Halting the Deportation of Businesses: A Pragmatic Paradigm for Dealing with Success

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ABSTRACT: Presently, there are estimated to be over 20,000 undocumented immigrants with six figure or higher annual incomes, and many of them are small business owners that provide valuable goods and services, pay taxes, and employ thousands of individuals who are lawfully authorized to work in the United States. Every time one of these individuals is removed from the country, the removal in effect acts to deport the immigrant’s business as well. This article proposes the creation of an entirely new visa category for certain undocumented entrepreneurs to resolve this issue. Part I of the article briefly discusses the economic benefits of immigration, and focuses on the specific benefit of certain high-value undocumented immigrant business creators. Part II then analyzes the economic and social policies behind the current immigrant and non-immigrant investor visa programs, noting that the purpose of the proposed visa coincides almost entirely with the existing legal regime with the exception of its availability to certain undocumented immigrants. While recognizing and discussing the arguments against rewarding unlawful presence, the article concludes that for economically-oriented visa categories, economic concerns have and should continue to be given priority over social ones. Part III proposes certain profitability, participation, employee generation and tax compliance metrics that would need to be satisfied to ensure visa eligibility, noting specifically the attendant issues of corporate structuring. By creating such a visa, U.S. immigration law would incentivize and reward successful entrepreneurial activity, and by doing so strongly benefit the U.S. economy and establish a mechanism that would allow some of the most successful and talented immigrants to legalize their immigration status when they would otherwise be unable to do so.
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"Unless the stream of their importation can be turned from this to other Colonies, they will soon so outnumber us, that all the advantages we have will not (in my Opinion) be able to preserve our language, and even our government will become precarious."1

—Benjamin Franklin

"Everywhere immigrants have enriched and strengthened the fabric of American life."2

—John F. Kennedy

INTRODUCTION

Inhabitants of the United States have had opposing views on immigration dating back to colonial times.3 The actors have changed over the decades, but the arguments remain much the same. Proponents of increased immigration have argued for a larger labor pool, family unity and humanitarian concerns,4 while opponents have argued about the costs of immigrants through direct and indirect government aid and public service programs, the displacement of native employees with cheaper foreign labor and the concern of rewarding “illegal” behavior with the right to reside legally in the United States.5 These tensions traditionally ebb and flow with

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1 Franklin to Peter Collinson, May 9, 1753, in The Papers of Benjamin Franklin, 4:484-85 (New Haven 1959) (cited in Ralph Frasca, “To Rescue the Germans out of Sauer’s Hands” Benjamin Franklin’s German Language Printing Partnerships, 121 THE PA. MAGAZINE OF HISTORY AND BIOGRAPHY 4, at 343 (1997)).
2 JOHN F. KENNEDY, A NATION OF IMMIGRANTS 3 (rev. 1964).
3 See John Higham, American Immigration Policy in Historical Perspective, 21 LAW & CONTEMP. PROBS. 213-14 (1956) (noting the inevitable tension created between a country founded on freedom from discrimination and any type of restrictionist immigration policy which must, by its sheer existence, discriminate).
5 See Lamar Smith, “Immigration: Many Questions, A Few Answers,” July 30, 2007 available at http://www.heritage.org/Research/Immigration/hl1046.cfm (highlighting the differences between documented and undocumented immigrants, the costs associated with undocumented immigrants, and the potential costs that would be associated with any
the overall condition of the U.S. economy. As a result, immigration law has largely (r)evolved over time depending on the economic condition of the United States.

This article does not offer any suggestions or curative provisions for the wider immigration debate, but it does propose a new paradigm to change the issue debated for a certain class of undocumented immigrants from one of immigration status to one of success. The title of this article is something of a misnomer. The United States does not have the ability to “deport” businesses as they are simply the tangible manifestations of a legal fiction sanctioned by states to enhance commerce. However, in a very real
sense many businesses are deported when the owner of the company is removed from the country. In any economy, but especially in a struggling one, it does not make any fiscal sense to remove individuals from the country who are generating substantial taxable revenue and employing hundreds to thousands of lawfully authorized employees.\textsuperscript{9}

This article proposes the creation of a new class of entrepreneurial visa that is specifically targeted at those successful immigrant entrepreneurs who have entered without inspection or who have overstayed a visa. Part I of this article discusses the economic effect of immigrants, and more specifically, immigrant entrepreneurs on the U.S. economy. Part II of this article explores the historical role of immigrant investors in the United States, and Part III proposes the creation of a new class of visa to specifically encourage and reward successful entrepreneurs while outlining certain criteria necessary for visa eligibility.

I. THE NUMBERS BEHIND IMMIGRANT ENTREPRENEURS

A. The General Economics of Immigration

The costs and benefits of immigration have long been debated. Economists have devised many models for analyzing the net benefit or burden of immigration,\textsuperscript{10} and unsurprisingly, there is no definitive answer. Depending on the different methods of modeling and forecasting used, immigration may represent anywhere from a net cost to the United States of

\textsuperscript{9} It is estimated that approximately 20,000 undocumented immigrants earn six-figure or higher salaries. \textit{See} John Buchanan, \textit{Illegal Immigrants Grown Rich Fret over U.S. Deportation Laws}, Reuters (Feb. 6, 2008), available at http://www.reuters.com/article/domesticNews/idUSN2533661620080206 (noting that, though difficult to ascertain, there may be up to 20,000 undocumented immigrants in the United States earning over $100,000 per year). It is also well-documented that immigrants are consistently more entrepreneurial than non-immigrants. Rafael Efrat, \textit{Immigrant Entrepreneurs in Bankruptcy}, 82 AM. BANKR. L.J. 693, 695 (2008); Robert W. Fairlie, \textit{Kauffman Index of Entrepreneurial Activity National Report 1996-2005} (2006), available at http://www.kauffman.org/uploadedFiles/KIEA_national_052206.pdf (noting that approximately 350 out of every 100,000 immigrants started businesses per month in 2005 compared to only 280 out of 100,000 native born Americans).

\textsuperscript{10} See George J. Borjas, \textit{The Labor Demand Curve is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market}, 118 Q. J. OF ECON., No. 4 at 1335-74 (concluding that immigrant labor decreases wages in the American labor pool) (June 2003); \textit{but see} JAMES P. SMITH AND BARRY EDMONSTON, EDs., \textit{THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION} 220 (1997) (noting that immigrants have a very small impact on wages in the American labor pool).
$42.5 billion per year\textsuperscript{11} to a net benefit of $37 billion per year.\textsuperscript{12} These figures are inclusive of all immigrants meaning that they represent the economic effects of documented immigrants and nonimmigrants as well as undocumented immigrants.\textsuperscript{13}

However, even within those states that have been most negatively affected by immigration, one can clearly see that different types of immigrants affect the receiving populations differently.\textsuperscript{14} As might be expected, low-skilled immigrants (documented or otherwise) present the most costly (or least beneficial) segment of the immigrant community to the receiving country.\textsuperscript{15} These low-income, low-skilled (documented or otherwise) immigrants have been shown to place a large burden on the U.S. economy.\textsuperscript{11}

\textsuperscript{11} Donald Huddle, The Cost of Immigration, Carrying Capacity Network Washington, DC, (rev. Jul. 1993). The underlying economic assumption made in this study have been heavily criticized. See, Passel, infra note 77.

\textsuperscript{12} See White House Council of Economic Advisers, Immigration’s Economic Impact, Washington, DC: Executive Office of the President, The White House, June 20, 2007, at 3 (noting that using a simple economic model that likely underreports the actual benefits immigrants provide, the current net benefit provided by immigrants is approximately 0.28% of GDP, approximately $37 billion per year. Immigration also appears to positively impact wages and salaries in the U.S. of at least 90% of the native born population. See G. Ottaviano & G. Peri, Rethinking the Effects of Immigration on Wages, (Working Paper No. 12497), Cambring, MA: National Bureau of Economic Research, at 34 (August 2006).

\textsuperscript{13} See Jeffrey S. Passel & D’Vera Cohn, Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow, Washington, DC: Pew Hispanic Center, October 2008, 1 (noting that there were approximately 11.9 million undocumented immigrants residing in the United States as of March 2008 which is approximately 4% of the U.S. population). Undocumented immigrants are those who do not have permission to reside in the United States such as naturalized citizens, lawful permanent residents, temporary legal residents, temporary protected status immigrants and/or refugees. The total size of the undocumented immigration population may be decreasing; however, it is clear that the rate of growth of such population has fallen dramatically. Id. at 5 (noting that average annual growth has slowed from approximately 525,000 for the years 2000-2005 to 275,000 for years 2005-2008); see also N.C. Aizenman, Data Show Big Dip in Migration to the U.S., WASH. POST, Sept. 23, 2008, at A19 (hypothesizing that the slowdown in immigration appears to be driven primarily by the ailing economy); see also Mariano Castillo, Mexican Immigration to U.s. Off 40 Percent, Study Finds, CNN.com, July 22, 2009, available at http://cnn.com/2009/WORLD/americas/07/22/mexico.immigrants/index.html.

\textsuperscript{14} See Robert Rector & Christine Kim, The Fiscal Cost of Low-Skill Immigrants to the U.S. Taxpayer, THE HERITAGE FOUND., Special Report #14 (May 22, 2007), available at http://www.heritage.org/research/immigration/sr14.cfm (arguing that low-skill immigrants represent a net annual cost of approximately $89 billion); see also Giovanni Peri, Immigrants, Skills and Wages: Measuring the Economic Gains from Immigration, 5 IMMIGR. POL’Y IN FOCUS 3, at 6-7 (2006) (noting that immigrants with higher education, and advanced skills generally increase productivity at higher rate than other immigrants).

\textsuperscript{15} In fact the low-skilled documented immigrants present the greatest cost as they are eligible for many federal and state assistance programs after 40 qualifying quarters of work or naturalization. See PRWORA, 110 Stat. 2105 § 402(a)(1,2); see also id.
otherwise) laborers also typically create a negative fiscal impact on the local state economy by receiving more state-provided benefits than they contribute in taxes.\textsuperscript{16} Studies have shown that while even immigration of this kind typically increases overall societal wealth by reducing the cost of goods and labor,\textsuperscript{17} the immigration of low-skilled laborers generally provokes two fears: that immigrants will adversely affect the domestic labor market, and that they will increase the fiscal burden of native-born residents.\textsuperscript{18}

As to the argument that immigration negatively affects the wages of native-born workers, there is much literature on the topic.\textsuperscript{19} Unsurprisingly perhaps, the results are conflicting depending on certain assumptions and simplifications used in the economic models.\textsuperscript{20} The majority seems to have

\textsuperscript{16} See Jena Baker McNeill, \textit{Amnesty as an Economic Stimulus: Not the Answer to the Illegal Immigration Problem}, THE HERITAGE FOUND., May 18, 2009, available at http://www.heritage.org/Research/Immigration/wm2451.cfm (arguing against any legalization program for undocumented immigrants while conflating undocumented immigrants with low-skilled immigrants by arguing that immigrants households headed by an individual with a high school diploma or less received $30,160 per household in direct benefits, means-tested benefits, and education and other services in 2004).


\textsuperscript{18} See Michael J. Trebilcock, \textit{The Law and Economics of Immigration Policy}, 5 AM. L. \\ & ECON. REV. 271, 277-78 (2003) (noting the results of surveys conducted by Julian Simon that highlight the discrepancies between the economic benefits brought about by immigrants and the natives attitudes desire to reduce immigration levels due to fears of adverse effects on wages and increased tax burdens); see also JULIAN SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION 377-84 (2nd ed. 1999).


\textsuperscript{20} See GEORGE J. BORJAS, HEAVEN’S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY 68 (1999) (observing that:

\begin{quote}
[the various studies] offer something for everyone. If one believes that immigrants adversely affect native economic outcomes, the evidence reported in some reputable academic publications substantiates that claim. If, in contrast, one believe (sic) that immigrants do not change native economic outcomes—or perhaps even improve them—there are equally reputable studies substantiating that claim." (citations omitted; emphasis in original)).
\end{quote}
reached a consensus that, whether positive or negative, immigration’s overall impact on wages is small, but if immigration’s impact on native wage levels is in fact quite small, from whence come the vociferous arguments regarding decreases in wages and loss of jobs formerly held by natives?

These arguments typically stem from the most-affected populations rather than from general population as a whole (e.g. the low-skilled native workers negatively affected versus consumer X who pays a slightly lower amount for a manufactured item). In these terms, the population most impacted in terms of wage reduction is unequivocally native-born workers without a high school diploma. In fact, native-born workers without a high school diploma may suffer an average decrease in wages of up to 9% due to immigration.

The plight of the native-born workers without a high school degree is compounded by two principal factors. First, the vast majority of immigrants (especially undocumented immigrants) are low-skilled workers. Second, low-skilled laborers can generally perform many of the same positions as native-born workers without a high school diploma.

The studies that have found the greatest decreases in native-born wages and salaries have tended to treat foreign-born and native laborers with the same level of education as fungible and the supply of physical capital as constant. See, e.g., Peri, supra note 12, at 2 (criticizing studies by Harvard economist George Borjas that had relied on assumptions that similarly-situated foreign-born and native-born workers were fungible, and that as the labor supply increases, physical capital remains the same). In such a model, it is easy to see how an increase in the supply of labor would force a corollary decrease in the wages paid. Finding to the contrary, the National Academy of Sciences recently concluded that “the weight of the empirical evidence suggests that the impact of immigration on the wages of competing native workers is small.” SMITH AND EDMONSTON, supra note 11, at 220 (noting that the average wage decrease was between 1% and 2%); but see George J. Borjas, supra note 10, at 1335-74 (estimating that immigration contributed to an average decrease of 3% in U.S. wages from 1980-2000) (June 2003).

See Peri, supra note 12, at 2.


See George J. Borjas, Native Internal Migration and the Labor Market Impact of Immigration, J. of Human Res. XLI. (2), 221-258 (2006) (predicting a 3%-4% drop in wages for every 10% increase in immigration), see Borjas, supra 10, at 1369 (arguing that wage levels could drop up to 9% in the short run for native workers without a high school degree), but see Ottaviano & Peri supra note 12, at 30 (noting that from 1990-2004 natives without a high school diploma experienced a drop in wages of only 1.1%).

because a very low degree of specialization is required for these jobs. In this category, and perhaps only this category, one can see immigrants supplementing (or taking) the positions formerly held by native-born laborers. This combination of factors allows for individuals who may have not have been trained in any trade to easily assume the role of factory worker, taxi driver, housekeeper, gardener, roofer, etc., that was previously held by a native-born worker.26

As mentioned above, the principal arguments against a free influx of foreign born workers, especially for natives without a high school diploma, tend to assume that such workers are supplementing, i.e. replacing, instead of complementing the U.S. labor force.27 In fact, in most cases it appears that quite the opposite is true.28 While there may be some overlap in the financial and accounting industries, foreign-born workers are much more likely to study and work in the fields of mathematics, sciences, computer programming, physics and engineering;29 and U.S.-born workers are more likely to enter fields such as law, business and management.30 If such evidence holds up, then more flexibility should be allowed under the current laws to admit these individuals that complement and improve the U.S. labor force, and indeed, some change has already been incorporated.31

The second principle economic argument against immigration is that it will increase the fiscal burden of lawfully present individuals. On a federal level this appears to be incorrect as immigrants receive few federal

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26 As to the native-born workers without a high school diploma, one alleviating factor is that such group represents 10% or less of the total population. See Peri, supra note 12, at 1, 5.
29 See Greg Toppo and Dan Vergano, Scientist Shortage? Maybe Not, USA TODAY, July 9, 2009 (noting that while U.S. universities graduated approximately 460,000 scientists and engineers combined in 2005, India and China graduated nearly 700,000 engineers).
30 See, e.g., John Tierney, What Shortage of Scientists and Engineers, N.Y. TIMES, Oct. 17, 2008 (noting that current economic incentives push students towards degrees in law and business).
31 See, e.g. I.N.A. § 214(g) (noting an additional 20,000 H-1B visas may be granted to holders of advanced degrees from U.S. universities), and I.N.A. §§ 101(a)(15)(H)(i)(c), 212(m) (noting that 500 H-1C visas may be granted to nurses provided that certain requirements are met).
benefits\textsuperscript{32} while paying taxes and helping to fund Social Security.\textsuperscript{33} Any argument that undocumented immigrants are a drain at the federal level is inaccurate as these individuals usually have taxes and social security payments withheld directly from their paychecks,\textsuperscript{34} with the exception of those who are paid solely in cash. In addition, undocumented immigrants also file year-end federal tax returns.\textsuperscript{35}

The numbers outlining the net gains or losses of immigration to the U.S. economy, especially when viewed a percentage of U.S. GDP, are broad generalizations, and, as the old saw goes, “all politics is local.”\textsuperscript{36} Certain states, especially those along the southwest border, feel the effects of immigration much more than others.\textsuperscript{37} Therefore, although immigration may confer a net benefit at the federal level, it presents high costs to states with a disproportionate amount of immigration.\textsuperscript{38} Such a discrepancy presents a conundrum for the states that are powerless to effect change to federal immigration policy.\textsuperscript{39}

\textsuperscript{34} See Trebilcock, \textit{supra} note 18, at 289 (noting that the undocumented immigrants “generate considerable tax revenues” through payment of a variety of mandatory taxes).
\textsuperscript{36} This saying was used frequently by former Speaker of the House Thomas P. "Tip" O'Neill, U.S. Speaker of the House, 1977-1986. It is unlikely he coined the phrase, though it is part of the title of his 1995 book, \textit{All Politics Is Local} (and Other Rules of the Game). The expression actually "appeared much earlier, such as in the Frederick News (from Maryland) July 1, 1932." Yale Book of Quotations 566 (Fred Shapiro ed., 2006).
\textsuperscript{37} See Lora L. Grandrath, Note, \textit{Illegal Immigrants and Public Education: Is There a Right to the 3 Rs?}, 30 VAL. U. L. REV. 749, 784-85 (1996) (noting that states along the southwest border such as California and Arizona have unsuccessfully sued the federal government for compensation relating to their fiscal burden imposed by undocumented immigrants). \textit{See also} California v. United States, 104 F.3d 1086, 1089 (9th Cir. 1997) (affirming the district court’s dismissal of the case); Arizona v. United States, 104 F.3d 1095, 1096 (9th Cir. 1997) (also affirming the district court’s dismissal of the case).
\textsuperscript{38} See How Illegal Immigration Impacts Constituencies: Perspectives from Members of Congress (Part I): Hearing Before the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary, 109th Cong. 12 (2005) (statement of Rep. Pearce, Member, House of Representatives) (noting that states are often taxed with responsibility of providing certain medical and educational services to individuals regardless of their immigration status).
\textsuperscript{39} Some states, with Arizona leading the charge, have begun to enact aggressive legislation to combat the problem of undocumented immigration and its associated costs \textit{See} Sarita A. Mohanty, \textit{Health Care Expenditures of Immigrants in the United States: A Nationally Representative Analysis}, American Journal of Public Health 95(8), Aug. 2005, at 1431-1438 (noting that although undocumented immigrants did receive an average of
Many states feel spurned into action as it is the states that traditionally bear the majority of costs incurred by immigrants by providing education, health care, food or housing assistance. Though immigrants typically avail themselves much less frequently of these programs than their native-born counterparts, it is clear that the immigrant groups that do utilize these services tend to be low-skilled laborers, and often, when the benefits are education and emergency medical care, undocumented immigrants. Therefore, the calculus of the states is simple: by reducing the number of consumers of state-provided goods, the states can reduce the cost of providing such services.

All of the above calculations have focused on the most expensive segment of the immigrant population – the low-skilled workers; however, as there is a group of immigrants who tend to represent a net expense at the local level, there are also groups that represent net benefits. In terms of economic utility, one clearly sees that some immigrant population groups are much more economically beneficial than others. The groups that are most beneficial are those that raise U.S. productivity, and also pay more in taxes than they receive in government benefits (direct and indirect). Unsurprisingly, this group tends to be composed of highly-skilled or otherwise successful newcomers that are usually either highly-skilled temporary immigrants, or employment-based permanent immigrants.

$1,139 each per year in health care services, undocumented immigrants have lower expenditures for emergency room visits, doctor’s office visits, prescription drugs. During the same time period, native-born residents received approximately $2,546 in health care services. See, also Ariz. Rev. Stat. Ann. § 23-214 (providing requirement for employers, in order to maintain a valid state license, to participate in federal E-Verify program which requires employers to obtain employees’ work authorization status electronically).

40 See Hanson, supra note 35, at 30.


42 See, e.g. Mohanty, supra note 39 and accompanying text.

43 See Hanson, supra note 35, at 21.

44 Davis, supra note 28, at 367 (noting that it is widely accepted that immigrants generally increase productivity and growth in the United States), see also Peri, supra note 14, at 6-7 (2006) (noting that immigrants with higher education, and advanced skills generally increase productivity at higher rate than other immigrants).

45 See Tyler Grimm, Using Employer Sanctions to Open the Border and End Undocumented Immigration, 12 J. GENDER RACE & JUST. 415, 417 (2009) (stating that undocumented immigrants pay more in taxes than they receive in public benefits).

46 See Peri, supra note 44, at 4-5 (2006) (noting the U-shaped distribution of immigrants and the fact that immigrants tend to arrive in two distinct education categories: “less than high school” and “college or more”).
This group of workers is tremendously important as the United States has long prized itself as the center of technological innovation and invention. It is estimated that the foreign-born share of all PhDs working in science, engineering and technology is approximately 30%.\(^{47}\) This type of highly-skilled individual has steadily overseen innovations that directly led to increased productivity and economic growth.\(^{48}\) However, fewer native-born workers are entering these technological fields. In 2003, approximately 30-50% of all physics, mathematics, computer science and engineering doctorates were awarded to students born outside of the United States, and the percentages were even higher at the most elite universities.\(^{49}\) Allowing (and maintaining) this inflow of highly-skilled human capital provides U.S. industry and universities with leaders in their fields and also assures that the newly-developed technology will continue to reside in the United States.\(^{50}\)

Currently, these highly-skilled individuals may enter the country as permanent residents, or adjust to permanent resident status if lawfully present, if they have satisfied all necessary requirements.\(^{51}\) Alternatively the individual may enter as a non-immigrant under a variety of visas of which the most well-known is the H-1B.\(^{52}\) One recent study has found “a positive and statistically significant association” between the number of H-1B petitions solicited and the percentage change in overall employment the

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\(^{47}\) *Id.* at 2. In fact, the percentage of foreign born with doctorates in science, engineering and technology as a percentage of the U.S. labor force is approximately 7% greater than the comparable rate of high school dropouts, and more than 20% greater than the comparable percentage of high school graduates. *Id.*

\(^{48}\) *Id.* at 6.

\(^{49}\) *Id.* at 7.

\(^{50}\) Of course in terms of human capital this is a zero sum game. For every foreign-born PhD that remains in the United States, there is one fewer to return to his/her country of origin. Any discussion other than this brief note on the fairness of a policy to encourage “brain-drain” from other nations is beyond the scope of this article; however, it should be noted that Canada and Australia have both developed successful programs to receive these highly-qualified individuals. See infra note 185 and accompanying text, see also Jagdeep S. Bhandari, *Economic Analysis of Labor and Employment Law in the New Economy: Proceedings of the 2008 Annual Meeting, Association Of American Law Schools, Section on Law and Economics*, 12 EMPLOYEE RTS. & EMP’Y J. 327 at fn. 174 (noting that England, Canada and Australia have implemented immigration policies that are primarily merit-based).

\(^{51}\) I.N.A. §§203(b)(1)(A), (B); 203(b)(2)(A) and 203(b)(3). Each of these categories is numerically limited. *Id.* In addition, some of the visas require a U.S. employer to sponsor the petition. See I.N.A. §§ 203(b)(2), (3).

\(^{52}\) I.N.A. §101(a)(15)(H)(i)(b) (aliens with specialized knowledge and the attainment of a bachelor’s or higher degree (or its equivalent), and §101(a)(15)(O) (aliens with extraordinary abilities in the sciences, arts, education, business or athletics with sustained national or international acclaim).
following year. The study opined that “for every H-1B position requested, U.S. technology companies increase their employment by 5 workers” on average in the following year, and the benefits were even larger for technology companies with fewer than 5,000 employees.

Clearly it is difficult to precisely gauge the full economic value of the benefits that these immigrants provide to the United States. A study by the National Research Council estimated that the average immigrant produced a net fiscal benefit of $80,000 for natives of the United States in 1996 present value dollars, and that highly-skilled immigrants produced a net fiscal benefit of $198,000 each. Therefore, relative to the average immigrant the highly-skilled or successful immigrant produces a much greater economic benefit.


54 See id. These numbers should be taken with a grain of salt as it is difficult to assess causality in the correlation. Additional factors such as sustained growth in the economy or a particular segment of the economy would likewise tend to cause growth in one or both categories simultaneously.

55 Id. (noting the average job gain to be approximately 7.5 workers per H-1B petition).

56 See JOHN ISBISTER, THE IMMIGRATION DEBATE: REMAKING AMERICA 168 (1996) (noting that traditional economic assumptions are that immigration will benefit the U.S. economy, but that some of the economic models used may be overly simplified).

57 See Trebilcock, supra note 18, at 279-80. (citing NRC study and noting also that the impact for immigrants with less than a high school degree is -$13,000 per immigrant). The NRC’s exact numbers are subject to debate given the 300-year timeline used by the study’s authors. Id. at 279 (noting other commentator’s criticism of the timeline and their opinion that a 50-year timeline would yield an average benefit of $11,000 per immigrant with negative returns for unskilled and older immigrants) (citing George J. Borjas, Richard B. Freeman, & Lawrence F. Katz, How Much Do Immigration and Trade Affect Labor Market Outcomes?, 1997 Brookings Papers on Economic Activity 1, 62-63 (1997)).

58 In the case of the NRC study, the benefit per highly-skilled immigrant is approximately 2 ½ times the benefit of the average immigrant. Id. See Hanson supra note 35, at 21 (citing JAMES P. SMITH AND BARRY EDMONSTON, EDS., THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION (1997); and Alan J. Auerbach and Philip Oreopoulos, Analyzing the Fiscal Impact of U.S. Immigration, 89 AM. ECON. REV. 2, 176-180 (1999) (noting that immigration may help fund certain unfunded pension liabilities) See also Immigration’s Economic Impact, Executive Office of the President, June 20, 2007 (noting immigrants’ contributions to innovation). If the highly-skilled immigrants represent such an economic windfall, the obvious initial question is whether there should be any limits on their admission to the United States, other than traditional exclusionary factors. See, e.g. I.N.A. § 212(a) (setting out specific grounds for inadmissibility). The essence of the threat that workers born abroad will compete with native-born workers for the highest-paying jobs has spurred Congress to action at various times in our nation’s history to enact numerical limits and a quota system, often against the wishes of U.S. industry. See I.N.A. § 203(b)(2)-(3); see also 8 C.F.R. § 204.5; see also Robert Pare, High-Tech Titans Strike Out on Immigration Bill, N.Y. TIMES, June 25, 2007 (noting the recent loss suffered by technology companies such as Microsoft and Google
This brief discussion highlights two key points: first, immigration in general (marginally) and especially immigration of highly-skilled or otherwise successful individuals (much more significantly) benefits the overall U.S. economy and its natives; and second, even faced with clear evidence outlining the economic benefit of these highly-skilled immigrants, U.S. policy-makers have chosen to impose strict numerical limits on the ability to immigrate to the U.S. which means that policy justifications for the limits must outweigh the pure fiscal benefits of this type of immigration. The analysis above, which seems to greatly favor highly-skilled immigration so long as certain limits are imposed; however, has largely been limited to highly-skilled employees. While the United States certainly has a strong tradition of successful professionals in the fields of science, technology, medicine, law, and academia, it has consistently prided itself on the entrepreneurial spirit of its inhabitants. The “American Dream” has often focused on the rags to riches stories of entrepreneurs. So, how then should U.S. immigration policy treat those individuals who have successfully embodied the spirit of the American Dream both in terms of idealism and pecuniary gain?

B. The Economics of Immigrant Entrepreneurs

1. The Benefits of Business Creation

Immigrants are and have historically been very successful entrepreneurs. In the United States, immigrants have taken to

who had been pushing for an increase in visas for qualified professionals).


60 See Part II.C., infra and accompanying text (outlining the major social concerns that have lead to opposition to potentially economically advantageous immigration).


62 JAMES TRUSLOW ADAMS, THE EPIC OF AMERICA 404 (1931)

[T]he American Dream [is] that dream of a land in which life should be better and richer and fuller for every man, with opportunity for each according to his ability or achievement. It is ... a dream of social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position.

63 Id.

64 “Undocumented immigrants ‘tend to be strong, courageous, vigourous,
entrepreneurship at higher rates than native-born individuals. Recently, a Kauffman study found that immigrants’ rate of entrepreneurial activity was almost twice as high as native-born individuals. Immigrant entrepreneurial activity is likely the result of a combination of many factors including: a cultural preference for self-employment, language barriers, the inability to find like-paying or better job opportunities in the United States, discrimination, a higher risk tolerance coupled with a willingness to work longer hours, and community/family-based support networks that encourage and assist with the entrepreneurial activity.

Regardless of the reason, immigrants are much more likely to be entrepreneurs than native-born individuals, and their success is a boon to the U.S. economy. For example, as noted above, immigrants provide much of the human capital necessary for technological growth. Also, another area in which immigrants have demonstrated considerable success is with small businesses. Somewhat ironically, it appears that immigrants have entrepreneurial types who enrich our economy and civilization with their drive and creative powers.” Francine J. Lipman, The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation, 9 HARV. LATINO L. REV. 1, 14 (2006) (citing JULIAN L. SIMON, HOW DO IMMIGRANTS AFFECT US ECONOMICALLY 3 (1985)).

65 See Efrat, supra note 9, at 695 (noting that foreign-born entrepreneurs have outstripped native-born entrepreneurs as evidenced by every decennial census between 1880 and 1980).

66 See Robert W. Fairlie, Kauffman Index of Entrepreneurial Activity: 1996-2008 2, 11 (2009) (noting that the continued increase in the immigrant rate of entrepreneurial activity to 0.53% compared to a native-born rate of 0.28%).


68 Id.

69 See N.C. Aizenmen, Study: Many immigrants’ skills underused; College-educated Latinos, Africans lag in employment, Chi. Trib., Oct. 23, 2008, at 16(noting that 20% of all college-educated immigrants (and nearly half of all college-educated Latin Americans) are either unemployed or underemployed in menial labor positions).


71 See Kane and Litan supra note 59 at 5 (citing Vivek Wadhwa, AnnaLee Saxenian, Ben Rissing, and Gary Gereffi, America’s New Immigrant Entrepreneurs: Part I, Duke University, January 2007, available at http://www.soc.duke.edu/GlobalEngineering/papers_newimmigrant.php (noting that during the 1995-2005 period, 25% of all newly-founded technology and engineering companies had at least one immigrant founder, while in Silicon Valley, it was over 50%).

72 See Kloosterman & Rath, supra note 70, at 17 (noting that foreign-born individuals have typically had higher rates of self-employment in the United States than their native-born counterparts). According to the U.S. Small Business Administration,
provided many jobs to native-born laborers. Even historically disadvantaged communities have experienced at worst a neutral effect when incoming immigrants begin to establish businesses in what were traditionally nonimmigrant neighborhoods.

2. Taxes, Taxes, Taxes

As a corollary to the economic benefits cited above, immigrant businesses appear to fail at a lower rate than non-immigrant businesses, despite being overrepresented in the entrepreneurial sector. Additionally, the owners of these businesses typically enjoy higher annual incomes than salaried employees as well as a higher net worth. In net terms, these contributions add significantly to U.S. coffers through income taxes paid by the immigrant entrepreneurs, as it is estimated the immigrants contribute well over $30 billion in tax revenue every year. Those contributions

approximately 99% of businesses in the United States are small businesses, and these businesses employ approximately half of the adult workforce. See Office of Advocacy, Small Business Admin., Annual Rep. on Small Bus. And Competition 17 (2001), available at http://www.sba.gov/advo/research/stateofsb99_00.pdf (“Small businesses represent 99 percent of businesses, employ more than half of the American work force, and create two-thirds of the net new jobs.”). A recent study has found that “the ratio of immigrants to natives declines as companies mature, indicating immigrants are creating opportunities for U.S. workers born here.” See Kloosterman & Rath, supra note 70, at 17. The data bear out this assertion, as a recent study estimates that immigrant-owned venture-capital firms have provided more than 400,000 jobs in the last two decades. See Kane and Litan supra note 59, at 5 (citing Stuart Anderson and Michaela Platzer, American Made: The Impact of Immigrants and Professionals on U.S. Competitiveness, National Venture Capital Association, 2006, available at http://www.nvca.org/pdf/AmericanMade_study.pdf.


See Efrat supra note 9, at 705-06 (noting with a 95% confidence level that “small business owners born outside the United States are less likely to file bankruptcy, and small business owners born in the United States are more likely to do so.”).


See, e.g., Jeffrey S. Passel & Michael E. Fix, Setting the Record Straight, Urban Institute, Immigration and Immigrants (1994), at 6, available at http://www.urban.org/UploadedPDF/305184_immigration_immigrants.pdf (noting that the net fiscal benefits of immigration were $25 to $30 billion per year in 1994, and analyzing and disproving a similar study sponsored by an entity favoring reduced immigration).
would be significantly higher were it not for the fact that the U.S. immigration quota system drove away federal revenues in the range of $6.3 billion to $9.8 billion during the 2003-2007 period.78

One of the most common arguments against immigrant legalization programs, in addition to the argument against rewarding illegal activity, is that these individuals have unfairly benefitted from the U.S. economy by working within the United States without paying any income tax (either state or federal).79 While this argument may be accurate for the undocumented immigrants who are paid only in cash, it simply is untrue for those who are paid in the standard fashion.80 So, how can an undocumented immigrant pay income taxes? The majority pay them in the same way that most other individuals pay taxes – through withholding from their paychecks.81 Many also file their income tax statements annually just as individuals authorized to work do.82 In fact, undocumented immigrants typically face higher effective tax rates on their income than similarly situated native-born workers or documented immigrants due to their inability to take advantage of certain tax benefits in the Internal Revenue Code.83

78 See Kane and Litan, supra note 59, at 6 (citing Arlene Holen, The Budgetary Effects of High-skilled Immigration Reform, Technology Policy Institute, March 2009, available at http://techpolicyinstitute.org/files/the%20budgetary%effects%20of%20high-skilled%20immigration%20reform.pdf (detailing the actual revenue lost by the U.S. due to the forced removal of certain high-skilled immigrants). The foregoing figure represents only the income lost to the United States through taxes paid, not the loss of human capital or resulting profits for the employing companies nor the U.S. economy as a whole.


80 See Youngro Lee, Note, To Dream or not to Dream: A Cost-Benefit Analysis of the Development, Relief, and Education for Alien Minors (Dream) Act, 16 CORNELL J.L. & PUB. POL’Y 231, at fn. 112 (2006) (noting that certain taxes such as sales tax, payroll withholding taxes and property taxes are applied mandatorily, and that they are unavoidable by undocumented immigrants).

81 Id.

82 See Colleen DeBaise, For Illegal-Alien Entrepreneurs, Tax Time is Tricky, SMARTMONEY.COM, Mar. 12, 2007 available at http://www.smartmoney.com/personal-finance/taxes/for-illegal-alien-entrepreneurs-tax-time-is-tricky-20920/ (noting that undocumented individuals are often counseled to file taxes and comply with U.S. tax laws, and that payment of taxes may provide undocumented immigrants the ability to document presence in the United States should the need arise for immigration-related purposes such as cancellation of removal or Nicaraguan Adjustment and Central American Relief Act (NACARA) relief); see also Lipman, supra note 64, at 5 (citing Paula N. Singer & Linda Dodd-Major, Identification Numbers and U.S. Government Compliance Initiatives, 104 Tax Notes 1429, 1433 (Sept. 20, 2004) noting the more than 500,000 tax returns filed by undocumented individuals who were without work authorization).

83 See Lipman, supra note 64, at 7 (noting the disparate tax treatment of nonresident aliens with respect to certain deductions, credits and tax rates while specifically including
In addition to the standard withholding benefits, undocumented immigrants also contribute to the health of the U.S. Social Security system.\textsuperscript{84} As of 2005, undocumented individuals were contributing approximately $7 billion dollars annually to Social Security for which they will never receive any benefit.\textsuperscript{85} These annual contributions have continued to grow, and projections by the Social Security Administration estimate that raising net immigration to 1.3 million individuals a year as opposed to 900,000 would yield a saving of approximately half a trillion dollars in 2005 dollars.\textsuperscript{86}

Documented immigrants also pay substantial taxes. Evidence has shown that documented immigrants tend to do as well or better financially as their native-born counterparts, especially when assessed over time in order to account for the assimilation process.\textsuperscript{87} Predictably, the tax benefit of documented immigrants is much higher than that of undocumented
immigrants as their annual salaries typically tend to be from two to eight times higher, due in no small part to the benefit of being lawfully present, and their effective tax rate is likewise higher.\(^8\) Therefore, whatever policy arguments may be made against immigration in general, there appears to be a consensus forming that economically, and especially fiscally, immigrants, both documented and undocumented, represent an overall benefit to the U.S. economy.\(^8\)

3. Incentivizing Business Creation

Given that successful business creation confers many benefits on the U.S. economy, it follows that promoting this entrepreneurship is a desirable policy goal. In fact, for this very purpose, the U.S. government created the U.S. Small Business Administration (SBA) in 1953.\(^9\) The purpose of the SBA was to “aid, counsel, assist and protect, insofar as possible, the interests of small business concerns.”\(^9\) As far back as 1964, the SBA began focusing specifically on encouraging promising applicants with annual incomes below the federal poverty lines to start new businesses.\(^9\) It has more recently begun to focus on minority and female prospective entrepreneurs.\(^9\) However, although the United States has recognized the benefit of incentivizing business creation, the SBA is expressly precluded by statute from providing funding to undocumented individuals,\(^9\) leaving

\(^8\) See id., at 17 (stating that that average undocumented immigrants’ family income of $27,400 is slightly more than half the average of documented immigrants or native-born families).

\(^9\) See supra Part I.A. (discussing the overall positive economic impact of immigration on the U.S. economy); see also Julian L. Simon, Immigration: The Demographic & Economic Facts, The Cato Institute, at 47-48 (1995) (noting that at least 80% of surveyed economists believed that immigration in the last 100 years has had a very favorable effect on the U.S. economy); contra George J. Borjas, Know the Flow, in IMMIGRATION: DEBATING THE ISSUES 194-195 (1997) (arguing that immigrants create a negative effect on the wage levels of low-skilled native born employees).

\(^9\) See U.S. Small Business Administration, Overview & History, available at http://www.sba.gov/aboutsba/history/index.html (noting the official establishment of the SBA in 1953, but also referring to its predecessor, the Reconstruction Finance Corporation, which was established by President Hoover in 1932 in response to the economic times prevalent during the Great Depression).


\(^9\) See § 8(a), 15 U.S.C.A. § 637(a) (referencing the Business Development Program of the Small Business Act which provides education as well as opportunities to government contracts for minority business owners).


None of the funds made available pursuant to this chapter may be used to
undocumented entrepreneurs looking for alternative forms of investment capital.

For prospective investors, any cost-benefit analysis of investing capital in new businesses will inevitably vary greatly depending on many factors such as: type of business, location, customer-base, owner-involvement, debt servicing, etc.\textsuperscript{95} Failure is not uncommon with roughly half of all new small businesses failing within their first five years.\textsuperscript{96} Legalizing owners’ immigration status and allowing successful entrepreneurs to continue operating their businesses, rather than requiring closure of the business, a fire-sale, or some type of change of control, in the context of incentivizing business creation is the economic equivalent of creating entirely new businesses from whole cloth, and in that sense, it is a much better alternative than the creation of new businesses given the typical rates of failure.\textsuperscript{97}

Where a typical new business may operate at a loss for an initial period of months or years, an ongoing business that satisfies the requirements of eligibility for the proposed entrepreneur visa has already, crossed the threshold of profitability for at least two consecutive years thereby reducing the risk of failure from 50\% to something much lower.\textsuperscript{98} Additionally, legalizing the immigration status of the owners of these businesses will allow them to seek areas of traditional financing that may otherwise have been foreclosed to them.\textsuperscript{99}

provide any direct benefit or assistance to any individual in the United States if the Administrator or the official to which the funds are made available receives notification that the individual is not lawfully within the United States.

\textit{Id.}\textsuperscript{95} See Liu v. U.S. Dept. of Justice, 13 F.3d 1175, 1177 (8th Cir. 1994) (holding that a business owner would not suffer “extreme hardship” if he were forced to sell his business in the United States and move back to Taiwan).

\textit{Id.}\textsuperscript{96} See John W. Lee, \textit{A Populist Political Perspective of the Business Tax Entities Universe: “Hey the Stars Might Lie but the Numbers Never Do,”} \textit{78 TEX. L. REV.} 885, 986 Fn. 225 (2000) (noting that the rate of failure for small businesses in the first five years is between fifty percent and seventy-five percent).

\textit{Id.}\textsuperscript{97} See Part III.A. \textit{infra} (discussing certain minimum qualifications necessary to be eligible for the undocumented entrepreneur visa).

\textit{Id.}\textsuperscript{98} Undocumented immigrants frequently face difficulties with access to credit facilities. \textit{See}, e.g. Miriam Jordan, \textit{Loans to Illegals Seen as Sturdy; Some Undocumented Workers Seen as Better at Paying Back Loans}, \textit{CHICAGO SUN-TIMES}, Oct. 14, 2007, at S8 (noting that Fannie Mae and Freddie Mac refuse to buy mortgages written to undocumented immigrants as a matter of policy), and Janice Alfred, \textit{Note, Denial of the American Dream: The Plight of Undocumented High School Students Within the U.S. Educational System}, \textit{19 N.Y.L. SCH. J. HUM. RTS.} 615, 615-16 (2003) (noting that, in the context of higher education, many undocumented immigrants are unable to obtain loans).
investors, mezzanine financing, revolving credit lines, letters of credit, or even a public or private offering, will then be more readily available to these business owners at comparable rates as to traditional domestic businesses.

While the economic benefits of encouraging entrepreneurship are evident, the costs are less so. If the economy were a zero-sum game, every business opportunity seized by an undocumented immigrant would necessarily result in one fewer for a native-born citizen or documented immigrant. While the economy is arguably better viewed as growing rather than zero-sum, it is also probably true that certain investments by immigrants, documented or not, tend to influence and affect other investment opportunities in same geographic region.

In certain industries, it is likely true that immigrant businesses have thrived at the expense of domestic ones, and most likely it is a result of cheaper production costs (including labor) for immigrant businesses. However, if the question remains solely an economic one, the benefits of entrepreneurship are well-documented. As the economic harm that domestic businesses and laborers suffer is less than the net benefit to society from immigrant-created businesses, rational actors (in the traditional economic sense of motivated self-interest) should favor the granting of special visas to undocumented immigrant entrepreneurs. However, reconciling immigration policy goals with economic utility has not been a priority for the United States since the earliest days of settlement, and a multitude of interests and stakeholders view the issue through an entirely different lens, and with many different motivations.

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100 See, e.g., Isbister, supra note 56, at 166-168 (arguing that increases in immigration, even if the increase have no effect on wages, profitability rates or natives income, will expand the overall size of the economy, and that such expansion is beneficial in economic and political terms).

101 Stereotypical businesses such as dry-cleaners, tailors, landscapers, and ethnic restaurants quickly come to mind.

102 See generally Scott L. Newbert, Realizing the Spirit and Impact of Adam Smith’s Capitalism by Entrepreneurship, 46 J. BUS. ETHICS 251 (2003).

103 During the first decades of the United States immigrants were generally welcomed almost unconditionally, and some states even developed programs designed to increase immigration in their states. See Gordon, Mailman & Yale-Loehr, supra note 7, at § 2.02[1], 2-6.

104 See infra Part II.C. (discussing potential political hurdles and opposition to any program that is seen as “rewarding” undocumented immigrants and potentially growing the pool of annual immigrants, especially during a time of higher unemployment).
C. Incorporation, Entity Selection, Business Negotiations and the Undocumented Immigrant

1. Incorporation and/or Entity Selection

While many undocumented immigrants may establish their business informally under their own name, e.g. as a sole proprietor,105 a partnership with another, or by obtaining a “Doing Business As” (D/B/A),106 there are those who take advantage of state law and create an entity to provide them with the same protections and benefits as enjoyed by other business owners.107 By creating an entity, the public face of the company is generally indistinguishable to the average consumer from any other operating business. This result is feasible because undocumented immigrants may legally own shares or interests in U.S.-based companies, execute leases, own trademarks, and otherwise act as owners of U.S.-based businesses.108 Other than the Subchapter S corporation (S corporation), for which ownership by nonresident aliens is prohibited,109 undocumented immigrants are generally able to elect any other potential business vehicle,110 though anything other than a cursory summary is beyond the

105 A business that is owned by a single individual where there is no legal distinction between the owner and the business is known as a sole proprietor. See ROBERT W. HAMILTON AND JONATHAN R. MACEY, CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 10 (8th ed. 2003).
107 Typical benefits of incorporating are limited liability, ease of transferability, tax benefits, profit-sharing, estate planning, etc. See HAMILTON & MACEY, supra note 105, at 16-19.
108 Undocumented immigrants; however, are prohibited from working in the United States, even if they are self-employed. See I.N.A. § 274A (a)(1) (noting that hiring of undocumented immigrants by any individual or entity). For the purposes of I.N.A. §274A, entity is defined to include any legal entity including proprietorships, associations and partnerships). 8 C.F.R. 274a.1(b).
110 The creation of an entity is typically dependent on the undocumented immigrant obtaining an ITIN. Many, if not all, state filing documents, but especially federal form SS-4 which is required to obtain Employer Identification Numbers (EINs) require the primary applicant to provide his/her SSN. Form SS-4 provides that the applicant “[u]nder penalties of perjury, . . . declare[s] that [the applicant] has examined this application, and to the best of [the applicant’s] knowledge and belief, it is true, correct and complete.” See Form SS-4 (Rev. Jan. 2009) Application For Employer Identification Number, available at http://www.irs.gov/pub/irs-pdf/fss4.pdf. Any use of an SSN not belonging to the applicant is prohibited and possibly illegal. Such use could cause the applicant and/or any attorney or accountant assisting the applicant to incur serious adverse consequences. Federal law
scope of this article.

In general, the undocumented immigrants that elect to utilize some form of business entity have two basic choices: a Subchapter C corporation (C corporation),\(^{111}\) or a limited liability company (LLC).\(^{112}\) Both entity options provide for limited liability for the owner(s); however, the LLC, due to the nature of the pass-through taxation of gains, is often-times the best option.\(^{113}\) C corporations, on the other hand, provide for taxation at both the corporate and individual levels, effectively resulting in double-taxation of the same earnings.\(^{114}\)

Entity selection comes to bear on undocumented immigrant status by foreclosing the option of creating an S corporation which is one of the most attractive options for small business owners.\(^{115}\) Allowing undocumented entrepreneurs the ability to obtain lawful permanent resident status would have the added corporate benefit of allowing them to incorporate S corporations which possess a combination of many of the beneficial characteristics of both C corporations and LLCs.\(^{116}\) Access to competitive corporate structuring options could further serve to stimulate beneficial entrepreneurial activity by undocumented entrepreneurs.

2. Business Negotiations and Undocumented Immigrants

Similar to the commercial disadvantage undocumented immigrants face by being unable to take advantage of all corporate vehicles available to U.S. citizens and lawful permanent residents, undocumented immigrants, employers and employees, are also at a tremendous disadvantage when

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\(^{112}\) LLCs, as with all entities, are regulated by the states and they were created to provide limited liability for their members and beneficial tax treatment. See HAMILTON & MACEY, supra note 105, at 15.

\(^{113}\) See Lee supra note 96, at 892-86.


\(^{115}\) See 26 U.S.C. § 1361(b)(1)(C) (disallowing any nonresident aliens as shareholders of S corporations).

conducting everyday business negotiations due to their immigration status. On the employee front, the examples are many and have been the subject of much literature. There are fewer examples, and no reported decisions, on the business-owner front; which is likely indicative of the actual pressure felt by the undocumented entrepreneurs and the lengths the affected undocumented individuals are willing to go to deal with actual or threatened legal challenges.

The quintessential scenario is one in which an interested party learns of the undocumented immigrant status of the entrepreneur and then uses that knowledge to its advantage. Whether there is a breach of contract complaint, lease issue, trademark infringement or other legal dispute, most if not all undocumented entrepreneurs are willing to accept monetary losses to avoid the disclosure of their immigration status rather than risk removal and pursue or defend any just claims they may have in court. The situation presents an economic harm to the undocumented immigrant as well as to the consumers of the immigrant’s services or products as the immigrant’s cost of business increases. The gains in such a transaction are enjoyed by the business controlled by an individual with no immigration-status concerns who is willing to employ morally-questionable business practices. In these cases at least, the additional social and moral justifications used to argue against legalizing the status of undocumented entrepreneurs would appear to have been ceded away as the end result appears to be both economically and morally deleterious. The proposed legalized pathway for undocumented entrepreneurs could resolve the issue entirely.

II. HISTORICAL ASPECTS AND PURPOSES OF INVESTOR VISAS

A. Immigrant Visas

The concept of attracting immigrant investors to the United States is not new. As far back as 1952 there has been a formalized process to

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117 See infra notes 118-119 and accompanying text.
119 The issue has been largely unreported. While in private practice, the author encountered this issue in two separate situations: one involving an independent contractor’s non-competition agreement, and the other a trademark dispute.
120 See Part II.C. infra (discussing social and moral policy justifications for limiting immigration and/or prohibiting the legalization of individuals who are unlawfully present).
121 See Part III. infra.
grant residency to individuals meeting certain financial criteria.\textsuperscript{123} Although critics decried the program as the equivalent of selling U.S. citizenship,\textsuperscript{124} Congress easily passed the law containing the current immigrant investor visa (the EB-5).\textsuperscript{125} Regardless of its relatively smooth passage, the law has never obtained the predicted results in terms of immigrant flows to the United States.\textsuperscript{126} Many of the problems in recruiting viable foreign investors come from the rules and regulations regarding the EB-5 investor visa. While its predecessor had fewer financial requirements, perhaps due to the limiting nature of the quota,\textsuperscript{127} the new law has proven much more onerous\textsuperscript{128} due to “regulatory and administrative obstacles,”\textsuperscript{129}

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\textsuperscript{123}§1153(b)(5) (Supp. II 1990) has been around in its present state since 1990, its predecessor, included in IRCA and enacted in 1986, was originally proposed in the first part of the 1980s. \textit{See} Ronald R. Rose, \textit{Fixing the Wheel: A Critical Analysis of the Immigrant Investor Visa}, 29 SAN DIEGO L. REV. 615, 617 (1992).
\textsuperscript{124}See Beth MacDonald, \textit{The Immigrant Investor Program: Proposed Solutions to Particular Problems}, 31 LAW & POL’Y INT’L BUS. 403, 406-07 (2000) (noting that the Immigration and Nationality Act of 1952 provided a non-preference visa category to investors which was exempt from the labor certification process). However, although the pathway technically existed, the visas were only made available if there were any unused visas left over from the six preference categories. \textit{Id.} From 1977 until the enactment of 8 U.S.C. 1153(b)(5) in 1990, no visas had been left over. \textit{Id.}
\textsuperscript{125}See Gary Endelman & Jeffrey Hardy, \textit{Uncle Sam Wants You: Foreign Investment and the Immigration Act of 1990}, 28 SAN DIEGO L. REV. 671, 675 (citing Notre Dame President Father Theodore Hesburgh’s criticism of the investor visa program); \textit{see also} S. Vote Record No. 323 (101st Cong., Oct. 26, 1990) (noting 89 in favor, 8 against and 3 no-votes), H. Roll Call 530 (101st Cong., Oct. 27, 1990) (voting 264 in favor, 118 against, and 50 no-votes).
\textsuperscript{126}While the number of fifth employment-based immigrant visas, the so-called investor visas, is capped at approximately 10,000 annually (7.1% of worldwide employment-based immigration), less than 1/10 of that amount are issued yearly. \textit{See} I.N.A. §203(b)(5); 8 U.S.C. 1153(b)(5); \textit{see also} Office of Immigration Statistics, U.S. Dep’t of Homeland Security, 2007 Yearbook of Immigration Statistics 14-15 (2008) (Table 6), at \url{http://www.dhs.gov/ximtgtn/statistics/publications/yearbook.shtml}. In the last ten years, annual EB-5 admissions varied from a low of 64 in 2003, to a higher of 1,360 in 2008. \textit{Id.}
\textsuperscript{127}The former law regarding immigrant investors required: an alien [to] establish[] … that he ha[d] invested, or [was] actively in the process of investing, capital totaling at least $40,000 in an enterprise in the U.S. of which he will be a principal manager and that the enterprise will employ a person or persons in the U.S.
\textit{See} 8 C.F.R. § 212(b)(4) (1980)).
\textsuperscript{128}See 8 U.S.C. §1153(b)(5)(C) (requiring an investment of $1,000,000 (or a lower $500,000 if the investment was made in a “targeted employment area.”)).
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inconsistent application of the law, and the resulting uncertainty facing the immigrant investor.

The principal requirements of the EB-5 visa are the investment of $1,000,000, and the creation of not less than 10 full-time jobs for individuals lawfully authorized for employment in the United States.\textsuperscript{130} The $1,000,000 figure has not been adjusted since the enactment of the statute,\textsuperscript{131} and it is also worthwhile to note that, at the time of its enactment, comparable investor visa laws in Canada and Australia had investment requirements of $250,000 and $365,000 respectively.\textsuperscript{132} In addition to the higher comparative cost to potential immigrant presented by U.S. immigration law, U.S. tax law was and continues to be of primary importance for immigrant investors selecting a country of destination\textsuperscript{133} as the Internal Revenue Code taxes U.S. residents on their worldwide income, rather than just U.S.-sourced income.\textsuperscript{134}

Although the EB-5 program purports to provide a bright-line test,\textsuperscript{135} in practice it has done anything but.\textsuperscript{136} The EB-5 visa contains

\textsuperscript{130} Id. The statute provides additional restrictions regarding the creation of jobs and prohibits the inclusion of any jobs for the immigrant and the immigrant’s immediate family in calculating whether the 10 employment positions have been created. 8 U.S.C. §1153(b)(5)(A)(ii).

\textsuperscript{131} It should be noted; however, that the $1,000,000 may be adjusted at any time by the Secretary of Homeland Security in consultation with the Secretary of Labor and the Secretary of State. 8 U.S.C. §1153(b)(5)(C)(i).

\textsuperscript{132} See Rose, supra note 122 at 616 (citing Section 2 of the Canada Immigration Act (1978) which required an investment of $250,000 Canadian dollars and the requisite business experience; and Department of Immigration, Local Government and Ethnic Affairs, Migrating to Australia, Business Skills Migration Requirements (1992) which required an investment of $500,000 Australian dollars which, in 1992, was equivalent to approximately $365,000 U.S. dollars). Currently, Canada requires a passive investment of $400,000 Canadian which is guaranteed to be returned by the Canadian government in five years (without interest). See Jeffrey S. Lowe, “Canada’s Immigrant Investor Program,” Research Solutions (Dec. 2007). In the past four years Canada has received between 6,000 and 9,500 qualified immigrant investors annually. See Office of the Citizenship and Immigration Services Ombudsman, Employment Creation Immigrant Visa (EB-5) Program Recommendations, Mar. 18, 2009, 6, available at http://www.dhs.gov/xlibrary/assets/CIS_Ombudsman_EB-5_Recommendation_3_18_09.pdf.

\textsuperscript{133} See Rose, supra note 122 at 621-22 (noting that “[p]rofessionals involved with this program agree that the biggest problem with the immigrant investor visa is the worldwide taxation effect.”).

\textsuperscript{134} Provide cite and clearly define “resident.” Canada, by comparison, taxes only Canadian-sourced income. See Rose, supra note 122 (citing Nathan Boidman, Tax Havens Encyclopedia, in 29 CAN. L. & PRAC. 8 (Butterworth & Co. ed., 1990).

\textsuperscript{135} See Rose, supra note 122 at 627 (noting that the bright-line test is “one of the great advantages of the immigrant investor visa).

\textsuperscript{136} See generally Gordon, Mailman & Yale-Loehr, supra note 7, at §39.07[1][b]-[j].
requirements for: documenting the source of the investment capital,\textsuperscript{137} having invested or actively being in the process of investing capital prior to filing the visa petition,\textsuperscript{138} proving that all capital contributions have been invested rather than provided in any sort of debt arrangement,\textsuperscript{139} demonstrating that the investment is “at-risk,”\textsuperscript{140} and proving the investor is “engaged in the management of the new commercial exercise . . . through the exercise of day-to-day managerial control or . . . policy formulation, as opposed to maintain[ing] a purely passive role . . .”\textsuperscript{141} Lamentably, USCIS has struggled since the visa’s inception to apply the rules uniformly and provide decisions in a timely manner.\textsuperscript{142}

In addition to the conditions precedent involved in filing an EB-5 petition, the permanent residency granted to the investor is conditional for a period of 2 years.\textsuperscript{143} In addition to proving the necessary jobs creation, the applicant must show that he or she “sustained the actions required for removal of the condition . . . in good faith, [and has] substantially met the capital investment requirement of the statute and continuously maintained

\textsuperscript{137} See 8 C.F.R. §204.6(g)(1) (requiring the source of all invested capital to be identified and shown to have been derived by law means).

\textsuperscript{138} See 8 C.F.R. § 204.6(j)(2). Although the statutory language provides that an immigrant investor may be in the process of investing his/her capital, currently, only those petitioners who have actually invested prior to the petition are being considered. See I.N.A. §203(b)(5)(A)(i), 8 U.S.C. §1153(b)(5)(A)(i); see also 8 C.F.R. § 216.6(a)(4)(ii); GORDON, MAILMAN & YALE-LOEHR, supra note 7, at §39.07[1][c] fn. 16 (noting that although the precedent relied upon by the immigration agency in requiring payment prior to filing seems inapplicable, the USCIS has continued to stand by the requirement).

\textsuperscript{139} See 8 C.F.R. § 204.6(e).

\textsuperscript{140} See 8 C.F.R. § 204.6(j)(2).

\textsuperscript{141} See 8 C.F.R. § 204.6(j)(5).


\textsuperscript{143} See I.N.A. § 216A, 8 U.S.C. §1186b (imposing a two-year conditional status to deter fraud).
his or her capital investment over the two years of conditional residence.\footnote{144}

As mentioned above, this pathway to permanent residency has proven perilous to potential investors,\footnote{145} so much so that the Homeland Security Act of 2002 created the office of the Citizenship and Immigration Services Ombudsman to provide recommendations to improve the processing and handling of EB-5 petitions.\footnote{146} Prior to noting its recommendations, the Ombudsman noted the relative lack of success of the EB-5 program and concluded that this result was caused, at least partially, by administratively-imposed impediments.\footnote{147}

In short, the EB-5 program has had a brief and tumultuous history; but it was created for very specific reasons, namely to benefit the U.S. economy and create full-time employment for its residents.\footnote{148} Senator Gramm summed up his belief of the program’s purpose by stating, “if people have been successful in business – if they can bring that talent and the fruits of that talent, a million dollars to this country, and if they meet the criteria of job creation and ability to sustain that business – they then have a right to come here and to practice that business.”\footnote{149} This paradigm, rewarding success in business while also capturing part of the rewards for the benefit of the U.S. economy, which was passed with relative ease, is essentially the same as proposed herein, with one major caveat: unauthorized presence in the United States which is be explored further below.\footnote{150}

\footnote{144} See 8 C.F.R. § 216.6(a)(4(iii).

\footnote{145} There are approximately 700 investors in the EB-5 program have been awaiting adjudication of their petitions including some from as early as 1995 which has causes one commentator to remark that the “legal quagmire these foreign investors are in is unconscionable... and continues to cause doubt about the integrity of the EB-5 program.”). See Lee, Hinrichsen, & Yale-Loehr, supra note 129, at 658.

\footnote{146} See Homeland Security Act of 2002, 5 U.S.C. §452, (creating the independent office of the Citizenship and Immigration Services Ombudsman who reports to Deputy Secretary for Homeland Security, and who provides annual reports to the Committee on the Judiciary of the House of Representatives and the Senate. Id.

\footnote{147} See Ombudsman, Employment Creation Immigrant Visa (EB-5) Program Recommendations, supra note 132; see generally Lee, Hinrichsen, & Yale-Loehr, USCIS supra note 129, at 657 (summarizing the Ombudsman’s recommendations and providing additional recommendations).

\footnote{148} In floor debate, Sen. Edward Kennedy the bill’s sponsor, promoted the provisions stating “we are talking about new jobs.” Arguing for the proposed EB-5 program, the bill’s early supporters claimed that the program could attract up to $8 billion annually in capital contributions and create 100,000 each year. See Ashley Dunn, Lure of Visas Fails to Attract Rich Investors, L.A. TIMES, Dec. 24, 1991, at A3.


\footnote{150} See infra notes 174-183, and accompanying text, and Part III.D.2. (discussing the genesis of arguments against immigration reform based on unlawful presence).
B. Nonimmigrant Visas

While U.S. immigration law has long provided an avenue for investor immigrants, it has generally favored nonimmigrant investors to a greater extent provided that the nonimmigrant comes from a country which has a treaty in place with the United States.\(^{151}\) It has favored nonimmigrant investors in the same manner as it has favored other nonimmigrants, by imposing fewer burdens on them than on their immigrant counterparts.\(^{152}\) Principally, the nonimmigrant investors (known as treaty investors or E-2s) must show that they are investing a “substantial amount of capital” to allow them to direct and grow the intended business enterprise.\(^{153}\)

Whereas immigrant investors are required to invest $1,000,000, treaty investors are only required to invest a “substantial amount of capital.”\(^{154}\) The term “substantial amount of capital” is defined in the regulations, but the definition itself omits any specific dollar amounts,\(^{155}\) and instead relies on a proportionality test.\(^{156}\) As the required investment is

\(^{151}\) See I.N.A. §101(a)(15)(E(ii); 8 U.S.C. § 1101(a)(15)(E)(ii) (describing so-called “treaty investors”). The eligibility of the nonimmigrant to enter the United States initially hinges on the terms of the treaty involved. \textit{Id.}

\(^{152}\) See, e.g., I.N.A. §101(a)(15)(B) (noting fairly minimal requirements to establish initial eligibility for entrance as a business visitor compared to §203(b)(1)-(3) which provides much stricter credentialing requirements and/or labor certification prior to visa issuance); \textit{contra} I.N.A. §101(a)(15)(H) (requiring labor condition application and a bachelor’s degree or equivalent for admittance as a temporary visitor (up to six years)).

\(^{153}\) See 8 C.F.R. § 214.2(e)(2)(i)-(iii). The treaty investor regulation requires that the investor:

(i) Has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living; (ii) Is seeking entry solely to develop and direct the enterprise; and (iii) Intends to depart the United States upon the expiration or termination of treaty investor (E-2) status. \textit{Id.} The treaty investor visas (E-2 visas) are typically issued for a period of up to two years, though they may be renewed indefinitely. 8 C.F.R. § 214.2(e)(19), 214.2(e)(20)(iii).

\(^{154}\) See \textit{id.}

\(^{155}\) See 8 C.F.R. § 214.2(e)(14). A substantial amount of capital is:

(i) Substantial in relationship to the total cost of either purchasing an established enterprise or creating the type of enterprise under consideration; (ii) Sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and (iii) Of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise. Generally, the lower the cost of the enterprise, the higher, proportionately, the investment must be to be considered a substantial amount of capital. \textit{Id.}

\(^{156}\) \textit{What constitutes a substantial investment is a relative matter and is not determined}
relative to size of the business, even modest amounts may suffice, provided that they meet all additional criteria. Given the less-restrictive requirements, it is unsurprising that the E-2 visa program has been numerically more successful than the EB-5 program. In terms of sheer volume, in 2006 over 40,000 E visas were issued compared to less than 1,000 EB-5 immigrant investor visas.

Initially created in 1952, the E-2 visa category yielded no debate on the floors of Congress. One of the E-2 program’s primary goals was to attract foreign investment to the United States. As a result, U.S. immigration law has treated nonimmigrant investors more generously than alone by size of investment.” See Gordon, Mailman & Yale-Loehr, supra, note 7, at 17.06[n][b] (citing 6 U.S.T. 3030 (1955), as quoted in Kim v. Dist. Director, 586 F.2d 713, 718 (9th Cir. 1978)); see also In re Walsh & Pollard, 20 I. & N. Dec. 60, 5 Immigr. Rep. B1-141 (BIA 1988) (holding that a modest investment of approximately less than $20,000 was sufficient for the issuance of two E-2 visas to design engineers).

In determining the substantiality of the amount invested, the State Department compares the amount invested to the value of the business. See 9 Foreign Affairs Manual § 41.51 nn.10.2-10.4, as amended, TL:VISA-322 (Oct. 10, 2001). The Foreign Affairs Manual notes, by example, that some smaller, less capital-intensive businesses may require an investment of as little as $50,000. Id.

The business in which the nonimmigrant invests must be real and active, and the investor come to the United States “solely to develop and direct” the commercial venture.” I.N.A. § 101(a)(15)(E)(ii). The investor’s money must be at risk (i.e., subject to loss) rather than loaned to the enterprise, and the money must be under the investor’s control. See Gordon, Mailman & Yale-Loehr, supra note 7, at 17.06[n][a]. Additionally, and significantly, the investment “must have the present or future capacity to generate more than enough income to provide a minimal living for the treaty investor and his or her family . . .” 8 C.F.R. § 214.2(e)(15).

See Department of State, Report of the the Visa Office 2006, Table 17 (Part I) Nonimmigrant Visas Issued (preliminary data), available at http://travel.state.gov/pdf/FY06AnnualReportTableXVII.pdf (noting that 40,439 E visas were issued in fiscal year 2006). E visas include treaty investors (E-2s) as well as treaty traders (E-1s), and the available data do not provide a breakdown for the two subcategories. Id.

See Ombudsman, Employment Creation Immigrant Visa (EB-5) Program Recommendations, supra note 132 (noting annual rates of EB-5 issuance).


See H.R. Rep. No. 1365, 82d Cong., 2d Sess. 44 (1952). The committee report outlining the E-2 visa program simply stated, “[t]he [E-2 Visa] category is intended to provide for the temporary admission of such aliens who will be engaged in developing or directing the operations of a real operating enterprise and not a fictitious paper operation.” Id. No mention of the treaty investor program appears in the Congressional Record; see also Nice v. Turnage, 752 F.2d 431, 432 (9th Cir. 1985) (quoting Kun Young Kim v. INS, 586 F.2d 713, 716 (9th Cir. 1978) (noting the spare legislative history surrounding the E-2 visa category gives “little assistance” for the formulation of E-2 visa requirements).

immigrant investors for a variety of reasons: the investors are granted only temporary residency, they come from countries that are on friendly terms with the United States, at least to the extent that the necessary treaty is in force, and by allowing these investors access to U.S. soil, the United States is able to foster international relations while increasing its own economic growth.

While differing considerably in structure from the EB-5 immigrant investor program, the principal objective of both investor programs is the same – to enhance the economic condition of the United States through the immigration of individuals with the ability to create operating businesses in the United States. Because both programs provide significant limitations, they were able to garner sufficient support for passage, and while the volume of incoming investors appears to present some concern, it appears that a more important concern surrounding the programs is one of volume coupled with permanence. Any permanent increase in the number of immigrants coupled with the purported economic and non-economic concerns that attach to such an increase have been the primary arguments

164 See I.N.A. § 101(a)(15)(E); 8 C.F.R. § 214.2(e)(20).
165 See I.N.A. § 101(a)(15)(E). The availability of an E-2 visa is dependent on the existence of an authorizing treaty between the United States and the alien’s country. The number of countries that have enacted Bilateral Investment Treaties (BITs) with the United States continues to grow. See GORDON, MAILMAN & YALE-LOEHR, supra note 7, at § 17.03[2][b] (listing the countries that have enacted BITs and providing additional commentary regarding each).
166 See GORDON, MAILMAN & YALE-LOEHR, supra note 7, at § 17.03[2][b] (noting that in certain circumstances, treaties may be cancelled, terminated or revoked as was the case with Iran in 1980, and Nicaragua in 1986).
168 See I.N.A. § 203(b)(5)(A), and 101(a)(15)(E)(ii) (noting numerical limitations on the EB-5 program and the nonimmigrant aspect of the E-2 program); contra 8 C.F.R. 214.2(e)(20) (noting that although E-2 treaty investors may not be permanent residents under immigration law, they may in fact reside indefinitely in the United States provided that they meet their visa requirements).
169 Significantly, although the EB-5 visas are statutorily capped, there is no annual limit of E-2 visas that may be granted. As compared to the annual EB-5 cap of approximately 10,000, in 2007, over 177,000 E-2 immigrants were admitted to the United States. See United States Department of Homeland Security Office of Immigration Statistics 2007 Yearbook of Immigration Statistics, Nonimmigrant Supplemental Table 1, available at http://www.dhs.gov/ximtgtn/statistics/publications/YrBk07NI.shtml. The 177,000 figure only represents separate admissions and not necessarily separate individuals.
expounding against investor visa programs.\(^{170}\)

C. Encumbering Policies – Apples to Oranges

For immigration law, as with any other, competing interests and compromises affect the final structure and provisions contained within the law.\(^{171}\) Inevitably, the relative priority of the competing concerns determine the final outcome of the law as the more important concerns, insofar as their magnitude and/or scope of application, come to outweigh the concerns that are deemed to be of lesser importance to the majority of voting individuals. For purely economic legislation such as federal funding bills, the economic value and cost of the proposed bills are readily understood and easily debatable.\(^{172}\) However, with legislation that touches on more than economic grounds, any economic effects must be balanced against competing interests and values that are not easily monetized. Such is the case with immigration law which touches on concerns of family unity, democratic ideals, and the opportunity for meritorious advancement.\(^{173}\)

The social concerns mentioned above have typically been addressed in the drafting of U.S. immigration laws at the committee level as well as

\(^{170}\) *See* Endelman and Hardy, *supra* note 124 at 675 (citing Senator Dale Bumpers (D-Ark) who argued against the EB-5 investor program because many foreign investors were already purchasing U.S.-based property at an impressive pace, an investor-visa program cheapened American citizenship, and would attract undesirable immigrants). Senator Bumpers went on to note: [w]e all know that business is important to the creation of jobs. But I can tell you one thing, that the business of America is just not business. It is jobs. It is housing. It is education. It is health care. It is compassion for those who have not been as well-born as others. It is concern. And it is liberty and justice. That is what America stands for. Those are things that people here understand and that is the reason they love it.


\(^{172}\) Additionally, for federal regulations the process is even more straightforward. The President may request the Office of Management and Budget, Office of Information and Regulatory Affairs (OMB-OIRA) to analyze the cost effectiveness of proposed regulations and provide a report detailing the study’s outcome. *See* Office of Management and Budget, Office of Information and Regulatory Affairs (OMB-OIRA), Q&A’s available at http://www.whitehouse.gov/omb/OIRA_QsandAs/ (noting the OIRA’s duty of reviewing draft regulations and commenting on the proposed regulation’s effects on society).

through debate on the floors of Congress. In addition to these social concerns, another paramount concern continues to be the treatment of individuals who are unlawfully present in the United States. While IRCA implemented a legalization program for many undocumented immigrants in 1986, current comprehensive immigration reform tends to stumble on this point. As a precondition for even considering a comprehensive legalization provision, opponents of comprehensive reform have advocated for additional preventative measures such as increased border fencing, stricter employer sanctions, a guest worker program, and stricter enforcement of current immigration laws.

There is no persuasive rebuttal to the contention that a legalization program rewards unlawful presence. It would. However, this issue, as with most immigration issues, is not black and white. Instead of grappling with the multitude of social and economic concerns of a mass legalization program, for the purposes of this article, a better approach is to examine a legalization program for the specific population subset at issue, undocumented entrepreneurs. The same concerns of rewarding unlawful presence and allowing a visa to be obtained through investment are present for these undocumented entrepreneurs; however, the identity of this benefiting population is significant.

While foreign investors had their motives questioned and were

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176 See Natsu Taylor Saito, Crossing the Line? Examining Current U.S. Immigration & Border Policy: Border Constructions: Immigration Enforcement and Territorial Presumptions, 10 J. GENDER RACE & JUST. 193, 194 (2007), see also, President Bush, Address to the Nation on Immigration Reform, (May 15, 2006), available at http://georgewbush-whitehouse.archives.gov/news/releases/2006/05/20060515-8.html (noting the inherent perceived tension between the granting “amnesty” to undocumented immigrants while simultaneously rewarding their unlawful activity). “People who meet [certain residency and penalty] conditions should be able to apply for citizenship, but approval would not be automatic, and they will have to wait in line behind those who played by the rules and followed the law.” Id.
177 Id. at 194.
179 See Statement of Sen. Bumpers, 135 Cong. Rec. 14292 (stating “I would rather have a plumber or a carpenter coming here for the right reasons that a Ph.D. or a guy with a million bucks coming here for the wrong reasons” and noting the right reasons are jobs, “compassion for those who are not as well-born as others,” and liberty and justice).
criticized for “purchasing” their residency, undocumented entrepreneurs have demonstrated a commitment to the ideal of U.S. capitalism by creating new business and wealth while knowing that they were subject to removal at any moment. Undocumented immigrants in general have also been criticized for displacing lawfully authorized workers\footnote{See Dobbs, supra note 28.} and lowering the level of domestic wages,\footnote{See, e.g., DeCanas v. Bica, 424 U.S. 351, 356-57 (1976) (arguing that undocumented immigrants “seriously depress wage scales and working conditions of citizens and legally admitted immigrants”).} but undocumented entrepreneurs do not compete in the labor market inasmuch as they are employers providing employment opportunities to individuals authorized to work in the United States.\footnote{See Kane and Litan, supra note 59, at 5 (citing \textit{AMAR BHIDÉ, THE VENTURESOME ECONOMY: HOW INNOVATION SUSTAINS PROSPERITY IN A MORE CONNECTED WORLD,} (2008)).}

The most defensible criticism of these undocumented entrepreneurs would be that they displace and/or negatively affect lawfully-present entrepreneurs. Other than anecdotal evidence to the contrary, this does not appear to be the case.\footnote{See \textit{LIGHT \\& ROSENSTEIN, supra} note 74, at 193, 197 (noting that immigrant entrepreneurs do not detrimentally affect white or African American entrepreneurs).} It appears rather, that a zero-sum argument is incorrect, and that undocumented entrepreneurs increase the overall size of the economy rather than displace other similarly-situated entrepreneurs.\footnote{See supra note 100 and accompanying text.}

In addition to the social concerns regarding unlawful presence, the United States also has an historic tradition of favoring family unification and other intangible values. The fact that immigration is not treated solely as an economic issue is the reason merit-based immigration programs favored in other countries\footnote{Canada, in addition to a more traditional family sponsorship approach, employs a merit-based system for skilled immigrants. For an enjoyable exercise in determining immigrant eligibility, the Canadian test is available online at http://www.cic.gc.ca/english/immigrate/skilled/assess/index.asp. Significantly, the test provides a near-immediate clear indicator of immigrant eligibility, though every case will be reviewed upon application by a Canadian immigration officer. \textit{Id.}} have failed to garner the necessary amount of support in the United States to bring about change.\footnote{Professors Papademetriou and Yale-Loehr proposed a similar points-based test for certain immigrants and for temporary skilled non-immigrants in 1996. \textit{See Demetrious G. Papademetriou \\& Stephen Yale-Loehr, BALANCING INTERESTS: RETHINKING U.S. SELECTION OF SKILLED IMMIGRANTS, 15-34, 141-61 (1996).}} However, the type of visa at issue should play a role in determining which priorities should ultimately prevail. For an economically-oriented visa category, the idea of placing economic concerns ahead of others follows logically. In fact, this order of prioritization has typically been the norm for the investor visa

\footnote{See supra note 28.}
categories discussed above, as well as for essentially every employment-based visa category.\textsuperscript{187}

As noted above, perhaps the most potent argument against providing additional visa categories or visa allotments for workers, investors, or entrepreneurs is the potential displacement of opportunities for U.S. citizens or permanent residents.\textsuperscript{188} The complaint, at its core, is an economic one, though it portends a more social concern of unemployed, underemployed or disadvantaged individuals who were present in the United States prior to the entry of any perceived interlopers. If that hypothesis is correct and the argument is primarily economic in nature, we should be left with a situation in which we are indeed comparing apples to apples, i.e., whether a proposed visa provides a greater economic benefit than cost.\textsuperscript{189} Additionally, moving beyond the net effect of a visa to society as a whole, at a micro level the question would be, are the populations claiming a disadvantage truly, negatively affected in net terms? For the specific case of the proposed visa category for undocumented entrepreneurs, if we are able to answer the last question by showing no economic detriment for the populations that have supposedly been harmed as has been contended,\textsuperscript{190} the remaining arguments against such a visa category, including any arguments based primarily upon unlawful presence,\textsuperscript{191} should be of secondary importance.

Even if we are to concede that creating an entrepreneur visa category for undocumented individuals is economical beneficial, the criteria for any visa will likely need to be significantly lower than for EB-5 immigrant investors to be effective.\textsuperscript{192} In that sense, the entrepreneur visa would, in effect, treat undocumented entrepreneurs more favorably than “lawful” immigrant investors. While that argument is not without merit, the two categories are not equal. While EB-5 investors do face significant requirements,\textsuperscript{193} they have already demonstrated financial success by being

\textsuperscript{187} H-1B nonimmigrant professional worker visas, EB-2 immigrant visas for aliens with advanced degrees or extraordinary ability, and EB-3 immigrant visas for skilled workers, professionals and other workers all have a component that requires a U.S. employer petitioning or offering employment to the potential alien. \textit{See} I.N.A. §§ 101(a)(15)(h)(i)(b), 203(b)(2), (3).

\textsuperscript{188} \textit{Contra} Dobbs, \textit{supra} note 28 arguing that undocumented immigrants have displaced more than two million American workers from their jobs).

\textsuperscript{189} \textit{See supra} Part I.A. and B. (outlining and identifying the overall economic benefit of immigration, as well as the specific additional benefits of immigration of certain desired classes of individuals including skilled workers and investors).

\textsuperscript{190} \textit{See} \textit{Light} & \textit{Rosenstein, supra} note 74, at 193, 197 (noting that immigrant entrepreneurs do not detrimentally affect white or African American entrepreneurs).

\textsuperscript{191} \textit{See supra} Part I.C.

\textsuperscript{192} I.N.A. § 203(b)(5), 8 C.F.R § 204.6(g).

\textsuperscript{193} \textit{See} I.N.A. § 203(b)(5), \textit{see also} \textit{Gordon, Mailman & Yale-Loehr, supra} note 7, at 39.07[1][a], 39-65 (noting that the “statutory requirements of the EB-5 visa category are
in a position to invest $1 million in a U.S. enterprise. Most undocumented entrepreneurs on the other hand, have created their business knowing that the risk of removal is ever present. This entrepreneurial spirit has long been recognized as a cornerstone of the U.S. economy. In that sense, undocumented entrepreneurs who have fulfilled the visa requirements proposed below may be even more deserving of a visa than any prospective EB-5 investor.

III. STRUCTURING THE VISA

While a nonimmigrant undocumented entrepreneur visa is an option, an immigrant version appears to be the better of the two for a variety of reasons. First, although a nonimmigrant version would operate to legalize the status of the applicant, it would not provide any avenue to lawful permanent residency. Additionally, questions as to duration and renewability would be the first to arise. For what timespans should a visa be granted to an individual that has already demonstrated a viable U.S. business? The nearest equivalent, the E-2 visa, provides for two-year terms that are renewable indefinitely. And if the visa were renewable, what conditions would be necessary to renew? Would the applicant be required to continue operation of the same business or any business that met size requirements? If the applicant would like to sell his/her business, would the visa be renewable if the applicant invested in opportunities that were not foreseen within the visa category? Even more importantly in light of the goal of the entrepreneur visa, would a nonimmigrant visa limit the applicant’s ability to receive financing opportunities or pursue corporate structuring similar to other domestic businesses such that it could compete fairly, or would it otherwise restrict or discourage further investment by the applicant?

By providing a more permanent solution, an immigrant entrepreneur visa would resolve many of these issues. Concerns regarding stability would abate, and the applicant would be able to seek financing on

194 See I.N.A. § 203(b)(5)(C).
195 See note 72 supra (detailing the extent to which the U.S. economy depends on small businesses).
196 See infra Part III.A.
197 See, e.g. I.N.A. § 245 (providing for the adjustment of status of certain nonimmigrants who meet the statutory requirements to that of lawful permanent resident).
198 See 8 C.F.R. § 214.2(e)(19); see also Robert C. Groven, Setting Our Sights: The United States and Canadian Investor Visa Programs, 4 Minn. J. Global Trade 271, 279 (1995) (noting that E-2 visa holders may remain in the United States indefinitely provided they continue their investment activities).
comparable terms as received by other similarly-situated business owners. The applicant would be able to diversify and change the investments in which he/she was involved to maximize economic gain rather than needing to inefficiently modify his/her activities to conform to visa renewal requirements. Implementing a permanent solution removes the need to determine the appropriate length of an initial visa term, and incentivizes the applicant to increase investment in his/her business and assimilate his/her family more quickly into the United States with the knowledge that they will not be forced to leave the country in the near future by immigration officials.

Assuming the merits of an immigrant entrepreneur visa exceed the merits of a nonimmigrant version, the next step is determining the scope and conditions necessary for an individual to be able to take advantage of the new visa program. The currently-existing investor programs are fraught with uncertainty, delay, a lack of clearly-defined expectations, and equivocal language. Any new proposal should take pains to avoid a repetition of these prior failings so that USCIS, the prospective visa applicants and their counsel have a clear understanding of the program, its processes, and expected outcomes. The easiest way to ensure this desired outcome is to provide clear and comprehensive statutory language and regulations.

A. Bright-Lines are most Easily Seen

Clearly-defined requirements are essential to the successful implementation of any new visa program. On the other hand, if the requirements are clearly-defined but overly onerous, the program will be underutilized and fail to fully meet its intended purpose. The principal categories proposed for determining eligibility for an immigrant entrepreneur visa are likely to be seen as fairly benign: profitability requirements, substantial participation, employee generation, and demonstrated tax compliance; however, the specifics of each may give rise to differing points of view.

1. Revenue/Profitability Requirements

The revenue and/or profitability requirement for an entrepreneur visa presents both challenges and opportunities, and it is largely an

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199 See supra Part II.A. and B.
200 See supra Part II.A. and B.
201 The most prime example of visa underuse is, of course, the current EB-5 investor visa which is only used to about 10% of its capacity. I.N.A. § 203(b)(5).
accounting problem. Any number or figure chosen will necessarily be an arbitrary distinction. If a modest sum for the elected metric is chosen, many will qualify, whereas if a more significant sum is chosen, the visa category may not be as widely-used as desired. What a specific number does however is provide a clear barometer of eligibility. Additionally, the number chosen will also serve as an incentive to all undocumented current and prospective business owners. For the vast majority of undocumented individuals with no other means of adjusting their immigration status available, this type of incentive could prove to be very strong.

As to choosing a metric of revenue or profitability, either category could suffice, but utilizing a profitability metric would seem to be more in line with the theory behind the immigrant entrepreneur visa, namely that success is being rewarded. While high revenues likely reflect a large company with a medium to large labor force and significant participation in the U.S. economy, a lack of profitability may indicate troubles in the short-term. A profitable company is much more likely to be stable and/or growing than a company forced to deal with losses and cash flow issues, especially when alternative sources of financing may be unavailable. Profitability; however, may not be as concise an indicator as desired unless further defined, and profitability numbers may be less consistent on an annual basis than revenue numbers given the timing of when business expenses occur and when they appear on the balance sheet and profit and loss statement. However, using net profitability as determined by U.S. tax law as our metric presents the advantage of a uniform, comprehensive set of rules.

Profitability for corporations will be different than profitability for LLCs with flow-through taxation or individual proprietorships. On an individual level, wages or dividends can clearly state the amount an

202 See I.N.A. § 245(a), (c) (noting that adjustment of status is not available to individuals who have not been admitted to the United States or to those who are unlawfully present).


204 See infra Part III.A.1.i.-iii. (noting different profitability guidelines adopted by the I.R.C.).

205 See supra note 114 and accompanying text.
individual has received in a year, but if a corporation is successful and retaining all profits for improvements, the individual’s year-end tax statement would reflect only wages received which may or may not be an accurate portrayal of that individual’s annual gain in net worth. The problems are compounded if there is an entity owned by more than one individual. Allocating gains will typically represent nothing more than an exercise in mathematics, but what of the case where a certain annual income requirement is missed because the majority of owners failed to agree to declare a dividend.\footnote{Dividends are earnings that a company distributes to its shareholders pro rata in accordance with share ownership. BLACK’S LAW DICTIONARY 512 (8th ed. 2004).} The owner-applicant is essentially “worth” the same amount whether or not the dividend is declared, but depending on the required metric, his/her eligibility for an entrepreneur visa may evaporate.

A net worth requirement also feels unsatisfactory.\footnote{Net worth is defined as “[a] measure of one’s wealth, usually calculated as the excess of total assets over total liabilities.” BLACK’S LAW DICTIONARY 1639 (8th ed. 2004).} While Generally Accepted Accounting Principles\footnote{See Federal Accounting Standards Advisory Board, \textit{Generally Accepted Accounting Principles}, available at http://www.fasab.gov/accepted.html.} may provide standardization in determining net worth, portfolios are still subject to volatility as key assets gain or lose value over time. Furthermore, regardless of any fluctuations in value, net worth is a gauge that does not necessarily reflect entrepreneurial activity nor the health of any given entity and is not a good fit for determining eligibility for an entrepreneur visa. Whether high net-worth, undocumented individuals should be allowed to adjust their immigration status solely because of their net worth or a large investment is a question better considered in connection with any evaluation of the EB-5 program and is beyond the scope of this article.

The bright lines that would be easiest to implement and easiest to understand would be those that first distinguish the type of corporate vehicle utilized by the entrepreneur. Comparing like vehicles, be they corporations or sole proprietors, should yield more consistent results and readily determinable guidelines. Treating entities, pass-through entities, and individuals separately should allow for more consistent results with the ideal goal being that entity selection should not positively or negatively impact an entrepreneur visa application.\footnote{Equivalent treatment based on readily available income or profitability metrics is practically impossible. In addition, corporations typically allow for more beneficial tax treatment of fringe benefits which further clouds the issue and renders impossible an equivalent metric across all entity types. See Lee \textit{supra} note 96, at 907-08.} Furthermore, as to entities owned by more than one individual, provided that the applicant’s percentage of ownership multiplied by the stated metric exceeds the visa...
requirement, common ownership should not preclude the visa issuance provided certain other criteria are met.\textsuperscript{210}

This article proposes using data readily available from the immediately preceding two years of filed U.S. tax returns to determine whether the profitability threshold has been satisfied. This requirement has multiple benefits including: standardized format; proof of U.S. tax filings; and reliance on a third-party specialist (the IRS) for policing of the data. As the integrity of any information included on a tax return is only as good as the integrity of the return preparer, there is a risk that some numbers may be inflated to meet the threshold requirements.\textsuperscript{211} In order to avoid rewarding individuals who overstate income and profitability with an entrepreneur visa, additional requirements such as employee generation have been added. While the additional requirements provided below and the standard policing by the IRS do not make the attainment of an entrepreneur visa through a sham businesses vehicle impossible, it greatly increases the cost of doing so.

a. Sole Proprietors

Arguably the easiest category to determine the profitability requirement is for sole proprietors. Schedule C to Form 1040\textsuperscript{212} provides a line item for net profitability that allows for quick determination of profitability. This requirement will require that the applicant file a Schedule C rather than just a 1040 which may have been the form used in the past due to preparer error. At most, this problem should represent a delay of two years.\textsuperscript{213} Allowing sole proprietors to supplement the information contained in their standard 1040 tax filing to circumvent the

\textsuperscript{210} See Part II.A.4. \textit{infra} (noting requirements that entrepreneur be primarily engaged in the management and day-to-day operations of the business in question).

\textsuperscript{211} While typically there is some incentive for individuals to underreport income in order to avoid taxation on the underreported portion, an entrepreneur visa presents an incentive to over-report, and therefore over-pay any taxes owed. While some may not see over-reporting of income as problematic, it threatens the integrity of the visa program if it is done when there has been no business created or there is one that is less profitable than necessary.


\textsuperscript{213} See \textit{infra} Part II.B.1. (detailing the requirement that business show profitability over a two-year period as evidenced by federal tax returns). In the alternative, the applicant could seek to file form 1040X, \textit{Amended U.S. Individual Income Tax Return} for the required two years prior to applying for an entrepreneur visa. The tax implications of doing so will necessarily vary on a case by case basis, and the immigrant may be entitled to additional credits or subject to additional tax owed as the case may be.
requirement of the use of Schedule C would place the visa reviewers in the unfortunate position of needing to pass judgment on the supplemental information as to its accuracy, veracity, and propriety inasmuch as the information documented gains and expenses accruing to the business. These categories are all areas requiring a certain degree of financial sophistication that may be beyond the training of the visa reviewers.\footnote{Cf. U.S. Citizenship and Immigration Services, USCIS Update: USCIS Changes Filing Location for EB-5 Related Items, available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=848cb172e7bce110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD (noting that all EB-5 filings were to be reviewed by the California Service Center as it has established a unit “comprised of specially-trained adjudicators dedicated to EB-5 adjudications.”).}

According to IRS statistics, households filing income tax returns with $100,000 or more in adjusted gross income represented approximately twelve percent of the population in 2006.\footnote{See Individual Income Tax Returns Filed and Sources of Income, Table 1.1 – Selected Income and Tax Items, by Size and Accumulated Size of Adjusted Gross Income, Tax Year 2006, available at http://www.irs.gov/taxstats/indtaxstats/article/0,,id=96981,00.html.} Therefore, this article proposes to establish the profitability threshold at $100,000. This $100,000 threshold is not just the adjusted gross income of an individual (or spouse if filing jointly), but must represent the profitability of the created business. Given that the vast majority of the individuals in the twelve percent mentioned above (approximately 16.5 million out of the total population of returns of approximately 138 million) are lawfully present, the exact number of individuals eligible for this type of visa will likely be relatively small. In addition, the figure will act as a positive incentive to earn at least the minimum required to obtain the visa, and as employment generation is an additional requirement,\footnote{See supra Part III.A.1.} each visa received will represent a significant net benefit to the U.S. economy on whole.

b. Flow-through Entities and Partnerships

Individuals establishing an LLC may elect to be taxed as a partnership, i.e., the earnings “flow through” the entity and are taxed only at the individual level.\footnote{Any discussion of a single-member LLC is unnecessary as the IRS treats the entity as a sole proprietorship. See 26 C.F.R. § 301.7701-3(a). As with the sole proprietorship, the single member would file Schedule C with his/her 1040 filing. As a result, the analysis and eligibility guidelines for the investor visa would be the same as for sole proprietors. See supra notes 212-216 and accompanying text. Members may also “check the box” and elect to be treated as a C corporation or an S corporation. See James C. Chudy, Federal Income Tax Issues in the Acquisition or Sale of a Privately-Held Company, Practicing Law} In this manner, partnerships and LLCs share similar...
tax effects. The only slightly technical aspect that this article needs to address is special allocations, i.e., when profits are distributed in a manner not equal to ownership percentage. In such cases, the IRS may either accept or reject the special allocation. Provided the special allocation is accepted, the members are taxed according to their portion of the pre-agreed allocation, otherwise the earnings (or losses) are deemed to be distributed according to actual ownership percentages. Additionally, any retained earnings problem present with C corporations is eliminated with LLCs and partnerships as the IRS annually assesses the tax owed on the members’ or partners’ distributive share whether or not such share is actually issued.

As with sole proprietors’ use of net profitability, the members’ and partners’ share of profits as set forth in Parts II and III of Schedule K-1 provide a satisfactory metric for determining visa eligibility as to the profitability requirement. Therefore, as with sole proprietors, a $100,000 profitability threshold per member or partner as demonstrated by Schedule K-1 provides a clean, understandable metric for visa adjudicators. The only supporting documentation necessary would be the appropriate annual tax forms which would then be verified by USCIS.

Institute, Corporate Law and Practice Course Handbook Series, PLI Order NO. 18988, at 429 (May-June 2009). As undocumented individuals are ineligible to be shareholders in an S corporation, only the effects electing treatment as a C corporation are discussed below. See infra Part III.A.1.iii.

LLCs and partnerships both file Form 1065 with the IRS for their annual reporting. Likewise, both LLCs and partnerships issue their members Schedule K-1s which detail each member’s share of profits and losses. LLC members, like partners, report their share of profits on Schedule E of their personal tax returns. Typically, profits are distributed according to ownership percentage, and are easily calculated. See Gregg D. Polsky, Can Treasury Overrule the Supreme Court?, 84 B.U.L. REV. 185 at n. 330 (2004) (citing I.R.C. § 702(a) (providing for distributive share taxation of a partner’s loss or income).

In order to avoid individuals assigning greater amounts of losses to members in the highest income bracket, or, to a lesser extent, gains to an individual in a lower income bracket, the IRS will analyze the special allocation to ensure that it was entered into for legitimate business reasons. Generally speaking, the special allocation will be accepted if the allocation has an economic effect; and that economic effect is substantial. Treas. Reg. § 1.704-1(b)(2).

By submitting IRS Form 4506 along with the entrepreneur visa petition, all applicants would grant consent to the IRS to release a copy of the tax return actually filed. See IRS Form 1065, Schedule K-1, Partner’s Share of Income, Deductions, Credits, etc., available at http://www.irs.gov/pub/irs-pdf/f1065sk1.pdf.

By submitting IRS Form 4506 along with the entrepreneur visa petition, all applicants would grant consent to the IRS to release a copy of the tax return actually filed. See IRS Form 4506(Rev. Oct. 2008) – Request for Copy of Tax Return, available at http://www.irs.gov/pub/irs-pdf/f4506.pdf. Form 4506 can be used for both individuals and entities. Id.
The primary substantive difference between sole proprietors (and single member LLCs) and pass-through entities such as LLCs and partnerships for the sake of determining eligibility for an entrepreneur visa is the question of any given individual’s participation. When only a single individual is involved, presumably that individual is responsible for all income generation. As more individuals become involved, it becomes more and more difficult to assess the degree of participation and the importance of that individual’s participation to the entity. As this visa category is intended to reward entrepreneurs, the additional tests discussed below should mitigate concerns over potential abuse of the visa program by selling ownership interests solely to confer visa benefits.226

c. Corporations

Corporations (and LLCs treated as corporations) present a much more difficult situation given the role of retained earnings in any corporation and the varying tax rates regarding corporate income.227 As the entrepreneur visa category should, to the extent possible, treat all applicants equally, there needs to be a metric that is easily derived and equivalent to the $100,000 profitability metrics imposed on sole proprietors, partnerships and pass-through LLCs. The best way to establish such a metric is to incorporate three separate data points. The first two, wages and dividends received, are clearly the easiest to determine and document. Presumably for many small, family-owned corporations, these two categories will often be the only two used for the visa application process as the corporation will attempt to zero-out any gains through wages and fringe benefits.228 In this scenario it is easy enough to provide that the individual must document wages and/or dividends received from the entity in excess of $100,000. Accounting problems arise, however, when the corporation needs to retain earnings for future growth, cash flow, or any other business concern. In such case, the earnings are not taxed to the individual until a dividend is

226 See infra Part II.A.4.

227 For example, the corporate income tax rates may be lower than individual rates that would apply to most LLC owners due to certain FICA deductions. See F. Owen Evans III, William J. Hyland, Jr., The LLC Envelope, 77 Fla. Bar J. 50 (2003). Though beyond the scope of this article, owners of an LLC electing S corporation tax treatment may also receive minor tax benefits regarding Social Security, Medicare and other self-employment taxes. Id.

228 See Daryll K. Jones and David Kirk, Choice of Entity Planning After JGTRRA: Brainstorming the Triple Split, 6 No. 2 Bus. Entities 4, 2004 WL 887424, at n. 37 (2004). Retained earnings are more likely to be used when the health or goals of the business outweighs the need to provide easily determinable tax information to adjust the immigration status of the co-owner(s) applying for the entrepreneur visa.
declared and sent to the individual.\textsuperscript{229}

Since retained earnings have not been distributed, and therefore not taxed at the individual level, $1 of retained earnings is not equivalent to $1 held by an investor after a dividend has been declared.\textsuperscript{230} One possible way to measure retained earnings for the purpose of determining eligibility for the entrepreneur visa could be to simply divide the retained earnings declared on the most recent tax filing by the number of outstanding shares and multiply that quotient by the number of shares held by the applicant. While the resulting product does represent retained earnings per shareholder, the corporation metric is not exactly equivalent to the previous metrics do to the differing tax treatment mentioned above. This estimation, however, may provide the most easily-determinable close approximation.

The resulting formula, therefore, would require the addition of wages, dividends received, and the applicant’s allocation of retained earnings to meet the $100,000 threshold required per shareholder. The problem regarding multiple owners alluded to in the section on LLCs and partnerships is more prevalent in the corporate context. Given that the number of shareholders, partners or members is limitless, a numerical limit as well as a participation requirement should be considered in order to ensure that the individual stockholder, unit holder or partner in fact meets the requirements of the entrepreneurial aspect of the proposed visa.

2. Joint Ownership/Substantial Participation

The most significant problem with the joint ownership of any entity in the context of the proposed entrepreneur visa is that it may serve to obfuscate the particular role of any particular owner.\textsuperscript{231} Were the proposed visa an entrepreneur and/or investor visa, then, provided the entity was

\textsuperscript{229} I.R.C. § 301(c)(1).

\textsuperscript{230} The $1 in the investor’s hands is worth something less than $1 due to the tax imposed on the amount at the individual level. I.R.C. § 301(c)(1). The actual amount of the tax imposed will depend on the income bracket of the investor. Id. Therefore, any calculation that uses retained earnings may have the unintended consequence of encouraging immigrants to establish their business as a C corporation as it may reflect slightly higher profitability due to the beneficial tax treatment of self-employment taxes. See supra note 227. If the individual is allowed to leave the earnings in the company and include such amount (or such percentage as corresponds to the individual), then on the margin some businesses may meet the profitability threshold requirement were they to be established as C corporations rather than LLCs or partnerships. That being said, the individual owner will, at some point, be taxed individually on the money. I.R.C. § 301(c)(1). The second level of taxation is likely to be a sufficient enough deterrent to counteract the marginal incentive for C corporations created here.

\textsuperscript{231} See supra Part III.A.1.i. (noting the inherent difficulty in assessing an individual’s actual role in a business enterprise).
successful enough to support multiple visa petitions, there would be no problem. However, where the primary purpose of the visa is to encourage entrepreneurs and entrepreneurial activity, passive investment, though important, should not suffice for the granting of this type of visa. The problem then, is how to eliminate the possibility that an individual will purchase an ownership interest that is significant enough to qualify for an entrepreneur visa while maintaining clear, bright-line rules for visa petition examiners.

One possibility would be to limit the dilution of ownership interests. For example, there could be a presumption (or prohibition) that any individual who owns less than fifty-one percent of a business is not significantly enough involved in the entity to merit an entrepreneur visa. The benefit of such a rule would be ease of implementation. Ownership percentages are typically contained in the tax forms that are already required to be submitted, and are readily understandable by non-tax individuals. The negative would be that it may operate as a barrier to the most successful entrepreneurs.\(^{232}\)

Another possibility is a requirement of substantial participation. The E-2 visa requires that the investor come “solely to develop and direct the operations of [the] enterprise.”\(^{233}\) Some case law exists surrounding this language so that the test would not be entirely new,\(^{234}\) but there appears to be a history of policy and case law requiring at least 50% ownership in order to meet this requirement.\(^ {235}\) For those cases in which an entity is utilized, this type of control may be demonstrated through “a managerial

\(^{232}\) See infra note 247 and accompanying text.

\(^{233}\) Although it is possible for employees of a qualified E-2 employer to also receive an E visa, this type of arrangement is not contemplated in the proposed entrepreneur visa as it would reward employees rather than the entrepreneurs. See, e.g., I.N.A. § 101(a)(15); 8 C.F.R.\(^ {234}\) See, e.g., Matter of Lee, 15 I. & N. Dec. 187 (Reg. Comm’r 1975) (holding that an investor that owned less than half of a partnership lacked sufficient control to develop and direct operations).\(^ {235}\) 9 FAM § 41.51 N.12.1. “In all treaty investor cases, it must be shown that nationals of a treaty country own at least 50 percent of an enterprise.” See also Matter of Lee, 15 I. & N. Dec. 187, 8 C.F.R. § 214.2(e)(16).

Solely to develop and direct. An alien seeking classification as a treaty investor (or, in the case of an employee of a treaty investor, the owner of the treaty enterprise) must demonstrate that he or she does or will develop and direct the investment enterprise. Such an applicant must establish that he or she controls the enterprise by demonstrating ownership of at least 50 percent of the enterprise, by possessing operational control through a managerial position or other corporate device, or by other means.

8 C.F.R. § 214.2(e)(16).
position or other corporate device…”236 Determining control of joint ventures and equal partnerships is treated similarly, provided that there are no more than two co-owners or partners.237

Within these criteria there is room for additional interpretation. The Foreign Affairs Manual (FAM) notes the constant evolution of corporate structuring, and the inherent difficulty of predetermining which owners may qualify as having control.238 Outside of percentage ownership, immigration regulations and the FAM emphasize managerial control for determining if the owner is sufficiently able to direct the enterprise.239 Ownership of the largest block of shares in a company with diffuse ownership, proxy rights, and shareholder voting agreements may all be utilized to prove control.240

The EB-5 investor visa has a similar, though not identical requirement.241 For an EB-5 visa, the applicant must show that he/she is engaged in a day-to-day managerial role in the company, or a policy maker.242 In order to establish that this requirement has been fulfilled, the applicant may submit evidence including a written statement describing the position, proof of role as officer or director of the entity, or, if the entity is a partnership, proof that the applicant is directly involved in the management and/or policy-making of the partnership.243 While the requirements are fairly clear, substantial discretion is given to the visa petition examiner in determining whether a given role or position is sufficiently involved in the management and control of the enterprise, except as to accepting

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236 8 C.F.R. § 214.2(e)(16), 9 FAM 41.51 N.12.4.
237 See GORDON, MAILMAN & YALE-LOEHR, supra note 7, at § 17.06[4], 17-42 (noting also that any control in equal partnerships with more than two partners has been deemed “too remote.”).
238 9 FAM § 41.51 N.12.4.
239 8 C.F.R. 214.2(e)(16), 9 FAM 41.51 N.12.4.
240 See GORDON, MAILMAN & YALE-LOEHR, supra note 7, at § 17.06[4], 17-42 fn. 45 (citing agency definitions of control provided in 8 C.F.R. § 214.2(l)(1)(ii)(K)). The regulations and FAM briefly mentions the issue of a diffuse group of individuals consolidating their power to obtain a position of control over the entity with regards to employee hiring. 9 FAM § 41.51 N.12.3. The FAM is also clear that the consolidation of diffuse ownership interests is only sufficient to establish control in order to obtain an E-2 visa for an employee, not for the purported owner. Id.
241 See I.N.A. § 203(b)(5); 8 C.F.R. § 204.6(j)(5).
242 8 C.F.R. § 204.6(j)(5). One of the primary purposes of this regulation is to ensure that the petitioner is not simply a passive investor. Id. Due to the initially disappointing results of the EB-5 visa, Congress created a pilot program that allowed for investors to pool their investments in approved regional economic growth programs without the managerial involvement requirement. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, § 610, 106 Stat. 1828; S. Rep. No. 102-918 (1992). The regional pilot program is limited to 3,000 visas annually. Id. at § 610(b).
243 8 C.F.R. § 204.6(j)(5)(i)-(iii).
documentation establishing a role as director or officer.\textsuperscript{244}

For the entrepreneur visa, this article proposes a combination of ownership and control be used to satisfy the substantial participation requirement. First, the individual must be an officer, director or managing member of the entity (for corporations or LLCs), or a partner with management rights set forth in the partnership agreement.\textsuperscript{245} While a “substantial participation” requirement is appealing, requiring proof of substantial participation leads down the path of uncertainty. The type of evidence acceptable to prove participation would necessarily be increased, and as the types of possible evidence increase, the discretion to validate the information given to the visa petition examiner must also increase. Given the history of the current invest visa categories, predictability of results and uniformity in documentary requirements dictate a bright-line standard for the proposed visa.

Second, in order to ensure that the individuals receiving the visas are sufficiently entrepreneurial, the visas shall be limited to owners of at least 25\% of an entity. By requiring 25\% ownership, no more than four individuals may qualify for an investor visa for any given entity. This requirement ensures that the ability to purchase an entrepreneur visa remains cost-prohibitive for the vast majority of individuals. 25\% ownership would require that any eligible entity must show profitability of at least $400,000 per year, as well as the creation and maintenance of at least 12 full-time employees\textsuperscript{246} for any 25\% owner to qualify for an entrepreneur visa. While limiting the visa to owners of 25\% or more may negatively affect the most successful enterprises,\textsuperscript{247} it serves to better establish the true entrepreneurs involved in the day-to-day operations.

The two elements taken together provide clear, concise rules that should ensure that the applicant is significantly involved in the business

\textsuperscript{244} Id.

\textsuperscript{245} The partner may be either a general or limited partner. This requirement, which follows state law on the subject, better establishes that the partner is indeed involved in the day-to-day operations. See, e.g. Uniform Limited Partnership Act 2001 (ULPA 2001) §§ 302-303 (noting that although a limited partner does not have the ability to act for or bind the partnership due to its role as a limited partner, its liability is no longer determined by its involvement in the managerial operations of the partnership). Former versions of the ULPA focused on a partner’s “control” in imputing liability on a limited partner, but such provision was deleted as new entity forms rendered it “anachronistic.” See ULPA 2001 § 303, Comment.

\textsuperscript{246} See infra Section II.3.

\textsuperscript{247} If, for example 10 individuals formed an entity with 10\% ownership each, in order to qualify for the entrepreneur visa the entity would have to show profitability of $1 million and the creation of thirty full-time positions. See Part II.A.3 infra. Obviously this type of company is successful, however the problem of determining each individual’s degree of participation necessitates a cap that is easily understood and applied.
enterprise. Even given the requirements above, it is clear that this visa category, as with any other, is susceptible to fraud. However, given the documentary, profitability, employee generation, and tax compliance requirements, it should be no more (and hopefully less) susceptible to fraud than any other visa category.

3. Employee Generation

In addition to profitability, this article proposes the entrepreneur visa also contain an employee generation requirement. While the profitability requirement clearly acknowledges that the business must be successful, an employee generation requirement serves two purposes: one, it ensures that a portion of the benefit the applicant’s company provides the U.S. economy goes to authorized workers; and two, it makes the entrepreneur visa proposal more palatable to a wider range of individuals given that there are clear, direct beneficiaries lawfully present in the United States. In order to better ensure compliance with the stated goal of providing a direct benefit to additional authorized workers in the United States, the employee generation requirement should exclude from the applicant’s application any positions which are held by any member of the applicant’s immediate family or any positions held by unauthorized workers. The question of employee generation then becomes one of degree.

There is no non-arbitrary way to determine the precise number of employment positions that should be created in order to be eligible for an entrepreneur visa. As with the profitability requirement, the best resolution is to elect the most-defensible arbitrary measure based on other indicia; however for a category such as this, there are few comparable guidelines. The EB-5 program, which requires a $1 million investment, requires the creation of ten full-time positions, or roughly one employee for each $100,000 in revenue. A straight-line proportionality test following the EB-5 criteria would indicate that the proper number of jobs created for the entrepreneur visa would be one, which would provide little more than lip service to any employee generation requirement.

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248 While the EB-5 immigrant investor visa requires the creation of at least ten full-time positions, the E-2 visa has no employment creation requirement. I.N.A. §§ 101(a)(15)(E), 203(b)(5). One reason that the E-2 has no employment creation requirement is that the purpose of the provision is to foster trade, friendship and commerce between countries. See GORDON, MAILMAN & YALE-LOEHR, supra note 7, at § 17.06, fn 1.1 (noting that in meeting its purpose of promoting trade between countries, the E-2 visa is “unrelated to the task of preserving the jobs of authorized workers…”).

249 Statutorily, the exclusion could for sake of simplicity utilize the definition of immediate relative in I.N.A. § 201(b)(2)(A)(i).

250 I.N.A. § 203(b)(5).
Another way to approach the problem is by analyzing cost. For example, a minimum-wage employee currently earns $7.25 per hour. On an annual basis, that amounts to approximately $15,000 pre-tax for the employee.\footnote{The following figures are necessarily all estimates. Several states have higher minimum-wage requirements than federal law, states vary widely with respect to worker’s compensation, and health care, benefits, etc. also vary widely based on position and geography. For minimum wage information, see the Department of Labor, Wage and Hour Division, \textit{Minimum Wage Laws in the United States – July 1, 2009}, available at http://www.dol.gov/esa/minwage/america.htm.} The cost to the employer will be higher than just wages as it will include deductions for FICA,\footnote{The Federal Insurance Contributions Act, better known as FICA, requires a deduction 7.65\% of the employee’s total salary (15.3\% if the employee is self-employed), though the Social Security portion is not taxed on wages above $102,000 in 2009. See 26 U.S.C. § 3101 et al; see also IRS Publication 15, Circular E, available at http://www.irs.gov/publications/p15/ar02.html#en_US_publink100011663.} FUTA/SUTA,\footnote{The Federal Unemployment Tax Act (FUTA) and its state counterpart, the State Unemployment Tax Act (SUTA) are payroll deductions for unemployed workers. FUTA is taxed at a rate of 6.2\% on the first $7,000 of earnings, though any SUTA payments may be offset up to 5.4\% leaving the true FUTA rate to be approximately 0.8\%. See IRS Publication 15, Circular E, § 14, available at http://www.irs.gov/publications/p15/ar02.html#en_US_publink100011663.} worker’s compensation, health insurance, vacation time, holidays, and sick pay. A conservative estimate would be approximately 50\% of salary. In that case, every full-time employee earning minimum wage would cost approximately $22,500. When dealing with a profitability metric of $100,000, that represents a significant portion of profitability. In essence, requiring one full-time employee would require that the business have a profitability of at least $122,500 prior to deducting the employee’s expense, and requiring five full-time employees would require the business to have a profitability of at least $212,500 prior to deducting the employees’ expenses, or more than twice the stated requirement.

Requiring three full-time employees \textit{per applicant} would require the business to earn approximately $167,500 \textit{per applicant} prior to deducting the employees’ salaries and benefits. In that case, the applicant’s business is likely experiencing revenues of at least twice that amount when considering other expenses such as the costs of goods sold or services provided, any overhead expenses, as well as other miscellaneous business expenses. For businesses that typically pay wages in excess of minimum-wage, the cost and profitability numbers are even higher. Therefore, the per applicant requirement of owner profitability of at least $100,000 coupled with the creation of three separate full-time employment positions should serve to demonstrate which undocumented immigrant entrepreneurs have created significant economic benefits to the U.S. economy such that they
should be rewarded with the opportunity to apply for an entrepreneur visa.

4. Tax Compliance

One condition that requires very little elaboration is compliance with all U.S. tax laws and filing requirements for at least the two years preceding application for the entrepreneur visa.254 This requirement is largely subsumed by the profitability requirement as two years of U.S. tax returns are necessary to document that the applicant has met or exceeded the profitability threshold established in Part I.A.1 above. Any compliance issues regarding faulty returns are outside the purview of U.S. immigration law, and are best left to the compliance and investigation divisions of the IRS without effect as to the visa petition process. Of course, any tax returns subsequently found to contain evidence of fraud or materially erroneous entries255 could give rise to the possible revocation of any lawful permanent residency and/or naturalization benefit in addition to any fines or criminal actions instigated by the IRS.256

B. No “Condition” Necessary

In a way, both the immigrant and nonimmigrant investor visas are conditional. As the E-2 nonimmigrant visa must be renewed every two years, the applicant must continually prove that all necessary requirements are being met in order to maintain E-2 status.257 Additionally, the EB-5 visa provides a traditional, formal condition that must be removed after two years of conditional permanent residency.258 The conditions for both visa types serve to confirm the bona fides of the investor in first establishing and

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254 Tax compliance has often been discussed as a component of comprehensive immigration reform. See S. 2611 109th Cong. § 601 (as passed by the Senate on May 25, 2006); see also Cynthia Blum, Rethinking Tax Compliance of Unauthorized Workers After Immigration Reform, 21 GEO. IMMIGR. L.J. 595, 611 (2007). As noted above, compliance with filing requirements is no guarantee that the applicant is in compliance with all U.S. tax laws; however, proof of filing demonstrates at least minimal knowledge of U.S. tax requirements.

255 See, e.g. I.N.A. § 246(a) (noting that the Secretary of Homeland Security may, at any time within five years of adjustment of status under § 245, rescind the permanent residency or naturalization granted if the Secretary is satisfied that the individual was not eligible for adjustment of status). ICE may instead chose to initiate removal proceedings under § 240, and any final order of removal would also serve to rescind the alien’s permanent resident status. I.N.A. §§ 240, 246(a).

256 See I.N.A. § 340(a).

257 See 8 C.F.R. § 214.2(e)(19).

258 See supra note 143 and accompanying text (noting that the condition is largely used to deter fraud).
then maintaining his/her investment in the United States. By structuring the entrepreneur visa to require two years of profitability and at least two years of operation, the purpose for any similar condition is eviscerated.

While the argument against such an approach is that there would be no requirement for the immigrant entrepreneur to remain in business upon attaining the visa, such argument seems superficial at best as it largely overlooks the role of the applicant’s own self-interest. By qualifying for the visa, the applicant has already demonstrated a profitable, stable commercial enterprise that provides the applicant an income level that is approximately equal to the top 10% of all income tax filers. Additionally, even if the entrepreneur were to sell or, more improbably, close the business, by imposing a condition precedent on the granting of the visa, many benefits have already accrued to the U.S. economy and the employees hired by the applicant, especially during the period in which the applicant has proven his/her eligibility for the visa.

Requiring eligibility at the time of application may mean that some undocumented entrepreneurs will have an additional waiting period in order to receive the visa if they lack one or more of the outlined requirements. Requiring initial eligibility upon application also means that there is no need to create a bureaucratic system of review to ensure compliance with any conditions that may involve additional levels of discretion and delay, and it also means that the residency initially granted is permanent. Of course, even though such lawful permanent residency may be granted initially, it would still be subject to rescission if all statements and documents submitted in connection with the visa petition were not true and accurate, or the commercial enterprise was established solely to evade immigration laws.

C. Numerical Limitations - A Necessary Evil?

The proposed entrepreneur visa would most likely be placed under INA § 203(b) which deals with employment-based visas. Employment-
based visas are capped annually at 140,000 plus any unused family-sponsored visas.\textsuperscript{266} Currently, the first three employment preferences are each entitled to approximately 29\% of the available employment-based visas, and the remaining categories (including the EB-5 investor visa) are capped at approximately 7\% of the available employment-based visas. If the annual cap is not subject to debate, any visas allocated to the newly proposed entrepreneur visa category must necessarily displace some combination of visas from the other five categories. The ideal solution would be to raise the ceiling from 140,000 to some higher number and recalculate the distribution percentages so that in terms of hard numbers, visa applicants in the first five categories are treated similarly as in the past while allocating all newly created visas to the entrepreneur visa category.

If faced with the decision of reallocating visas rather than creating new ones, difficult decisions must be made. In the past three years, total employment-based visas have averaged approximately 160,000 per year.\textsuperscript{267} In terms of visa issuance, of the five employment-based visa categories, the fifth category (investor visa), and first category (priority workers) are generally the most undersubscribed in terms of percentage used.\textsuperscript{268} Additionally, in the most recent Visa Bulletin, the only preference category that was not current was the third preference for skilled workers, professionals and other workers.\textsuperscript{269} Therefore, the question becomes which preference or combination of preferences should be reduced – oversubscribed categories for which there is great demand, or undersubscribed categories which generally represent aliens with extraordinary ability and multimillionaire investors that are deemed

\textsuperscript{266} I.N.A. \S 201(d).
\textsuperscript{267} See Department of Homeland Security, Yearbook of Immigration Statistics 2008, Table 6 (noting totals of 159,081, 162,176 and 166,511 in years 2006, 2007 and 2008 respectively). Totals include both new arrivals and adjusters of status. See I.N.A. \S 241(a), 8 C.F.R. \S\S 245.1(g)(1), 245.2(a)(2)(i)(B).
\textsuperscript{268} See, e.g., Yearbook of Immigration Statistics 2008, Table 6 (noting high percent rates of use for the second, third and fourth employment-based visa categories). Absolute numbers are somewhat misleading as the visa categories provide a cascading effect for usage. I.N.A. \S 201(d). All unused fourth and fifth preference visas are allocated to the first preference category. \textit{Id}. Therefore, the first preference which is already underutilized appears even more so. The second preference then receives any unused first preference allocations (which included the unused fourth and fifth preference allocations), and the third preference lastly receives any unused second preference allocations. \textit{Id}. Given the higher rates of usage, even with the additional allocations, among the second and third preference, they appear to be utilized more often than the first preference priority worker category.
For example, if a 7.1% allocation, currently the allocation for investor visas, is seen as an informal ceiling, implementing the visa reallocation could be a fairly painless process. One solution to implement would be to reduce the fifth preference category by four percent, and the first, second, and third preferences could each be reduced by one percent.\textsuperscript{271} Given that hard data on the number of undocumented immigrants is difficult to come by,\textsuperscript{272} it is difficult to determine what number of visas would be inadequate and what number would be politically unacceptable. For the first years of the program, a sliding scale could be used so that for each of the first seven years in which 100% of the entrepreneur visas are allocated, by operation of law, the entrepreneur visa allocation shall increase by one percent, and, based on actual allocations, the other visa categories would be reduced in some combination equal to one percent. This method would serve to provide a ceiling of approximately 14% of worldwide employment-based entrepreneur visas which would amount to approximately 19,000-25,000 visas each year. Likewise, if the visa category were underused, it could similarly be reduced with a simple mathematical formula redistributing the visa allocation to the remaining five preference categories to a floor as low as one percent annually.

Given the economic benefits that these undocumented entrepreneurs provide the U.S. economy, the ideal solution would be to allow as many as are qualified to adjust their status in any given year,\textsuperscript{273} while also not acting in a manner detrimental to other prospective employment-based immigrants. While creating a cap-free category for undocumented entrepreneurs may be the only solution to completely accomplish the purpose stated above, such solution is politically infeasible, especially since it is impossible at this point to determine the number of potential new immigrants this category would create. Increasing the worldwide cap on employment-based visas to allow for up to 10,000-25,000 undocumented entrepreneurs annually would be the next best alternative, though a more likely scenario would probably involve a reallocation of existing visa allocations in order to make the visa category politically viable.

\textsuperscript{270} See I.N.A. §§ 203(b)(1), 205(b)(5).
\textsuperscript{271} Due to the composition of the fourth-preference, special immigrant category, the fourth preference would remain unchanged. I.N.A. §§ 101(a)(27), 203(b)(4).
\textsuperscript{272} See Buchanan, supra note 9.
\textsuperscript{273} A comparative approach was adopted in the 1986 IRCA legislation dealing with the legalization of undocumented immigrants. I.N.A. § 245A(d)(1).
D. “Adjusting” to a New Life

Qualifying for an entrepreneur visa would serve the undocumented immigrant little unless there were a corresponding way to adjust his/her status to that of lawful permanent resident. Typically, for those immigrants who have overstayed their visa or who have entered the country without inspection, adjustment is statutorily prohibited as the alien: must be inspected and admitted or paroled into the country, be eligible to receive an immigrant visa, have the immigrant visa immediately available to him/her, and be lawfully present in the United States. Fortunately, prior U.S. immigration law provides some assistance for resolving this issue.

1. Removing Barriers to Adjustment and Ancillary Removability Issues

By co-opting much of INA § 245(i), a workable framework is easily established. For the undocumented entrepreneur visa, this article proposes that so long as the undocumented entrepreneur is physically present in the United States, admissible except for any inadmissibility triggered solely as a result of unlawful presence, and an entrepreneur visa is immediately available to him/her, that adjustment should be granted as a matter of right. Implicit in the foregoing, is that the applicant must be eligible for admission, i.e., not excludable under INA § 212(a).

Any visa category that provides an avenue to permanent residency, especially one that does so mandatorily, should include sufficient safeguards to ensure that no otherwise inadmissible aliens are granted adjustment. INA § 245A, created by IRCA and better known as the “amnesty” provision, dealt specifically with the problem of encouraging adjustment of those who qualified while prohibiting those who were

274 See I.N.A. § 245 (detailing the requirements for adjusting immigration status to that of a lawful permanent resident).
275 I.N.A. § 245(a), and (c). The lawful presence requirement does not apply to immediate relatives. Id.
276 See I.N.A. § 245(i), 8 U.S.C. § 1255(i), added by Pub. L. 103-317, § 506(b), 108 Stat. 1724, 1765-66 (Aug. 26, 1994) (creating I.N.A. § 245(i) which provided a mechanism for individuals who had entered the United States without inspection or who were not lawfully present to adjust their immigration status upon payment of a fee of $1,000 provided that certain other criteria were met and they received a favorable exercise of discretion).
277 I.N.A. § 245(i).
278 Contra § 245(a) (noting that for eligible aliens, the Secretary of Homeland Security may, “in his discretion and under such regulations as he may prescribe” adjust the alien’s status).
inadmissible based on certain, specified statutory grounds.\textsuperscript{279} Simply stated, except for inadmissibility relating to unlawful presence or the failure to have necessary documentation as discussed below,\textsuperscript{280} all other grounds for inadmissibility shall continue to apply. For those grounds which provide waivers, such waivers should be available to the entrepreneur visa applicant provided he/she qualifies for them.\textsuperscript{281}

2. Dealing with Unlawful Presence and Prior Removal Orders

In discussing unlawful presence, it seems that the act of being present is no more or less culpable simply due to repetition. While one may argue that repeat offenders demonstrating high rates of recidivism are qualitatively and quantitatively “worse” than those who commit an offense once, it seems that the type of crime at issue is relevant. If the crime is one normally deemed bad or offensive, i.e., \textit{malum per se},\textsuperscript{282} that analysis appears unassailable. However, if the crime is one which has been determined to be illegal because society dislikes it, i.e., \textit{malum prohibitum},\textsuperscript{283} the analysis is not as convincing. Repeat jaywalkers and repeat speeders, provided no accidents occur, are not looked at as inherently more culpable or evil in the eyes of society than those who are caught just once or not at all.

Presence in the United States is similar. The act of being present in the United States is not in and of itself illegal. Presence is only illegal when certain documentary requirements have not been met. As we saw with adjustment of status for immediate relatives, an individual unlawfully present in the United States can rectify the situation without leaving the United States by obtaining the necessary documents.\textsuperscript{284} It is for this reason that this article proposes treating all individuals who are unlawfully present

\textsuperscript{279} See I.N.A. § 245A(a)(4)(A), (d)(2) (noting specific grounds of exclusion that were not applicable, which were subject to waiver, and which were non-waivable).

\textsuperscript{280} See \textit{infra} Part III.D.2 (discussing inapplicability of §§ 212(a)(6)(A), (7), and (9) to the extent that any previous removal was based solely on unlawful presence, in determining eligibility for entrepreneur visas).

\textsuperscript{281} See, e.g., I.N.A. § 212(h), Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E). Many waivers are likely to be unavailable to undocumented entrepreneurs as they require a showing of hardship by a U.S. citizen or permanent resident. I.N.A. § 212(h)(1)(B) (noting denial of waiver must result in “extreme hardship” to U.S. citizen or lawful permanent resident).

\textsuperscript{282} “[A crime that is inherently immoral, such as murder, arson, or rape]” \textsc{black’s law dictionary} 978 (8th ed. 1999).

\textsuperscript{283} “[An act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral.]” \textit{Id.} at 978-79.

\textsuperscript{284} See, e.g., I.N.A. § 245(c) (providing the remedy of adjustment of status even to those who are unlawfully present if they are immediate relatives).
similarly regardless of past orders of removal provided that those removal orders were based solely on unlawful presence.

Therefore, provided the entrepreneur visa is accepted, language should be provided to explicitly note the inapplicability of INA §§ 212(a)(6)(A) – Aliens present without admission or parole, 285 212(a)(7) – Documentation requirements, 286 and 212(a)(9) – Aliens previously removed in determining entrepreneur visa eligibility. 287 INA § 212(a)(9) should only be inapplicable only if the underlying removal order at issue was based solely on unlawful presence. By removing these barriers to adjustment which would otherwise render the entrepreneur visa program meaningless, the entrepreneur visa will best be able to serve the intended population of visa applicants, and hopefully maximize its benefit to the U.S. economy.

IV. CONCLUSION

It makes very little economic sense to essentially deport productive U.S. businesses, especially in the midst of a worldwide recession. Undocumented entrepreneurs who have established viable and profitable enterprises at considerable personal risk have demonstrated through their actions a commitment to traditional U.S. ideals of capitalism and meritocracy. These undocumented individuals and their commercial enterprises clearly provide the type of benefits foreseen under both the immigrant and nonimmigrant investor visas, 288 and do so in a way that resonates with our nation’s history of promoting Horatio Alger stories of success against all odds. By providing a pathway to legal residency for these individuals, the United States will allow the individuals to better grow their enterprises on similar economic terms, encourage further investment in the United States, and assist in and incentivize the creation of new businesses and jobs throughout the country. 289

While some may argue that immigration inflows are too great for the country’s capacity to assimilate these immigrants, 290 it is difficult to

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286 I.N.A. § 212(a)(7) generally requires that immigrants and nonimmigrants in the United States be in possession of valid, unexpired travel documents. As many undocumented individuals entered without inspection rather than overstaying a visa, such a requirement would severely curtail the functionality of a visa directed at undocumented individuals. Id.
287 I.N.A. § 212(a)(9).
288 See supra Part II.A. and B. and accompanying text.
289 See supra Part I.B.3. and accompanying text.
maintain the same argument for individuals who have already demonstrated the capability of creating businesses and jobs for themselves and others,\textsuperscript{291} have not detrimentally affected lawful present individuals,\textsuperscript{292} have earnings in the top income brackets of all U.S. households,\textsuperscript{293} and have provided a substantial contribution to the U.S. economy.\textsuperscript{294} If the only arguments against the entrepreneur visa category are based on immigration volume or rewarding unlawful actions, i.e. presence,\textsuperscript{295} this visa category should be strongly considered either in connection with comprehensive immigration reform or as a standalone amendment to the INA.

\textsuperscript{291} See supra Part III.A.3. (noting the employee generation requirement of the entrepreneur visa).
\textsuperscript{292} See supra notes 44-46 and accompanying text.
\textsuperscript{293} See supra note 215 and accompanying text.
\textsuperscript{294} See supra Part III.A. (outlining substantial economic performance requirements for entrepreneur visa eligibility).
\textsuperscript{295} See supra Part II.C. (discussing the pros and cons of a legalization program, and more specifically the argument that such a program would reward and encourage additional unlawful entries in the future).