and is not the appropriate vehicle for attracting and retaining international entrepreneurs.”²¹⁰ The DHS also asserted that the E-2 nonimmigrant classification and the EB-5 immigrant classification visas already provide opportunities to foreign entrepreneurs to start businesses and work in the U.S.²¹¹ The IE Rule was expected to attract thousands of foreign immigrant entrepreneurs, but as of April 2018, there were only ten applicants.²¹²

5. Compare to Current Policy

The IE Rule would have expanded the applicant pool of immigrant entrepreneurs. The E-2 program is currently limited to nationals of a treaty country, whereas the IE Rule would be open to

²⁰⁶ *Id.* at 18.

²⁰⁷ *Id.* at 21.

²⁰⁸ Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

²⁰⁹ *DHS Proposes to Remove the International Entrepreneur Rule*, U.S. CITIZENSHIP AND IMMIGR.SERV., <https://www.uscis.gov/humanitarian/humanitarian-parole/dhs-proposes-remove-international-entrepreneur-rule> (last updated May 25, 2018).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Lizette Chapman, *U.S. Startup Visa Draws Only 10 Applicants as Trump Throttles Program*, FIN. POST (Apr. 25, 2018, 7:04 AM), <https://business.financialpost.com/entrepreneur/startup-visa-draws-only-10-applicants-as-trump-throttles-program>.

all individuals looking to invest in the U.S. This Rule would include citizens from nontreaty countries such as Brazil, China, India, or Russia.

Additionally, the E-2 and EB-5 visas require entrepreneurs to invest his or her money into a U.S. entity. Comparatively, the IE Rule requires a capital investment from U.S. investors or government entities, allowing entrepreneurs to use funding outside their personal funds. Unlike the E-2 and EB-5 options, foreign investments cannot be used in meeting the IE Rule's capital investment requirement.

Also, the IE Rule is a parole program and not an additional visa category. The INA allows the Secretary of Homeland Security the discretion "to grant individuals parole on a case-by-case basis for urgent humanitarian reasons or significant public benefit."²¹³ The IE Rule's use of parole authority for public benefit was strengthened on the belief that those entrepreneurs of startup entities have the potential for rapid growth and job creation in the U.S.²¹⁴

B. *Startup Act*

On January 31, 2019, a bipartisan group of senators²¹⁵ reintroduced the Startup Act to encourage job creation and entrepreneurial activity in the U.S.²¹⁶ The Act was originally introduced in Senate on January 16, 2015.²¹⁷ The recent legislation aims to support entrepreneur and STEM visas for highly educated individuals that are already in the U.S.²¹⁸

The Act's goal is to keep these individuals in the U.S. to "promote new ideas, fuel economic opportunity and create good-paying American jobs."²¹⁹ Senator Warner hopes that "[b]y encouraging entrepreneurship and helping attract and retain talented individu-

²¹³ International Entrepreneur Rule, 82 Fed. Reg. 5238 (Jan. 17, 1017).

²¹⁴ *Id.*

²¹⁵ Senators Jerry Moran (R-Kan.), Mark Warner (D-Va.), Roy Blunt (R-Mo.) and Amy Klobuchar (D-Minn.).

²¹⁶ Press Release, Jerry Moran, U.S. Senator, Bipartisan Grp. of Senators Introduce Startup Act (Jan. 31, 2019) (available at <https://www.moran.senate.gov/public/index.cfm/news-releases?id=31F2F710-4FC5-4BF4-9D8C-9B03261AD488>).

²¹⁷ Startup Act, S. 181, 114th Cong. (2015).

²¹⁸ *Id.*

²¹⁹ Press Release, *supra* note 216.

als,” the Act will help states increase capital investment and promote U.S. competitiveness.²²⁰

The Act is supported by research from the Kauffman Foundation, finding that immigrants to the U.S. are nearly twice as likely as native-born Americans to start businesses.²²¹ The data also shows that international students studying in the U.S. on temporary visas accounted for nearly forty percent of all doctorate degrees in STEM fields.²²² This number of students has doubled over the past 30 years.²²³

1. Eligibility & Conditions

The Act would amend the INA and allow the Secretary of Homeland Security to adjust the status of not more than 50,000 aliens who have earned a masters or a doctorate degree in a STEM field to that of an alien conditionally admitted for permanent residence.²²⁴ Each alien granted status may remain in the U.S. “for up to one year after the expiration of the alien’s student visa . . . if the alien is diligently searching for an opportunity to become actively engaged in a STEM field” and “indefinitely if the alien remains actively engaged in a STEM field.”²²⁵ Those who qualify will be ineligible for federal government assistance, including unemployment compensation.²²⁶ If the alien is granted conditional permanent resident status, he or she will be lawfully admitted for permanent residence in order to satisfy the five-year residency requirement.²²⁷ The Act also includes a Government Accountability Office Study, that will be available not later than three years after implementation to analyze the effects of the program.²²⁸

The next section of the Act, titled “Immigrant Entrepreneurs” further amends the INA to include a provision for qualified alien entrepreneurs to receive a conditional immigrant visa.²²⁹ These

²²⁰ *Id.*

²²¹ *See generally Kauffman Report 2017, supra* note 20, at 6.

²²² Press Release, *supra* note 216.

²²³ *Id.*

²²⁴ Startup Act, S. 181, 114th Cong. § 3 (2015).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at § 4.

visas would be limited to not more than 75,000 qualified alien entrepreneurs.²³⁰

An alien is a qualified alien entrepreneur if he or she meets three requirements. First, at the time of application the alien is lawfully in the U.S. and holds one of the nonimmigrant visas listed in the bill.²³¹ Second, during the one-year period that the alien is granted the visa, the alien must register (at a minimum) one new business entity in a state, employ at least two full-time employees, which are not relatives of the alien, and invest or raise capital of no less than \$100,000.²³² Lastly, during the three-year period, which begins on the last day of the initial one-year period, the business entity must employ an average of at least five full-time employees, none of which are relatives of the alien.²³³ The Secretary of Homeland Security reserves the right to revoke the visa if the alien is no longer a qualified alien entrepreneur.²³⁴

The Act also makes minor adjustments in the tax code and regulatory system, creating a permanent capital gains tax exemption for startup companies.²³⁵ Additionally, the Act creates a tax credit for small companies with less than \$5 million in annual receipts.²³⁶

2. Compare to E-2, EB-5 and the IE Rule

The Startup Act seeks to fix the difficulties foreign students face passing from student immigration status to another. After graduation, a foreign student is typically required to leave the U.S.²³⁷ However, recent graduates can stay for an additional year without changing status if they are employed in optional practical training or “OPT” within their study.²³⁸ Seeing the benefits of STEM graduates on the U.S., the USCIS extended this period to twenty-nine months for qualifying STEM graduates.²³⁹ However, when this period ends, the former student must depart the U.S. An-

²³⁰ S. 181 § 4.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at § 6.

²³⁶ S. 181 § 7.

²³⁷ Hart & Acs, *supra* note 16, at 126.

²³⁸ *Id.*

²³⁹ *Id.*

other option is for graduating students or previous OPT employees to seek H-1B status through employment at a U.S. company.²⁴⁰ This is not always an option, however, because of the H-1B lottery system and cap.²⁴¹ To solve this issue, the Act would instead introduce conditional permanent residence status change for aliens with an advanced degree that meet the requirements.²⁴²

Unlike the current immigration options and the proposed IE Rule, the Start Up Act focuses on keeping those foreign individuals studying for an advanced degree in the U.S., specifically those students studying in a STEM field, to remain in the U.S. after his or her student visa expires. Unlike the IE Rule, which grants an individual parole, the Act proposes a conditional immigrant visa program. Additionally, unlike the three other programs, there is no requirement within the bill that restricts where the entrepreneur's capital investment can come from.

C. *Attracting and Retaining Entrepreneurs Act (2016)*

Senator Flake (R-AZ) introduced the Attracting and Retaining Entrepreneurs Act in the Senate on December 6, 2016.²⁴³ The purpose was “to facilitate the creation of American jobs by immigrant entrepreneurs.”²⁴⁴ The bill was “read twice and referred to the Committee on the Judiciary.”²⁴⁵

The NVCA applauded this legislation as part of its ongoing platform as an advocate for the creation of a startup visa for foreign-born entrepreneurs.²⁴⁶ After the Act was introduced, Bobby Franklin, President and CEO of the NVCA, offered his support for the action and dissatisfaction for the current immigration policy:

²⁴⁰ *Id.*

²⁴¹ See generally *H-1B Fiscal Year (FY) 2020 Cap*, USCIS (last updated April 11, 2019) (<https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2020-cap-season>).

²⁴² Startup Act, S. 181, 114th Cong. § 4 (2015).

²⁴³ Attracting and Retaining Entrepreneurs Act, S. 3510, 114th Cong. (2016).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Press Release, National Venture Capital Association, NVCA Cheers Introduction of Bill by Senator Flake to Create Startup Visa (Dec. 6, 2016) (available at <https://nvca.org/pressreleases/nvca-cheers-introduction-bill-senator-flake-create-startup-visa/>).

For too long, U.S. immigration policy has created more roadblocks than opportunities, and with the U.S. continuing to lose market share of global venture capital investment, now more than ever we need to do all we can to attract and retain the best and the brightest from around the world.²⁴⁷

The Act amends the INA and adds two visa categories: Entrepreneur Nonimmigrant Visa and Entrepreneur Immigrant Visa.

1. Entrepreneur Nonimmigrant Visa

The Entrepreneur Nonimmigrant Visa would be available to foreign-born entrepreneurs seeking temporary admission into the U.S. to create and run their business.²⁴⁸ The applicant would then be allowed to secure funding, or a combination of funding, for its entity from “a qualified venture capitalist, a qualified angel investor, a qualified government entity, qualified community development financial institution, qualified startup accelerator, or such other type of entity or investors, as determined by the Secretary.”²⁴⁹ The investment must be no less than \$100,000.²⁵⁰ The applicant must show the above investment or they can show the entity has created not fewer than three qualified jobs and that revenues are not less than \$250,000 annually.²⁵¹ Additionally, there is a \$1,000 visa processing fee.²⁵²

The initial period of authorized status is three years.²⁵³ However, the visa is renewable for additional three-year periods if during the most recent three year period, the business entity has created not fewer than three qualified jobs, *and* either during that three year period, there has been a qualified investment of not less than \$250,000 in the entity, *or* if during that two-year period, the date when the alien petitioned for renewal, the entity has generated not

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Attracting and Retaining Entrepreneurs Act, S. 3510, 114th Cong. § 2 (2016).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

less than \$250,000 in general revenue from business conducted within the U.S.²⁵⁴

2. Entrepreneur Immigrant Visa

The Entrepreneur Immigrant Visas would be limited to not more than 10,000 visas during each fiscal year.²⁵⁵ There are two main categories to qualify for this visa.

First, an alien is eligible for this visa if the alien has maintained valid nonimmigrant status in the U.S. for at least two years and during the three-year period prior to the date of filing, the alien has a significant ownership in a U.S. business entity that has not created fewer than five qualified jobs.²⁵⁶ The alien must also prove qualified investments of not less than \$500,000 into his or her business entity or the alien may show that the business generated at least \$500,000 in annual revenue in the U.S.²⁵⁷ Additionally, the alien must show that two or fewer people have received nonimmigrant status on the basis of the entity.²⁵⁸

Second, an alien is eligible if he or she has maintained valid nonimmigrant status in the U.S. for at least three years before applying for status, and “the alien holds an advanced degree in a field of science, technology, engineering or mathematics.”²⁵⁹ During that three-year period, the alien must have significant ownership interest in a U.S. entity that has created no fewer than four qualified jobs and secured qualified investments of not less than \$500,000 total.²⁶⁰ Again, there is an additional option for eligibility. The aforementioned requirement may be substituted by showing significant ownership interest in a business entity that has created no fewer than three qualified jobs and that the entity has generated no less than \$500,000 in annual revenue within the U.S.²⁶¹

²⁵⁴ *Id.*

²⁵⁵ S. 3510 § 3.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ S. 3510 §3.

Finally, no more than three other people may receive nonimmigrant status on the basis of the alien's ownership of the entity.²⁶²

The Act also includes a business plan requirement, meaning the qualified entrepreneur must submit an updated plan to USCIS if there are any material changes to the entity.²⁶³

V. RECENT IMMIGRATION REFORM IN NEIGHBORING COUNTRIES TO INCREASE IMMIGRANT ENTREPRENEURSHIP

It should be no surprise that within the last decade, countries have started reforming their visa options to create pathways for immigrant entrepreneurs. Using the U.S. as an inspiration, many countries have strived to imitate the high tech and innovative area and create their own "Silicon Valley".²⁶⁴ Additionally, many talented professionals have chosen to start their companies outside the U.S. in a country with more favorable immigration laws and working environment.²⁶⁵

South American governments have taken extra steps to attract foreign talent, including implementing tech or investor visas and promoting accelerator programs.²⁶⁶ International investment across Latin American startups have more than doubled since 2013.²⁶⁷ Canada's government has also taken measures, such as implementing a startup visa, to boost its entrepreneurial efforts.²⁶⁸ This part looks at what neighboring countries have implemented, and steps

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Michael Aaron Dennis, *Silicon Valley*, ENCYCLOPEDIA BRITANNICA, (last updated Sept. 12, 2019), <https://www.britannica.com/place/Silicon-Valley-region-California>.

²⁶⁵ Semuels, *supra* note 164.

²⁶⁶ Nathan Lustig, *As U.S. Cracks Down on H1-B Visas, Latin America Adds Fast-Track Alternatives for Entrepreneurs and Investors*, ENTREPRENEUR (Oct. 4, 2018), <https://www.entrepreneur.com/article/320566>.

²⁶⁷ Julie Ruvolo, *Global Tech Firms and Investors Are Reshaping Latin America's Startup Environment*, TECH CRUNCH (Feb. 27, 2018, 8:00 PM), <https://techcrunch.com/2018/02/27/global-tech-firms-and-investors-are-reshaping-latin-americas-startup-environment>.

²⁶⁸ Julie Friedman, *Don't Look Now, but There's a Startup Frenzy Up North*, LAW.COM (Jan. 1, 2015, 12:00 AM), https://www.law.com/corpcounsel/almID/1202679207582/Dont-Look-Now-but-Theres-a-Startup-Frenzy-Up-North/?cmp=share_linkedin&slreturn=20190108131612.

taken to reform their immigration and policies to increase entrepreneurial efforts. Specifically, this part looks at the efforts of Canada, Chile, Brazil, and Mexico.

A. *Canada*

The amount of venture capital investment in Canada is increasing and although the country is still behind the U.S., startup and tech activity is increasing.²⁶⁹ In 2017, Toronto added more tech jobs than any other North American city.²⁷⁰ Canada's more open immigration policy compared to the U.S.'s policy and current political climate have been credited with the increase in Canadian tech firms.²⁷¹

In 2018, Canada officially launched its Startup Visa Program after a pilot of the program was launched in 2013.²⁷² The program "targets immigrant entrepreneurs with the skills and potential to build [a] business in Canada [and] compete on a global scale."²⁷³ However, those applicants looking to open in Quebec must meet the province's own immigration rules.²⁷⁴

An applicant must meet four requirements to be eligible for the visa program.

First, an applicant must have a qualifying business, meaning that "at the time [of] commitment from a designated organization[,] each applicant holds 10% or more of the voting rights"²⁷⁵ The applicant(s) and the organization must jointly hold more than half of the total voting rights attached to the corporation at the

²⁶⁹ *Id.*

²⁷⁰ Chris Sorensen, *Toronto Added More Tech Jobs Last Year than Silicon Valley - or Anywhere Else in North America: Report*, *U of T News*, UNIV. OF TORONTO (July 26, 2018), <https://www.utoronto.ca/news/toronto-added-more-tech-jobs-last-year-silicon-valley-or-anywhere-else-report>.

²⁷¹ *Id.*

²⁷² Narayan Ammachchi, *Canada to Officially Launch Startup Visa Program in 2018*, *Nearshore Am.* (Aug. 1, 2017), <https://www.nearshoreamericas.com/canada-to-launch-startup-visa-program-formally/>.

²⁷³ *Immigrate with a Start-up Visa: About the Process*, GOV'T OF CANADA., <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa/about.html> (last updated Feb. 1, 2019).

²⁷⁴ *Id.*

²⁷⁵ *Immigrate with a Start-up Visa: Who Can Apply*, GOV'T OF CANADA., <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa/eligibility.html> (last updated Jan. 16, 2019).

time of commitment.²⁷⁶ Once permanent residence is established, the applicant “must provide active and ongoing management of this business from within Canada,” be an “essential part” of the business happenings, and incorporate the company in Canada.²⁷⁷

Second, the applicant is required to “get a letter of support from [an] . . . organization” or “business group that has been approved to invest in or support” the startup.²⁷⁸ This is proof that a venture capital fund, angel investor group or business incubator is financially supporting the business. If the investment is from a Canadian venture capital fund, the applicant “must secure a minimum investment of \$200,000.”²⁷⁹ If the investment is from a designated Canadian angel investor group, the minimum investment is \$75,000.²⁸⁰

Third, the applicant must be able “to communicate and work in English, French, or both languages.”²⁸¹ This requires passing a language test.²⁸²

Lastly, the applicant must show that he or she has enough funds to support living costs.²⁸³ The amount of funds required depends on the size of the family and increases with each additional family member.²⁸⁴ Canada will not provide financial support to startup visa immigrants.²⁸⁵

The processing time is approximately twelve to sixteen months.²⁸⁶ Canada allows applicants to apply for a temporary work permit while waiting for their application to be processed.²⁸⁷ Only

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Start-up Visa Program: Help Centre*, GOV'T OF CANADA, <http://www.cic.gc.ca/english/helpcentre/questions-answers-by-topic.asp?st=6.3.5> (last updated Aug. 27, 2019).

²⁸⁰ *Id.*

²⁸¹ *Immigrate with a Start-up Visa: Who Can Apply*, *supra* note 275.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Immigrate with a Start-up Visa: After You Apply*, GOV'T OF CANADA., <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa/after-apply-next-steps.html> (last updated Dec. 28, 2018).

²⁸⁷ *Id.*

foreign nationals who have received a commitment letter may be considered for a short-term work permit.²⁸⁸

This program offers permanent residence to applicants accepted into the program.²⁸⁹ Additionally, the permanent residence will not be taken away should the business fail.²⁹⁰

This program has been applauded by entrepreneurs and journalists for its predictability and simplicity, specifically in comparison with U.S.'s current programs.²⁹¹ Unfortunately, data is limited, and no empirical studies have been published with regards to the program's success and number of immigrants obtaining these visas. This lack of information is perhaps due to the fact the program is a year old.

B. *Chile*

“Many countries have sought to create their own versions of Silicon Valley. Nearly all have failed. Yet Chile’s attempt is interesting because it exploits the original Silicon Valley’s weak spot—America’s awful immigration system. When the home of free enterprise turns away entrepreneurs, Chile welcomes them.”²⁹²

Chilean entrepreneurial efforts over the last decade and a half have received global praise and imitation.²⁹³ The country’s capital, Santiago, has even been referred to as the “Chilecon Valley” of South America.²⁹⁴ The Chilean government, universities, and private corporations have come together to promote the country as a global innovation hub.

In 2010, Chile was the first South American country accepted in to the Organisation for Economic Co-Operation and Develop-

²⁸⁸ *Work Permits for Start-Up Visa Applicants*, GOV'T OF CANADA., <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa/work-permits.html> (last updated June 13, 2019).

²⁸⁹ *Immigrate with a Start-up Visa: After You Apply*, *supra* note 286.

²⁹⁰ *Start-up Visa Program*, *supra* note 279.

²⁹¹ Semuels, *supra* note 164.

²⁹² *The Lure of Chilecon Valley*, THE ECONOMIST (Oct. 13, 2012), <https://www.economist.com/business/2012/10/13/the-lure-of-chilecon-valley>.

²⁹³ *Id.*

²⁹⁴ Cadie Thompson, *Three Growing Start-up Cities in South America*, CNBC (May 7, 2015, 4:42 PM), <https://www.cnbc.com/2015/05/07/three-growing-start-up-cities-in-south-america.html>.

ment (OECD).²⁹⁵ As one of its main goals, the OECD strives to grow innovation and improve the economic and social well-being of people around the world.²⁹⁶

During that year, Chile also debuted its government-backed Start-Up Chile accelerator, which has since gained the reputation as a world-leading program, inspiring public accelerator programs in over fifty countries across the globe.²⁹⁷ The program had two main intentions: “to change the nation’s culture towards entrepreneurship and to position Chile as the hub of innovation for Latin America.”²⁹⁸ The accelerator includes a Santiago-based Seed program that offers both native and foreign companies up to \$80,000 U.S. dollars, a working visa, training and office space.²⁹⁹ Additionally, the accelerator includes a pre-acceleration program targeting women.³⁰⁰

The program’s Executive Director, Sebastian Diaz, credits timing as a key factor for the growth of the company.³⁰¹ The accelerator program launched in 2010 while economies in the U.S. and Europe were coping with the recession.³⁰² Further, the U.S.’s immigration policy being viewed as an obstacle for many foreigners, has been credited with helping the program thrive.³⁰³ “Today, Start-Up Chile is the leading accelerator in Latin America [and] among the top 10 globally.”³⁰⁴

Through the program, the applicant, all founding team members, and direct family members will be eligible for a working vi-

²⁹⁵ *Chile Accepts Invitation to Join the OECD*, OECD (Jan. 11, 2010), <https://www.oecd.org/chile/chileacceptsinvitationtojointheoecd.htm>.

²⁹⁶ *About*, OECD, <http://www.oecd.org/about/> (last visited Mar. 6, 2019).

²⁹⁷ Jonathan Moed, *Start-Up Chile’s Impact 2010-2018: Inside the Revolutionary Startup Accelerator*, FORBES (Nov. 19, 2018, 7:37 AM), <https://www.forbes.com/sites/jonathanmoed/2018/11/19/start-up-chiles-impact-2010-2018-inside-the-revolutionary-startup-accelerator/#10263e796dc5>.

²⁹⁸ *Impact*, START UP CHILE, <https://www.startupchile.org/impact/> (last visited Mar. 6, 2019).

²⁹⁹ Moed, *supra* note 297.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *About us*, START UP CHILE, <https://www.startupchile.org/about-us/> (last visited Mar. 6, 2019).

sa.³⁰⁵ Visa Tech Chile is “an initiative that streamline[s] the process of obtaining a work visa . . . for local and overseas companies . . .” in the technology sector and companies created through Start-Up Chile.³⁰⁶ A temporary work visa can be obtained within a maximum of fifteen working days.³⁰⁷

Since its launch, the program “has accelerated more than 1,600 companies from 85 countries”³⁰⁸ The program’s global sales are approximately \$700 million, and the overall survival rate exceeds the foreign average.³⁰⁹

C. *Brazil*

As the fifth most populous country with over 200 million inhabitants, Brazil presents a unique and attractive market in Latin America.³¹⁰ Using Start-Up Chile’s funding and visa program as a model, Brazil created Startup Brasil.³¹¹ However, unlike Chile’s program which offers “foreign companies to temporarily operate overseas,” Brazil’s program focuses on “companies willing to permanently relocate.”³¹² Those eligible for the program receive a twelve-month researcher visa for foreign professionals.³¹³

The country also has its own Brazilian Investor Visa, similarly structured and comparable to the U.S.’s EB-5 program. Unlike the EB-5 program, which requires an investment in a bona fide enterprise, under Brazil’s program, the applicant must make a minimum investment of \$150,000 USD to the country, which can include

³⁰⁵ *FAQ*, START UP CHILE, <https://www.startupchile.org/faq> (last visited Mar. 6, 2019).

³⁰⁶ *Visa Tech*, START UP CHILE, <https://www.startupchile.org/visatech/> (last visited Mar. 6, 2019).

³⁰⁷ *Id.*

³⁰⁸ Moed, *supra* note 297.

³⁰⁹ *Id.*

³¹⁰ Louis, *Brazil Startup Scene*, INNOVATION IS EVERYWHERE (Feb. 2015), <https://www.innovationiseverywhere.com/brazil-startup-scene/>.

³¹¹ Neil Ungerleider, *Brazil Offering Foreign Startups Visas, Funding*, FAST COMPANY (Apr. 15, 2013), <https://www.fastcompany.com/3008348/brazil-offering-foreign-startups-visas-funding>.

³¹² *Id.*

³¹³ START UP BRASIL, <https://www.startupbrasil.org.br/?lang=en> (last visited Mar. 6, 2019).

buying property or land.³¹⁴ The visa can be applied for remotely and includes full residency for dependents and citizenship and passports after four years.³¹⁵ The visa allows the foreigner to live and work in Brazil.³¹⁶

D. Mexico

Mexico's startup ecosystem is thriving and the country currently ranks 36th in terms of ease of setting up a business.³¹⁷ Aristóteles Sandoval, governor of Jalisco at the time, wanted the province to be a "sanctuary" for highly-skilled workers.³¹⁸ As a result, the area loosened its immigration rules and removed a previous requirement that companies could only have ten percent foreign employees.³¹⁹

In February of 2018, Guadalajara, also known as "Mexico's Silicon Valley," debuted its JaliscoConnect initiative to help foreign entrepreneurs begin their startup operations in Mexico.³²⁰ The initiative and its self-described "Soft Landing Program" help entrepreneurs with legal, staffing, administrative, accounting, and financing issues.³²¹ The initiative's goal is to make the state "attractive enough to keep induc[e] start-ups and other tech companies . . ." to open in the area.³²² The program created Tech Visas,

³¹⁴ BRAZILIAN CITIZENSHIP, <http://www.braziliancitizenship.com> (last visited Mar. 6, 2019).

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ Filter Coffee, *How to Apply for Mexico Business Visa - The Only Guide You Need Read*, IMMIGR. WORLD (Aug. 8, 2018), <https://www.immigrationworld.com/mexico/how-to-apply-for-mexico-business-visa>.

³¹⁸ Christian Paz & Robbie Gramer, *Mexico's 'Silicon Valley' Trolls Trump Hard Over Travel Ban*, FOREIGN POLICY (Feb. 10, 2017, 3:09 PM), <https://foreignpolicy.com/2017/02/10/mexicos-silicon-valley-trolls-trump-hard-over-travel-ban-immigration-nafta-free-trade-technology-industry-jobs-nieto/>.

³¹⁹ Hannah Kuchler, Aliya Ram, & Jude Webber, *Trump visa crackdown spurs tech moves to Mexico*, FINANCIAL TIMES (May 4, 2017), <https://www.ft.com/content/7d8e3a2e-302c-11e7-9555-23ef563ecf9a>.

³²⁰ Lustig, *supra* note 266.

³²¹ JALISCOCONNECT, <http://jaliscoconnect.com> (last visited Mar. 6, 2019).

³²² Matt Fink, *Jalisco Continues to Woo Bay Area Tech Industry with New Initiative*, THE GUADALAJARA REP. (Feb. 22, 2018), <https://theguadalajarareporter.net/index.php/news/news/regional/51442-jalisco-continues-to-woo-bay-area-tech-industry-with-new-initiative>.

which may be obtained in as little as twenty-four hours for only \$36 U.S. dollars.³²³ The visa is a “repurposed residential visa” for international entrepreneurs who want to be a part of the JalisConnect initiative and live in Mexico for a significant period of time.³²⁴ The financial requirement is a minimum foreign income of \$2,000 U.S. dollars monthly.³²⁵ Currently, this option is only available to startups from the U.S., but the program intends to expand.³²⁶

VI. CONCLUSION

Immigration will continue to be a widely debated and controversial topic across the U.S. With today’s immigration debate predominantly focused on securing borders and increasing security measures with regard to illegal immigrants, it is unclear whether there will be significant immigration reform regarding immigrant entrepreneurs in the near future.

However, what is clear, is the need for more research focused on immigrant entrepreneurs and their direct impact on U.S. economy and business creation. The DHS asserts that the E-2 and EB-5 visas provide sufficient avenues for immigrant entrepreneurs, however, politicians strongly argue these options often leave potential high-impact entrepreneurs falling through the cracks. Therefore, it would be beneficial to compose studies to narrow down who the immigrants are, where they are from, and how they gained access into the U.S. The increase of empirical research regarding immigration trends and the entities formed can lead to more persuasive immigration reform that also protects the country’s needs and concerns. Nevertheless, even given the limited data available, politicians and scholars seem to agree that enabling talented entrepreneurs to come to the U.S. is a good thing.

As entrepreneurship increases globally and other countries continue to change their regulations to welcome local and foreign talent, the U.S. will only continue to lose its edge on the entrepreneurial competition. Therefore, the time is ripe for the U.S. to fur-

³²³ *Id.*

³²⁴ *Jalisco Plans to Become the Next Silicon Valley*, CLOSED PAGE (Feb. 23, 2018), <https://www.closedpage.com/jalisco-plans-become-next-silicon-valley/>.

³²⁵ *Id.*

³²⁶ *Id.*

ther analyze immigrant entrepreneur trends and potential immigration reform in order to remain the dominant location for startups, innovation and entrepreneurship.