



THE BLOCKING OF AN ENTREPRENEUR: A BROKEN IMMIGRATION SYSTEM AT WORK

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[3D printing technology](#) is about to revolutionize the way we understand manufacturing, and the country that takes the lead in this new technology will be the winner of what The Economist magazine has called the [third industrial revolution](#). A state of the art hearing aid or a high tech component for a military jet can be designed through a computer and printed on an unattended 3D printer as a solid functioning object.

Yet, the US Customs and Border Protection on the Canadian border recently refused admission to a dual national Canadian/British entrepreneur [JF Brandon](#) who is part of a startup called [D Shape](#) – which has developed a large-scale 3D printer that will revolutionize the way architectural design is planned, and building constructions are executed. By simply pressing the “enter” key on the keypad D Shape gives the architect the possibility to make buildings directly, without intermediaries who can add interpretation and realization mistakes.

Although refused entry into the United States, Mr. Brandon participated in a panel discussion on February 13, 2012 at Brooklyn Law School in New York entitled [Immigration Policy and Entrepreneurship: Challenges and Pathways for Startups](#). Thanks to technology that has now become so routine, he could participate through Skype from overseas, and told a riveted audience that he had been refused entry under a NAFTA TN visa to work for D Shape in New York, which is limited to certain occupational categories and applies to Canadian and Mexican citizens. For an individual who wishes to work in a business related field, the only TN occupational classification is “Management Consultant,” but the CBP official did not think Mr. Brandon would fall under this category as he would be more of a “Manager,” which is not a TN classification. Although he will try again for a TN visa, the H-1B visa category is more obvious,

which allows one to work in many more professional fields, but there are no H-1B visa numbers left for this fiscal year. If he applies for one, he will have to wait until October 1, 2013 to get in, and that too if he is lucky enough to get selected in the event that the USCIS receives more than the allotted 65,000 H-1B visas during the first week April 2013 – the first month when employers can file H-1B visas for an effective start date of October 1, 2013. Other than the H-1B visa, there are few options for enterprising foreign entrepreneurs. The O-1 visa is limited to foreign nationals who can demonstrate extraordinary ability in their fields through sustained national or international acclaim. The L-1 visa is available to intra-company executives, managers or specialized knowledge employees who have been working for an affiliated overseas company for one year in the same capacities. The E-2 visa, applies to nationals of a few countries that have as treaty with the US (and Canada is one of them), but it requires the entrepreneur to make a substantial investment.

I was honored to be on the distinguished panel last week, along with [Jeremy Robbins](#) who is Director of the Partnership for a New American Economy and Special Advisor to Mayor Bloomberg, [Michael Wildes](#), Partner of Wildes and Weinberg PC and [Owen Davis](#), Venture Capitalist, Director of NYC Seed. The moderator was [Professor Jonathan Askin](#), who is the Director of the innovative [Brooklyn Law Incubator Policy Clinic](#), which also sponsored the program along with [New York Legal Hackers](#). Apart from the wonderful ambience and engaging audience –and there was jazz at the beginning and end of the program – the panelists generally painted a grim picture of the visa options available to foreign entrepreneurs who wish to develop startups in the US. Indeed, Mr. Davis said that NYC Seed would be reluctant to fund foreign national entrepreneurs due to the inherent risks and uncertainties caused by the immigration system. Mr. Wildes described the many immigration options that exist in the US immigration system, but then qualified that it would be very difficult for an entrepreneur to take advantage of them. Under the H-1B visa program, for example, the USCIS insists on the need to show that the H-1B worker's employment will be controlled by the employer, which will be difficult in the case of startup owned by the foreign national. This obstacle is in addition to the fact that H-1B visa numbers run out even before the start of the fiscal year. Even the E-2 visa is limited to nationals of treaty countries, according to Wildes, which does not include any of the dynamic BRIC (Brazil, Russia, India and China) countries. I pointed out that there may be new hope, even amidst

the bureaucratic “culture of no” mindset, in the USCIS’s new [Entrepreneurs in Residence Initiative](#), where immigration officers have been trained to recognize the unique nature of startups, such as operating in stealth mode or not having an established office space. Control of employment may also be shown in other ways, through the need to maintain a separate existence between the corporation and the shareholder, as well as the possibility of minority shareholders exercising control through shareholding agreements or through their latent power to seek dissolution based on egregious conduct by the majority shareholders. Mr. Robbins highlighted the political realities, which means that a new Startup Visa will only be enacted when Congress rolls out a Comprehensive Immigration Reform bill. Despite the importance of foreign entrepreneurs, and the fact that America knows best how to nurture entrepreneurship, there is little chance of a Startup Visa Act in the absence of Comprehensive Immigration Reform.

The take away from this program is that 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 will flounder unless they are included in a Comprehensive Immigration Reform (CIR) bill. 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 raise 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. Thus, a CIR proposal can also tweak some of the existing visa categories to make it easier for founders to remain in the US as nonimmigrants and provide alternative pathways, such as by relaxing the element of control in the H-1B visa and also allowing a majority shareholder to be sponsored for a green card through the labor certification program. The [well-intended](#) guidance for entrepreneurs under existing visa categories should also be part of reform legislation rather than remain as mere guidelines that run the risk of not being followed by an immigration officer. Otherwise, we will have initiatives like [Blueseed](#), which envisages a ship in international waters off Silicon Valley that will serve as an incubator for foreign entrepreneurs to develop their startups without needing to get a US visa. They can visit shore briefly on a B-1 business visa for meetings, and then return to the ship to work

at their startup. To add to the uniqueness of the entrepreneur and immigration program in Brooklyn, the founder of Blueseed, [Dario Mutabdzija](#), also participated through Skype. I have a feeling that Blueseed will succeed even if we have CIR as there will always be entrepreneurs who may not be able to take advantage of onerous visa options in the early stages of the startup.

Finally, from my experience as a practitioner, I have seen that immigrants from all backgrounds can become entrepreneurs, and it is not necessary that only graduates from STEM (Science, Technology, Engineering and Math) programs will succeed with startups. A lesser educated immigrant with burning ambition, such as a cook, can one day start a restaurant chain just as a Ph.D in Engineering can develop the next generation 3D printer. Both create more jobs – and America could also enjoy more cultural diversity through the businesses of foreign entrepreneurs. As I recently tweeted on [Twitter](#), “We need both brilliant STEM and delectable tandoori chicken in America.” Thus, if the political reality is to include startup visa options in CIR, let’s bring it on sooner than later so that American will be able to benefit from the talents of foreign entrepreneurs of all backgrounds and stripes.