S. Bill 744: Benefits & limitations for foreign national entrepreneurs

By Himani Bhardwaj of HBM Law Offices, LLC and Tejas Shah of Kriezelman, Burton & Associates, LLC

I. Introduction

S. Bill 744, which the U.S. Senate recently passed 68-32, includes a sweeping set of changes to U.S. immigration laws. Among these changes are provisions that would make it significantly easier for foreign nationals who establish businesses in the United States to obtain status by virtue of their founding of the business and involvement therein. Subtitle H of the bill, titled "Investing in New Venture, Entrepreneurial Startups, and Technologies" ("INVEST") creates a nonimmigrant visa category known as the X visa through which entrepreneurs can start companies in the US and also creates an immigrant EB-6 visa that leads to permanent residency. The nonimmigrant X visa appears to permit both initial admissions and changes of status from another status, such as H-1B or F. The immigrant EB-6 visa is limited to foreign nationals inside the U.S. in another nonimmigrant status and is therefore unavailable to foreign nationals outside the U.S.

While current immigration laws include options for entrepreneurs and/or investors through the E-2 visa and the EB-5 permanent residency program, this bill significantly decreases barriers for the founders of new businesses seeking immigration status in the U.S. Furthermore, the X visa benefits all foreign nationals rather than only those from countries that have signed treaties with the United States, which is a limitation of the existing E visa. This article provides an overview of these options by describing not only their strengths in comparison to current immigration laws promoting investment and entrepreneurialism in the United States, but also their limitations.

II. Overview of the X Visa Under Subtitle H of the Bill

The nonimmigrant X visa and the EB-6 immigrant visa set out different thresholds for investment, capital raised, jobs created, and revenue earned. A "qualified entrepreneur" is eligible to apply for a X visa if in the three-year period before filing the petition, the entrepreneur either: (1) received a "qualified investment" into their business of $100,000 from a qualified venture capitalist ("QVC"), a super angel, an accelerator, a community development financial institution ("CDFI") or other set of investors determined by the Secretary of Homeland Security or any combination of these entities or investors; or (2) in the previous two-year period the business created at least three qualified jobs and generated a minimum of $250,000 in annual revenue in the United States.

The X visa allows for an initial three-year admission and can be renewed in three-year increments. To secure a renewal, the qualified entrepreneur needs to show that in the most recent three-year period of holding the X visa, the business entity has created at least three qualified jobs and has either received a qualified investment (from sources as listed above) of at least $250,000 or generated $200,000 in annual revenue in the two-year period preceding the date of filing for an extension. Whether the $250,000 qualified investment is separate or inclusive of the $100,000 originally raised is not clarified in the bill.

If the qualified entrepreneur fails to meet the three-year renewal criteria above, the Secretary of Homeland Security may renew the X visa for a maximum of two one-year periods. For this, the qualified entrepreneur needs to show that the business entity made "substantial progress" toward meeting the three-year renewal criteria and that the renewal would be "economically beneficial" to the United States. The term "economically beneficial" or "substantial progress" is not defined in the bill. Rather the bill defers to the Secretary of Homeland Security in consultation with the Secretary of Commerce to set the criteria on how to gauge "economically beneficial" and "substantial progress." Further, the assessment is left to adjudicators, which provides for both flexibility but also exposes petitions to possible erroneous assumptions about startups, funding sources, growth, and knowledge gaps about start-up business culture among USCIS adjudicators.

III. Overview of the EB-6 Visa Under Subtitle H of the Bill

The bill provides for 10,000 EB-6 immi-

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OFFICE
Illinois Bar Center
424 S. Second Street
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www.isba.org

EDITOR
Lewis F. Matuszewich
453 Coventry Lane, Ste. 104
Crystal Lake, IL 60014

MANAGING EDITOR/ PRODUCTION
Katie Underwood
kunderwood@isba.org

grant visas for each fiscal year to entrepreneurs that meet EB-6 visa's criteria of a "qualified entrepreneur." A "qualified entrepreneur" is an individual who (1) has a significant ownership interest in a US business, (2) is employed in a senior executive position in the US business, (3) has a substantial role as founder or in early-stage development of the business, and (4) presents a business plan with the petition to the U.S. Citizenship and Immigration Services.

Qualified entrepreneurs can meet the eligibility requirements of the EB-6 visa in two ways. The first path emphasizes job creation and raising investment. Under the first path, the qualified entrepreneur needs to show that s/he maintained a valid nonimmigrant status for at least two years prior to the petition to convert to immigrant status and that during the three-year period prior to filing the petition, the qualified entrepreneur had a significant ownership interest in a US business entity that has created at least 5 qualified jobs. The qualified entrepreneur must also show that the business entity received at least $500,000 in investments from an investor or a combination of the listed investors (i.e. Qualified VC, Angel investor, etc.). Alternatively, the qualified entrepreneur can show that s/he has a significant ownership interest in a US business entity that has created at least five qualified jobs and during the two-year period prior to the filing of the petition, the business entity generated at lease $750,000 in annual revenue within the United States.

Under the second path, the qualified entrepreneur has to show that s/he maintained valid nonimmigrant status for at least three years prior to the date of filing an EB-6 application. The qualified entrepreneur needs to have an advanced degree in a field of science, technology, engineering, or mathematics (STEM degree), and during the three-year period prior to filing the petition for such status, s/he has a significant ownership interest in a US business that has created at least 4 qualified jobs. In addition, the business entity must have received a qualified investment (from QVC or other investors in the list) of at least $500,000 or alternatively the qualified entrepreneur has a significant ownership interest in the US business entity that has created at least three qualified jobs and generated an annual revenue of at least $500,000 during the two-year period at time of filing.

IV. Comparison to Existing Law

By comparison to existing immigration options for investors and entrepreneurs, Subtitle H contains several important distinctions and establishes entirely new categories of visas. Entrepreneurs seeking permanent residency in the United States have been dependent upon the EB-5 program to date. If they are nationals of a country with which the United States has entered into a qualifying treaty, the E-2 program presents options for short-term status. The H-1B program is an option for selected entrepreneurs who intend to be employed by their new company if they can show that notwithstanding their investment/ownership of the company, they will be subject to the control of this company and will maintain a valid employer-employee relationship with the company. This is most likely to be the case where the entrepreneur has only a minority ownership share in the company.

The traditional route to permanent residency—through labor certification—is highly questionable for an entrepreneur who owns a percentage or portion of the business. The labor certification form requires disclosure of such ownership, and an entrepreneur in a business who sponsors him/herself for a labor certification invites scrutiny from the Dept. of Labor, which will question whether or not the job offer was truly open to any qualified, able, and willing U.S. worker. Additionally, the process only permits the selection of an applicant based upon their possession of the minimum credentials or requirements for a position, and does not provide any additional preference to an entrepreneur based upon his or her ownership share in the business or unique knowledge regarding the business.

Additionally, the EB-5 program is not well-tailored to start-up/entrepreneurial culture. The investment thresholds are exceedingly high, with a minimum required investment of $500,000 (if the investment is made in a high unemployment area, or "TEA") and, in most cases, an initial investment of $1,000,000. The investor must also show the creation of 10 jobs for U.S. Citizens or Legal Permanent Residents over a two-year period, a difficult proposition for most start-ups, especially in their founding years. While the creation of the Regional Center program made it easier for passive investors to participate in the program, it did nothing to create immigration options for traditional entrepreneurs with access to limited capital.

In comparison to the EB-5 program, the new visa category clearly allows for significantly lower investment thresholds and relaxed job creation requirements. Although many start-ups may still fail to meet the targets set forth in the statute, the alternative sets of requirements do allow for coverage of many companies and start-up ventures. This is good news for start-up companies which often struggle to create jobs in their early stages and to generate substantial revenue. The significant timeframes to meet targets provided for by the statute appear to be based upon the normal life-cycles for determining whether a particular start-up venture is likely to succeed.

Additionally, the short-term visa options for entrepreneurs benefit nationals of all countries. The traditional short-term visa route for investors has been the E-2 visa, but nationals of many countries, including India, China, Russia, Brazil, and South Africa, are excluded from this program due to the lack of a treaty between their home countries and the United States.

Due to the lower investment thresholds, the INVEST visa is also likely to invite more active, rather than passive, investors. The EB-5 program's primary purpose for most investors has tended to be permanent residency, rather than earning a high rate of return on their capital. As a result, many foreign nationals have simply chosen to act as passive investors through the Regional Center program instead of taking risks by founding their own business. The new visa categories created by the INVEST visa are much more likely to attract traditional entrepreneurs, who are aggressive risk-takers and are truly pursuing a business venture for profit rather than just for status in the United States. This is likely to be good news for the U.S. economy.

The provisions in Subtitle H of the bill were the result of concerted lobbying by entrepreneurial groups in places such as the Silicon Valley, and recognition by policymakers and legislators that current U.S. immigration laws are discouraging rather than encouraging investment and the creation of new businesses by foreign nationals. By contrast to the EB-5 program, which requires the investment of at least a half million dollars, current start-up culture allows for the creation of a business with tens of thousands of dollars, rather than hundreds of thousands or millions. While the bill is an improvement over current law, as the next section demonstrates, it does suffer

from limitations.

V. Limitations of the INVEST Visa

The high threshold of investment required by the provisions can backfire and undermine the purpose of the INVEST visa because this can still pose a barrier to entry for many entrepreneurs. Many start-up companies may not require significant amount of initial investment (i.e. $500,000) to start a business since many begin in dormitories or coffee shops, typically foregoing salary for long-term creative compensation in order to prioritize the efficient use of capital.

Further, the job-creation requirement of the INVEST visa is also inconsistent with start-up culture with regards to the creation of "qualified jobs." The bill defines qualified jobs as full time positions with the entrepreneur's business entity in the US filled by an individual who is not the entrepreneur, or an immediate relative (spouse, son or daughter of entrepreneur), which pays a wage that is not less than 250 percent of the Federal minimum wage. The bill's requirement that employees of the newly formed entity receive wages is not reflective of economic realities for many start-up ventures. Many start-up entrepreneurs and their employees may simply choose not to be paid salary in lieu of long-term gains by way of stock options or other such non-cash compensation options. It is a common business practice among start-ups to establish creative/long-term compensation arrangements with their employees, especially in the first few years. The INVEST visa's inflexible job creation requirement will limit the ability of entrepreneurs to run their business on a bootstrap budget or be inventive in their business operations. This will hinder entrepreneurs' ability to save on cash that is needed to run other business operations in the short term before the business generates profit, which can then be distributed as wages when the business is more established.

Lastly, the dynamic nature of the start-up industry and the ever-expanding list of funding sources is inconsistent with the rigid categories of eligible funding sources in the INVEST visa bill. The provisions currently only provide for fund raising through a qualified venture capitalist, super angel, accelerator, government entity or community development financial institution, or a combination of these sources. These provisions do not allow for alternative fund raising methods such as crowd-funding (an increasingly more popular way of funding startups). Crowdfunding is the collective effort of individuals who network and pool their money, usually via the internet, to support efforts initiated by other people or organizations such as free software development and invention development, to name a few.[1]

VI. Conclusion

The INVEST visa would represent a notable change to immigration laws serving and promoting investment and entrepreneurialism in the United States. By comparison to existing law, Subtitle H of S. 744 would significantly expand the scope of business entities and nationalities of investors who would benefit from short-term and long-term visa options. Nevertheless, the visa does not account for some of the realities of start-up culture. The actual value of this bill, if it remains a component of a comprehensive immigration reform bill or becomes a separate law, will lie in the training given to adjudicators in light of the considerable discretion that the law appears to provide, the regulations implementing this bill, and ultimately the willingness of the USCIS and Congress to account for the ever-changing and dynamic nature of start-up businesses. ■

Tejas Shah is an attorney at the Kriezelman Burton and Associates law firm in Chicago, Illinois. His practice focuses on immigration law and he is particularly passionate about working with investors and entrepreneurs seeking to follow their American dream. Mr. Shah has lived and worked in India and South Africa, and he speaks Hindi and Gujarati. He can be reached at tshah@krilaw.com or 312.332.2550.

Himani Bhardwaj is the principal attorney of HBM Law Offices, an immigration & nationality law firm representing clients across the United States. As an entrepreneur and first-generation immigrant who has lived and worked in 6 countries, she is passionate about helping fellow immigrants realize their professional and personal dreams. Himani obtained her J.D. from DePaul University College of Law and her B.A from University of Chicago. She may be reached by telephone at (312) 857-5402 or by e-mail at himani@hbmlawllc.com.

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