Wanted: Faster Visa Track for Foreign Entrepreneurs

Robert S. Whitehill, Fox Rothschild

After the Statue of Liberty, one the most resonating images of America is a smiling face on a young immigrant who came to the United States, had a dream, idea or a discovery and turned it into a business, an industry, or even perhaps a technological revolution. Beckoned by the chance to enter the U.S. and learn, he or she took advantage of the opportunity that awaited and succeeded.

The United States attracts hundreds of thousands of such students every year from literally every corner of the world. There are more foreigners educated here than any other country. Our brand, a U.S. college or a university degree, is the world's standard.

Immigrants in the United States typically are more entrepreneurial than our native born population, and have driven some of our top business successes. It is well reported that about 40 percent of tech companies and a majority of Silicon Valley firms have been founded by foreign born residents. Google, Intel, Yahoo and eBay all have at least one foreign born founder. Moreover, startups create more jobs than do established firms.

All this talent — foreign students educated here and foreign born entrepreneurs — often is the "low hanging fruit" that our immigration law should promote and drive growth in our economy. But, what the iconic "smiling face" image fails to convey is the darker side of immigration that results in long lines of downcast, frowning faces of aliens with the Next Big Idea who are deeply discouraged by the many legal road blocks, delays and frustrations that await.

Some persistent immigrants become that smiling face holding a green card. Others give up and leave. Some, who frightened by the prospect of failure which is anathema in their culture, do not come at all. These huge dis-incentives need to be corrected before our nation can fully reap the benefit from this key sector of our populace.

It is estimated that as many as 34 million non-citizens live in the United States. According to U.S. Citizenship and Immigration Services (USCIS) a record number of 950,000 academic and vocational students and their families came to the United States in fiscal year 2009. Opportunity after opportunity walks right through customs at our airports and water ports, ready, willing but thwarted in their ability and desire to make a difference.

First, let's examine the immigration law from 35,000 feet. There are U.S. citizens and everyone else in the U.S. is an "alien." "Alien" is not politically correct, but it is the legal term. Aliens who are here lawfully are either immigrants or non-immigrants. More legal terms, but, simply put, non-immigrants are admitted to the United States on a specific visa granted for a specific purpose and limited to a specific period of time. Non-immigrants may legally

come to visit or work or study or wed or engage in dozens of other different types of activity.

One of the earliest problems aliens face is that when the non-immigrant visa expires, he or she is obligated to leave the U.S. Statistically, most do. Obviously, many stay and become immigrants, with the right to stay permanently and engage in any lawful activity. Immigrants are free to start their own business or retire without having to ask permission from USCIS, as do non-immigrants. Immigrants are granted the right to live and work here permanently, having what is known as "green cards," based upon one of several routes: family reunification, employment, their status as a refugee or asylee or winning the Diversity Lottery.

For some people, the path from non-immigrant to immigrant is relatively swift, a year or less. For others, it's a decade or more. During all this time, the alien has to scrupulously follow federal immigrations rules or risk deportation.

In fiscal year 2009, USCIS reports that approximately 1.3 million immigrants secured green cards, and a whopping 163 million aliens were granted entry (mostly tourists) into the United States. Of those 163 million legal non-immigrant entries, let's start by following students.

Student Disincentives

Foreign students have major anxiety as they contemplate a future in the U.S.

Upon completing a level of educational achievement, bachelors, masters or doctorate, a student (F-1 visa holder to be precise) is eligible for "optional practical training" (OPT).

This practical training opportunity provides the student with one year of employment authorization to apply her or his academic learning in the real world. Students receive an Employment Authorization Document (EAD) that authorizes employment related to the field of study that they have pursued. The document is evidence of work authorization that is required by the I-9 employment verification process for all new hires.

OPT may be extended for students who studied in a STEM field (science, technology, engineering or mathematics) and work for employers who utilize E-Verify, the government's on-line employment verification system. But for most graduates, one year is the limit to their OPT work authorization. But when OPT ends, a student is no longer a student, no longer has employment authorization and will be forced to leave the United States unless, in most cases, an employer is willing and able to apply for and secure a visa on behalf of that student, now employee. Usually that non-immigrant visa is an H-1B, temporary worker.

During their limited time here, some students with the Next Big Idea may yearn to take what they learned or developed academically and turn it into a business or a potential business. But Immigration policy gets in the way.

Outs of H-1B

USCIS recently issued a policy memo, entitled, *"Determining Employer/Employee Relationship for Adjudication of H-1B Petitions, Including Third Party Site Placements"*, also known as the Neufeld Memo. Simply put, the memo prohibits the grant of H-1B visas to the self-employed and to those whose employer does not "control them." Therein lies the rub. A startup is a new company usually thinly capitalized, with a founder or three feverishly working to operationalize a brilliant new idea. For the founders, it is lots of work, little financial reward, big potential, but very difficult to qualify for an H-1B in light of current USCIS policy. This is another dysfunction that begs for correction.

Not able to transition to his or her own startup, some students seek opportunity elsewhere. Sometimes they take their education to another country, which is our loss. Others delay their entrepreneurship and take a job to earn a salary, employment authorization and the right to remain

in the United States, while the Next Big Idea languishes. Because the amount of time it takes to grant permanent residency, some H-1B workers are on their seventh, eighth, ninth or even tenth year of H before their ship or green card comes in.

An H-1B or temporary worker visa, is a non-immigrant visa classification which normally requires an offer of employment to perform work that generally requires a bachelors level degree, or greater. The employee must have the educational requirements and any other additional requirements or licensure for the position. In addition, the employer must offer compensation at the "prevailing wage," determined by the Department of Labor to be the median amount paid for positions of that sort in the geographical area of intended employment. The visa is generally sought in three-year increments for a total of six years. The status may be extended beyond the sixth year and, thereafter, if the employer has started the permanent residency process. Of course, the employer is obligated to pay all the costs and fees of the most common path to permanent residency through a labor certification.

Under current law, except when a company is a very large user of H-1B workers and is H-1B dependent, there is no need to test the labor market to confirm that a U.S. worker is unavailable for the job. Still, as protection for the U.S. workforce, the Department of Labor mandates that all H-1B employers pay at least the prevailing wage for the occupation in the geographic area where the H-1B worker will be located. This requirement is meant to deter unscrupulous employers from undermining the U.S. labor market by hiring foreign workers at lowball wages. Of course, it also deters foreign workers from working for startups or from trying to start up their own businesses.

H-1B petitions are further complicated by the USCIS announcement after February 20, 2011 that it will require employers to certify that they have reviewed the relevant regulations and made the determination as to whether or not an export license is required to release any controlled technology or technical data to a foreign national. If so, an export license will need to be obtained for the foreign worker. This is unbelievably complex and will discourage both ambitious budding entrepreneurs and all other H-1B employers.

The H-1B process is also costly. USCIS is principally funded by user fees. For this visa, there is a $325 visa fee, a $500 anti-fraud fee and a training fee imposed on employers (except non-profits which are affiliated with institutions of higher learning or government research institutions in the amount of $750 if the employer has fewer than 25 employees and $1,500 for larger employers). A recently enacted fee has been added for heavy users of the H-1B visas. For those with more than 50 employees, half or more of whom are in H-1B status, the additional fee is $2,000. And, there is an optional fee of $1,225, if necessary, to have USCIS take speedy action on a petition within 15 days of the date of filing.

The H visa may work well for many established firms and institutions that rely upon foreign workers and clearly have the ability to pay the worker and the desire to pay the government the filing fees. But it dampens the entrepreneurial spirit. Fees are a cost of doing business which may deter startups or other small companies from engaging the services of well qualified and desirable foreign workers or entrepreneurs.

Other Non-Immigrant Opportunities

Aside from employment authorization arising from student status, the only other non-immigrant visa that allows self-employment is the Treaty Investor visa, or Treaty Trade visa. These require petitioners to make substantial investments in the United States or a substantial bi-lateral trade with the U.S. by the alien's home country, so long as the home country has a treaty of navigation and commerce with the U.S. The word "substantial" is likely to be an impediment to a newly-minted Ph.D. or enterprising foreign investor. This visa is very useful for foreign firms expanding their presence in the

United States, but not particularly useful for the startup.

Permanent Residency

In scenarios where a budding entrepreneur is working for someone else, but wants to remain here, it is not long before he or she will need to seek permanent residency through employment. This is an elaborate complex and unforgiving process, which, in part, is designed to protect U.S. workers and to create immigrant diversity in our country, but creates significant disincentives and anxiety to many foreign workers, in part, because it takes so long to mature.

Our immigration law limits the number of permanent residency visas based on employment to 140,000 per year. To foster diversity, further limits are put on the number of visas available to people from any given country.

The demand for employment-based immigrant visas in its several categories consistently outstrips the supply, causing delays. The delayed availability is further exacerbated by the fact that the demand from the people born in India or China greatly exceeds the statutory limit for their country per year. Consequently, very long waits. Individuals from India and China whose employment is not taking a job away from a U.S. worker (EB-2) and whose job requires a Master's degree or greater may have to wait…some Doomsday estimates are 20 years or longer before they can apply to get their green cards. This is quite a disincentive.

Slavery was abolished in the U.S. during the Civil War. But while a foreign worker's employment is not involuntary servitude to the petitioning employer, it may feel that way. Until there is a visa immediately available, and an application to secure the "green card" (I-485) has been pending for more than six months and the immigrant visa petition (I-140) has been approved, if leaving the employer to start a new firm, she or he may very well find himself out of legal status. All dressed up, nowhere to go, and the employer knows this.

There are three opportunities for a foreign born entrepreneur to petition for himself or herself for permanent residency, and to escape the long lines.

Narrow Routes to Self-Petitioned Green Cards

Current law permits certain "extraordinary" individuals to seek permanent residency based upon their entrepreneurship. Employment based first preference (EB-1/priority worker) is available for an individual at the top of his or her field who is able to demonstrate through sustained national or international acclaim his or her leadership in the field of science, business, or the arts. Some foreign born entrepreneurs are able to qualify for this visa, but it requires substantial documentation of accomplishment and notoriety over the course of years. This visa, although theoretically available to a young entrepreneur, unfortunately is better suited for one whose company is past the start up stage, whose successes are making headlines in this newspaper. This priority worker visa awards the endless waits because there are only so many people at the top of their field.[1]

Also able to self-petition are individuals whose work advances the national interest (EB-2/NIW). Here, scientists, researchers, technicians who have invented, discovered or developed something that is marketable and that advances the national interest may self petition. Hula hoops probably would not qualify, while robotic motion detectors might.

While the statistics are not available as to the number of self-petitioning entrepreneurs in these two former categories, they are available for employment based fifth preference (EB-5), the employment creation visa. Here, an affluent entrepreneur who invests between $500,000 and $1 million in an enterprise in the U.S. which creates 10 jobs may petition for himself and his family for conditional, then permanent residency in the United States. The U.S. makes 10,000 of these visas available annually. But, in fiscal year 2009, only 3,688 were used. It's so far below the cap because it is so limiting. The minute number of people taking

advantage of this visa indicates that the visa is more for green card creation rather than employment creation.

Rewards for Persistence?

Despite all these disincentives and the high threshold for self-petitioning, a few people are successful. We have had the distinct pleasure of working with foreign students who complete their Ph.D. program at name brand universities with new ideas fit into a National Interest Waiver or "Alien of Extraordinary Ability" visa.

These are available and, indeed, clients for whom we secured permanent residency have started their own firm, have secured capitalization and have gone on, not only to grow, but to create jobs for U.S. and foreign born workers alike, adding new vitality to our economic health. One such individual developed technologies that allow scientists to speedily and cheaply analyze DNA, facilitating the use of DNA by physicians in diagnosing disease and setting treatment protocols. This person was willing to take many risks and has been successful so far. His is the happy, smiling face of a person who did it on his own and is holding a green card. But, sadly, he is in a very small minority.

Robert S. Whitehill (rwhitehill@foxrothschild.com) chairs the Immigration Group of the law firm of Fox Rothschild in Pittsburgh.

[1] To be complete, EB-1 is also available for executives and managers of multinational firms and "outstanding" professors or researchers, but these do not permit self-petitions.