



NEW PORTAL WELCOMES ENTREPRENEURS TO THE USA: BUT WILL THIS CHANGE THE CULTURE OF "NO" AT USCIS

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Consistent with its [earlier policy](#) of welcoming entrepreneurs, the USCIS launched a new portal called [Entrepreneur Pathways](#) providing resources on how foreign entrepreneurs can use existing visas to launch their innovative startups in the US. The portal is quite good, and it is hoped that USCIS officials retreat from their culture of "No" and process cases in the spirit of this new guidance.

At the outset, we clearly need Congress to create a [Startup Visa](#) rather than entrepreneurs using existing visas that were not designed for them, but those legislative proposals are still floundering. One version of a Startup Visa would require the entrepreneur to invest a minimum of \$100,000 in order to get a two year green card. To keep the green card past two years, the founder would need to create five jobs and either raises at least \$500,000 in additional funding or \$500,000 in revenues. Even if Congress enacted a Startup Visa, these requirements could be rather burdensome for a nimble entrepreneur who could still launch a successful business without an initial \$100,000 investment.

There are enough opportunities under our existing immigration law for entrepreneurs who may not need to make such a high investment in their startup. The existing visa system if interpreted broadly, together with the Startup Visa, would provide a welcoming environment for job creating foreign entrepreneurs in the US. The new portal shows the way on how entrepreneurs can use the existing immigration system to set up ventures in the US and possibly even flourish. While these ideas have been used by creative immigration attorneys on behalf of their clients from time immemorial, it is good to know that the portal validates them, largely based on the input that the

USCIS received from real entrepreneurs through its [Entrepreneur in Residence](#) initiative. Most important, the EIR has endeavored to train USCIS officers about the unique aspects of a startup business. It is hoped that USCIS officers, after receiving such training, will change their mindset and be willing to distinguishing a legitimate startup from a fraudulent artifice.

For instance, startups may not yet be generating a revenue stream as they are developing new technologies that may lead to products and services later on. Many have received financing through venture capital, angel investors or through "Series A and B" rounds of shares. Startups may also operate in more informal spaces, such as the residences of the founders (with regular meetings at Starbucks) instead of a commercial premise. Some are also operating in "stealth mode" so as not to attract the attention of competitors and may not display the usual bells and whistles such as a website or other marketing material. Startups may also not have payroll records since founders may be compensated in stock options. Still, such startups are legitimate companies that should be able to support H-1B, L, O or other visa statuses.

The portal suggests that if a foreign student has a "Facebook" type of idea, he or she can start a business while in F-1 Optional Practical Training [provided the business is directly related to the student's major area of study](#). After completing F-1 OPT, this student can potentially switch to H-1B visa status (provided there are H-1B visa numbers at that time). Regarding the startup owner being able to sponsor himself or herself on an H-1B, the USCIS is surprisingly receptive, but still obsessed with the [Neufeld Memo](#) that there must be a valid employer-employee relationship and that the entity has a right to control the employment. Still, the USCIS suggests that a startup may be able to [demonstrate this if the ownership and control of the company are different](#). This can be shown through a board of directors, preferred shareholders, investors, or other factors that the organization has the right to control the terms and conditions of the beneficiary's employment (such as the right to hire, fire, pay, supervise or otherwise control the terms and conditions of employment). Some of the suggested evidence could include a term sheet, capitalization table, stock purchase agreement, investor rights agreement, voting agreement or organization documents and operating agreements.

Even with intra-company transferee L-1 visas for executives and managers, the [portal recognizes that an entrepreneur may establish a "new office" L-1](#) (which could be a subsidiary, parent, affiliate or branch of the foreign company) with a

validity period of one year, which allows a ramp up period where the entrepreneur can be involved in "hands on" tasks instead of function as an executive or manager. After the one year ramp up, the organization must be able to support the entrepreneur in a true managerial or executive capacity. The portal also refreshingly suggests that entrepreneurs who can demonstrate extraordinary ability in their field of endeavor [can take advantage of the O-1 visa](#), and can set up a company who can sponsor them. Interestingly, there is no mention of the control test for the O-1 visa like for the H-1B visa. Finally, the portal also provides guidance for nationals of certain countries that have a treaty with the US, which [facilitates the E-2 investor visa](#).

All this looks good on paper (rather online!), and it remains to be seen whether USCIS officers will faithfully interpret this guidance. Even if an H-1B founder of a company successfully establishes that the entity can control her employment through a board of directors or through preferred shareholders, the USCIS could likely challenge whether a position in a startup, where the beneficiary may be wearing many hats, can support a specialized position. The H-1B visa law requires the petitioner to demonstrate that a bachelor's degree in a specialized field is the minimum qualification for entry into that occupation. Also, positions in innovative startups may not necessarily fit under the occupations listed in the [Department of Labor's Occupational Outlook Handbook](#) but may yet require at least a bachelor's degree. It is hoped that USCIS examiners are trained to be receptive to other evidence to demonstrate that the position requires a bachelor's degree. Furthermore, an MBA degree should be considered a specialized degree in itself since many [MBA programs at top business schools focus on entrepreneurship](#) and other fields, such as technology or web analytics, which equip one to be a successful entrepreneur.

In the end, the success of the Entrepreneur in Residence initiative largely depends on whether the USCIS has been able to alter the mindset of its officials who are in the habit of saying "No."