

MAKING IMMIGRATION ENTREPRENEURIAL

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INTRODUCTION/ABSTRACT

The H1-B visa program is one of two significant immigration programs for skilled labor, and currently imports tens of thousands of skilled foreign workers to the United States each year.¹ Today, companies like Amazon, Meta, and Tesla dominate the H1-B program, taking up hundreds of spots respectively each year.² This state of affairs allows technology companies to fill their ranks with skilled labor where there are shortages of such workers in the United States.³ However, it does little to help new entrepreneurial ventures acquire much needed talent, since startups are mostly unable to compete with larger technology companies in utilizing the H1-B visa program's lottery process. This lottery process favors employers who can pay to submit multiple visa applications per applicant in an effort to bolster the applicant's odds of being selected for one of a limited number of H1-B visas.⁴ In this sense, the current H1-B framework is anti-entrepreneurship, favoring temporary workers for large enterprises over workers who will work quickly to create significant economic value through new business startups.

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1. See *infra* notes 12–14 and accompanying text.

2. See Kate Gibson, *Which Companies Have the Most Employees Working on an H-1B Visa?*, CBS NEWS (Jan. 13, 2025, at 15:40 ET), <https://www.cbsnews.com/news/elon-musk-h1b-work-visa-tesla-technology/> [<https://perma.cc/5M9A-3326>].

3. *Id.*

4. See Hristo Todorov, *At Start-Ups, Foreigners Need Not Apply*, STAN. REV. (Oct. 21, 2024, at 10:02 ET), <https://stanfordreview.org/at-start-ups-foreigners-need-not-apply/> [<https://perma.cc/398A-68WK>].

This essay argues that the United States is due for an entrepreneurship-specific visa for startup founders and early-stage startup employees. It builds on the work of previous scholars who have advocated for founder-specific and investor-specific visas.⁵ However, this essay goes further, by advocating for visas and a path to permanent residence specific to early-stage startup employees who are granted meaningful equity in the new venture for which they work. A program like the one proposed here would allow the United States to maintain its lead as the preeminent destination for entrepreneurs globally,⁶ and further, would provide a clear pathway for permanently recruiting highly skilled workers with an orientation towards innovation. Given that new business ventures are the main driver of economic growth in the United States,⁷ this proposal provides for a program that would drive more economic growth than the current H1-B program.

This essay proceeds in three parts. First, Section I discusses the basics of the H1-B visa program generally, as well as the political climate around the issue of business immigration in early 2025. Then, in Section II, this essay contemplates the obstacles that exist for new startups who seek to utilize the current H1-B program for hiring employees. Lastly, this essay suggests reforms to be made via a new visa program for both startup founders and early-stage startup employees.

I. H1-B VISAS AND THE DEBATE SURROUNDING THEM

At its core, the H-1B visa program in the United States exists to provide a pathway for talented or highly skilled professionals to work in the United States for a sponsoring employer on a temporary basis.⁸ The purpose of the law providing for the H-1B program is to provide a pathway for American employers to hire skilled foreign professionals who can fill roles that otherwise would go unfilled by the domestic labor force.⁹ Typically, large employers with many resources like Amazon, Tesla, Meta, and Google take advantage of the H-1B visa program and hire

5. See, e.g., *infra* notes 107–08 and accompanying text.

6. See *infra* note 36.

7. See *infra* note 97.

8. D. Gordon Smith & Darian M. Ibrahim, *Law and Entrepreneurial Opportunities*, 98 CORN. L. REV. 1533, 1538 (2013) (“[T]he H-1B visa . . . is of particular importance to technology firms because it allows temporary or nonimmigrant workers in occupations requiring ‘a body of highly specialized knowledge’ to work for a sponsoring employer in the United States for up to three years.”).

9. See Sejal Singh, *Recent Changes to the H-1B Visa Program and the Future of Agency Deference*, 29 MIDWEST L.J. 49, 50 (2019).

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many temporary workers each year.¹⁰ In large part, this is due to the expense of sponsoring the H-1B process for an individual worker, as well as the uncertainty with respect to an individual H-1B applicant's likelihood of having their application approved.¹¹

This uncertainty regarding application approval stems from a limit on the number of applicants who may receive an H-1B visa each year.¹² By law, there is a 65,000 employee cap on the number of H-1B visas that may be granted each year.¹³ Additional H-1B visa slots exist for applicants with a graduate or doctoral degree from a university in the United States, which are 20,000 in number.¹⁴ These caps create an intense application process for both employers and applicants, so much so that new businesses have been launched to shortcut the H-1B process by providing aspiring entrepreneurs a residence on a cruise ship in international waters, but within commuting distance of San Francisco's thriving tech startup ecosystem.¹⁵ H-1B applications have consistently exceeded the caps each year in the recent past, sometimes by a significant number.¹⁶ For example, in 2024, there were roughly 780,000 H-1B applications filed on behalf of prospective visa holders.¹⁷ Given that applications for H-1B visas exceed the number of slots available, a lottery process is used to determine which applicants will receive the available visas.¹⁸

10. See Gibson, *supra* note 2 (sharing a list of the employers who filed the most H-1B visa applications on behalf of prospective employees in 2024).

11. See Stuart Anderson, *A Look at the High Fees Making Hiring H-1B Visa Holders Challenging*, FORBES (Feb. 22, 2024, at 09:34 ET), <https://www.forbes.com/sites/stuartanderson/2024/02/22/a-look-at-the-high-fees-making-hiring-h-1b-visa-holders-challenging/> [<https://perma.cc/C3T3-8WUZ>].

12. See Yasser Killawi, *Preserving an Entrepreneurial America: How Restrictive Immigration Policies Stifle the Creation and Growth of Startups and Small Businesses*, 8 OHIO ST. ENTREPRENEURIAL BUS. L.J. 129, 144 (2013) ("U.S. immigration laws cap on the number of H-1B visas issued annually. Currently, H-1B visas are capped at 65,000 for each fiscal year . . .").

13. *Id.*

14. Mauhan M. Zonoozy, *Current Developments, Development in the Legislative Branch: America's Stutter Towards H-1B Immigration Reform in America*, 26 GEO. IMMIGR. L.J. 655, 655 (2012) ("Certain exceptions to the limit have been developed, including exemption for up to 20,000 foreign nationals holding a master's degree or higher from U.S. universities . . .").

15. See Brian M. Sirman, *Loophole Entrepreneurship*, 29 FORDHAM J. CORP. & FIN. L. 33, 71–73 (2023) (discussing startup "Blueseed").

16. See *H-1B Lottery and Historical Data*, GOELITE: THE WHITE PAPER FOR F1 STUDENTS, <https://goelite.com/en/knowledge-base/h-1b-lottery-and-historical-data-1> [<https://perma.cc/2KMZ-9RYJ>] (last visited Sep. 9, 2025).

17. *Id.*

18. Danielle M. Drago, *Losing the Best and the Brightest: The Disappearing Wage Premium for H-1B Visa Recipients*, 17 VAND. J. ENT. & TECH. L. 1051, 1057 (2015)

Once an applicant has received an H-1B visa, they are permitted to pursue a more permanent stay in the United States, including through permanent residence.¹⁹ This was not always the case.²⁰ While iterations of the H-1B visa have existed since 1952, it was the Immigration Act of 1990 that finally permitted the concept of dual intent: working on a temporary basis while intending to pursue a more permanent ability to remain in the United States.²¹

While large tech companies dominate the H-1B visa space, these visas are available to entrepreneurs and employees of new ventures as well.²² However, given the incredible competition for H-1B visas, founders and employees of smaller companies may choose to pursue other avenues to provide foreign workers with the lawful right to work in the United States.²³ For university students and recent graduates, the optional practical training (“OPT”) program allows for current university students on an F-1 visa or recent graduates to work in the United States for twelve months in employment that is related to their area of study.²⁴ This twelve month window can be extended by an additional twenty-four months for students working toward a degree in a science, technology, engineering, or mathematics (“STEM”) discipline, which provides a pathway for many foreign students who would be good candidates to work for a high-growth startup.²⁵ Thus, students using their F-1 visa plus OPT as a pathway to work for a high-growth venture can provide themselves with up to three years post-graduation to get established in the United States, and further, play the H-1B lottery process.²⁶ Lastly,

(“Successful applicants must proceed through a lottery process to obtain a visa. A lottery for H-1B visas has been in place since the demand for these visas exceeded the statutorily mandated cap placed on the amount of visas available.”).

19. Singh, *supra* note 9, at 51.

20. *Id.*

21. *Id.* at 50–51.

22. Conor Gowder, *Useful Stats: A Look at the H-1B Visa Program by Industry, Employer and State*, STATE SCI. & TECH. INST. (Oct. 26, 2023), <https://ssti.org/blog/useful-stats-look-h-1b-visa-program-industry-employer-and-state> [<https://perma.cc/8574-LKP6>]; see *Options for Alien Entrepreneurs to Work in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/options-for-alien-entrepreneurs-to-work-in-the-united-states> [<https://perma.cc/B4DZ-TWS6>] (last visited Sep. 9, 2025).

23. See Alison Moodie, *Alternative Visa Options If You Lose the H-1B Cap Lottery*, BOUNDLESS (Mar. 7, 2025), <https://www.boundless.com/blog/alternative-visas-if-you-lose-h-1b-lottery/> [<https://perma.cc/MZ5V-B4R6>].

24. Brianna Garland, *Leveling NIL’s Uneven Playing Field: A Call for Fairness for International Student-Athletes*, 2024 U. ILL. L. REV. 1809, 1822 (2024).

25. Justin Auh, *Leveling the Playing Field: How to Get International Student-Athletes Paid Under Name, Image, and Likeness*, 43 NW. J. INT’L L. & BUS. 347, 354–55 (2023).

26. See *id.*

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other visas through the E-series visa program and the employment-based (EB) series are potentially available to startup founders and employees, but include higher skill, qualification, or financial hurdles for the individual to clear in order to demonstrate eligibility.²⁷ President Trump has proposed replacing one of these programs, the EB-5 visa, with a new program that will require five million dollars from an investor (to be paid to the United States federal government) in exchange for residence in the country.²⁸

H-1B visas entered mainstream political debates in early 2025.²⁹ Two of the loudest voices have been Elon Musk and Vivek Ramaswamy, both of whom were tapped by President Donald Trump to lead the federal government's "Department of Governmental Efficiency" ("DOGE").³⁰ Musk and Ramaswamy both fervently support the H-1B program.³¹ In Musk's case, his companies (like Tesla and SpaceX) regularly rely on H-1B workers to advance the company's goals.³² Ramaswamy took things further by saying that American companies prize foreign workers in technology-related fields, in part because America's culture "venerated mediocrity over excellence."³³ These comments caused commotion

27. See generally Mariela Olivares, *Renewing the Dream: Dream Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 99–103 (2013) (describing the EB-1, EB-2, EB-3, and EB-5 visas). See also *E-visas*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 12, 2020), <https://www.uscis.gov/i-9-central/completing-form-i-9/e-visas> [<https://perma.cc/47TZ-ET6D>] (describing the E-series visas).

28. See Elliot Spagat, *Trump Says He Will Offer 'Gold Cards' for \$5 Million Path to Citizenship, Replacing Investor Visas*, ASSOCIATED PRESS (Feb. 26, 2025, at 09:51 ET), <https://apnews.com/article/investor-visas-trump-immigration-eb5-gold-cards-cdb943dd1633bc234bb715fa20914e05> [<https://perma.cc/BQP6-SJ8R>]. See also Ja'han Jones, *Trump Admits He Worries People Will Abuse His 'Gold Card' Visa Plan*, MSNBC (Mar. 20, 2025, at 05:05 ET), <https://www.msnbc.com/top-stories/latest/gold-visas-trump-fox-news-interview-rena197352> [<https://perma.cc/2GQY-YJQC>].

29. Aimee Picchi, *Musk and Ramaswamy Are Sparking a Debate over the H-1B Visa. Here's What to Know About the Visa.*, CBS NEWS (Dec. 30, 2024, at 11:39 ET), <https://www.cbsnews.com/news/musk-vivek-ramaswamy-h1b-visa-maga-immigration-what-to-know/> [<https://perma.cc/HP98-RLLU>].

30. Elena Moore et al., *Trump Taps Musk to Lead a 'Department of Government Efficiency' with Ramaswamy*, NPR (Nov. 12, 2024, at 09:03 ET), <https://www.npr.org/2024/11/12/g-s1-33972/trump-elon-musk-vivek-ramaswamy-doge-government-efficiency-deep-state> [<https://perma.cc/JSU8-BX5S>].

31. See Aaron Pellish, *Musk and Ramaswamy Defend Foreign Worker Visas, Sparking MAGA Backlash*, CNN (Dec. 27, 2024, at 08:20 ET), <https://www.cnn.com/2024/12/27/politics/elon-musk-vivek-ramaswamy-foreign-worker-visas> [<https://perma.cc/9BP9-K6ZF>].

32. See Gibson, *supra* note 2.

33. See Adam Wren & Holly Otterbein, *'Everyone Wants Him Out': How Musk Helped Boot Ramaswamy from DOGE*, POLITICO (Jan. 20, 2025, at 18:00 ET),

amongst conservative commenters, some of whom went as far as “calling the entire program a ‘scam’ run by Silicon Valley oligarchs.”³⁴ Ramaswamy’s comments, in part, are believed to be part of the reason he left DOGE before Trump took office in January 2025.³⁵ This type of attention could make the opportunity for H-1B reform, or visa reform related to entrepreneurship generally, ripe in the months and years to come. However, reforms suggested by the President and those in his orbit are unlikely to be in alignment with the suggestions made in this essay.³⁶ Instead, this essay will outline the reasons why a new visa program that prioritizes new entrepreneurial ventures over large technology companies is sorely needed in Section II, and further, provide policy suggestions for how to achieve that goal in Section III.

Lastly, the remainder of this work assumes that foreign workers desire to immigrate to the United States through employment visas to work for high-tech companies like emerging startups and established H-1B sponsors. In the past, this has been a safe assumption, given the United States’ dominance in entrepreneurship globally.³⁷ The best workers have wanted to work for the best new ventures, and those new ventures have largely resided in the United States.³⁸ However, the idea that foreign workers want to immigrate to the United States to work for tech companies has become less of a sure thing in recent years.³⁹ For

<https://www.politico.com/news/2025/01/20/doge-musk-helped-eject-ramaswamy-00199487> [<https://perma.cc/9Y8C-E2H6>].

34. See Rafael Bernal, *What to Know About H-1B Visas at the Center of Musk-MAGA Fight*, THE HILL (Dec. 30, 2024 at 18:02 ET), <https://thehill.com/business/5060579-h-1b-visas-musk-maga-trump-ramaswamy-bannon-loomer-krishnan-immigration/> [<https://perma.cc/FLS9-TWZF>].

35. See Wren & Otterbein, *supra* note 33.

36. As this article went to press, President Trump did, in fact, begin an overhaul of the H-1B visa program. Proclamation No. 10,973, 90 Fed. Reg. 46027 (Sept. 9, 2025); see also Michelle Hackman and Victoria Albert, *What to Know About Changes to the H-1B Visa Program*, WALL ST. J. (Sept. 23, 2025, 4:14 PM), <https://www.wsj.com/us-news/h1b-visa-changes-explained-45b818e9?msockid=39cd5dddede4665537504948ec6b67e4> [<https://perma.cc/JG2V-W6QW>].

37. See Catherine Clifford, *U.S. Remains Dominant Force in Global Entrepreneurship... For Now*, ENTREPRENEUR (Aug. 28, 2013), <https://www.entrepreneur.com/starting-a-business/us-remains-dominant-force-in-global-entrepreneurship/228128> [<https://perma.cc/4EP5-BLBj>] (discussing the United States’ historical lead in entrepreneurship, as well as emerging threats to maintaining that lead).

38. See *id.*; ESMT Berlin, *Beyond the Paycheck: Why Top Talents Choose Startups over Google*, SCITECHDAILY (Aug. 18, 2023), <https://scitechdaily.com/beyond-the-paycheck-why-top-talents-choose-startups-over-google/> [<https://perma.cc/Y75U-HHMM>].

39. See Rest of World Staff, *“I Need to Rethink my Future”: Tech Professionals on how They’re Coping with Trump’s Rapidly Shifting Immigration Changes*, REST OF WORLD (Mar. 20, 2025), <https://restofworld.org/2025/trump-immigration-policy-us-tech-talent-workforce/> [<https://perma.cc/987G-QATW>].

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example, quality tech companies are less concentrated in the United States than they have been in the past,⁴⁰ and further, the rhetoric around immigration has become far less positive in recent years.⁴¹ While these factors work against the case for accommodating additional business visa applicants each year, this essay does not address these issues, given the continuing robust demand for H-1B visas.⁴²

II. GROWTH VENTURES AND TALENT: HIRING, COMPENSATION, VISAS, AND JOB SECURITY

This Section addresses the core question motivating this essay: how does current immigration policy, namely through the H1-B program, relate to building a new entrepreneurial venture and scaling a maturing entrepreneurial venture? Given the significant expense of the H1-B process, and further, the uncertainty of success in obtaining an H1-B visa through a given year's lottery process, H1-B visas exist largely for companies with money to spend on the process and a lack of suitable domestic workers.⁴³ Importantly, the companies that fall into this category usually resemble publicly-traded technology companies, which in today's world are technology companies that are decades-old.⁴⁴ Mature private companies may also regularly utilize the H1-B process to hire workers, but again, financial resources and an ability to lose the lottery for a given worker are pre-requisites for these firms.⁴⁵

Once an H1-B visa is granted to a particular employee, the employee has the ability to work in the United States for the sponsoring employer.⁴⁶ However, the employee also faces some challenges presented by the terms of their H1-B visa with which domestic workers do not have to contend. Namely, an employee working on an H1-B visa is effectively tied to their employer, since workers only receive a sixty-day grace period to find new employment, change to another immigration status, or leave

40. See Kayla Zhu, *Mapped: The Biggest Tech Talent Hubs in the World*, VISUAL CAPITALIST (June 16, 2025), <https://www.visualcapitalist.com/mapped-the-biggest-tech-talent-hubs-in-the-world/> [<https://perma.cc/D268-ZVMD>].

41. See generally Caroline Nagel, *Immigration Policy in the Second Trump Administration: Restriction, Removal, and the Limits of MAGA Nativism*, GEOGRAPHICAL J., 01 May 2025, <https://doi.org/10.1111/geoj.70015> [<https://perma.cc/U7R8-AKFK>].

42. See *H-1B Lottery and Historical Data*, *supra* note 16.

43. See, e.g., Gibson, *supra* note 2.

44. See *id.*

45. See Cecilia Esterline, *Give Small Businesses a Special H-1B Allocation*, NISKANEN CTR. (Oct. 10, 2023), <https://www.niskanencenter.org/small-business-employees-need-a-special-allocation-in-the-h-1b-lottery/> [<https://perma.cc/RB7L-TRAQ>].

46. See Singh, *supra* note 9, at 52.

the United States after a termination of employment.⁴⁷ This requirement can create pressure for H1-B visa holders to work longer hours for lesser rewards, especially in situations where the visa holder feels their employment is tenuous.⁴⁸ In today's business environment, where tech firm layoffs are commonplace, this pressure is real for many H1-B visa holders.⁴⁹

The minimal sixty-day grace period for H1-B visa holders transitioning to new employment also serves as a reason for immigrants to possibly disfavor early-stage startups as their employer of choice. Since early-stage startups often have no proven revenue source and investor funding amounting to only months of expenses, there is a heightened risk that the H1-B holder's employer folds or lays them off, starting the sixty-day grace period.⁵⁰ For early-stage startups as employers, employees on an H1-B visa are also a less attractive option.⁵¹ Again, the main issues here from the employer side are the cost of submitting multiple visa applications on behalf of each prospective employee, and further, the risk that a key worker is unable to be hired if they are not selected through the lottery process.⁵² Instead of utilizing the H1-B process, early-stage

47. See *Options for Nonimmigrant Workers Following Termination of Employment*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 24, 2025), <https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/options-for-nonimmigrant-workers-following-termination-of-employment> [https://perma.cc/9HP5-EADW] (contemplating the sixty-day grace period provided to H1-B visa holders upon termination of employment).

48. See Drago, *supra* note 18, at 1063–65 (discussing conflicting evidence on whether H1-B visa holders truly receive lower wages, and further, discussing the role of the law in discouraging this practice); Jung S. Hahm, *American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests Under the New H-1B Visa Program*, 85 CORN. L. REV. 1673, 1698 (2000) (explaining that H-1B workers are vulnerable to employer exploitation because of their temporary visa status and weak program safeguards).

49. See generally Bobby Allyn, *Nearly 25,000 Tech Workers Were Laid Off in the First Weeks of 2024. Why Is That?*, NPR (Jan. 28, 2024, at 05:00 ET), <https://www.npr.org/2024/01/28/1227326215/nearly-25-000-tech-workers-laid-off-in-the-first-weeks-of-2024-whats-going-on> [https://perma.cc/CB48-HQKJ] (providing background on recent, significant layoffs by technology companies); Dan Gooding, *H-1B Visas Under Scrutiny as Big Tech Accelerates Layoffs*, NEWSWEEK (Aug. 1, 2025, at 13:26 ET), <https://www.newsweek.com/h1b-visa-immigrants-tech-jobs-impact-college-grads-2106392> [https://perma.cc/9RBF-CYLF] (explaining that even amid widespread tech-sector layoffs, employers continue filing new H-1B applications, underscoring job-security pressures for visa holders).

50. See generally Elizabeth Pollman, *Startup Failure*, 73 DUKE L.J. 327, 327–28, 335–36, 341 (2023) (explaining the likelihood and subsequent consequences of failed startups).

51. See Todorov, *supra* note 4.

52. See *id.*; Jeremy Neufeld, *Talent Recruitment Roulette: Replacing the H-1B Lottery*, INST. FOR PROGRESS (Jan. 17, 2025) <https://ifp.org/h1b/> [https://perma.cc/UJ8H-ANDX]

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startups are likely to favor post-graduation programs like OPT to hire new graduates for a try-out.⁵³ Given that OPT can last for up to three years for recent graduates with a STEM degree,⁵⁴ it provides the early-stage company with the ability to try out a worker and have three chances at the H-1B lottery process,⁵⁵ if the individual contributor proves to be an asset to the emerging company.⁵⁶

Another significant drawback to current immigration policy as it relates to early-stage startup workers is the likely negative impact it has on H-1B and OPT employee compensation.⁵⁷ To understand this issue fully, one must first have a grasp of how employees of emerging ventures are typically compensated. New entrepreneurial ventures typically have limited cash on hand for two reasons.⁵⁸ First, investors limit the amount of capital they will invest in a new venture to the amount of money the venture's leadership believes it needs to achieve its next milestone (e.g., launching a product.)⁵⁹ This allows for investors to ensure the company

(noting that the H-1B lottery forces employers to over file, wasting over \$1.9 billion annually and risking key hires).

53. See Alice Armitage et al., *Startups and Unmet Legal Needs*, 2016 UTAH L. REV. 575, 590 (2016) (discussing the use of Optional Practical Training by hiring startups).

54. *Id.*

55. Killawi, *supra* note 12, at 142; see *Extension of Post Completion Optional Practical Training (OPT) and F-1 Status for Eligible Students Under the H-1B Cap-Gap Regulations*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 17, 2025), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations/extension-of-post-completion-optional-practical-training-opt-and-f-1-status-for-eligible-students> [https://perma.cc/397Y-42VT] (explaining that because employers may not file an H-1B cap-subject petition more than six months before the start date, the earliest filing date is April 1 for the following fiscal year, effectively giving an OPT worker one opportunity per year for H-1B sponsorship).

56. See *Optional Practical Training (OPT) for F-1 Students*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 25, 2024), <https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/optional-practical-training-opt-for-f-1-students> [https://perma.cc/45U6-H6MC] (detailing how students on OPT can work in a STEM-related job or field tied to their degree, and how employers have the opportunity to file H-1B petitions if the individual meets H-1B criteria).

57. See Stuart Anderson, *New Trump Immigration Policy: Ending the H-1B Visa Lottery*, FORBES (July 21, 2025, at 13:02 ET), <https://www.forbes.com/sites/stuartanderson/2025/07/21/new-trump-immigration-policy-ending-the-h-1b-visa-lottery/> [https://perma.cc/9P5S-9Z5Y] (noting that replacing the lottery with a salary-based ranking system would disadvantage H-1B applicants and recent graduates relying on OPT).

58. See Rachel Landy, *Downstreaming*, 65 B.C. L. REV. 1251, 1277 (2024) (“The average ‘runway’ for a startup (i.e., the length of time it has before it runs out of money) is twelve to eighteen months.”).

59. See Ryan A. Ashburn, Comment, *Venture Capital's ESG Problem*, 58 U. RICH. L. REV. 513, 523 (2024) (describing the milestone and funding process between venture capitalists and startups).

is making adequate progress before risking additional capital.⁶⁰ Second, new ventures are unlikely to be immediately profitable because they reinvest any profits into the growth of the company, meaning the company chooses to spend any and all revenue on things like inventory, hiring new employees, or research and development rather than distributing that income to investors.⁶¹

Both of these factors mean that early-stage startups rarely have the capital to compensate an employee with the same level of cash today when compared to a more mature company.⁶² Thus, early-stage startups need to find another avenue through which to close the compensation gap, otherwise, they will never be able to hire the best and brightest talent.⁶³ This is where the concept of equity compensation comes into play.⁶⁴ To compete with large companies for the best talent, new ventures offer employees limitless financial upside in the form of equity ownership in the new venture.⁶⁵ In addition to the employee's salary and other benefits, early-stage startup employees receive shares of common stock in their employer, which have the potential to grow in value during the time the employee works for the company.⁶⁶

Shares of common stock are valuable to the employee because they represent unlimited financial upside, once the company has paid back creditors and any investors with preferred dividends.⁶⁷ This is because

60. *See id.*

61. *See generally* PHIL KNIGHT, *SHOE DOG* (2016) (recounting the history of Nike from its start-up days).

62. *See* Thomas A. Smith, *The Zynga Clawback: Shoring Up the Central Pillar of Innovation*, 53 SANTA CLARA L. REV. 577, 607 (2013) (stating that startups make up for lower compensation with equity grants to employees).

63. *See* Calvin Croskey, *How to Adapt Your Compensation Philosophy as Your Company Grows*, SEQUOIA: FOREWORD (Oct. 15, 2024), <https://www.sequoia.com/2024/10/compensation-philosophy-strategy/> [<https://perma.cc/SK5Q-AMHG>] (explaining the different phases and considerations for restructuring compensation for start-ups).

64. *See* Smith, *supra* note 62, at 606–07.

65. *See* Charles R. Korsmo, *Venture Capital and Preferred Stock*, 78 BROOK. L. REV. 1163, 1220 (2013) (“While in most industries, equity compensation is generally limited to high-level executives—who may be thought to possess substantial financial sophistication or who may benefit from the counsel of those who do—it is quite common in VC-financed startups for all but the most menial of employees to receive substantial compensation in the form of equity.”).

66. *See generally* David Nows & Jeff Thomas, *Delaware’s Public Benefit Corporation: The Traditional VC-Backed Company’s Mission-Driven Twin*, 88 UMKC L. REV. 873, 887–89 (2020) (describing the equity compensation model for employees in venture capital backed startups); Brian Broughman & Jesse M. Fried, *Carrots and Sticks: How VCS Induce Entrepreneurial Teams to Sell Startups*, 98 CORN. L. REV. 1319, 1327 (2013).

67. *See generally* Juliet P. Kostritsky, *One Size Does Not Fit All: A Contextual Approach to Fiduciary Duties Owed to Preferred Stockholders from Venture Capital to Public*

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common stockholders are the residual claimants of the company, meaning any value remaining after the creditors and investors are paid back lies with the common stockholders.⁶⁸ Thus, common stockholders stand to build immense wealth if the company becomes the next billion-dollar company.⁶⁹ However, common stockholders hold something of little value if the company does not experience significant growth. Once an employee quits or is terminated, the restricted stock purchase agreement which granted the employee the shares of company stock contains both a vesting schedule and a repurchase option in favor of the company.⁷⁰ These contractual mechanisms work in unison to ensure that companies share the increasing value of the enterprise with those who have furthered the company's prospects, while also allowing for the employer to repurchase all stock granted to the employee upon their hire.⁷¹

More specifically, vesting schedules allow for employees to earn the right to the economic value of the shares they have been granted over time.⁷² Thus, the contract granting shares will stipulate when the shares of stock become vested, meaning their value has been earned by the employee.⁷³ This vesting typically occurs with a cliff and then periodic vesting.⁷⁴ Cliff vesting refers to the idea that no shares of stock will vest until an employee has completed a minimum period of service, usually one year.⁷⁵ Cliffs are commonly used in vesting provisions to ensure that an employee makes a significant enough contribution to the new company's growth before earning the right to any appreciation of the company's shares.⁷⁶ Usually, twenty-five percent of the shares granted to

Preferred to Family Business, 70 RUTGERS U. L. REV. 43, 92–98 (2017) (describing that common stock is the residual claimant and using case law examples to demonstrate how it can create conflict with other classes of stockholders).

68. See, e.g., Robert Anderson IV, *A Property Theory of Corporate Law*, 2020 COLUM. BUS. L. REV. 1, 71 (2020) (describing common stockholders as residual claimants).

69. See *id.*

70. See Jeff Thomas et al., *Democratizing Entrepreneurship: Online Documents, Tools, and Startup Know-How*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. L. 193, 222–24 (2017) (sharing a sample contract provision).

71. See *id.*

72. See Denise Glagau, *To Pay or Not to Pay? Dividend and Dividend Equivalent Payments on Employee Equity Awards*, 45 CORP. TAX'N 23, 23–24 (2018) (describing the value of restricted stock to employees).

73. See *id.*

74. See Alexander J. Civetta & Garrett T. Galvin, *Stock Vesting in Startup Companies*, MINTZ (Mar. 15, 2022), <https://www.mintz.com/insights-center/viewpoints/2022-03-15-stock-vesting-startup-companies> [<https://perma.cc/V7LD-SNDF>] (discussing the typical vesting provisions found in restricted stock grants for startup founders).

75. Cf. *id.* (discussing typical time-based vesting schedules for startup founders).

76. Cf. *id.* (“To address this concern, the initial grant of shares to each founder is often made subject to ‘vesting,’ which links a founder’s right to keep such shares (or some portion thereof) to their continued service with the company.”).

an employee will vest upon the one-year cliff contained in the contract.⁷⁷ After the cliff has been reached, the remaining shares typically vest on a monthly or quarterly basis over the next three years, which correspond with years 2 to 4 of the employee's employment with the company.⁷⁸ This more regular vesting schedule reflects the fact that the employee has now met the minimum contribution required to receive value from the equity, and further, should have the ability to lock in the value of their contributions on a more regular basis moving forward.⁷⁹

As shares of company stock vest for the employee, the employee retains the right to the fair market value of those shares.⁸⁰ Employees cash out on the growth on these vested shares on termination, when the company exercises a repurchase option to buy back vested shares from the employee at the current fair market value of those shares.⁸¹ In startups where the value of the enterprise is ever-increasing, the growth between the employee's purchase price of the stock (typically pennies per share) and the new fair market value can be significant. For any unvested shares of stock held by the employee, the company retains the right to repurchase those shares at termination as well, but typically at the low cost the employee paid for them on their hire date.⁸² In the case of unvested shares, the employee breaks even when the value of the company has grown.⁸³

These contractual mechanisms, in tandem, allow for early-stage startups to share in the growth of the company with employees during the period of time in which they are making contributions, then, repurchase the shares of stock upon the employee's departure.⁸⁴ From there, the company can rehire the departing employee's role and re-issue those same shares of stock to a new employee, this time with the then-current fair market value as the purchase price.⁸⁵ From here, the cycle begins anew, allowing for the second employee to financially benefit from

77. *See id.* (discussing typical time-based vesting schedules for startup founders).

78. *See id.* (discussing typical time-based vesting schedules for startup founders).

79. *Cf. id.* ("To address this concern, the initial grant of shares to each founder is often made subject to 'vesting,' which links a founder's right to keep such shares (or some portion thereof) to their continued service with the company.").

80. *See generally* Charles A. Wry Jr., *Stock Options and Restricted Stock*, MORSE L. (Feb. 15, 2018), <https://www.morse.law/news/stock-options-restricted-stock/> [<https://perma.cc/UR2L-LJ56>] (discussing vesting and the value restricted stock provides employees).

81. *See id.*

82. *See id.*

83. *See generally id.*

84. *See* Civetta & Galvin, *supra* note 74; Wry Jr., *supra* note 80.

85. *See generally* Civetta & Galvin, *supra* note 74; Wry Jr., *supra* note 80.

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the contributions they have made to the company's growth, subject to vesting restrictions and the repurchase agreement.⁸⁶

Lastly, in cases where the fair market value of the company's stock has risen to a level where it becomes prohibitively expensive for new employees to purchase the shares upon hire, the company can grant the employee stock options instead of the shares of common stock.⁸⁷ Stock options essentially act as a coupon for the employee to purchase shares of company common stock at a later date, at the fair market value of the stock on the date the option was granted.⁸⁸ Thus, if the price of shares goes up, for example, from \$5 per share to \$15 per share, the employee will exercise the option. This allows the employee to pay \$5 for something that is really worth \$15. However, if the company's share price decreases, the employee simply will not exercise the option, receiving no benefit or loss. Options are limited in how long they may remain open to exercise by employees by the Internal Revenue Service, providing a ten-year limit for most employees, and a stricter five-year limit for shareholders owning ten percent or more of a company's stock.⁸⁹ Lastly, stock options are typically subject to the same vesting and repurchase restrictions as common stock.⁹⁰

These equity compensation structures for startup employees relate to the H1-B visa framework in important ways. First, the time limits placed on H1-B holders by their visa⁹¹ can severely curtail their ability to benefit from equity compensation in the new venture setting. For example, a worker on the standard three-year H1-B visa⁹² will not benefit from the full amount of an equity compensation grant. Instead, only 75% of the granted shares of common stock will vest before the H1-B visa expires, costing the employee the value of both 25% of their shares of stock, as well as a full year of the company's growth (and its impact on the company's share price).⁹³ Further, workers on an H1-B visa are

86. See generally Civetta & Galvin, *supra* note 74; Wry Jr., *supra* note 80.

87. See generally Anat Alon-Beck, *Unicorn Stock Options—Golden Goose or Trojan Horse?*, 2019 COLUM. BUS. L. REV. 107, 146–48 (2019).

88. See *id.* at 127–29 (describing how stock options work).

89. A.B.A. Subcomm. on Exec. Comp., *Executive Compensation: A Road Map for the Corporate Advisor*, 40 BUS. LAW. 219, 272–74 (1984) (describing the IRS rules related to stock option duration).

90. See *id.* at 275 (“Any other restriction may be imposed on the grant of an incentive stock option if not inconsistent with the [Internal Revenue Code]. For example, the issuing corporation . . . may obtain a right to repurchase these shares in the event of termination of employment, or a general right of first refusal on any sale of the shares.”).

91. See Bernal, *supra* note 34 (explaining H-1B visas are initially granted for a three-year period).

92. See Bernal, *supra* note 34.

93. See *supra* text accompanying notes 76–78.

actively discouraged from working at early-stage ventures by the current visa framework. This is because many early-stage companies may take longer than three years to experience significant growth.⁹⁴ In these cases, the visa holder will not work for the company long enough to benefit from a later spike in enterprise value. Thus, these workers would be left to forgo a significant chunk of compensation in the new venture setting, and would be better served pursuing employment with a more mature company that can offer a higher salary.

III. POLICY GAPS AND PROPOSED NEXT STEPS

H1-B visas exist to provide United States employers with skilled foreign workers, when no suitable American workers are available for the job.⁹⁵ While not explicitly stated, another driving force behind the program is to allow for economic growth generally through these skilled workers' contributions to U.S. companies.⁹⁶ In many respects, these goals are at odds with one another. This is because mature technology companies are the ones most likely to suffer from a dearth of suitable American workers, as evidenced by those companies being the most active in pursuing H1-B workers each year.⁹⁷ However, these mature technology companies are not the main contributors to economic growth in the United States; instead, new business startups claim that title.⁹⁸ This essay argues that for immigration policy to be more startup-friendly, a new type of visa specific to founders and early-stage startup employees is required.

The reasons for a new program like the one proposed above are numerous. Among them are the noble goals of economic growth, fostering a greater number of successful new ventures, and providing permanence

94. See *How Long Do Startups Take to Become Profitable?*, NINE TWO THREE (Aug. 14, 2023), <https://www.ninetwothree.co/blog/how-long-do-startups-take-to-become-profitable> [https://perma.cc/3FKT-4B5J].

95. See Maxwell Blum, *Equal Protection, Preemption, and the Need for Uniform Regulation of Nonimmigrant Aliens' Ability to Obtain Professional Licenses*, 16 U. PA. J. BUS. L. 631, 635 (2014) ("As a policy matter, H1-B and other temporary work visa programs are supported because employers claim that they cannot find suitable domestic-resident candidates for open positions.").

96. See *The H-1B Visa Program and Its Impact on the U.S. Economy*, AM. IMMIGR. COUNCIL (Aug. 1, 2024), <https://www.americanimmigrationcouncil.org/fact-sheet/h1b-visa-program-fact-sheet/> [https://perma.cc/WXX6-DWSB].

97. See Gibson, *supra* note 2.

98. See *The Startup Act*, EWING MARION KAUFFMAN FOUND. (Sep. 27, 2013), <https://www.kauffman.org/resources/policy/the-startup-act/> [https://perma.cc/W943-4XU2] ("Virtually all of the growth in U.S. jobs has been driven by the formation of firms less than five years old, and these new firms have been disproportionately responsible for commercializing the cutting-edge innovations that characterize modern life.").

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for a larger skilled entrepreneurial workforce. Unfortunately, the H1-B visa program does not do a fantastic job of achieving these goals currently. This is because large technology companies are often looking for stopgap solutions to fill difficult-to-fill job titles, rather than recruiting talent with the intent of developing it to flourish in the United States permanently.⁹⁹ Those company-level goals are reflected in mature technology company business practices like demanding work environments and a culture of layoffs for low performers.¹⁰⁰ H1-B visas, in some cases, create a way for tech companies to hire vulnerable workers looking to stay in the United States.¹⁰¹

Alternatively, a startup-specific visa can provide a path for skilled foreign workers to enter the United States and permanently contribute to a culture of innovation. Studies repeatedly have shown that skilled foreign workers are “disproportionately innovative” when compared to other groups of workers.¹⁰² Thus, visa policy should favor allowing those who contribute to a better society through innovation to build a permanent life in the United States. This essay advocates for visa criteria for a proposed startup visa that would encourage legitimate business formation and growth, while attempting to combat fraudulent applications to the extent possible. Thus, for startup founders, this essay proposes that any founder who can demonstrate that their new venture has six months of operating capital would be eligible to apply for the founder startup visa. This can be done through the writing of a brief business plan that demonstrates the company’s anticipated expenses, and further, through a proof of funds. Importantly, many new ventures have rather low operating expenses at their initial stages, so the capital hurdle to apply is lower than one might expect.¹⁰³

99. See Julia Ingram, *Does the Tech Industry Really Need So Many Workers on H-1B Visas?*, MSN (Jan. 13, 2025), <https://www.msn.com/en-us/money/careersandeducation/does-the-tech-industry-really-need-so-many-workers-on-h-1b-visas/ar-BB1rogdq> [<https://perma.cc/L2WQ-SR9F>] (discussing the significantly higher number of layoffs made by United States tech companies as compared to the number of H1-B hires each year).

100. See *id.*

101. See Daniel Costa & Ron Hira, *Tech and Outsourcing Companies Continue to Exploit the H-1B Visa Program at a Time of Mass Layoffs*, ECON. POL’Y INST.: WORKING ECON. BLOG (Apr. 11, 2023, at 15:41 ET), <https://www.epi.org/blog/tech-and-outsourcing-companies-continue-to-exploit-the-h-1b-visa-program-at-a-time-of-mass-layoffs-the-top-30-h-1b-employers-hired-34000-new-h-1b-workers-in-2022-and-laid-off-at-least-85000-workers/> [<https://perma.cc/UR8Q-CYTD>].

102. See Peter H. Schuck & John E. Tyler, *Making the Case for Changing U.S. Policy Regarding Highly Skilled Immigrants*, 38 FORDHAM URB. L.J. 327, 327 (2010).

103. See, e.g., Guy Kawasaki, *The Art of Bootstrapping*, GUY KAWASAKI (Jan. 26, 2006), https://guykawasaki.com/the_art_of_boot/ [<https://perma.cc/C9R7-Z9XA>] (suggesting that tech startups begin as a service business to generate income and reduce capital needs).

Secondly, post-application screening criteria would be required, and would mirror the processes for other current visa programs. For example, the H1-B visa process requires an interview of visa applicants, where immigration officials ask the applicant questions in an attempt to ensure the applicant has the requisite skills and a legitimate job opportunity in the United States.¹⁰⁴ A similar interview process could be used for a startup visa, to determine if the proposed company is sufficiently legitimate to warrant an applicant's admission to the United States. Assuming an applicant passes through this process, their visa lasts for as long as the business is operational, and further, provides a one-year grace period to transition to employment or a new company launch, at which point the visa continues on indefinitely again. This extended grace period would be beneficial to both applicants and the United States, since the sixty-day grace period involved with H1-B visa holders is a true threat to a visa holder's ability to remain in the country if their employment lapses.¹⁰⁵ In the startup context, this is particularly important because first-time founders have an eighteen percent success rate, and the odds of success for founders increase with both experience and age.¹⁰⁶ It often takes time and repetition to have success in entrepreneurship.¹⁰⁷ Sending away key contributors before they realize such success is nonsensical, a view in which this extended grace period reflects.

Permanence is the key characteristic needed in any startup-specific visa, and a visa that provides permanence in the form of a long grace period between ventures is proposed here. However, this proposal goes further by suggesting a path to permanent residence for visa holders who meet certain criteria. Policymakers can draw inspiration from past proposals by scholars to revamp H1-B and EB series visas, like the Job Creator Visa contemplated by Peter H. Schuck and John E. Tyler in a 2010 law review article.¹⁰⁸ The Job Creator Visa proposal is targeted

104. See, e.g., Mani Karthik, *Top H1B Visa Interview Questions & How to Answer Them*, MANI KARTHIK (Dec. 2, 2024), <https://manikarthik.com/blog/usa-visa-interview-questions/> [<https://perma.cc/77E9-BHEH>] (discussing the most typical H1-B visa interview questions asked to applicants).

105. See *Options for Nonimmigrant Workers Following Termination of Employment*, *supra* note 47.

106. Anastasia Belyh, *The Ultimate List of Startup Statistics for 2025*, FOUNDERJAR (Feb. 14, 2023), <https://www.founderjar.com/startup-statistics/> [<https://perma.cc/AS7E-CRJP>] (providing statistics on startup founder success).

107. See *id.*

108. Schuck & Tyler, *supra* note 102, at 357 ("One better approach might be to remove the investment criteria from the Start Up Visa and focus on jobs created. For instance, Robert E. Litan proposes allowing H-1B or student visa-holders who establish a business to obtain another temporary visa. This visa could be extended if the business hires at least

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toward startup founders specifically and would provide clear pathways for entrepreneurs to launch a business and remain in the United States permanently by creating at least ten jobs.¹⁰⁹ While job creation is one relevant way to establish permanence, there are others that are also worthy of consideration. For example, a startup visa could consider criteria like dollars invested in an enterprise, revenue generated by the company, economic impact of the company's operations, or positive societal impact (as measured by an objective third-party certifier¹¹⁰) as metrics that could make a startup founder worthy of permanent residence after a temporary visa is granted.

Lastly, any startup visa program should extend to significant equity holder employees in any qualifying startup business. As discussed in Section II of this essay, the current H1-B visa framework is largely incompatible with typical compensation practices in growth ventures, including restricted stock or stock options grants that are subject to a four-year vesting schedule.¹¹¹ The above proposal solves this problem by providing the ability to work in the United States for as long as one remains employed with a startup, and further, by providing a one-year grace period in the event of termination. This proposal provides the ability for visa holding employees to take full advantage of equity grants subject to vesting, much like their American counterparts can. Additionally, it provides the opportunity for the startup employee to take any windfall they receive as an equity holder and reinvest it in a new startup of their own in the United States, to remain in the country on the same visa indefinitely. Research shows that former employees of entrepreneurial ventures are more likely than others to start their own company.¹¹² Immigration policy that encourages these employees, with capital to invest in a new business, to become serial entrepreneurs who will contribute to economic growth on an ongoing basis should be favored, and this proposal does just that.

one American non-family resident. Litan proposes that the visa become permanent if the business passes a certain job threshold (e.g., five or ten workers). An alternative strategy would be to provide such a provisional visa to job creators even if they are not already in the United States on H-1B or student visa.”).

109. *See id.*

110. *See, e.g., Measuring a Company's Entire Social and Environmental Impact.*, B LAB GLOB., <https://www.bcorporation.net/en-us/certification/> [<https://perma.cc/7DJL-CQQN>] (last visited Sep. 15, 2025) (discussing the process for becoming a Certified B Corporation, which speaks to an entity's social benefits generated through its activities).

111. *See supra* Section II.

112. *See generally* Daniel W. Elfenbein et al., *The Small Firm Effect and the Entrepreneurial Spawning of Scientists and Engineers*, 56 *MGMT. SCI.* 659 (2010) (discussing evidence-based theory of relationship between small firm employment and entry into self employment).

CONCLUSION

Given the dominance of mature technology companies in obtaining H1-B visas for employees,¹¹³ the United States is due for a startup-specific visa for both founders and employee equity holders in early-stage companies. This visa would meaningfully differ from alternatives in that it provides the ability for both classes of startup workers to remain in the United States indefinitely while working for an active new venture. Further, it would provide a one-year grace period for any worker who is terminated at their startup, or whose startup goes out of business. Given the regular churn in the workforce of new ventures,¹¹⁴ this extended grace period is critical to retain the skilled workers brought to the United States through the proposed startup visa. New business ventures contribute to the vast majority of all economic growth in the United States,¹¹⁵ and this proposed startup visa would fuel that growth even further.

113. See Gibson, *supra* note 2.

114. See Belyh, *supra* note 106 (discussing startup failure rates).

115. *The Startup Act*, *supra* note 98 (“Virtually all of the growth in U.S. jobs has been driven by the formation of firms less than five years old, and these new firms have been disproportionately responsible for commercializing the cutting-edge innovations that characterize modern life.”).