

Morgan Lewis

together

Venture-Ready Entrepreneur Workshop:  
Keeping Foreign Entrepreneurs (and Their Startups)  
in the United States

**Presenters: Jeff Bodle**

[jbodle@morganlewis.com](mailto:jbodle@morganlewis.com)

**Eleanor Pelta**

[epelta@morganlewis.com](mailto:epelta@morganlewis.com)

**Lisa Stephanian Burton**

[lburton@morganlewis.com](mailto:lburton@morganlewis.com)

[www.morganlewis.com](http://www.morganlewis.com)

## Overview

- New focus on small and emerging business by the Obama administration
- Current visa options—and their pluses and minuses—for founders, owners, and key employees of emerging businesses, and related corporate and employment law considerations
- Crystal ball gazing: What does Congress have in store for foreign nationals involved in emerging businesses? What is the likelihood of success with respect to these initiatives?

## Key Facts

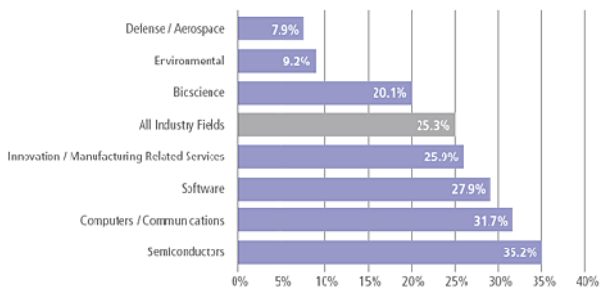
- America's 25.8 million small businesses<sup>1</sup>
  - Employ more than 50% of the private workforce
  - Generate more than half of America's GDP
  - Are the principal source of U.S. job growth
- Research of Vivek Wadhwa during 1995-2005 reveals<sup>2</sup>
  - 25% of U.S. science and technology companies founded had CEOs or lead technologists who were foreign born
  - In Silicon Valley, 52% of the science and technology companies founded had CEOs or lead technologists who were foreign born

<sup>1</sup> Source: U.S. Department of Labor.

<sup>2</sup> Source: Vivek Wadhwa – Executive in Residence, Pratt School of Engineering, Duke University; Wertheim Fellow, Labor and Worklife Program, Harvard University; Fellow, Social Sciences Research Institute, Duke University.

## Data Results by Industry

PERCENTAGE OF IMMIGRANT-FOUNDED COMPANIES BY INDUSTRY



Source: Ewing Marion Kauffman Foundation during 1995-2005

## Key Facts

- December 2011 briefing from National Foundation for American Policy found that 48% of U.S. top venture-funded companies have at least one immigrant founder
- Partnership for a New American Economy issued a report in June 2011 titled The “New American” Fortune 500 regarding immigrant entrepreneurs. Findings include:
  - 18% of Fortune 500 companies were started by immigrants, ranging across industries such as aerospace, defense, Internet, consumer products, specialty railroads, insurance, electronics, hospitality, finance and other sectors
  - Almost 20 percent of newest Fortune 500 companies—those founded between 1985 and 2010—have an immigrant founder
  - The United States will lose talent to other countries such as the UK, Canada, and Australia unless we change our immigration system to drop barriers to aspiring entrepreneurs

© Morgan, Lewis & Bockius LLP

5

**Morgan Lewis**

## Partnership for a New American Economy

- Key Recommendations:
  - Pursue immigration policies that encourage entrepreneurs to bring businesses to the United States
  - Provide incentives for foreign students to stay in the United States after graduation
  - Make it easier for American businesses to hire and retain key foreign workers
  - Create a special entrepreneur visa

© Morgan, Lewis & Bockius LLP

6

**Morgan Lewis**

## Obama Administration Initiatives

- 2011 White House Startup America Initiative and Startup America Partnership to encourage agencies and Congress to support entrepreneurship
- August 2011: USCIS released several documents including a fact sheet on national interest waivers and H-1Bs for entrepreneurs and a FAQ on use of the EB-2 for entrepreneurs
- Yesterday was one-year anniversary of White House Startup America Initiative, and DHS announced certain changes

## DHS Announcements: Jan. 31, 2012

- Expand eligibility for 17-month extension of optional practical training (OPT) for F-1 international students to include students with a prior degree in science, technology, engineering, or mathematics (STEM degree).
- Allow for additional part-time study for spouses of F-1 students, and expand the number of designated school officials at schools certified by DHS to enroll international students.
- Provide work authorization for spouses of certain H-1B visa holders.
- Allow outstanding professors and researchers to present a broader scope of evidence of academic achievement.
- Harmonize rules to allow E-3 visa holders from Australia and H-1B1 visa holders from Singapore and Chile to continue working with their current employers for up to 240 days while their petitions for extension of status are pending.
- Launch Entrepreneurs in Residence initiative.

## Temporary Visa Options for Entrepreneurs, Founders, and Employees of Emerging Businesses

- H-1B – Temporary Professional Worker
- L-1 – Intracompany Transferee
- E – Treaty Trader and Investor
- TN – NAFTA Visa for Nationals of Mexico and Canada
- H-1B1 – for Chilean and Singaporean Nationals
- E-3 – for Australian Nationals
- Foreign Students on CPT and OPT
- B-1 Visitor – To explore and startup but not work for entity

## H-1B Visas

- For professional-level workers who are coming to work for a U.S. employer in a “specialty occupation”; position requiring specific baccalaureate degree as minimum entry requirement
- Capped for for-profit institutions—65,000 each FY plus 20,000 for U.S. advanced degree recipients
- Heavily regulated: labor condition attestation must be filed with DOL
- Issues:
  - Neufeld memo an enormous issue for owner-beneficiaries
  - Employer must pay prevailing wage (cannot “volunteer” or be paid in equity)
  - Increasingly restrictive adjudications

## L Visas

- Multinational companies may use L to transfer managers, executives (L-1As), and individuals with specialized company knowledge (L-1Bs) who have worked for the company abroad for one of the prior three years in a similar capacity
- Founders may qualify
- L-1A visa is good for seven years in total; L-1B visa is good for five years
- L-2 spouse may obtain unrestricted work authorization
- Issues: Must have related entity abroad, size of U.S. entity, increasingly restrictive USCIS adjudications

## E Visas for Treaty Traders and Investors

- E visas are for executive, managerial, or essential employees of companies that represent substantial investments in the United States by nationals of treaty countries or that conduct trade with treaty countries
- U.S. company must be majority owned by treaty nationals or traded on stock exchange of treaty country
- E-visa company must be registered at U.S. Embassy abroad, and registration must be updated/renewed from time to time
- Valid for five years, renewable
- Spouses of E-visa holders qualify for unrestricted work authorization
- Issues: Majority ownership, "Marginality"

## TN, H-1B1, and E-3

- These offer work authorization pursuant to treaties with certain countries.
- For employees, not founders, although ownership interest is not necessarily precluded under regulation.
- TN is for certain professionals from Canada and Mexico working in professions listed in an appendix to NAFTA.
- H-1B1 for nationals of Chile and Singapore; E-3 for nationals of Australia. Eligibility requirements are very similar to H-1B.

## Foreign Students

- Can work pursuant to CPT and OPT
- OPT is usually 12 months following degree, unless employer is an e-Verify employer and foreign student has STEM degree
- Student must work in field related to degree
- No specific preclusions on having ownership interest in employer, but foreign student officer must approve CPT and OPT

## Lawful Permanent Residence

- EB-5 program for certain foreign investors
- Multinational manager and executive category similar to L visa—must have worked for related entity abroad
- Extraordinary ability petitions may be self-sponsored and could be an option for a founder/entrepreneur with international renown
- National interest waivers
- Labor certification–based permanent residence will only work for employees, not those with significant ownership interest in an entity

## Looking Ahead

### Immigration Bills Pending in Congress

- Startup Visa Act of 2011 – sponsored by Senators Kerry (D-MA), Lugar (R-IN) and Udall (D-CO)
- IDEA Act of 2011 – sponsored by Representative Lofgren (D-CA)
- The Fairness for High-Skilled Immigrants Act – sponsored by Representative Chaffetz (R-UT)
- VISIT USA Act – sponsored by Senator Schumer (D-NY)
- Creating American Jobs Through Foreign Capital Investment Act – sponsored by Representative Larsen (D-WA)



## Startup Visa Act

- A bill to establish an employment-based immigrant visa for alien entrepreneurs who have received “significant” capital from investors to establish businesses in the United States.
- Will allow an immigrant entrepreneur to receive a two-year visa if he or she can show that a qualified U.S. investor is willing to invest in the immigrant’s startup venture.
- Currently referred to the Committee on the Judiciary.

## IDEA Act of 2011

- Immigration Driving Entrepreneurship in America Act of 2011 (IDEA).
- Establishes an immigrant visa category for qualifying venture capital-backed startup entrepreneurs and for self-sponsored startup entrepreneurs who intend to engage in, or have engaged in, new commercial enterprises in the United States.
- Establishes a priority worker immigrant visa for foreign nationals who have a qualifying master’s or STEM degree from a United States institution of higher education.
- Currently referred to the Subcommittee on Workforce Protections.

## The Fairness for High-Skilled Immigrants Act

- Eliminate the per-country numerical limitation for employment-based immigrants, to increase the per-country numerical limitation for family-sponsored immigrants, and for other purposes.
- Passed in the House of Representatives on November 29, 2011.
- Currently placed on Senate Legislative Calendar under General Orders, Calendar No. 293.

## VISIT USA

- Visa Improvements to Stimulate International Tourism to the United States of America Act.
- Establishes an X (nonimmigrant)-visa for (1) an alien who invests (and maintains) at least \$500,000 in U.S. residential real estate, of which at least \$250,000 must be for a U.S. primary residence where such alien will reside for more than 180 days per year; and (2) such alien's accompanying spouse and children. Makes such visa renewable every three years.
- Currently referred to the Judiciary Committee.

## Creating American Jobs Through Foreign Capital Investment Act

- Amends the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 to make the EB-5 visa (alien investor) regional center program permanent.
- Currently referred to the Subcommittee on Immigration Policy and Enforcement.

## Questions or Comments?

## CLE Credit

If you would like to receive CLE credit for today's event, please email Jennifer Domer-Shank, [jdomer-shank@morganlewis.com](mailto:jdomer-shank@morganlewis.com). Please include the following:

- State in which you'd like to receive CLE credit
- Your bar number

**Questions?** Please call Jennifer Domer-Shank at (215) 963-4896.

