

Reforming Immigration Law to Allow More Foreign  
Student Entrepreneurs to Launch Job-Creating  
Ventures in the United States

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University of Missouri—Kansas City

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## Introduction

As universities move toward a more experiential approach to entrepreneurship education, many academic units and cross-campus entrepreneurship programs are encouraging their students to actively engage with the curriculum and apply the skills they learn. One such approach is to have students start their own businesses before they graduate. In addition to enhancing their education, participation in the planning, launch and operation of a start-up venture can lead directly to the creation of new jobs for many other individuals. Unfortunately, being the founder of a start-up venture in the United States proves complicated for foreign students in our colleges and universities. Across the country, both undergraduate and graduate entrepreneurship students desiring to participate actively in a startup face vexing immigration law challenges.

This paper outlines some of the barriers that foreign student entrepreneurs face, and describes how a somewhat expanded version of bipartisan legislation along the lines of the Startup Act 2.0 (S. 3217 or the Startup Act), cosponsored by Senators Jerry Moran (R-KS), Mark Warner (D-VA), Marco Rubio (R-FL), Chris Coons (D-DE), Roy Blunt (R-MO), and Scott Brown (R-MA), would help to address some of these roadblocks. The Startup Act, which has also been introduced in the House of Representatives on a bipartisan basis, as discussed below, would create a new conditional permanent resident status opportunity for foreign students who hold master's or doctorate degrees in science, technology, engineering, or mathematics (STEM) awarded by a U.S. institution of higher education. It would also create a conditional immigrant visa opportunity for "qualified alien entrepreneurs": entrepreneurs who either hold an H-1B visa or have completed or will complete a graduate level degree in a STEM field, and register a business that meets certain conditions for number of employees and dollar amount of investment discussed further below (Startup Visa).

While we support these important proposals, we believe there are compelling reasons to broaden the Startup Act's reach to allow both graduate and undergraduate students to launch and participate in qualifying start-up ventures while in school, and to be eligible for the Startup Visa if such ventures continue as viable businesses with revenues and employees post-graduation. This would include coverage of students who are actively involved as employees or owners in businesses related to entrepreneurship

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<sup>1</sup> This study was supported by the Ewing Marion Kauffman Foundation. The views expressed are those of the authors and do not necessarily reflect the views of the Ewing Marion Kauffman Foundation. All three authors are faculty members at the University of Missouri—Kansas City. Anthony Luppino is a professor of law with the UMKC School of Law and a teaching fellow with the UMKC Institute for Entrepreneurship & Innovation (IEI). Dr. John Norton is a visiting professor of Entrepreneurship & Innovation with the Henry W. Bloch School of Management and the associate director of the IEI. Malika Simmons is a visiting assistant clinical professor of law with the UMKC School of Law.

study at an institution of higher education, whether or not they hold or are pursuing a STEM degree. We also propose streamlining the current H-1B visa process and documentation requirements for applicants who are principals in a business. Based on our experiences and those of many others at colleges and universities throughout the country, we believe it is imperative to expand the Startup Act's coverage to include measures to assist undergraduate foreign entrepreneurs, and to call for regulatory action to facilitate bona fide student start-up ventures with job creation potential.

This paper will initially focus on the F-1 visa, the most common visa category for foreign students, and detail some of its general restrictions and limited exceptions. Although the F-1 visa allows students to participate in internships pertinent to their field of study, it generally does not allow students to be employed, unless that employment has been authorized as part of the student's educational pursuits and is deemed necessary practical training. Self-employment is considered employment in this context; students so engaged may thereby violate the law and jeopardize their visa status. Investment activities are allowed, but sometimes the distinction between employment and investment is not easily determined. Moreover, if we make financial investment determinative while dismissing intellectual investment, it denies America's heritage as a nation whose success lies in meritocracy. We thus will examine the special problems confronted by foreign student entrepreneurs who want to create and own equity interests in companies to further understand why the passage of a modified form of the Startup Act is so critical.

The discussion will include exploration of the limited possibilities under current U.S. immigration law for starting a business while in the country on the F-1 visa. These possible options include Curricular Practical Training (CPT), Optional Practical Training (OPT), or the H-1B visa, with OPT having the potential to transition into an H-1B. Each option carries its own set of challenges and restrictions. As detailed below, CPT opportunities vary from school to school, and it appears many institutions are reluctant to interpret the associated regulations to allow students on F-1 visas to be principals in start-up ventures. OPT may allow for self-employment, but the student's business must be directly related to his or her major course of study. Obtaining an H-1B visa is presently an uncertain process, the administration of which by U.S. Citizenship and Immigration Services (hereinafter referred to as "USCIS" or the "Agency") has been criticized as unfavorable to entrepreneurial start-up ventures. While we acknowledge there are several other visa categories that may be compatible with possessing an ownership interest in an organization, they typically are not attainable options for foreign students.<sup>2</sup>

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<sup>2</sup> For example, the B-1 business visitor visa and the E-1 and E-2 treaty-related visas are options for those who seek to engage in some business-related activity in the United States and remain compliant with the U.S. immigration laws, but those options are generally not appropriate for foreign students seeking to launch and run a business. The B-1 business visitor visa is not a work authorized visa; while it may accommodate negotiating and making an investment in a business, it does not cover work in operating a business. See Alan Tafapolsky, "Immigration Briefings, Foreign Entrepreneurs and Immigration: Founding and Funding a Business in the United States—What are Your Options? How Ownership Interests Affect Business Part I," *Immigration Briefs* (2003): 4. The E-1 (treaty-trader) visa allows a citizen of a country with which the United States maintains a treaty of commerce and navigation to be admitted to the country

We conclude by advocating several changes, both administrative and legislative, that would aid foreign student entrepreneurship and spur U.S. job creation. The proposed administrative changes deal with clarification and, if deemed necessary, modification of CPT and OPT rules and regulations, as well as the Agency's interpretations of the current rules on H-1B petitions. Such actions would render the CPT and OPT opportunities more supportive of student entrepreneurship and allow the H-1B petition process in the context of small startup businesses to flow more smoothly rather than routinely subjecting the founders of such ventures to onerous requests for documents. In terms of legislative changes, we propose expansion of the Startup Act to add provisions promoting entrepreneurship by undergraduates and students not necessarily engaged in a STEM discipline. In addition to enriching their academic experience, passage of such a modified version of the Startup Act would facilitate the establishment and growth of job-creating ventures through extended postgraduate visa opportunities available to those with a bachelor's degree or higher who possess an ownership interest in a qualified student venture that has achieved minimum levels of profit and employees (detailed below).

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solely to engage in international trade on his or her own behalf. See "E-1 Treaty Traders," USCIS, accessed July 12, 2012, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=05536811264a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=05536811264a3210VgnVCM100000b92ca60aRCRD>. The E-2 (treaty-investor) visa, sometimes called the "entrepreneurs visa" is another possibility. Subject to various conditions, it allows admission to the country when investing a substantial amount of capital in a U.S. business. See "E-2 Treaty Investors," USCIS, accessed July 21, 2012, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2ea36811264a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=2ea36811264a3210VgnVCM100000b92ca60aRCRD>. The determination of what constitutes a "substantial" amount of capital for E-2 purposes will be fact specific and may be difficult to predict, and, for many students, can as a practical matter be beyond their current financial reach. Moreover, many foreign student entrepreneurs studying in the United States come from China and India, and those two countries do not have treaties of commerce and navigation with the United States. See also discussion of the various categories of "EB" visas in Christine Chester and Amanda Cully, "Putting a Plug in America's Brain Drain: A Proposal to Increase U.S. Retention of Foreign Students Post-Graduation," *Hofstra Labor & Employment Law Journal* (Spring 2011): 385, 393, and in Peter H. Schuck and John E. Tyler, "Making the Case for Changing U.S. Policy Regarding Highly Skilled Immigrants," *Fordham Urban Law Journal* 38 (November, 2010): 327, 346-347. The EB permanent workers series of visas include, among other possibilities, narrowly defined categories for professionals with advanced degrees or special abilities, skilled or unskilled workers, and substantial investors in "new commercial enterprises," but would be unavailable to mainstream entrepreneurship students seeking to launch their own business because of, among others, such requirements as lack of qualified workers available in the United States for the same work, or required levels of prior experience or training or abilities, or, in the case of the EB-5 "investor" visa the minimum investment thresholds of \$1,000,000 generally and \$500,000 in enterprises in high unemployment or rural areas. The various requirements or conditions are summarized in links under "Permanent Workers," USCIS, accessed August 3, 2012, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=cdfd2f8b69583210VgnVCM100000082ca60aRCRD&vgnnextchannel=cdfd2f8b69583210VgnVCM100000082ca60aRCRD>.

## The Job Creation Imperative

Visa restrictions greatly affect the ability of foreign student entrepreneurs to contribute toward job creation. The inhibiting effects of such restrictions are particularly significant in a down economy. In a speech at the U.S. Chamber of Commerce offices in the fall of 2011, New York City Mayor Michael Bloomberg called the restrictive U.S. visa policies a form of “national suicide.”<sup>3</sup> The persistently high rates of unemployment since the financial crisis of 2008 and reactions of investors, business owners and managers, and private individuals to the bleak jobs numbers are well-documented in the popular press.

In the December 2011 article “Report: Immigrants Found Nearly Half of Top Start-ups,” *Inc.* magazine’s Eric Markowitz reported on a survey conducted by the National Foundation for American Policy, a nonprofit research group based in Arlington, Virginia. The article cites the survey’s findings, including the following:<sup>4</sup>

- 46 percent of America's top venture-funded companies have at least one immigrant founder.
- 74 percent have at least one immigrant holding a top-level management position (CEO, CTO, and VP were most common).
- Each company founded by an immigrant has already created, on average, about 150 jobs, and the companies in the study are still in their high-growth stage.
- The most common country of origin for immigrant founders is India, followed by Israel, Canada, Iran, and New Zealand.

Two further research results bear highlighting here:

1. Data from the Bureau of Labor Statistics Business Employment Database indicates that job losses by existing businesses have exceeded job gains by those firms every year since 2001.<sup>5</sup>
2. Research by Professor Michael Song and colleagues at the University of Missouri–Kansas City Institute for Entrepreneurship and Innovation indicates

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<sup>3</sup> “Careers H-1B Visa Cap Must Go, Says NYC Mayor,” *Computerworld*, October 10, 2011. Mayor Bloomberg also spoke at an event in the spring of 2011 that honored foreign student entrepreneurs and awarded them with funding and facilities to start developing their ideas. At this event he stated that the country could ill afford some of the effects of the current immigration system. See “Bloomberg says reform immigration laws to attract talent,” in Article List on Scott & Associates, PLLC website, accessed July 30, 2012, <http://www.scottimmigration.net/content/bloomberg-says-reform-immigration-rules-attract-talent>.

<sup>4</sup> Eric Markowitz, “Report: Immigrants Found Nearly Half of Top Start-ups,” *Inc.*, December 20, 2011, accessed July 22, 2012, <http://www.inc.com/eric-markowitz/immigrant-entrepreneurs-are-key-job-creators.html>.

<sup>5</sup> See table on total employment gains attributable to existing (not start-up) firms minus total employment losses by contracting and closing firms at [http://www.bls.gov/web/cewbd/anntab1\\_1.txt](http://www.bls.gov/web/cewbd/anntab1_1.txt) (accessed July 20, 2012). See also Schuck and Tyler, 335-336, see note 2 (observing that “new firms disproportionately increase employment” and citing in that connection: Dane Stangler, “High Growth Firms and the Future of the American Economy,” *Ewing Marion Kauffman Foundation* 5 (2010), and Dane Stangler and Robert E. Litan, “Where Will the Jobs Come From?,” *Ewing Marion Kauffman Foundation* 6 & fig. 3 (2009)).

that, in a database of more than 11,000 U.S. firms, an entrepreneur can be expected to create 512 jobs in his or her lifetime.<sup>6</sup>

Given those conditions, it is more than in our economic interest—it is *urgent*—that we take action to encourage and enable the creation of new companies and new jobs. The White House has taken notice of this imperative. One of the Obama administration's main goals related to entrepreneurship is making it easier for foreign student entrepreneurs on visas to stay in the country to create innovative businesses.<sup>7</sup> The administration readily acknowledges that foreign-born students studying in our universities have the potential to make significant contributions to our future economic growth if they could stay and work in the United States after they graduate, and that exporting this talent to other countries is not in our economic interest.<sup>8</sup> This paper embraces those objectives by calling for the removal of immigration law impediments to student-initiated entrepreneurial growth, and thus hopefully will make an important contribution to the public policy debate.

### **U.S. Colleges and Universities Are Well-Suited to Fostering Entrepreneurship and Innovation**

American colleges and universities are uniquely positioned to educate students on principles of entrepreneurship and innovation. In addition, these institutions of higher education provide opportunities to translate that knowledge into scalable, sustainable, commercial ventures that create jobs and spur economic recovery and growth. Many U.S. colleges and universities offer sophisticated and rigorous cross-campus entrepreneurship programs in which creative students from virtually any discipline can acquire the knowledge and skills needed to turn innovations into viable, job-creating businesses.<sup>9</sup> More and more business schools are ramping up the curriculum, number of classes, and contests designed to help students transform good ideas into commercially viable growth ventures.<sup>10</sup>

Experience tells us that many student innovators with entrepreneurial mindsets and great potential are studying in a variety of disciplines at all levels of higher

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<sup>6</sup> Lisa Zhao, Michael Song, and Mark E. Parry, "Perspective: Economic Conditions, Entrepreneurship, First-Product Development, and New Venture Success," *Journal of Product Innovation Management* 27 (2010): 130–35.

<sup>7</sup> "Student Entrepreneurs Visit White House," *George Washington University Today*, December 1, 2011, accessed July 21, 2012, <http://gwtoday.gwu.edu/aroundcampus/studententrepreneursvisitwhitehouse>.

<sup>8</sup> White House, *Blueprint for Immigration Reform: Building a 21<sup>st</sup> Century Immigration System*, May 2011, accessed July 21, 2012, [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/immigration\\_blueprint.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf).

<sup>9</sup> The Global Consortium of Entrepreneurship Centers (GCEC) reports, for example, that its "current membership totals 200 university based centers ranging in age from well established and nationally ranked to new and emerging centers." See GCEC website, accessed July 21, 2012, <http://www.globalentrepreneurshipconsortium.org/index.cfm>.

<sup>10</sup> Stacey Blackman, "Entrepreneurship Gains Momentum at Business Schools," *U.S. News & World Report*, November 18, 2011, <http://www.usnews.com/education/blogs/MBA-admissions-strictly-business/2011/11/18/entrepreneurship-gains-momentum-at-business-schools>.

education, including the undergraduate level. Some of today's most visible and well-known companies were reportedly originated by college students. Such large international companies include, for example, Facebook, Dell, Microsoft, FedEx, and Time Inc.

Many schools are developing programs and events to help nurture these budding entrepreneurs. The New Innovation Lab at Harvard Business School, for example, hosted a Startup Weekend Scramble on November 11-13, 2011. More than 100 students from Harvard and MIT participated in this intense fifty-four-hour event designed to let aspiring entrepreneurs discover if their startup ideas are viable. That same month, the Johnson School at Cornell University hosted 3Day Startup Cornell, which was sponsored by Facebook. At this event, participants aimed to start a technology company over the course of three days.

Yet another example of a program developing entrepreneurial talent on a campus-wide basis is the Entrepreneurship Scholars (E-Scholars) Program at the University of Missouri–Kansas City (“UMKC”). The UMKC Institute for Entrepreneurship and Innovation, operated at the UMKC Bloch School of Management with interdisciplinary reach across the university, launched the E-Scholars Program in late 2010 to accelerate sustainable and scalable student ventures, taking participants from ideation to launch in one year. During its first year and a half of operation, participants have launched approximately fifty new businesses. More than 350 people applied for the E-Scholars class of 2013 (which began in May 2012), of which seventy-two were selected for admission. They will work with faculty, staff, and mentors on developing and refining the plans for their business ideas, with the goal of being prepared to launch their ventures at the end of the yearlong process. Those who complete the program of study have their business plans vetted by a committee of mentors and faculty and, if judged to have developed a sound plan for sustainable, scalable ventures, earn certification as Entrepreneurship Scholars.

Technology startups, and those started by college dropouts, seem to capture the most press. However, not every startup is a tech startup and not every person who launches a successful firm is a dropout. Worthwhile ideas come from students in many fields. The Entrepreneurship Scholars program experience is that about half of the students are undergrads. The program is open not only to UMKC students, but also to the general public, and it is interesting to note the wide variety in participant backgrounds. Entrepreneurship by its very nature does not place boundaries on the credentials of innovators. Some members of the E-Scholars group have PhD or MD degrees; others have never been to college; some are eighteen years old; some are more than sixty years old; and while the majority of successful ventures may have innovative elements, most were created by people who were not students of science, technology, engineering, or mathematics. A significant number were created by actors, musicians, or people with backgrounds in finance, law, art, or accountancy.

The foregoing are just a few examples of how entrepreneurship education programs are promoting student creation of start-up businesses with significant job creation potential

at both the undergraduate and graduate levels. There is ample reason to believe such offerings will continue to expand in the coming years as entrepreneurship and innovation continue to be at the center of economic recovery and growth. As they continue to experience the emergence of entrepreneurship as a distinct and important field of study, institutions of higher education also are seeing increasing numbers of international students with a passion for entrepreneurship, which can and should lead to the establishment of successful ventures in the United States.

Immigrants to the United States historically have been very successful entrepreneurs. They are much more likely to be entrepreneurs than individuals born in the United States, and their success is great for the economy.<sup>11</sup> They also create new businesses at almost twice the rate of American citizens.<sup>12</sup> Foreign nationals also are represented disproportionately among the ranks of founding executives at technology firms around the country.<sup>13</sup> Yahoo!<sup>14</sup>, eBay, Intel, and Google<sup>15</sup> are companies where at least one of those student founders reportedly was foreign-born or a first-generation American citizen. In addition, of American engineering and technology companies founded between 1995 and 2005, more than 25 percent had at least one foreign-born key founder.<sup>16</sup> In 2005, these companies produced over \$52 billion in sales and employed more than 450,000 workers. An example from UMKC's E-Scholars program brings the issue into sharp relief. One E-Scholars participant has filed two patents and been instrumental in establishing two companies, but cannot stay in the United States to operate them. Instead, he will have to take a job with a U.S. firm, one that will sponsor him. The difference? He will fill one position at an established firm—rather than

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<sup>11</sup> David P. Weber, "Halting the Deportation of Businesses: A Pragmatic Paradigm for Dealing with Success," 23 *Georgetown Immigration Law Journal* 23 (Summer 2009): 765, 776. See also Schuck and Tyler, 329-336, see note 2 (citing and discussing studies demonstrating the extraordinary success, in general and relative to native-born Americans, of highly skilled immigrants, and particularly those with graduate degrees in STEM fields, in generating innovation and entrepreneurship with positive effects on the economy and job creation in the United States).

<sup>12</sup> The immigrant rate of entrepreneurial activity decreased from 0.62 percent in 2010 to 0.55 percent in 2011. The native-born rate declined from 0.28 percent in 2010 to 0.27 percent in 2011. Robert W. Fairlie, executive summary of the *Kauffman Index of Entrepreneurial Activity* (Kansas City, MO: Ewing Marion Kauffman Foundation, March 2012), [http://www.kauffman.org/uploadedFiles/KIEA\\_2012\\_report.pdf](http://www.kauffman.org/uploadedFiles/KIEA_2012_report.pdf) (last visited July 2, 2012).

<sup>13</sup> Vivek Wadhwa, AnnaLee Saxenian, Richard Freeman, and Alex Salkever, *Losing the World's Best and Brightest: America's New Immigrant Entrepreneurs Part V*, Report (Kansas City, MO: Ewing Marion Kauffman Foundation, March 2009), accessed July 20, 2012, [http://www.kauffman.org/uploadedFiles/ResearchAndPolicy/Losing\\_the\\_World%27s\\_Best\\_and\\_Brightest.pdf](http://www.kauffman.org/uploadedFiles/ResearchAndPolicy/Losing_the_World%27s_Best_and_Brightest.pdf).

<sup>14</sup> David Filo and Jerry Yang founded Yahoo! as PhD candidates in electrical engineering at Stanford University while looking for a way to track their personal interests on the Internet. See "The History of Yahoo!—How It All Started..." accessed July 21, 2012, <http://docs.yahoo.com/info/misc/history.html>. It is widely reported that Yang was born in Taiwan.

<sup>15</sup> Google began as a research project of Larry Page and Sergey Brin, also PhD students at Stanford. Brin is the child of an immigrant. See "Our History in Depth," Google, accessed July 21, 2012, <http://www.google.com/about/company/history/> and Stephanie Strom, "Billionaire Aids Charity that Aided Him," *The New York Times*, October 24, 2009.

<sup>16</sup> See, e.g., Chester and Cully, 406, see note 2.

contribute to perhaps dozens or hundreds of desperately needed new jobs in a newly created firm.

Many foreign founders of U.S. technology and engineering businesses established between 1995 and 2005 entered the country as students, and over half of them completed their highest degree at an American university.<sup>17</sup> It is critical that the country retain these foreign students and potential future innovators because the U.S. economy depends upon high rates of entrepreneurship and innovation to maintain its global edge.<sup>18</sup> The problem is that current U.S. immigration laws and administrative practices in many ways inhibit or preclude the launch and growth of entrepreneurial ventures by foreign students.

In a recent CNN article, contributor David Lloyd wrote: “There is a new talent war and it is global. But the battle to attract foreign entrepreneurs has put the differences between some countries under the microscope. In the U.S., PayPal founder Peter Thiel is backing the construction of a ship that will host foreign entrepreneurs off California’s coast. This will keep them beyond the reach of America’s draconian immigration stance towards foreign wealth-creators.”<sup>19</sup> Whether or not the policies ought to be characterized as “draconian,” it is clear that certain of our policies are far from friendly to foreign student entrepreneurs and are not in our collective long-term best interests.

### **United States Immigration Law Context**

Congress enacts immigration law and provides authority over immigration matters, including the entry and exit of all travelers across the nation’s borders and the duration of their stay. The Immigration and Nationality Act, along with its amendments (the “Immigration Act”),<sup>20</sup> provides the foundation for immigration law. Prior to September 11, 2001, students from certain countries were not even required to be interviewed to obtain a visa, but that changed with the heightened concerns over terrorism.<sup>21</sup> Most of the recent changes to the immigration laws have been in response to terrorism or the fear of potential terrorist activities.<sup>22</sup> As a result, most immigration matters now are overseen by the Department of Homeland Security,<sup>23</sup> and principally administered by USCIS.<sup>24</sup>

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<sup>17</sup> Ibid., 405.

<sup>18</sup> Ibid. See also the excellent discussion of the global competition for highly skilled workers and innovators and the evolution of related immigration policies in various countries in Schuck and Tyler, 336-339, see note 2.

<sup>19</sup> David Lloyd, “Foreign Entrepreneurs: Friend or Foe?” *CNN Business360 Blog*, May 21, 2012, <http://business.blogs.cnn.com/2012/05/21/foreign-entrepreneurs-friend-or-foe/#comment-57585>.

<sup>20</sup> Title 8 of the United States Code. See also the overview of U.S. Visa Policy by the U.S. Department of State Bureau of Consular Affairs, accessed July 30, 2012, [http://travel.state.gov/visa/questions/policy/policy\\_4433.html](http://travel.state.gov/visa/questions/policy/policy_4433.html).

<sup>21</sup> See Foreign Affairs Council, *Secretary Powell’s State Department*, Task Force Report, November 2004, accessed July 21, 2012, <http://www.facouncil.org/media/FAC2004~Powell.pdf>, 7.

<sup>22</sup> In the wake of the terrorist acts of September 11, 2001, Congress enacted the USA Patriot Act of 2001 and the Enhanced Border Security and Visa Reform Act of 2002, both of which have impacted visa processing.

<sup>23</sup> 8 U.S.C. sec. 1103 and 8 C.F.R. sec. 2.1.

A foreign national who seeks to enter the country generally must first obtain a U.S. visa. A visa is a travel document issued by the traveler's country of citizenship and placed in the traveler's passport. There are two main categories of visas: immigrant<sup>25</sup> and nonimmigrant.<sup>26</sup> There are thirty different types of nonimmigrant visas, which are temporary and issued for a specific purpose, such as education, tourism, or employment.<sup>27</sup> The F-1 visa is the most common type of nonimmigrant visa issued to foreign students so they may pursue an education in the United States.

## Overview of F-1 Student Visas

The F-1 visa allows foreign nationals to enter the country for the limited purpose of furthering their education at an authorized academic institution, which may range from elementary to graduate school.<sup>28</sup> Most students studying in the country are here on the temporary F-1 visa,<sup>29</sup> and they enter the country at a higher rate than any other visa classification.<sup>30</sup> In Fiscal Year 2011, the government issued over 447,410 F-1 visas.<sup>31</sup>

There are certain requirements students must meet to qualify for an F-1 visa. These include having a residence abroad with no immediate intent to abandon that residence, intent to depart from the country when they complete their course of study, and possessing sufficient funds to pursue the course of study.<sup>32</sup> A person entering on a student visa usually will be admitted for the duration of their status as a student.<sup>33</sup> F-1 visas do not provide students the right to immigrate (remain permanently) or remain in the country beyond what is required for their studies. These requirements and limitations are at the heart of some of the pertinent restrictions on F-1 students and consequent obstacles to their ability to start entrepreneurial ventures in the United States. Because they have been allowed to enter the country solely to pursue an

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<sup>24</sup> The Homeland Security Act of 2002 dissolved the Immigration and Naturalization Service and other agencies and created the Department of Homeland Security.

<sup>25</sup> It is reserved for foreigners who have been granted permission by the government to reside permanently in the United States.

<sup>26</sup> Nonimmigrants are foreigners who are in the United States temporarily for a specific purpose. Immigrants are here permanently.

<sup>27</sup> Chester and Cully, 388; see note 16.

<sup>28</sup> 8 U.S.C. sec. 101(a)(15)(F)(1).

<sup>29</sup> Reported data indicates that over 350,000 student F visas were issued in each of Fiscal Years 2008 and 2009, and over 400,000 in Fiscal Year 2010. U.S. State Department visa statistics, accessed July 20, 2012, <http://www.travel.state.gov/pdf/MultiYearTableXVI.pdf>.

<sup>30</sup> See "Students and Employment," U.S. Citizenship and Immigration Services., U.S. Department of Homeland Security, <http://www.uscis.gov> (follow "Students and Exchange Visitors" hyperlink under "Working in the U.S." then follow the "Students and Employment" hyperlink).

<sup>31</sup> State Department visa statistics, accessed July 21, 2012, <http://www.travel.state.gov/pdf/FY2011NIVWorkloadbyVisaCategory.pdf>.

<sup>32</sup> The Immigration Act specifies what is required for students to qualify for a visa. See 8 U.S.C. sec. 101(a)(15). The consular's office determines whether they meet the requirements. See also the overview of Exchange Visitor Visas by the U.S. Department of State Bureau of Consular Affairs, accessed July 30, 2012, [http://travel.state.gov/visa/temp/types/types\\_1267.html/#6](http://travel.state.gov/visa/temp/types/types_1267.html/#6).

<sup>33</sup> 8 C.F.R. sec. 214.2(f)(5); also discussed at [http://travel.state.gov/visa/temp/types/types\\_1268.html#1](http://travel.state.gov/visa/temp/types/types_1268.html#1) (accessed July 20, 2012).

education, their activities are restricted to that task, with a prohibition on most types of employment activities, including self-employment.

### **Work Restrictions for F-1 Students**

The regulations governing student visas prohibit students from engaging in off-campus employment, either for an employer or independently, unless USCIS has granted permission.<sup>34</sup> The Agency grants authority to a designated school official (usually affiliated with the international student office) who evaluates each employment opportunity individually and determines whether it qualifies. Any unauthorized employment is considered a violation of the student's visa status and may render the student removable.<sup>35</sup>

While F-1 students may not work off campus during their first academic year of study in the United States, they may accept on-campus employment subject to certain conditions and restrictions. A student may seek employment without prior approval of a school official if their work is performed on campus or at an off-campus location that is educationally affiliated with the school.<sup>36</sup> After their first year, students seeking off-campus employment may only do so if the position involves training that is integral to an established curriculum, and a designated school official authorizes it.<sup>37</sup> This "curricular practical training," discussed in more detail later in this paper, generally does not allow F-1 students to be employed by third parties. Nor, at least under prevailing interpretations, does it generally allow them to be self-employed in a business venture.

The F-1 visa prohibits students from being self-employed because self-employment is still considered "employment." The Board of Immigration Appeals addressed this matter long ago. In *Matter of Tong*, the board stated that "employment ... includes the act of being employed for one's self."<sup>38</sup> In the situation addressed in that decision, a student from Hong Kong was found in violation of his visa and ordered to deport from the country. The immigration judge noted that the student had been self-employed since he opened a used car dealership without authorization,<sup>39</sup> and was in violation of his status because he engaged in off-campus employment, either for an employer or independently,<sup>40</sup> without approval. Since that decision, self-employment has been consistently considered a form of employment.

Even though F-1 students are restricted from employment, including self-employment, they are not prohibited from becoming investors. However, there is no clear guidance on the distinction between investment and employment for F-1 students. As a result, there is a lack of clarity and certainty about which activities could lead to a potential visa

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<sup>34</sup> 8 C.F.R. sec. 214.2(f)(9).

<sup>35</sup> 8 U.S.C. sec. 1227(a)(1)(C)(i).

<sup>36</sup> 8 CFR sec. 214.2(f)(9)(i).

<sup>37</sup> 8 C.F.R. sec. 214.2(f)(10)(i).

<sup>38</sup> *Matter of Tong*, 16 I&N Dec. 593 (BIA 1978).

<sup>39</sup> Initially he was authorized to be in the United States as a student, but he graduated from college in 1975 and opened his business on May 1, 1976.

<sup>40</sup> The word "independently" was added effective September 2, 1975 (40 F.R. 32312, August 1, 1975).

violation. As a general proposition, a student on an F-1 visa can be a passive owner of a business but cannot actively engage in venture operations.<sup>41</sup>

A few of the circuit courts have addressed the issue of owner versus investor activities. In the U.S. Court of Appeals for the Sixth Circuit case of *Wettasinghe v. United States Department of Justice, Immigration & Naturalization Service*,<sup>42</sup> the court affirmed a deportation order from the Board of Immigration Appeals because the F-1 student was employed in the country, thus violating his student status. The student bought a fleet of ice cream trucks which he stocked daily and leased to others, but he never sought permission for this work from an authorized school official. He argued that his conduct was more akin to that of an investor and not employment. The judge found that he was actively involved in the day-to-day running of his business, and that he was more of an investor-manager, and thus engaged in unauthorized employment.<sup>43</sup>

What the court failed to acknowledge is that entrepreneurial investors do not compete with American labor, and in many cases actually create jobs for Americans. In the earlier case of *Bhakta v. INS*, the U.S. Court of Appeals for the Ninth Circuit concluded that this type of conduct was allowable because the management of the business enterprise did not reduce the number of available jobs for Americans.<sup>44</sup> While this Sixth Circuit decision is distinguished from the 1981 Ninth Circuit case, the Ninth Circuit's observation that entrepreneurial investors do not compete with American jobs because they are creating them is still relevant today and applies to many foreign student entrepreneurs. It also suggests that, while the roots of the prohibition on employment may stem from a concern that American workers will have to compete with non-immigrants for jobs, in reality, the prohibition is hindering job creation.

In addition to insufficient attention to the job-creation potential inherent in allowing foreign students to launch viable start-up ventures in the United States, overly restrictive current regulations and other interpretations of immigration law, discussed more specifically below, tend to ignore the tremendous educational benefits associated with planning and implementing a new business venture as an active founder. At a time

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<sup>41</sup> *Matter of Lett*, 17 I&N Dec. 312 (BIA 1980) holds that management of an investment by one qualified as a business investor does not constitute employment. In *Bhakta v. Immigration & Naturalization Service*, 667 F.2d 771 (1981), the U.S. Court of Appeals for the Ninth Circuit held that in considering an application for an adjustment of status, the INS (predecessor to the USCIS on such matters) may not deem a nonimmigrant's management of his business to be unauthorized employment because his activities were more akin to that of a business investor and his operations did not reduce the number of jobs for citizens or authorized alien workers. A subsequent Sixth Circuit case, *Wettasinghe v. United States Department of Justice, Immigration & Naturalization Service*, 702 F.2d 641 (U.S. App. 1983) addressed the *Bhakta* case, citing its inapplicability because the petitioner was seeking a status adjustment not opposing a deportation (and they do not serve the same purposes). 8 C.F.R. 214.2(f)(6) prohibits unauthorized self-employment by students as well as employment by another, and the day-to-day business activities amounted to more than that of an investor manager. The *Wettasinghe* case, as discussed in notes 41–42 and accompanying text below, specifically involved a nonimmigrant student visa.

<sup>42</sup> 702 F.2d 641 (U.S. App. 1983).

<sup>43</sup> *Ibid.*, 642.

<sup>44</sup> *Bhakta v. INS*, 667 F.2d 771, 773 (1981).

when higher education is placing increased emphasis on injecting in curricula more “experiential education” opportunities, recognizing the value of applied learning,<sup>45</sup> U.S. immigration law as applied to degree-seeking students appears to be making an implicit assumption that learning outside of the classroom is creditable only while doing so as an employee of someone else.

## **Possible Alternative Options to Address Visa Restrictions**

Having identified in general terms the immigration law problems faced by potential foreign student entrepreneurs, we now turn to some particular issues and suggestions of ways to address these challenges. Specifically, we will focus on foreign students who come to the United States to study under the F-1 visa and the existing, but extremely limited, eligibility for such students to “work” in the United States while seeking a degree under CPT, and under OPT, which can continue for a limited number of months post-graduation, and to stay in the United States for an extended post-graduation period under an H-1B visa. We then will recommend modifications to the applicable rules and practices on those three possibilities, and the expansion of proposals for new Startup Visas.

## **Curricular Practical Training**

Curricular Practical Training is a permissible work option available to foreign students on F-1 visas. CPT by definition may be “alternate work/study, cooperative education or any other type of required internship or practicum” offered through course work as an integral part of the established curriculum.<sup>46</sup> The work must be in a degree program or earning course credit toward a degree.<sup>47</sup> A designated school official will certify whether the student is authorized to participate and sign and date the required forms, specifying whether the training is full-time or part-time, the employer, location, and start and end dates.<sup>48</sup> CPT also may be “offered through institutionally-sponsored cooperative education” or as part of a degree program’s graduation requirement.<sup>49</sup> Students must have been in F-1 status for at least one academic year and be in good academic standing to be eligible for CPT.<sup>50</sup> Undergraduate students who have participated in CPT for one year or longer are not eligible for additional post-graduation training, although exceptions will be made for some graduate students who are required to participate in CPT as part of their studies.<sup>51</sup>

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<sup>45</sup> See, e.g., Anthony Luppino, *Can Do: Training Lawyers to be Effective Counselors to Entrepreneurs*, report to the Ewing Marion Kauffman Foundation, January 30, 2008, 18, available on SSRN; Anthony Luppino, “Minding More than Our Own Business: Educating Entrepreneurial Lawyers through Law School—Business School Collaborations,” *Western New England Law Review* 30 (2007): 151 and sources cited therein.

<sup>46</sup> 8 C.F.R. sec. 214.2(f)(10)(i).

<sup>47</sup> 69 No. 18 Interpreter Releases 587 (May 11, 1992).

<sup>48</sup> 8 C.F.R. sec. 214.2(f)(10)(i)(A).

<sup>49</sup> 8 C.F.R. sec. 214.2(f)(10)(i).

<sup>50</sup> 8 C.F.R. sec. 214.2(f)(9)(ii)(A).

<sup>51</sup> 8 C.F.R. sec. 214.2(f)(10)(i). Any exceptions must be authorized by the designated school officer after they receive a request for authorization.

The extent to which CPT may be used to help F-1 students participate in a startup without violating the terms of their visas is unclear and may be extremely limited.<sup>52</sup> Unfortunately, there is not much guidance on the extent to which a student may rely on CPT to avoid a visa violation if he or she also holds an ownership interest in the startup and is active in the conduct of the business. Current administrative guidance does not appear to expressly recognize work as an owner-principal as valid for CPT purposes. Ultimately, the designated school official approves whether or not the training qualifies.<sup>53</sup> The typical reported CPT case seems to be working for an established employer in a degree-related business. It appears that many designated school officials are reluctant to authorize active participation by a student as a founder and principal in his or her own business.

If the regulations were clarified to allow self-employment as permissible work under CPT, students formally studying entrepreneurship could use CPT as a way to actively engage in the launch of their business throughout the startup process, as they would acquire skills on the principles of entrepreneurship and receive practical, experiential training. For instance, in the UMKC E-Scholars program cited earlier, more than 100 mentors, most of whom are CEOs or founders of companies, provide criticism, feedback, advice, connections, and, just as importantly, their own example to student entrepreneurs. There could be no better learning environment than to launch and manage a business under the guidance of expert mentors.

While this approach may provide assurance for some students, a requirement that the course of study be limited to students majoring or seeking a specific degree solely in entrepreneurship would be unduly restrictive. Many entrepreneurship programs are by design interdisciplinary. These programs attract students from various disciplines and departments, many of whom may be pursuing more than one major or degree. Moreover, as noted above, innovation is not bounded by focus on just a single discipline. A student very well may conceive a business proposition that synthesizes learning from multiple areas of study, making it inappropriate to impose a requirement that the business be based on a single principal area of study. This reality can be accommodated by retaining the existing CPT requirement that the training experience

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<sup>52</sup> See, e.g., William A Stock, Esq., a partner at Klasko, Rulon, Stock & Seltzer, LLP, *Starting A Business in the US: Immigration Issues for Students*, PowerPoint presentation at New York University, Slide 5, accessed July 21, 2012, [https://docs.google.com/viewer?a=v&q=cache:tW-Ph8Mld-MJ:www.klaskolaw.com/library/files/was\\_nyu\\_students\\_starting\\_businesses.ppt+klaskolaw.com+international+students+starting+a+business&hl=en&gl=us&pid=bl&srcid=ADGEEsXijjuq51Dc7vFQ\\_EQKRjadlGrAqIE--k\\_4Oxlyx445\\_opEyWLRzC0XqRw\\_7zmtP\\_Sigho4sEsmcdhSogrWQoz\\_luazdUy5Yc7UstQ\\_rW48v141wd8L7Pb7rLloi\\_5VVN8Yj1F&sig=AHIEtbQQyviu7wOSLrp\\_ID0R2sW0bZSpSg](https://docs.google.com/viewer?a=v&q=cache:tW-Ph8Mld-MJ:www.klaskolaw.com/library/files/was_nyu_students_starting_businesses.ppt+klaskolaw.com+international+students+starting+a+business&hl=en&gl=us&pid=bl&srcid=ADGEEsXijjuq51Dc7vFQ_EQKRjadlGrAqIE--k_4Oxlyx445_opEyWLRzC0XqRw_7zmtP_Sigho4sEsmcdhSogrWQoz_luazdUy5Yc7UstQ_rW48v141wd8L7Pb7rLloi_5VVN8Yj1F&sig=AHIEtbQQyviu7wOSLrp_ID0R2sW0bZSpSg), suggesting the possibility of using CPT for the start of a business that is tied to a school project and ends with such project. See also "Starting a Business in Which an F-1/H-1B Visa Holder is a Shareholder or Owner," Zhang & Associates, P.C., last modified September 23, 2011, <http://www.hooyou.com/news/news092311business.html>, positing that: "Although an F-1 student is prevented from working for his or her own company, preliminary planning prior to start up should not be deemed to be 'engaging in business,' and thus, the F-1 student can also participate in limited preparation and planning for his or her own business."

<sup>53</sup> 8 C.F.R. sec. 214.2(f)(10)(i).

be a degree requirement or tied to a course taken for credit in a related field of study,<sup>54</sup> but with modification to include an entrepreneurship experience regardless of which academic disciplines are drawn upon in the proposed venture.

Another problem is that CPT opportunities vary from school to school, and approval depends on the policies and procedures of each school's international student affairs office. Although it seems possible that F-1 students may under current law be able to work on a start-up business related to their field of study under the CPT degree requirement or course credit scenario, students would have to demonstrate this to their school's international student affairs office. This leaves the matter open to interpretation and uncertainty. As it stands now, whether a student may rely on CPT depends on the school and its policies, and how it chooses to interpret the law. A proposed solution to this dilemma is set forth in our specific recommendations at the end of this paper.

While we advocate allowing a student on an F-1 visa to use CPT to lawfully start a legitimate business in the United States tied to a degree requirement or for-credit course, we recognize that such a change is only a partial solution to the existing problem. Too long a duration of CPT can preclude F-1 students from participating in OPT.<sup>55</sup> Students may engage in either part-time CPT (twenty hours or less per week) or full-time CPT (more than twenty hours per week), but students who use twelve months or more of full-time CPT are no longer eligible for OPT unless, as described below, they are in a STEM field.<sup>56</sup>

### **Optional Practical Training**

Optional Practical Training is temporary employment that is directly related to the F-1 student's major area of study. Students can work for up to twelve months,<sup>57</sup> and in some cases, if the student's major course of study is in science, technology, engineering, or math, extend that to a total of twenty-nine months (OPT-STEM).<sup>58</sup> OPT can start before graduation and continue for a specified duration after graduation. To initiate an OPT application process, a student requests a recommendation for OPT from the designated school official. If in agreement, the designated school official then makes the recommendation,<sup>59</sup> providing the student a signed Form I-20.<sup>60</sup> The student then files the appropriate documents with USCIS, and USCIS will notify the student of the decision or the reason for a denial.<sup>61</sup> Once OPT is approved, the student still may

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> 8 C.F.R. sec. 214.2(f)(10)(ii)(C)(1) and 69 No. 18 Interpreter Releases 587 (May 11, 1992).

<sup>57</sup> 8 C.F.R. sec. 214.2(f)(10).

<sup>58</sup> 8 C.F.R. sec. 214.2(f)(10)(ii)(C).

<sup>59</sup> Prior to making the recommendation, the official must ensure that the student is eligible for the type and period of OPT and that the student is aware of the student's responsibilities for maintaining status while on OPT. When a designated school official recommends a student for OPT, the school assumes the added responsibility for maintaining the Student and Exchange Visitor Information System (SEVIS) record of that student for the entire period of authorized OPT. 8 C.F.R. sec. 214.2(f)(11).

<sup>60</sup> 8 C.F.R. sec. 214.2(f)(11)(i).

<sup>61</sup> 8 C.F.R. sec. 214.2(f)(11)(i)(A) and 8 C.F.R. sec. 214.2(f)(11)(iii)(B).

remain in F-1 status and will be granted restricted employment authorization for the supplemental period of study.<sup>62</sup>

OPT rules permit self-employment, and OPT is a viable option for foreign students who seek to start businesses.<sup>63</sup> OPT allows an F-1 student to be self-employed as long as the work is related to the student's area of study. The challenge, as a practical matter, is maneuvering around the limitations of when a student can hold OPT status pre-degree completion (summer breaks, completion of coursework, etc.) when it takes three months to get the card authorizing such employment. In addition, there is a twelve-month clock on CPT and OPT, meaning the use of CPT before graduation likely will cut short OPT availability, perhaps to the extent that OPT would not be available as an option.<sup>64</sup>

It appears that many university international student affairs offices have counseled their students that self-employment is permissible under OPT, as long as the student proves that he or she has the proper business licenses and is actively engaged in a business related to the student's degree program.<sup>65</sup> Again, however, entrepreneurship is customarily interdisciplinary in its approach, and it may or may not be the case that a student's startup is related to just their principal field of study.<sup>66</sup> So under existing law and practice, the availability of this option depends on particular circumstances and involves some grey area determinations.

Another concern is that one of the requirements of both CPT and OPT is to maintain the F-1 non-immigrant status, which means maintaining the visa holder's intent to remain temporarily in the country and return home at the end of their stay. Starting a business appears to counter the presumption that the student plans to return to their country of origin. It arguably is a strong indicator of their intent to remain on a long-term basis. Accordingly, in our specific recommendations below, we propose legislative and regulatory action to clarify and modify CPT, OPT, and OPT-STEM to cover students who are actively involved in a legitimate business, as employees or owners, provided the business relates to the study of entrepreneurship at an institution of higher education.

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<sup>62</sup> 8 C.F.R. sec. 274(a)12(c)(3).

<sup>63</sup> Policy Guidance 1004-03 Update to Optional Practical Training: Student and Exchange Visitor Program and Designated School Officials of SEVP-Certified Schools with F-1 Students Eligible For or Pursuing Post-Completion Optional Practical Training, April 23, 2010.

<sup>64</sup> 69 No. 18 Interpreter Releases 587 (May 11, 1992).

<sup>65</sup> The following is a random sampling of some of the schools that appear to advise students that self-employment is possible with OPT. Carnegie-Mellon University Office of International Education:

<http://www.studentaffairs.cmu.edu/oie/newsandevents/news/08-09/april/optissues.html>; Harvard International Office:

<http://www.hio.harvard.edu/immigration/visatypes/fvisa/employmentpermission/postoptextensionsandregulations/>; University of Michigan International Center:

[http://internationalcenter.umich.edu/immig/fvisa/f\\_optapprove.html](http://internationalcenter.umich.edu/immig/fvisa/f_optapprove.html); and University of Texas at Dallas International Student Services:

<http://www.utdallas.edu/student/international/current/optReportingInstruction.html> (all accessed July 20, 2012).

<sup>66</sup> See discussion on pages 6-8.

## H-1B Visa

Any student who lawfully relies on CPT, OPT, or a permissible combination of the two in order to participate actively in a start-up business may need more time to stay in the United States to further refine and grow their entrepreneurial venture once they graduate and any applicable OPT or OPT-STEM period expires. Under current immigration law, a student entrepreneur's options generally are limited to returning to their home country, transferring to another degree program, or adjusting from F-1 visa to another non-immigrant visa. The E-1, E-2, and EB-5 are other existing visa possibilities noted earlier, but they often are inapplicable to foreign student entrepreneurs.<sup>67</sup> As a practical matter, the most likely option is the H-1B visa, which again offers only limited help.

The goal of many international students after graduation is to remain in the country to gain hands-on experience implementing the fruits of their education. A popular way to stay in the country longer to work in a business on a nonimmigrant visa is the H-1B route. The number of H-1B visas that can be issued is limited. Each year the competition is fierce for the limited number of visas available. For Fiscal Year 2013,<sup>68</sup> USCIS has allocated 65,000 H-1B visas for specialty occupations under the general cap,<sup>69</sup> and has an additional 20,000 H-1B visas for individuals who have earned a master's degree or higher from an American university.<sup>70</sup>

Unfortunately, a number of problems exist for those who attempt to convert from F-1 status to another visa status, including H-1B status. There are dual-intent issues for students with F-1 visas since they are not eligible for employment-based green cards.<sup>71</sup> In addition, the H-1B quota is filled before many of the students looking to apply even graduate.<sup>72</sup> To qualify, the student must hold a bachelor's degree at the time the employer files an H-1B petition.<sup>73</sup> The application period begins on April 1, which is more than a month before most academic institutions conduct exams and grant degrees. In addition, the H-1B visas do not become effective for several months after graduation.<sup>74</sup>

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<sup>67</sup> See note 2.

<sup>68</sup> USCIS started accepting applications for FY 2013 on April 1, 2012, and FY 2013's caps were reached on June 11, 2012. In FY 2012, the cap was reached by November 2011, two months earlier the previous year.

<sup>69</sup> These are occupations with theoretical or technical expertise in specialized fields, such as scientists, engineers, or computer programmers. See USCIS summary, accessed July 30, 2012, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=4b7cd1d5fd37210VgnVCM100000082ca60aRCRD&vgnnextchannel=73566811264a3210VgnVCM100000b92ca60aRCRD>.

<sup>70</sup> USCIS summary, accessed July 20, 2012, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=4b7cd1d5fd37210VgnVCM100000082ca60aRCRD&vgnnextchannel=73566811264a3210VgnVCM100000b92ca60aRCRD>.

<sup>71</sup> Chester and Cully, 401; see note 16.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, 402.

The H-1B is the only non-immigrant category that allows for employment authorization, which in theory can include self-employment as well, but has been in administration, as one observer notes, “laden with certain burdens that make the category extremely unattractive to the foreign entrepreneur.”<sup>75</sup> Achieving the goal of staying in the United States to grow their ventures becomes particularly complicated for students who have started their own business and wish to submit a petition as an employee of that new start-up business. Typically, as part of the application process, an employer petitions USCIS on behalf of an employee and establishes that the employee is coming to the country temporarily to work in a specialty occupation. The petitioning employer must satisfy the requirements and establish that a valid employer-employee relationship exists. If all requirements are satisfied, this visa last for three years, but can be extended for another three years for a total of six years.<sup>76</sup>

The restrictive nature of guidance clearly defining what constitutes a valid employer-employee relationship has raised problems with self-employed petitioners. USCIS has relied on common law principles and two leading Supreme Court cases,<sup>77</sup> drawing from those authorities several factors deemed relevant to determining what constitutes a valid employer-employee relationship. The employer must establish that it has the right to control when, where, and how the employee performs the job. In a Memorandum to Service Center Directors dated January 8, 2010, the Agency stated that it may consider up to eleven factors to make the determination, though no one factor is particularly decisive.<sup>78</sup>

Self-employed petitioners often face challenges to show that they meet the requirements because the Agency essentially takes the position that there is no separation between the employee and employer.<sup>79</sup> The Agency views the employer and employee as one and, therefore, reasons that there is no independent control exercised and no right to control.<sup>80</sup> The employee cannot be terminated, and there is no outside

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<sup>75</sup> Tafapolsky, 4; see note 2.

<sup>76</sup> “H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models,” USCIS, accessed July 20, 2012, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=73566811264a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=73566811264a3210VgnVCM100000b92ca60aRCRD>.

<sup>77</sup> *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992) and *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003).

<sup>78</sup> USCIS, “Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third Party Site Placements,” memorandum to Service Center Directors (January 8, 2010), 6. In the memo, Associate Director Donald Neufeld describes a scenario that would not present a valid employer-employee relationship. The petitioner of a fashion merchandising company is the sole operator, manager, and employee of the petitioning company. Because there was no separation between the individual and the employing entity, USCIS determined that a valid employer-employee relationship did not exist, as no independent control was exercised and no right to control existed.

<sup>79</sup> According to Malcolm Goeschl, “An Attack on Entrepreneurialism: A Review of USCIS Adjudication of H-1B Petitions for Startups and Small Companies in 2009,” *International HR Journal* 19, no. 2 (Spring 2010):12, certain requirements for H-1B petitions were added by the Immigration Act of 1990, and they require the H-1B employee to be controlled by a separate entity or person, even though nothing in the Immigration Act of 1990 rulemaking relating to H-1B petitions suggests that there is any link between the LCA requirements and a prohibition on owner-employee petitions.

<sup>80</sup> See note 78.

entity that can exercise control over the employee. In short, the problem is that the employee has not provided evidence that the organization, and not the employee, will be controlling the work.

Notably, previous legal precedent in immigration law held that a corporation had a separate legal identity from its owner.<sup>81</sup> A corporation, even if it is owned and operated by a single person, could hire that same individual and there would be an employer-employee relationship. However, in 2009, the Administrative Appeals Office (AAO) began to distinguish cases that were decided in the context of L-1A petitions<sup>82</sup> (non-immigrant visas available to certain employees of international companies) and the ones that were specific to H-1B petitions. The AAO further distinguishes earlier cases on the basis that these decisions dealt with a corporation's qualification to petition for an employee-owner and not with the employee-owner's qualification to be a beneficiary of such a petition.<sup>83</sup>

USCIS has attempted to clarify this issue.<sup>84</sup> Perhaps in response to criticism, and expressly as part of its initiative to "Promote Start-Up Enterprise and Spur Job Creation," it recently adopted policy manual changes. These changes are described on the USCIS website as designed to support a situation where entrepreneurs with an ownership stake in their own companies, including sole employees, may be able to establish the necessary employer-employee relationship to obtain an H-1B visa if they can demonstrate that the company has the independent right to control their employment.<sup>85</sup> Despite the pro-entrepreneurship objective stated in connection with the release of the policy manual changes, skepticism still exists, particularly if the business is wholly owned. It remains to be seen how requests for H-1B status for owner-employees of small start-up companies will be administered going forward.

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<sup>81</sup> The Administrative Appeals Office (AAO) consistently followed the *Matter of Aphrodite Investments Limited*, 17 I. & N. Dec. 530 (Comm. 1980). In this case, the petitioner sought to classify the beneficiary as an intercompany transferee (L-1 petition), which, as described by USCIS, "enables a U.S. employer to transfer an executive or manager from one of its affiliated foreign offices to one of its offices in the United States." In *Matter of Aphrodite*, the AAO held that the beneficiary of the petition could be classified as an intercompany transferee because the employer-employee relationship existed. For the USCIS description of the L-1 visa, see

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=64d34b65bef27210VgnVCM100000082ca60aRCRD&vgnnextchannel=64d34b65bef27210VgnVCM100000082ca60aRCRD> (accessed July 22, 2012).

<sup>82</sup> Goeschl, "An Attack on Entrepreneurialism"; see note 79.

<sup>83</sup> *Ibid.*, 13.

<sup>84</sup> "Questions & Answers," USCIS, accessed July 20, 2012,

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=3d015869c9326210VgnVCM100000082ca60aRCRD&vgnnextchannel=6abe6d26d17df110VgnVCM1000004718190aRCRD>.

<sup>85</sup> On August 2, 2011, Secretary of Homeland Security Janet Napolitano and USCIS Director Alejandro Mayorkas outlined a series of policy, operational, and outreach efforts to fuel the nation's economy and stimulate investment. This statement was made in connection with those outreach efforts.

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=3f412bfb4cf81310VgnVCM100000082ca60aRCRD&vgnnextchannel=44eec665e1681310VgnVCM100000082ca60aRCRD> (accessed July 20, 2012).

In addition to the challenges of establishing if an employee-employer relationship exists, there has been quite a bit of controversy over the widely reported administrative impediments encountered by small businesses seeking the H-1B visa status.<sup>86</sup> In recent years, the application process for small businesses petitioning for their sole or principal owners has been incredibly difficult.<sup>87</sup> The perception is that USCIS is being unduly restrictive in granting H-1B visas to owner-employees in small and start-up company settings.<sup>88</sup> The office has been openly criticized for requesting documents that are irrelevant, impossible to obtain, or beyond what would be required from large companies.<sup>89</sup> Sometimes the requests can include employment offer letters, letters from the petitioner's clients, client contracts, promotional materials, lease agreements, resumes, and copies of degrees for other employees and other documents.<sup>90</sup>

Reports of overly burdensome and unrealistic requirements strongly suggest that many potential startups with job-generating potential are being impeded by current administrative processes and practices.<sup>91</sup> Observers point to fear of fraud as a central factor in how USCIS has been adjudicating the H-1B petitions relating to small businesses and startups.<sup>92</sup> The Administrative Appeals Office, which reviews petition denials and issues decisions within an eighteen-month timeframe,<sup>93</sup> counters that the petitioner bears the burden of proof in establishing that they qualify for the H-1B.<sup>94</sup> In

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<sup>86</sup> Goeschl, 12; see note 79.

<sup>87</sup> Goeschl, 1; see note 79.

<sup>88</sup> Goeschl, 12; see note 79.

<sup>89</sup> Goeschl, 1; see note 79. See also "Open Letter to Alejandro Mayorkas, Director of United States Citizenship and Immigration Services," November 17, 2011, published in Cornell Center for Technology Enterprise and Commercialization newsletter, March 2012, accessed July 20, 2012, <http://www.cctec.cornell.edu/news/newsletters/March2012/Open-Letter-to-Alejandro-Mayorkas-11-17-11.pdf> (criticizing a trend on adjudications involving small businesses that seems unfairly onerous and calling for clearer field manual guidance and better training of adjudicators on startup and other business matters). The letter appears to have been favorably received by Mayorkas, who is reported to have promptly responded by expressing interest in more advice on the subject and intent to pursue reforms to facilitate entrepreneurship by foreign entrepreneurs in the United States. See Jolie O'Dell, "U.S. immigration chief getting serious about startups and immigrant entrepreneurs (exclusive)," *VentureBeat*, November 30, 2011, <http://venturebeat.com/2011/11/30/startups-immigration-reform/>. Not long thereafter USCIS "launched the Entrepreneurs in Residence (EIR) initiative with an Information Summit focused on ensuring that the immigration pathways for foreign entrepreneurs are clear and consistent, and better reflect today's business realities," as described at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=180cfa2f5825310VgnVCM100000082ca60aRCRD&vgnnextchannel=e0b081c52aa38210VgnVCM100000082ca60aRCRD> (accessed July 21, 2012).

<sup>90</sup> Goeschl, 5; see note 79.

<sup>91</sup> Goeschl, 1; see note 79.

<sup>92</sup> *Ibid.* (Arguing that the Agency approaches the processing of H-1B applications with an "underlying suspicion that all such companies are fraudulent or operating to the disadvantage of the U.S. economy.") See also Tafapolsky, 5, note 2 (observing that "H-1B petitioners are subject to a fraud profile if the entity is new, small, and/or without a track record of income or financing").

<sup>93</sup> American Immigration Lawyers Association, "AAO Processing Times as of May 1, 2012," report accessed July 21, 2012, <http://www.aila.org/content/default.aspx?docid=39464>.

<sup>94</sup> USCIS Administrative Appeals Office, *Adjudicator's Field Manual* redacted public version updated through May 10, 2011, Chapter 11.1(c), discussing a petitioner's burden of proof and the relevant "preponderance of the evidence" standard of proof.

any event, whatever the reason for such a cumbersome process, the result is that potential startups are not evaluated on their merits, and this practice stifles job creation. Our proposal in this area, with specifics detailed in the addendum at the end of this paper, is to clarify the administrative regulations regarding how USCIS evaluates these petitions and the presumption from which it starts the analysis, and to streamline the H-1B process for applicants who are principals in a legitimate start-up venture.

## **Pending Startup Legislation**

There are no obviously efficient paths for F-1 students to start, own an interest in, and actively participate in a start-up venture in the United States for an extended period of time. As we have described, there are some steps that may be pieced together with some limited success (such as CPT, OPT, or OPT-STEM, with the possibility of both OPT and OPT-STEM transitioning into the H-1B visa), but each option may be time-consuming and expensive to achieve, and all currently suffer from uncertainty about the implications of a foreign student entrepreneur being an active founder of a venture, as opposed to someone else's employee. To make matters worse, the level of complexity and grey area determinations involved in the current state of the law create an acute need for such entrepreneurs to obtain guidance from a licensed attorney specializing in immigration law to help analyze these matters. Unfortunately, such legal help often is beyond the resources of most students and new graduates.

Several members of Congress have proposed and continue to advocate the passage of legislation to introduce a visa that would aid foreign entrepreneurs. For the last several years, legislation has been introduced in both the House and Senate, but most activity seems to stop after it reaches committee. A bill titled "Startup Visa Act of 2011," also referred to as HR 1114, was introduced by Representatives Carolyn Maloney (D-NY) and William L. Owens (D-NY) in March 2011 (a year after an analogous bill sponsored by Senators John Kerry (D-MA), Dick Lugar (R-IN), and Mark Udall (D-CO), S 3029) to amend the Immigration Act to establish an employment-based, conditional immigrant visa for a sponsored alien entrepreneur: (1) with investments of at least \$100,000 in an equity financing of at least \$250,000 from a qualifying investor, government entity, or venture capitalist; and (2) whose commercial activities will generate at least \$1 million in capital investments or revenue and create at least five new full-time jobs.<sup>95</sup> After the bill was introduced, it was referred to the Committee on the Judiciary and no further action was taken.

In May 2012, Senators Jerry Moran (R-KS) Mark Warner (D-VA), Marco Rubio (R-FL), Roy Blunt (R-MO), Chris Coons (D-DE) and Scott Brown (R-MA) introduced bipartisan legislation aimed at jump-starting the economy through the creation and growth of new businesses. Their Startup Act, also introduced a few weeks later in the House by a large bipartisan group of representatives, recognizes the proven track record of entrepreneurs in job creation and contains measures designed to: (1) reduce regulatory burdens; (2)

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<sup>95</sup> The five new full-time jobs must employ people other than relatives of the foreign entrepreneur.

attract business investment; (3) accelerate the commercialization of university research; (4) attract and retain entrepreneurial talent; and (5) encourage pro-growth policies.<sup>96</sup> If enacted, the Startup Act would create a conditional permanent resident status opportunity for up to 50,000 aliens per year who have earned a master's or doctorate degree in a STEM discipline at an institution of higher education, giving them the opportunity to adjust their immigration status and stay in the United States and put their skills to work in a manner meeting an "actively engaged in a STEM field" standard.<sup>97</sup> In addition, the Startup Act would create a Startup Visa, as a form of conditional immigrant visa, for up to 75,000 "qualified alien entrepreneurs" who, within one year following the granting of their Startup Visa, register at least one new business that employs at least two full-time employees who are not relatives of the alien, and invests or raises capital investment of at least \$100,000. Individuals who are lawfully present in the United States and who either hold an H-1B visa or have completed or will complete a graduate-level degree in a STEM field would be eligible to apply for the Startup Visa. Continued status as a "qualified alien entrepreneur" beyond the first year of the visa requires that during the next three-year period, the business employs an average of at least five full-time employees who are not related to the visa holder. Conditional status granted to a qualified alien entrepreneur under such provisions would be removed (paving the way for permanent residency) after four years from the issuance of the visa if the visa was

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<sup>96</sup> Senator Jerry Moran, "Sens. Moran and Warner offer bipartisan job creation plan," news release, December 8, 2011, <http://moran.senate.gov/public/index.cfm?p=startup-act>. The release says, in part, "According to analysis conducted by the Ewing Marion Kauffman Foundation, companies less than 5 years old accounted for nearly all net job creation in the United States between 1980 and 2005. In fact, new firms create on average approximately 3 million jobs each year. The principles included in the Startup Act are based on the extensive research and analysis conducted by the Kauffman Foundation, and many of the Startup Act's provisions build on the recommendations of President Obama's Council on Jobs and Competitiveness." The House Bill (HR 5893) was introduced by Rep. Michael G. Grimm (R-NY) and large bipartisan groups of co-sponsors on June 5, 2012, as detailed at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR05893:@@P/home/LegislativeData.php> (accessed July 22, 2012). In addition to the immigration law provisions of the Startup Act described above, the proposed legislation would also: eliminate the existing per-country limitation on employment-based immigrant visas and increase the percentage per-country limitations on family-based visa petition (without increasing the overall number of allowable immigrant visas); provide a 100 percent capital gains exclusion from federal taxable gross income of non-corporate taxpayers from the disposition of qualified small business stock held for more than five years; add to the federal tax law a special research and development credit for startups; create a federally funded grant program to accelerate the commercialization of innovative research at institutions of higher education in the United States; and implement various reporting and rule-making process reforms in providing a more startup-supportive regulatory environment.

<sup>97</sup> *Startup Act 2.0*, S 3217, Section 3, 112th Cong., 2d sess., 2012, which would add a new section 216B to the Immigration Act creating a special status under which a qualifying alien would be able to lawfully remain in the United States "(1) for up 1 year after the expiration of the alien's student visa under [F-1] if the alien is diligently searching for an opportunity to become actively engaged in a STEM field; and (2) indefinitely if the alien remains actively engaged in the STEM field." For these purposes, "actively engaged in a STEM field" would mean "(i) gainfully employed in a for-profit business or nonprofit organization in the United States in a STEM field; (ii) teaching 1 or more STEM field courses at an institution of higher education or (iii) employed by a Federal, State, or local government entity," with provision for up to six-month hiatuses if immediately preceded by a one-year period of meeting the requirement. For a discussion of the potential benefits of a provisional visa for holders of graduate degrees, in particularly STEM disciplines, and possible variations in approaches to temporary or conditional visas designed to take advantage of the talents of foreign graduates of U.S. universities, see Schuck and Tyler, 350-351, see note 2.

not revoked prior to such fourth anniversary—revocation being the consequence of the Secretary of Homeland determining the alien no longer meets the qualified alien entrepreneur definitional conditions. For purposes of these proposed conditions, “full-time employee” is defined to include only a U.S. citizen or legal permanent resident “who is paid by the new business entity registered by a qualified alien entrepreneur at a rate that is comparable to the median income of employees in the region.”<sup>98</sup>

The Startup Act calls for some much-needed expansion of visa possibilities to create a better climate for foreign entrepreneurs to develop and launch start-up businesses with U.S. job generation potential, which we certainly support, as have many others.<sup>99</sup> However, even if that legislation designed to help foreign graduate-level STEM students and graduates from U.S. universities with qualifying STEM degrees makes it through the arduous congressional process, there still are many who would be left out. The STEM and graduate-level education requirement for applicants who have not been granted H-1B visas would exclude foreign student entrepreneurs earning undergraduate degrees, and foreign student entrepreneurs in non-STEM fields of study seeking to start and actively work in their own startups. Furthermore, the \$100,000 minimum investment requirement surpasses amounts contemplated by many students, especially undergraduate students.

Throughout the history of the United States, foreign entrepreneurs have been at the forefront of innovation, technology, and the resulting job creation. Accordingly, we suggest that the initiatives in the Startup Act relating to the Startup Visa be supplemented with provisions facilitating the establishment of job-creating ventures in the United States by innovative undergraduates from other countries, and by graduate-level foreign students in non-STEM disciplines. This change will substantially increase the job creation potential that exists in foreign entrepreneurs.

As an addendum to this paper, we have included descriptions of proposed regulatory reforms to facilitate the founding of bona fide businesses by undergraduate or graduate, STEM or non-STEM, student entrepreneurs while they are in school. Also included is proposed supplemental language to S. 3217 that would address the concerns explored above facing foreign student entrepreneurs who earn bachelor’s or higher, STEM or non-STEM degrees and have engaged in the study of entrepreneurship. As detailed in the addendum, our proposals include:

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<sup>98</sup> Startup Act 2.0, S. 3217, Section 4, 112th Cong., 2d sess., 2012, which would add a new section 210A to the Immigration Act.

<sup>99</sup> According to the Ewing Marion Kauffman Foundation *Entrepreneurship* blog, June 25, 2012, <http://www.entrepreneurship.org/en/Blogs/Policy-Forum-Blog/2012/June/Startup-Act-20-Gaining-Endorsements.aspx> (accessed July 20, 2012), Startup Act 2.0, S.3217, has been endorsed by The Kauffman Foundation, Google, National Small Business Association, TechAmerica, The Greater Kansas City Chamber of Commerce, Austin Chamber of Commerce, Silicon Valley Leadership Group, the Consumer Electronics Association, CTIA–The Wireless Association, Information Technology and Innovation Foundation, Financial Services Forum, TechNet, Computer and Communications Industry Association, Information Technology Industry Council, CompTIA, Compete America, Engine Advocacy, Angel Capital Association, and the Northern Virginia Technology Council.

- a requirement of certification by the institution of higher education of the potential of the student’s venture to generate profit;
- conditions to the benefits of the Startup Visa comparable to those in the Startup Act with respect to numbers of full-time employees; and
- with respect to financial benchmarks, an option to satisfy either (a) a modified definition of the \$100,000 minimum investment requirement (modified to include any combination of founders’ capital, capital from one or more outside investors or undistributed net profits) or (b) a revenue generation minimum (\$50,000 annual).

Our suggested modification of the Startup Visa provisions does not include an increase in the maximum number of such visas to be issued set forth in the Startup Act. We believe that, if enacted, this new visa opportunity for foreign entrepreneurs, including those originally contemplated in the proposed legislation and those our recommendation would add to its coverage, will produce jobs and positively impact the U.S. economy in significant ways, so that a revisiting of the cap may eventually be in order.<sup>100</sup> We hope that our proposal to supplement the current language of the Startup Act will add to the critically important pro-entrepreneurship movement in the United States, and that others will see these suggestions as a means to capitalize on the value and enormous job-creating potential that exists in foreign student entrepreneurs across U.S. campuses.

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<sup>100</sup> While we are not endeavoring to in this paper to propose modifications to the maximum number of visas made available, we note that pertinent literature contains a wide range of thoughtful and creative suggestions available to inform future deliberations on volume and allocation policies pertaining to pro-innovation and pro-startup visas. See, e.g., discussion of “a reconfiguration of the current H-1B visa framework through the implementation of a priority structure and reallocation system,” Chester and Cully, 387, 413-421, see note 2; and discussion of possibilities for point systems, auctions, and changes in various aspects of volume caps and allocations in Shuck and Tyler, 352-355 and 357-361, see note 2.

## Addendum

Below is a general summary of the changes, both administrative and legislative, that we are advocating in addition to the provisions of the Startup Act. The discussion immediately below provides a summary of both the regulatory and legislative proposals, followed by a detailed description of proposed modification of the Startup Visa provisions within the framework of Section 4 of the Startup Act. Exhibit 1, presented as a Draft Interpreter Release, then sets forth the proposed clarification of the administrative practices that pertain to Curricular Practical Training and Optional Practical Training. Finally, Exhibit 2 contains proposed regulatory language to make the OPT-STEM extension period available to a broader range of students who are involved in entrepreneurship.

### General Summary of Proposals

- Administrative regulations and practices should be clarified or modified, for CPT, OPT, and OPT-STEM purposes, to:
  - Allow for a student in an undergraduate or graduate degree program, whether or not in a STEM area, to be an active participant, as an employee or owner, or both, in a Qualifying Startup Student Venture (determined by an institution of higher education as having the potential to within two years after launch generate a net profit and have at least two full-time employees in the United States apart from the student and relatives of the student) (see Exhibit 1).
  - Expand the OPT-STEM seventeen-month extension eligibility to cover students who are actively involved in a qualifying business, as employees or owners, related to entrepreneurship study at an institution of higher education (see Exhibit 2).
  - Streamline the much-criticized H-1B process for applicants who are principals in a business so that USCIS administrative personnel and adjudicators are more receptive to the proposition that a foreign entrepreneur can, under an H-1B visa, be a founder and a controlling or non-controlling owner of a *bona fide* startup business while working in such business, and limit the list of requested documents to realistically reflect what is reasonably available for small and emerging ventures.
- Section 4 of S 3217 (and its proposed Section 210A of Chapter 1 of Title II of the Immigration and Nationality Act) should be modified to add as an additional category of foreign persons eligible for the proposed new conditional immigrant visa (Startup Visa) the holder of a bachelor's or higher degree from an institution of higher education who was a founder of and has an ownership interest in a "Qualifying Startup Student Venture" that has (i) achieved either a minimum level of annual revenue

of \$50,000 or \$100,000 capital investment (through any combination of founders' capital, capital from one or more outside investors, or undistributed net profits), and (ii) has at least two full-time employees in the United States who are not relatives of the alien. Such a recipient of a qualified alien entrepreneur visa would have conditional immigrant status under such visa for one year, consistent with existing provisions of Section 4 of the bill, continued conditional status, and ultimate removal of the "conditional" nature of such status if during the subsequent three-year period the venture employs in the United States an average of at least five full-time employees who are not relatives of the alien.

## **Detailed Explanation of Proposals**

### ***Key Definitions for Purposes of These Proposals:***

- The terms "full-time employee," "institution of higher education" and "relatives" have the same meaning as in the pertinent provisions of S. 3217;
- "Designated School Official" has the meaning used in USCIS regulations, and:
- "Qualifying Startup Student Venture" means a business venture formed in the United States under the laws of a state or federal law which upon formation: (i) has as its sole founder or one of its founders a candidate for a bachelor's, master's, PhD or other post-secondary degree at an institution of higher education, and (ii) has been certified by the institution's Designated School Official, under a process requiring a reasonable determination by an authorized faculty member with expertise in entrepreneurship, to have the potential to, within two years after formation, generate a net profit and employ at least two full-time employees who are not relatives of the student.

### ***Proposed Modification of Specific Aspects of S 3217:***

- A provision would be inserted in Section 4 directing USCIS to clarify or modify its rules, regulations, and practices for the administration of CPT, OPT, and OPT-STEM to (i) expressly allow, within the existing CPT framework, participation by a student on an F-1 or other student visa as an active owner of a Qualified Startup Student Venture in which the student is a founder or co-founder, whether or not such student is also an employee of such venture; (ii) expand the OPT-STEM seventeen-month extension eligibility to cover students who are actively involved in businesses, as employees or owners, related to entrepreneurship study at an institution of higher education; and (iii) streamline the H-1B process for applicants who are principals in a start-up venture.

- Section 4 (and its proposed new Section 210A of Chapter 1 of Title II of the Immigration and Nationality Act) would be modified to: (i) add to the list of “qualified alien entrepreneurs” eligible to apply for the new conditional immigrant visa an alien who has earned a bachelor’s or higher degree from an institution of higher education and within one year after being granted such visa has an ownership interest in, and actively participates in, a Qualifying Startup Student Venture in which such visa holder was a founder or co-founder, that has (A) achieved either a minimum level of \$50,000 in annual revenue or \$100,000 capital investment (through any combination of founders’ capital, capital from one or more outside investors, or undistributed net profits), and (B) has at least two full-time employees in the United States apart from the student and members of the student’s family; and (ii) consistent with the existing language of Section 4, provide such visa holder with continued conditional status and ultimate removal of the “conditional” nature of such status if during the subsequent three-year period such venture employs in the United States an average of at least five full-time employees who are not relatives of the alien, and the visa has not been previously revoked by reason of a determination by the Secretary of Homeland Security that the alien ceased to meet the qualified alien entrepreneur definitional conditions.

## Exhibit 1

### DRAFT Interpreter Release

We propose that USCIS prepare a release to clarify CURRICULAR TRAINING & OPTIONAL PRACTICAL TRAINING ASPECTS OF F-1 RULES.

In 68 Interpreter Releases 1553, 1578 (November 4, 1991), the legacy INS reported on and reproduced a new rule making significant changes to the Agency's F-1 foreign student regulations. Among other things, the rule modified F-1 practical training and work authorization requirements. We propose to further elaborate on those rules by clarifying certain specifics related to CPT and OPT. The italicized text below is the proposed language.

*The following is a clarification of curricular practical training and optional practical training as it relates to the study of entrepreneurship:*

*Curricular practical training and optional practical training may be offered to expressly allow, within the existing framework for permissible work, participation by a student on an F-1 or other student visa as an active owner of a Qualified Startup Student Venture which the student is a founder or co-founder, whether or not such student is also an employee of such venture.*

*A "Qualifying Startup Student Venture" is a business venture formed in the United States under the laws of a state or federal law which upon formation: (i) has as its sole founder or one of its founders a candidate for a bachelor's, master's, PhD, or other post-secondary degree at an institution of higher education, and (ii) has been certified by the institution's designated school official (as defined in the USCIS regulations), under a process requiring a reasonable determination by an authorized faculty member with expertise in entrepreneurship, to have the potential to, within two years after formation, generate a net profit and employ at least two full-time employees who are not relatives of the student.*

*This release clarifies curricular practical training by allowing students engaged in the study of entrepreneurship to be actively engaged in a start-up business. Previously, the legacy INS did not provide any guidance on whether or not such activities could qualify for curricular practical training or optional practical training.*

## Exhibit 2

Below is proposed language to expand the OPT-STEM seventeen-month extension eligibility to cover students who are actively involved in businesses, as employees or owners, related to entrepreneurship study at an institution of higher education.

### Sec. 214.2(f)(10)

(ii) Optional practical training—

\*(D) 17-month extension of post-completion OPT for students actively involved in businesses, as employees or owners, related to entrepreneurship study at an institution of higher education. Consistent with paragraph (f)(11)(i)(E) of this section, a qualified student may apply for an extension of OPT while in a valid period of postcompletion OPT. The extension will be for an additional 17 months, for a maximum of 29 months of OPT, if all of the following requirements are met.

(1)The student has not previously received a 17-month OPT extension after earning a STEM degree.

(2) The student is actively involved in a business venture formed in the U.S. under the laws of a State or federal law which upon formation: (a) has as its sole founder or one of its founders: (i) a candidate for a bachelor's, master's, PH.D, or other post-secondary degree at an institution of higher education or (ii) the recipient of such degree; and (b) has been certified by the institution's designated school official, under a process requiring a reasonable determination by an authorized faculty member with expertise in entrepreneurship, to have the potential to, within 2 years after formation, generate a net profit and employ at least 2 full-time employees who are not relatives of the student.

\*Upon adopting this proposed language, the section that is current 214.2(f)(10)(D) would become 214(f)10)(E) and all other sections would adjust accordingly.