



**IMMIGRATION CRASH COURSE FOR ENTREPRENEURS  
SILICON FLATIRONS**

**THE CENTER FOR LAW, TECHNOLOGY, AND  
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**INTRODUCTION**

Immigrant entrepreneurs, or start-up companies that seek to hire foreign-born professionals, are caught in the middle two powerful forces. On one hand, this Administration is recognizing and acknowledging the extraordinary economic contributions made by immigrant investors and entrepreneurs. At the same time, congressional gridlock virtually precludes any positive legislative change in this arena. As a result, USCIS (Immigration) is trying to interpret and manipulate existing law and regulations in a manner that makes our country more accepting and responsive to immigrant investors and start-up companies that seek to hire non-citizen talent.

In August 2011, USCIS announced a number of initiatives to promote start-up enterprises and spur job creation and more recently, the Agency has created the "USCIS Entrepreneurs in Residence" program to interview key stakeholders and develop new policy initiatives to make our country more favorably disposed to entrepreneurs and start-up businesses.

These initiatives include making H-1B visas more accessible to owners of start-up businesses, creating a new path to permanent residence using the national interest waiver model, streamlining and expediting the EB-5 program, expanding premium processing to visas that impact entrepreneurs and start-up companies, re-interpreting key components of the L-1 inter-company transferee visa process, providing petitioners direct access to adjudication teams, etc.

At the same time, a growing number of Congress people seek to pass new legislation to expand initiatives and opportunities for entrepreneurs and start-up companies, including the IDEA Act of 2011. Even the most optimistic people, however, do not expect there to be new legislation in an election year and most people don't expect passage or any meaningful legislation in the near future. Therefore, immigration practitioners and dialed-in entrepreneurs are closely following the new USCIS initiatives to gauge their effectiveness. Regardless of the eventual outcome of these initiatives, the spirit and intention behind them can be an effective tool to increase the chances for success with respect to individual visa applications.

The following is a list of best practices for entrepreneurs and start-up companies to maximize success in the area of immigration visa processing. Attached to this handout is a more comprehensive outline which provides background information regarding these best practices:

#### **I. H-1B VISAS:**

- Make sure the company has sufficient "substance" for H-1B visa purposes.

USCIS wants to ensure that the petitioner is not a "paper company," but rather is a legitimate commercial enterprise that either has, or will have, sufficient infrastructure and resources to support the H-1B beneficiary. If the company does not have a revenue stream, it is important to describe its present and/or future source of funding or capital. It is important to explain the company's business plan and how it intends to reach its goals. Collateral materials, budgets, profit and loss statements, etc. are helpful to demonstrate "substance."

- Establish the employer-employee relationship.

The new USCIS initiatives focus on the issue of the H-1Bs for owners. In order to demonstrate that there is an employer-employee relationship, there needs to be some mechanism in place to remove the H-1B owner/beneficiary from his/her position. Therefore, there needs to be an independent board of directors or some provision in the corporate documents that provide for the removal of the owner from his/her position under prescribed circumstances.

- Make sure the beneficiary does not have too lofty a title.

In order to obtain H-1B status, the company must show that it is paying the beneficiary the required wage, the most important aspect of which is the prevailing or average wage paid to similarly employed individuals. There is no separate prevailing wage for start-up companies. The title must match up with the prevailing wage.

## II. L-1 VISAS

- If the company is related to a foreign entity, make sure the company is formed in a way that satisfies the “affiliation” requirement for L-1 visas.
- Make sure there are not too many “chiefs.” It is hard to justify multiple managers or executives. A “New Office” can only support a certain number of L1A visa holders in managerial or executive capacities. Limit or stagger the number of applications in these categories:

For New Office L-1 petitions, strike the right balance between pedestrian goals and a lofty vision.

At the end of the one-year New Office period, the company will need to demonstrate that it has met the goals enumerated in its business plan. If the goals are too modest, the New Office L-1 will not be approved. If the goals are too lofty, and the company has not met those goals at the end of the one-year period it could be considered a failure even though it is done quite well.

- The L-1A manager or executive cannot be performing the direct services of the company.

Have a plan in place to demonstrate that the executive will be directing the future of the company as opposed to providing its services and the manager will be supervising individuals who will be providing the actual services of the company.

- Make sure the L-1B “specialized knowledge” is specific and unique to the petitioning company rather than to the market niche in general.

The definition of “specialized knowledge” which is currently under review, focuses on the individual having unique information about the specific technology, processes, procedures, and operations of the company, not expertise in the industry or market niche in general.

## III. E-2 VISAS

- Make sure they maintain the nationality of the company for E-2 purposes.

The majority owner(s) must have the nationality of the treaty countries. Once a person has permanent resident status or U.S. citizenship he/she is not considered a national of the treaty country.

- Include a business plan that shows job creation within five years.

A business must meet the marginality requirement which means showing it will create jobs within the 5-year life of the E visa

- Less can be more.

A ratio between cash invested and money financed must be in the proper balance. A smaller investment with a larger cash infusion can be better than the opposite.

#### **IV. SUCCESSFUL STRATEGIES FOR OBTAINING GREEN CARDS FOR ENTREPRENEURS OR KEY EMPLOYEES**

- Limit amount of ownership in the petitioning company.

If an individual will be seeking a green card through a labor certification the individual must have little to no ownership interest

Use of the national interest waiver for entrepreneurs who are creating jobs.

This the biggest question mark in the new series of USCIS initiatives. Clearly the requirement that the work be national in scope has been modified. What is unclear is how many jobs, now or in the future, must be created to qualify for the National Interest Waiver.