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# Startup Immigration: Stimulating Startup Communities with Immigrant Entrepreneurs

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*Comments***Startup Immigration: Stimulating Startup Communities  
with Immigrant Entrepreneurs**

David Vidal\*

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## I. INTRODUCTION

Foreign-born entrepreneurs (FBEs) promote US innovation, create jobs for US workers, and stimulate the economy.<sup>1</sup> Studies show that immigrant

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1. See STUART ANDERSON & MICHAELA PLATZER, AMERICAN MADE: THE IMPACT OF IMMIGRANT

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entrepreneurs have a “striking propensity . . . to start and grow successful American companies.”<sup>2</sup> US immigration law, however, has become a major barrier to FBEs trying to establish startup companies in the United States and many are taking their business to other countries.<sup>3</sup> This “exodus”<sup>4</sup> of immigrant entrepreneurs is highly criticized for creating a “reverse brain drain” on the United States, and Washington politicians are advocating reform.<sup>5</sup> In his 2013 State of the Union Address, President Obama said, “real reform means fixing the legal immigration system to cut waiting periods, reduce bureaucracy, and attract the highly-skilled entrepreneurs and engineers that will help create jobs and grow our economy.”<sup>6</sup> Both Republicans and Democrats support immigration reform, and in January 2013, a bipartisan group of senators proposed a framework for the necessary changes to immigration law.<sup>7</sup> Both parties agree that a major piece of immigration reform includes creating an easier path to citizenship for “the world’s future innovators and entrepreneurs.”<sup>8</sup> With change on the horizon, the

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ENTREPRENEURS AND PROFESSIONALS ON U.S. COMPETITIVENESS, NAT’L VENTURE CAPITAL ASS’N 6–7 (2006), available at [http://www.nvca.org/index.php?option=com\\_content&view=article&id=254&Itemid=103](http://www.nvca.org/index.php?option=com_content&view=article&id=254&Itemid=103) (on file with the *McGeorge Law Review*) (noting that “immigrants founded about 25% of the venture-backed U.S. companies in the last 15 years,” employing about 222,000 people in the United States). “The current market capitalization of publicly traded immigrant-founded venture-backed companies in the United States exceeds \$500 billion, adding significant value to the American economy.” *Id.* at 6.

2. *Id.* at 5.

3. See J.D. Harrison, *Decline in Immigrant Entrepreneurship Threatens U.S. Competitiveness*, WASH. POST, (Oct. 2, 2012), [http://www.washingtonpost.com/business/on-small-business/decline-in-immigrant-entrepreneurship-threatens-us-competitiveness/2012/10/02/bbe32c72-0cb8-11e2-a310-2363842b7057\\_story.html](http://www.washingtonpost.com/business/on-small-business/decline-in-immigrant-entrepreneurship-threatens-us-competitiveness/2012/10/02/bbe32c72-0cb8-11e2-a310-2363842b7057_story.html) (on file with the *McGeorge Law Review*) (“Should lawmakers not address the country’s immigration issues . . . the United States will likely struggle to maintain competitiveness in global markets.”).

4. See generally VIVEK WADHWA, *THE IMMIGRANT EXODUS: WHY AMERICA IS LOSING THE GLOBAL RACE TO CAPTURE ENTREPRENEURIAL TALENT* 16–18 (2012) (“Restrictive US immigration policies and the rise of other countries’ economies are driving talent elsewhere.”).

5. See Harrison, *supra* note 3 (“But increasingly strict immigration laws are making it more difficult for those immigrants to start their enterprises in the United States, prompting a ‘reverse brain drain,’ according to the researchers behind the Kauffman study.”).

6. *Obama’s 2013 State of the Union Address*, N.Y. TIMES (Feb. 12, 2013), <http://www.nytimes.com/2013/02/13/us/politics/obamas-2013-state-of-the-union-address.html?pagewanted=all> (on file with the *McGeorge Law Review*).

7. CHARLES E. SCHUMER, ET AL., *BIPARTISAN FRAMEWORK FOR COMPREHENSIVE IMMIGRATION REFORM*, available at <http://www.nytimes.com/interactive/2013/01/23/us/politics/28immigration-principles-document.html> (published Jan. 28, 2013) (on file with the *McGeorge Law Review*); see also Dan Lothian, *‘Now’s the Time’ to Move on Immigration, Obama Says*, CNN (Jan. 30, 2013 9:58 AM), <http://www.cnn.com/2013/01/29/politics/immigration-reform/index.html> (on file with the *McGeorge Law Review*) (describing a speech President Obama gave after a bipartisan group of senators proposed a framework for comprehensive immigration reform).

8. SCHUMER, ET AL. *supra* note 7; see also BUILDING A 21ST CENTURY IMMIGRATION SYSTEM, THE WHITE HOUSE 25 (May 2011), available at <http://www.whitehouse.gov/issues/fixing-immigration-system-america-s-21st-century-economy> (on file with the *McGeorge Law Review*) (“We should make it easier for the best and the brightest to come to the United States to start companies and create jobs by providing a visa for immigrant entrepreneurs.”).

time is ripe for immigration reform that allows FBEs to build and grow startups in the United States.<sup>9</sup>

Independent from immigration reform, there is another movement to create entrepreneurial-focused “startup communities” in the United States.<sup>10</sup> Startup communities are “clusters” of “energy, activity, and innovation” located in a particular geographic region.<sup>11</sup> Silicon Valley is the prominent example of a startup community, but other areas “both large and small, such as Boulder; Los Angeles; Chicago; Washington, DC; Portland; and Austin are seeing incredible activity and growth.”<sup>12</sup> There are strong economic and job creating incentives to establish startup communities.<sup>13</sup> Recognizing these advantages, the Obama Administration initiated a number of programs intended “to increase the development, prevalence, and success of innovative, high-growth, US firms.”<sup>14</sup> These programs and startup community experts conclude that the best way to create “startup communities” is to build regional ecosystems of connected startups and mentors that are “extremely inclusive” and led by the entrepreneur.<sup>15</sup>

This Comment links the previously separate concepts of immigration reform and the creation of startup communities.<sup>16</sup> It argues that while recently proposed legislation is a step in the right direction, these proposals still neglect to consider many of the advantages FBEs offer startup communities.<sup>17</sup> Recently proposed legislation targets immigrant entrepreneurs using standards such as the type of university degree, capital investment, and the number of jobs created, but these

9. See Somini Sengupta, *Silicon Valley and Immigrant Groups Find Common Cause*, N.Y. TIMES (Feb. 12, 2013), <http://www.nytimes.com/2013/02/13/business/tech-companies-and-immigrant-advocates-join-forces.html?pagewanted=all> (on file with the *McGeorge Law Review*) (quoting Ali Noorani, the executive director of the National Immigration Forum saying “[t]he stars are aligned here . . . [y]ou’ve got the politics of immigration reform changing”).

10. See BRAD FELD, *STARTUP COMMUNITIES: BUILDING AN ENTREPRENEURIAL ECOSYSTEM IN YOUR CITY 2* (2012) (“I strongly believe that startup communities can be built in any city and the future economic progress of cities, regions, countries, and society at large is dependent on creating, building, and sustaining startup communities over a long period of time.”).

11. *Id.* at 1.

12. *Id.* at 2.

13. See *id.* at ix (“During the past three decades, startups in the United States have created nearly 40 million American jobs. . .”).

14. PHILIP DELVES BROUGHTON, *THE START UPRISING: EIGHTEEN MONTHS OF THE STARTUP AMERICA PARTNERSHIP, THE KAUFFMAN FOUND 3* (2012), available at <http://www.kauffman.org/newsroom/story-of-a-startup-catalyst-points-to-the-power-of-regions-in-kauffman-foundation-paper.aspx> [hereinafter *THE START UPRISING*] (on file with the *McGeorge Law Review*) (describing the Startup American Partnership as an “independent private-sector alliance”). See also *Startup America*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/economy/business/startup-america> (last visited Jan. 3, 2013) [hereinafter *Startup America*] (on file with the *McGeorge Law Review*) (listing areas of “entrepreneur-focused policy initiatives” supported by the Obama Administration).

15. *THE START UPRISING*, *supra* note 14, at 12. (describing the regional strategy of the Startup America Partnership); see also FELD, *supra* note 10 at 25–29 (describing’s recommended “framework” to create startup communities led by entrepreneurs).

16. See *infra* Part VI (proposing community oriented additions to recently proposed legislation).

17. See *infra* Part II (discussing startups and foreign-born entrepreneurs).

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standards fail to take into account much of the human capital advantages that FBEs offer startup ecosystems.<sup>18</sup> Combining immigration reform with the actual needs and dynamics of proven startup communities could better meet the goals of both immigration reform and still developing startup communities.<sup>19</sup> This Comment proposes modifications to recently proposed legislation to make immigration law less restrictive on FBEs and give local governments the ability to attract and support FBEs that can advance their community.<sup>20</sup> The goal of this Comment is to propose community-friendly modifications to recently proposed legislation that could be implemented with either comprehensive or incremental immigration reform.<sup>21</sup>

Part II of this Comment discusses startup communities and the benefits of FBEs in startup ecosystems.<sup>22</sup> Part III provides a brief overview of current immigration law and the barriers FBEs encounter with visas available today.<sup>23</sup> In Part IV, this Comment outlines recently proposed legislation that would reduce immigration barriers for qualified FBEs.<sup>24</sup> Part V analyzes proposed startup legislation and identifies the unmet needs of startup communities and FBEs.<sup>25</sup> In Part VI, this Comment proposes community friendly additions to recently proposed legislation that meets the needs of FBEs, local communities, and policymakers by giving communities a voice in the selection of FBEs.<sup>26</sup> Part VII concludes by discussing the purpose of change and the future of immigrant entrepreneurship.<sup>27</sup>

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18. *See e.g.*, S. 310, 113th Cong. § 4 (2013) (outlining the qualifying conditions for the Startup Act 3.0); *see also* FELD, *supra* note 10, at 145–46 (2012).

The natural tendency of government is always to control, that is, to set up hierarchy and bureaucracy that controls and sustains a particular structure. A startup community is a rapidly evolving, ever-changing thing. It doesn't need a long-term structure . . . [i]t doesn't need a hierarchy . . . [and] it doesn't need any bureaucracy because this just slows down progress and the necessary and continual change that has to happen over a long period of time.

*Id.*

19. *See Obama's 2013 State of the Union Address*, *supra* note 6 (President Obama advocated that immigration reform should “attract the highly-skilled entrepreneurs and engineers that will help create jobs and grow our economy.”); *see also* FELD, *supra* note 10 at 25–29 (describing the “framework” for creating successful entrepreneurial communities).

20. *See infra* Part VI (proposing additions to recently proposed legislation).

21. *See infra* Part VI (discussing community-friendly additions to recently proposed legislation).

22. *See infra* Part II (describing the advantages of startups and foreign-born entrepreneurs).

23. *See infra* Part III (providing an overview of the current immigration system as it relates to FBEs).

24. *See infra* Part IV (outlining recently proposed legislation).

25. *See infra* Part V (analyzing recently proposed legislation).

26. *See infra* Part VI (proposing community-friendly additions to recently proposed legislation).

27. *See infra* Part VII (concluding and identifying the next step).

## II. STARTUP COMMUNITIES AND FOREIGN-BORN ENTREPRENEURS

Section A of this Part discusses startups and the need for highly skilled entrepreneurs in the creation of startup communities.<sup>28</sup> Section B then describes the abilities of FBEs to play a significant role in building startup communities.<sup>29</sup>

### A. *Startups and Startup Communities*

Startup expert and venture capitalist Brad Feld noted that “few people . . . in local or state government [understand] the difference between small businesses and high-growth businesses.”<sup>30</sup> Not all newly established businesses are startups.<sup>31</sup> Furthermore, startup entrepreneurs are not the same as investors.<sup>32</sup> In writing immigration legislation that promotes the growth of “startups,” it is important to define the term “startup” in order to accurately target FBEs that contribute to the creation of startups.<sup>33</sup> Startups are a unique class of business with an extremely high growth potential.<sup>34</sup> A startup can scale to a very large market because it can both “make something lots of people want” and can “reach and serve all those people.”<sup>35</sup> It is not constrained in the same way as other companies.<sup>36</sup>

Startups are essential to a healthy American economy.<sup>37</sup> In fact, studies indicate that “without startups, net job creation for the American economy would be negative in all but a handful of years.”<sup>38</sup> Recently proposed legislation includes findings that “[n]ew firms in the United States create an average of

28. See *infra* Part II.A (discussing startups and startup communities).

29. See *infra* Part II.B (describing the FBE and their entrepreneurial talent).

30. FELD, *supra* note 10, at 36.

31. See Paul Graham, *Startup = Growth*, PAULGRAHAM.COM (Sept. 2012), <http://paulgraham.com/growth.html> (on file with the *McGeorge Law Review*) (“[N]ot every newly founded company is a startup . . . startups are designed to grow fast.”).

32. See Katharine Q. Seelye, *Lure of Green Cards Brings Big Investments for Remote Resort in Vermont*, N.Y. TIMES (Dec. 30, 2012), [http://www.nytimes.com/2012/12/31/us/31vermont.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/12/31/us/31vermont.html?pagewanted=all&_r=0) (on file with the *McGeorge Law Review*) (illustrating how investors qualifying for citizenship may not need to be involved in the management of the startup).

33. See Graham, *supra* note 31 (“[S]tartups are different by nature, in the same way a redwood seedling has a different destiny from a bean sprout.”).

34. See *id.* (describing the “three phases” of startup growth and stating that “a good growth rate during [Y Combinator] is 5–7% per week”).

35. *Id.*

36. See *id.* (describing the growth of startups and the “constraints that limit ordinary companies”).

37. See DANE STRANGLER & ROBERT E. LITAN, WHERE WILL THE JOBS COME FROM?, KAUFFMAN FOUNDATION RESEARCH SERIES: FIRM FORMATION AND ECONOMIC GROWTH 5 (2009), available at [http://www.kauffman.org/uploadedFiles/where\\_will\\_the\\_jobs\\_come\\_from.pdf](http://www.kauffman.org/uploadedFiles/where_will_the_jobs_come_from.pdf) (on file with the *McGeorge Law Review*) (“Over the past thirty years [startups] have served as a primary source of immediate job creation for the U.S. economy.”).

38. *Id.*

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3,000,000 jobs per year.”<sup>39</sup> However, most startups fail to reach their anticipated growth.<sup>40</sup> In order to make up for this loss, job-creating policies must focus on the entrepreneurs creating startups.<sup>41</sup> One study concluded, “[t]he key implication for policymakers concerned about restarting America’s job engine . . . is to begin paying more attention to removing roadblocks to entrepreneurs who will lead us out of our current . . . pessimism about jobs and sustain economic expansion over the longer run.”<sup>42</sup>

In recent years, there has been a trend away from “government-driven” and “top-down” approaches to the creation of startups in the United States.<sup>43</sup> Government policy is generally geared toward control, while entrepreneurs are focused on the market “impact” of their startup.<sup>44</sup> However, in the past few years, government programs and communities building startups have begun to recommend and employ more entrepreneurial-focused policies that “foster a philosophy of inclusiveness.”<sup>45</sup> Entire books are dedicated to this approach of creating successful startup communities.<sup>46</sup> In his book *Startup Communities*, Brad Feld describes an entrepreneur-focused method of creating a startup ecosystem.<sup>47</sup> According to Feld, “[u]nless entrepreneurs lead, the startup community will not be sustainable over time.”<sup>48</sup> Feld also noted that startup communities “must be extremely inclusive” and “welcome other entrepreneurs [into the community], viewing the growth of the startup community as a positive force for all.”<sup>49</sup>

In addition, the Obama Administration has initiated a number of programs to promote startup communities including the Startup America Partnership.<sup>50</sup> The Startup America Partnership is “an independent alliance of entrepreneurs, corporations, universities, foundations, and other leaders, joining together to fuel

39. S. 310, 113TH Cong. § 1 (2013).

40. See STRANGLER & LITAN, *supra* note 37, at 5 (indicating that only about half of all startups survive five years); see also Graham, *supra* note 31 (“ . . . most startups fail.”).

41. See generally STRANGLER & LITAN, *supra* note 37, at 12 (describing entrepreneurs as a key to job recovery).

42. *Id.*

43. See Steve Blank, *Startup Communities—Building Regional Clusters*, HUFFINGTON POST (Oct. 19, 2012 6:22 PM), [http://www.huffingtonpost.com/steve-blank/startup-communities-build\\_b\\_1948353.html](http://www.huffingtonpost.com/steve-blank/startup-communities-build_b_1948353.html) (on file with the *McGeorge Law Review*) (describing Brad Feld’s book and the perspective on government intervention in startup communities); see also THE START UPRISING, *supra* note 14, at 17 (“The old top-down methods of economic development are broken.”) (quoting Scott Case).

44. FELD, *supra* note 10, at 145.

45. *Id.* at 27–28.

46. See generally *id.* (describing Brad Feld’s system for creating startup communities).

47. See *id.* at 25 (“Entrepreneurs must lead the startup community.”).

48. *Id.*

49. *Id.* at 27–28.

50. See generally *White House Announces Startup America Partnership to Foster Innovative, High-Growth Firms in United States*, THE KAUFFMAN FOUND. (Jan. 31, 2011), available at <http://www.kauffman.org/newsroom/white-house-announces-startup-america-partnership-to-foster-innovative-high-growth-firms-in-the-united-states.aspx> [hereinafter *White House Announces*] (on file with the *McGeorge Law Review*) (describing the Startup America Partnership).

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innovative, high-growth US startups.”<sup>51</sup> Initiated to increase US entrepreneurship, the Startup America Partnership is moving away from a controlling approach and toward an entrepreneurial-focused regional approach.<sup>52</sup> The Startup America Partnership began by providing entrepreneurs with resources, but shifted its focus after eighteen months when it became apparent that “[w]hat entrepreneurs want is the company and support of other entrepreneurs who can help and understand their struggles.”<sup>53</sup> According to Scott Case, the CEO of the Startup America Partnership, “vibrant startup ecosystems will create more successful startups, which lead to more startups.”<sup>54</sup> Donna Harris, a managing director with the Startup America Partnership, echoed this approach saying “[i]f you don’t strengthen the local community, all that other stuff you curate is less meaningful.”<sup>55</sup> The Startup America Partnership is now focusing its efforts on creating regional ecosystems.<sup>56</sup> According to Case, the strategy is now to help entrepreneurs “plug into their local communities” in order to “strengthen the startup and the communities where they operate.”<sup>57</sup> The goal of the Startup America Partnership “is to create . . . visible networks so that a startup in one city can be connected not just to the other startups and leaders in that city, but to adjacent cities and the entire country.”<sup>58</sup> This strategy, according to Case, recognizes that “[r]elationships come out of local networks first,” and startups “in a robust local network . . . have a much greater chance of success.”<sup>59</sup>

*B. The Benefits of Foreign-Born Entrepreneurs in Startup Ecosystems.*

FBEs have tremendous economic and job creating benefits in the United States.<sup>60</sup> This is particularly true for those immigrants “with graduate degrees in science, engineering, technology, and math (STEM) fields.”<sup>61</sup> FBEs play a

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51. *Startup America*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/economy/business/startup-america> [hereinafter *Startup America*] (last visited Jan. 3, 2013).

52. *See, e.g., White House Announces*, *supra* note 50 (describing how the focus of the Startup America Partnership includes “[r]eplicat[ing] successful community-based entrepreneurship accelerator programs” and “spurring regional ecosystem development”); *see also* THE START UPRISING, *supra* note 14, at 15–16 (explaining the lessons learned after eighteen months of the partnership and that they “realized. . . [r]elationships come out of local networks first”).

53. THE START UPRISING, *supra* note 14, at 15.

54. *Id.*

55. *Id.* at 12.

56. *See id.* (describing the “regional strategy” of the Startup America Partnership).

57. *Id.* at 16.

58. *Id.*

59. *Id.*

60. ANDERSON & PLATZER, *supra* note 1, at 6–8.

61. JOHN E. TYLER & PETER H. SCHUCK, U.S. POLICY REGARDING HIGHLY SKILLED IMMIGRANTS, RULES FOR GROWTH: PROMOTING INNOVATION AND GROWTH THROUGH LEGAL REFORM, THE KAUFFMAN FOUND. 83 (2011), available at <http://www.kauffman.org/uploadedfiles/Rules-for-Growth.%20pdf> [hereinafter RULES FOR GROWTH] (on file with the *McGeorge Law Review*).



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significant role in formation of young companies with their “striking propensity . . . to start and grow successful American companies.”<sup>62</sup> Studies clearly show the entrepreneurial potential of immigrant entrepreneurs.<sup>63</sup> The Small Business Administration, for example, estimated that “immigrants are nearly 30% more likely to start a business than nonimmigrants.”<sup>64</sup> Furthermore, “[i]n 2006[,] foreign nationals submitted over a quarter of American patent applications,”<sup>65</sup> and studies have shown that “increasing the number of H-1B visas strongly correlates with an increase in the number of patent applications filed in the United States.”<sup>66</sup> In the last fifteen years, FBEs founded about twenty-five percent of “venture-backed companies that went public” in the United States.<sup>67</sup> These companies employ about 222,000 people living in the United States.<sup>68</sup> This is a particularly impressive statistic when compared with the fact that immigrants make up only 8.7% of the US population.<sup>69</sup> One study estimated, “[t]he current market capitalization of publicly traded immigrant-founded venture-backed companies in the United States exceeds \$500 billion, adding significant value to the American economy.”<sup>70</sup> Google, eBay, and Yahoo, for example, were all started by FBEs.<sup>71</sup> It was estimated that in 2005 alone, “traded venture-backed companies established by immigrants generated more than \$130 billion in revenue.”<sup>72</sup>

Historically, immigrant-founded companies supported by venture capital were rare.<sup>73</sup> The 1965 Immigration Act and the 1990 Immigration Act, however, “opened the door of opportunity to immigrants.”<sup>74</sup> The result was a “higher . . . proportion of immigrant-founded venture-backed companies,” and the many advantages these companies offered the US economy.<sup>75</sup> For example, in Silicon Valley, “the nation’s preeminent start-up community,” 43.9 percent of new firms

62. ANDERSON & PLATZER, *supra* note 1, at 5.

63. See, e.g., Angus Loten, *New Pitch for Start-Up Visas*, WALL ST. J. (Dec. 16, 2010), <http://online.wsj.com/article/SB10001424052748704694004576020001550357580.html> (on file with the *McGeorge Law Review*) (noting one study that “found at least one immigrant founder in over a quarter of all engineering and technology firms launched in the U.S. since the mid 1990s”).

64. *Id.*

65. *The United States of Entrepreneurs*, THE ECONOMIST (Mar. 12, 2009), <http://www.economist.com/node/13216037> (on file with the *McGeorge Law Review*).

66. RULES FOR GROWTH, *supra* note 61, at 85.

67. ANDERSON & PLATZER, *supra* note 1, at 11.

68. *Id.*

69. *Id.* at 12.

70. *Id.* at 11.

71. *Id.* at 6.

72. *Id.* at 13.

73. See *id.* at 12–13 (Prior to 1980, only seven percent of “venture backed public companies” were founded by immigrants. Between 1980–1989, this number increased to twenty percent and between 1990–2005 this number increased to twenty-five percent.).

74. *Id.* at 12.

75. *Id.* at 13.

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have immigrant founders.<sup>76</sup> Despite the increase, however, “[t]he United States is no longer the only or even primary option for [highly skilled immigrants] seeking to find work or start and grow companies.”<sup>77</sup> Furthermore, “[o]ther nations offer . . . special visa and entry requirements for immigrants who may be entrepreneurs,” which may cause the United States to lag behind global competition.<sup>78</sup> This Comment argues that entrepreneurial-friendly immigration reform is in the best interest of the United States.

### III. IMMIGRATION LAW AND ENTREPRENEURSHIP

The following Section provides a brief overview of the current state of immigration law. There are many types of visas that apply to immigrant entrepreneurs but the most applicable to the FBE are the F-1 student visa, the H-1B work visa, and the EB series visas.<sup>79</sup>

#### A. *The F-1 Student Visa*

The F-1 visa is “the most common visa category for foreign students.”<sup>80</sup> It is granted to immigrant students to allow them “to enter the United States temporarily and solely for the purpose of pursuing [education].”<sup>81</sup> A student under an F-1 visa, therefore, does not have the authority to work off-campus or be self-employed without permission from US Citizenship and Immigration Services (USCIS).<sup>82</sup> Furthermore, “F-1 visas do not provide students the right to immigrate (remain permanently) or remain in the country beyond what is required for their studies.”<sup>83</sup> Foreign student entrepreneurs are limited to either

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76. Harrison, *supra* note 3. Note, however, that this statistic has dropped from 52.4 percent in 2005. VIVEK WADHWA ET AL., EDUCATION, ENTREPRENEURSHIP, AND IMMIGRATION: AMERICA’S NEW IMMIGRANT ENTREPRENEURS, PART II, THE KAUFFMAN FOUND 13 (2007), available at [http://www.kauffman.org/uploadedfiles/entrep\\_immigrants\\_2\\_61207.pdf](http://www.kauffman.org/uploadedfiles/entrep_immigrants_2_61207.pdf) [hereinafter EDUCATION, ENTREPRENEURSHIP, AND IMMIGRATION] (on file with the *McGeorge Law Review*).

77. RULES FOR GROWTH, *supra* note 61, at 90.

78. *Id.* at 90; see also WADHWA, *supra* note 4, at 65–72 (describing the Startup Chile program and the recruiting efforts by Australia, Canada, China, Germany, and Singapore).

79. See *infra* Part III.A–C (providing an overview of the F-1, H-1B and EB-5 visas).

80. ANTHONY LUPPINO, ET AL., REFORMING IMMIGRATION LAW TO ALLOW MORE FOREIGN STUDENT ENTREPRENEURS TO LAUNCH JOB-CREATING VENTURES IN THE UNITED STATES, THE KAUFFMAN FOUND 3 (Aug. 2012), available at <http://www.kauffman.org/uploadedFiles/DownloadableResources/KauffmanImmigrationReform.pdf> (on file with the *McGeorge Law Review*).

81. 8 U.S.C. § 1101(a)(15)(F) (2006); see also LUPPINO, ET AL., *supra* note 80, at 10 (F-1 visas are given “for the limited purpose of furthering their education at an authorized academic institution”).

82. LUPPINO, ET AL., *supra* note 80, at 11; see also 8 C.F.R. § 214(f) (2012) (outlining the federal regulations).

83. *Id.* at 10.

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beginning a startup in their own country or relying on other visa categories such as the H-1B or EB-5, which have their own limitations.<sup>84</sup>

#### *B. The H-1B Work Visa*

An H-1B visa is a three-year work visa that “requires a sponsoring employer” and has “the potential to renew once for an additional three years.”<sup>85</sup> The H-1B visa “may not exceed 6 years.”<sup>86</sup> Congress places a 65,000 cap on H-1B visas, which is depleted quickly after the visas become available.<sup>87</sup> In 2012, for example, “the entire allotment of H-1B visas was filed within 10 weeks after the filing period began in April.”<sup>88</sup> In 2008, “less than one out of three” applicants were issued an H-1B visa.<sup>89</sup> Therefore, companies like Google, interested in hiring talented foreigners, are sometimes forced to accommodate immigrants by placing them in offices outside of the United States.<sup>90</sup> Additionally, “Google estimates that it spends about \$20 million a year on its immigration efforts—including lobbying, administration, and [legal] fees.”<sup>91</sup>

Critics of the H-1B visa relate the visa category to a type of “indentured servitude” due to the lack of mobility experienced by H-1B visa holders.<sup>92</sup> Immigrants under an H-1B visa cannot change employment without the risk of losing their visa status.<sup>93</sup> H-1B holders waiting in the “queue” for permanent residency may also fear the consequences of asking their employers for raises or new jobs.<sup>94</sup> This is particularly unfortunate for entrepreneurs with the capability and intention to build startups, because new ventures might risk their ability to remain in the United States under a visa category.<sup>95</sup> Furthermore, observers

84. *See id.* at 17 (describing the barriers of alternate visa categories for entrepreneurial students).

85. RULES FOR GROWTH, *supra* note 61, at 91; *see also* 8 U.S.C. § 1101(a)(15)(H) (defining who is eligible for the H-1B visa).

86. 8 U.S.C. § 1184(g)(4).

87. RULES FOR GROWTH, *supra* note 61, at 92 (“Historically, about 163,000 applicants annually have sought these visas, so demand has generally overwhelmed supply.”).

88. WADHWA, *supra* note 4, at 49.

89. *Id.* at 51.

90. *See* Matt Richtel, *Tech Recruiting Clashes with Immigration Rules*, N.Y. TIMES (April 11, 2009), <http://www.nytimes.com/2009/04/12/business/12immig.html?pagewanted=all> (on file with the *McGeorge Law Review*) (describing how Google accommodated a key engineer by placing him in a Google office in Toronto, Canada).

91. *Id.*

92. Peter H. Schuck & John E. Tyler, *Making the Case for Changing U.S. Policy Regarding Highly Skilled Immigrants*, 38 FORDHAM URB. L.J. 327, 344 (2010); *see also* RULES FOR GROWTH, *supra* note 61, at 93 (“Some consider the most significant drawback of the H-1B visas to be the worker’s lack of employment mobility.”).

93. *See* Schuck & Tyler, *supra* note 92, at 344 (“The [H-1B] visa-holder cannot change employers without initiating the entire process again and jeopardizing his presence in the United States, unless the worker convinces his or her new employer to sponsor him or her.”).

94. WADHWA, *supra* note 4, at 61.

95. *See, e.g.*, Richtel, *supra* note 90 (describing the dilemma of Sanjay Mavinkurve, who would be

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criticize USCIS for “being unduly restrictive in granting H-1B visas to owner-employees in small and start-up company settings.”<sup>96</sup>

*C. The EB Series Visas*

The four visas in the EB series generally grant permanent residency to certain classes of immigrants.<sup>97</sup> The EB-1 visa is reserved for immigrants with “extraordinary ability,” including those who have “sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation.”<sup>98</sup> “Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability” receive the EB-2 visa.<sup>99</sup> The EB-3 visa is given to “skilled workers, professionals,” and workers “performing unskilled labor . . . for which qualified workers are not available in the United States.”<sup>100</sup> The EB-1, EB-2, and EB-3 “employment-based” visas, however, are each limited to about 40,000 visas per year.<sup>101</sup> There are “far more applicants for these visas” than the number allotted per year, resulting in a waiting period for qualified immigrants.<sup>102</sup> In 2006, an estimated 499,680 “employment-based” immigrants were “waiting for legal permanent residence in the United States.”<sup>103</sup>

The EB-5 or “investor” visa may be the category most associated with immigrant entrepreneurs.<sup>104</sup> The EB-5 is a “conditional visa” that offers a Green Card to immigrants who “invest at least \$1 million and create or sustain at least ten full-time jobs . . . .”<sup>105</sup> The EB-5 Visa is limited to about 10,000 visas per year.<sup>106</sup> Critics of the EB-5 Visa argue that it is simply a way for foreign investors

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“saying goodbye to [his] green card” if he were to leave Google to start his own venture).

96. *See, e.g.,* LUPPINO, ET AL., *supra* note 80, at 20 (“In addition to the challenges of establishing if an employee-employer relationship exists, there has been quite a bit of controversy over the widely reported administrative impediments encountered by small businesses seeking the H-1B visa status.”). On the other hand, the reason for the stricter procedures is likely a result of USCIS “fear of fraud.” *Id.*

97. RULES FOR GROWTH, *supra* note 61, at 94; *see also* Schuck & Tyler, *supra* note 92, at 348 (noting that The H-1B visa is highly related to the EB visa categories because as much as 90% of EB series visas are given to immigrants already working in the U.S).

98. 8 U.S.C. § 1153(b)(1) (2006).

99. *Id.* at § 1153(b)(2).

100. *Id.* at § 1153(b)(3).

101. *See id.* at § 1151(d)(1)(A) (noting the “worldwide level of employment-based immigrants . . . for a fiscal year is . . . 140,000.”); *see also id.* at § 1153(b)(1)–(3) (each establishing the “number not to exceed 28.6 percent of such worldwide level.”); RULES FOR GROWTH, *supra* note 61, at 94 (“Currently, about 40,000 visas are available for people with extraordinary ability (EB-1) [and] 40,000 for professionals with advanced degrees (EB-2).”).

102. WADHWA, *supra* note 4, at 61.

103. *Id.* at 60.

104. RULES FOR GROWTH, *supra* note 61, at 94 (describing the requirements of the EB-5 visa).

105. *Id.*; 8 U.S.C. § 1153(b)(5).

106. *See* 8 U.S.C. § 1151(d)(1)(A) (noting the “worldwide level of employment-based immigrants . . . for a fiscal year is . . . 140,000.”); *see also id.* at § 1153(b)(5) (each establishing the “number not to exceed 7.1

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to buy US citizenship.<sup>107</sup> While an EB-5 visa holder may benefit the United States, investing in the economy does not have the same effect as entrepreneurship.<sup>108</sup> EB-5 visa critics call for “a system that allows alien entrepreneurs to take risks and succeed, without having the onerous requirements of the EB-5 visa always hanging over their head.”<sup>109</sup>

#### IV. RECENTLY PROPOSED LEGISLATION AND REFORM

This Section focuses on the progression from StartUp Visa Act of 2010<sup>110</sup> through Startup Act 3.0 introduced in 2013.<sup>111</sup> The 2010, 2011, and 2012 versions of the Startup Act each failed to pass.<sup>112</sup> In addition, this Section describes administrative changes and the potential for comprehensive reform.<sup>113</sup>

##### A. *StartUp Visa Act of 2010*

In 2010, members of Congress introduced the 2010 version of the Act “[t]o establish an employment-based immigrant visa for alien entrepreneurs who have received significant capital from investors to establish a business in the United States.”<sup>114</sup> The Act provided a conditional visa to immigrant entrepreneurs who received at least \$100,000 from a qualified investor.<sup>115</sup> More specifically, the Act offered a Green Card if the startup created at least five jobs and raised or generated \$1,000,000 in investment or revenue during the “2-year period beginning on the date on which the visa [was] issued.”<sup>116</sup> When the 2010 Act was introduced, it was called “a more accessible version of the current EB-5 visa.”<sup>117</sup>

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percent of such worldwide level.”); RULES FOR GROWTH, *supra* note 61, at 95 (noting the limit of about 10,000 for EB-5 visas).

107. *See, e.g.*, Seelye, *supra* note 32 (describing how foreign investors were able to invest without having any other input into the business).

108. *See, e.g.*, Michael Sichtler, *Pumping up America: Using the EB-5 Visa to Inject Entrepreneurial Steroids into a Struggling U.S. Economy*, 79 UMKC L. REV. 1007, 1024 (2011) (“There is nothing wrong with the United States increasing the amount of investment capital . . . but the government must not overlook the importance of human capital . . . Human capital is the most important component in creating businesses, and true immigrant entrepreneurs are the ones in the best position to provide it.”).

109. *See id.* (“If one of the true purposes of the EB-5 program is to increase employment within the United States, then the strict requirements for a specific amount of investment capital is really unnecessary.”).

110. H.R. 5193, 111th Cong. § 1 (2010).

111. S. 310, 113th Cong. § 1 (2013).

112. *See* Meghan Casserly, *Can Startup Act 3.0 Reboot Entrepreneurship and America?*, FORBES (Feb. 13, 2013), <http://www.forbes.com/sites/meghancasserly/2013/02/13/can-startup-act-3-0-reboot-america-entrepreneurs-immigration-stem/> (on file with the *McGeorge Law Review*) (describing how Startup Act 3.0 “isn’t the first time we’ve seen such a piece of legislation”).

113. *See infra* Part IV.E (discussing administrative and comprehensive change).

114. H.R. 5193, 111th Cong. § 2 (2010).

115. *Id.*

116. *Id.*

117. Loten, *supra* note 63.

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However, the critics still objected to its far-reaching requirements.<sup>118</sup> One Silicon Valley consultant stated that she typically sees “people raising maybe \$50,000 or \$100,000 at the most,” which falls well below the \$1,000,000 requirement in the Act.<sup>119</sup> Furthermore, critics cited to the fact that “[o]nly about 16 percent of the fastest-growing companies receive any venture capital funding at all.”<sup>120</sup> Critics also argued that “temporary visas limit entrepreneurial activity” because they create uncertainty for investors that may be “less inclined to tolerate enhanced risks of deportation or nonrenewal” and may “induce people to sustain failed businesses rather than moving on to the next venture.”<sup>121</sup>

*B. StartUp Visa Act of 2011*

The 2011 version of the Act proposed lower investment and revenue requirements than the 2010 Act.<sup>122</sup> This Act proposed a conditional visa to immigrant entrepreneurs who raised at least \$100,000 from a qualified investor.<sup>123</sup> The entrepreneur would be eligible for the visa if he/she was either working in the United States under an H-1B visa or he/she had a graduate degree in a STEM field.<sup>124</sup> The conditions on the visa required the entrepreneur to “create not fewer than 5 new full-time jobs in the United States” and to “raise not less than \$500,000 in capital investment” or “generate not less than \$500,000 in revenue” in “the 2-year period beginning on the date on which the visa was issued.”<sup>125</sup>

*C. Startup Act 2.0*

In 2012, there were at least five bills in Congress proposing entrepreneurial-friendly changes to immigration law.<sup>126</sup> Startup Act 2.0 was one of the most publicized and was introduced “[t]o jump-start economic recovery through the formation and growth of new businesses.”<sup>127</sup> Startup Act 2.0 proposed “a

118. *See id.* (describing the criticisms of the StartUp Visa Act of 2010); *see also* RULES FOR GROWTH, *supra* note 61, at 103–04 (highlighting limited effect of the StartUp Visa Act of 2010).

119. Loten, *supra* note 63.

120. RULES FOR GROWTH, *supra* note 61, at 103.

121. *Id.* at 104.

122. *Compare* H.R. 5193, 111th Cong. § 2 (2010) (proposing an investment and revenue requirement of \$1,000,000), *with* S. 565, 112th Cong. § 1 (2011) (proposing an investment and revenue requirement of \$500,000).

123. S. 565, 112th Cong. § 2 (2011).

124. *Id.*

125. *Id.*; *see also infra* Part V.A (providing further analysis of the StartUp Visa Act of 2011).

126. Proposed legislation included Senate Bill 3185 (the STAR Act), Senate Bill 3192 (SMART Jobs), Senate Bill 3217 (Startup Act 2.0), House Bill 5893 (Startup Act 2.0), and House Bill 6210 (American Investment and Job Creation Act).

127. S. 3217 112th Cong. (2012); *see also* Steve Case, *Congress Should Pass the Startup Act 2.0*, TECHCRUNCH (Jun. 5, 2012), <http://techcrunch.com/2012/06/05/startup-act-2-0-steve-case/> (on file with the *McGeorge Law Review*) (illustrating some of the media attention that Startup Act 2.0 attained among startup

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conditional immigrant visa to not more than 75,000 qualified alien entrepreneurs.”<sup>128</sup> A “qualified alien entrepreneur,” must be “lawfully present in the United States” and either hold a H-1B visa or have “completed or will complete a graduate level degree in a STEM field from an institution of higher education.”<sup>129</sup> The “conditional basis” of the visa would be removed if, during the first year, the immigrant entrepreneur “registers at least 1 new business entity,” employs “at least 2 full-time employees who are not relatives,” and “invests, or raises capital investment of, not less than \$100,000.”<sup>130</sup> In addition, “during the 3-year period beginning on the last day of the 1-year period,” the business must employ “an average of at least 5 full-time employees who are not relatives of the alien.”<sup>131</sup>

Startup Act 2.0 also proposed a conditional visa for up to “50,000 aliens who have earned a master’s degree or a doctorate degree at an institution of higher education in a STEM field . . . .”<sup>132</sup> Immigrants that qualify for this visa would qualify for a Green Card if they remain “actively engaged” in a STEM field for five years.<sup>133</sup> The criteria for being “actively engaged” includes employment “in a for-profit business or nonprofit organization in the United States in a STEM field,” “teaching 1 or more STEM field courses at an institution of higher education,” or employment “by a Federal, State, or local government entity.”<sup>134</sup>

*D. Startup Act 3.0*

Startup Act 3.0 was introduced on February 13, 2013.<sup>135</sup> The intent of the bill is “[t]o jump-start economic recovery through the formation and growth of new businesses.”<sup>136</sup> Startup Act 3.0 proposes a number of entrepreneurial-friendly measures.<sup>137</sup> According to the bill author, the purpose of the “Entrepreneur’s Visa” in Startup Act 3.0 includes allowing qualified immigrants to “remain in the United States, launch businesses and create jobs.”<sup>138</sup> Startup Act 3.0 includes the

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community members).

128. *Id.* at § 4.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at § 3.

133. *Id.*

134. *Id.*; see also *infra* Part V.A (providing further analysis of Startup Act 2.0).

135. S. 310, 113th Cong. § 1 (2013).

136. *Id.*

137. See Casserly, *supra* note 112 (describing the key features of the Startup Act 3.0); see also Press Release, Startup Act 3.0 Introduced by Sens. Moran, Warner, Coons and Blunt (Feb. 13, 2013), available at <http://moran.senate.gov/public/index.cfm/2013/2/startup-act-3-0-introduced-by-sens-moran-warner-coons-and-blunt> [hereinafter Sens. Moran, Warner, Coons, and Blunt Press Release] (on file with the *McGeorge Law Review*) (explaining the origins and provisions of the Startup Act 3.0).

138. Sens. Moran, Warner, Coons, and Blunt Press Release, *supra* note 137.

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STEM visa category proposed in Startup Act 2.0, providing STEM graduates a Green Card if they remain “actively engaged” in a STEM field for five years.<sup>139</sup> The purpose of the STEM visa in Startup Act 3.0, according to the bill author, includes allowing “US-educated foreign students [to] stay in this country where their talent and ideas can fuel growth and create American jobs.”<sup>140</sup> Like Startup Act 2.0, Startup Act 3.0 creates “a conditional immigrant visa” for a maximum of “75,000 qualified alien entrepreneurs.”<sup>141</sup> The criteria for removal of “conditional status” in Startup Act 3.0 are unchanged from Startup Act 2.0.<sup>142</sup> The immigrant entrepreneur must “register[] at least 1 new business entity,” employ “at least 2 full-time employees who are not relatives of the alien,” and “invest[], or raise[] capital investment of, not less than \$100,000” in the business.<sup>143</sup> Like Startup Act 2.0, the business must also average “at least 5 full-time employees who are not relatives of the alien” during the three years after the first year.<sup>144</sup> The qualifications under Startup Act 3.0, however, differ slightly from Startup Act 2.0.<sup>145</sup> Under Startup Act 3.0, a “qualified alien entrepreneur,” must be “lawfully present in the United States” and hold either a H-1B or a F-1 visa.<sup>146</sup> The proposed Startup Act 2.0 required a H-1B visa or a STEM degree.<sup>147</sup>

*E. Administrative and Comprehensive Reform?*

In addition to recent legislation proposed in Congress, the Obama administration implemented the Entrepreneurs in Residence Initiative (EIR), an advisory panel to help USCIS better aid FBEs in the administration of immigration law.<sup>148</sup> The EIR team included a panel of startup community experts brought together to optimize USCIS policies in order to promote entrepreneurship.<sup>149</sup> The EIR program “aims to

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139. Compare S. 3217 112th Cong. § 2 (2012) with S. 310, 113th Cong. § 1 (2013).

140. Sens. Moran, Warner, Coons, and Blunt Press Release, *supra* note 137.

141. S. 310, 113th Cong. § 4 (2013).

142. Compare *id.*, with S. 3217 112th Cong. § 2 (2012).

143. S. 310, 113th Cong. § 4 (e)(2)(B)(iii) (2013).

144. *Id.* at § 4(e)(2)(C).

145. Compare *id.*, with S. 3217 112th Cong. § 2 (2012).

146. S. 310, 113th Cong. § 4(2013).

147. S. 3217 112th Cong. § 3 (2012); *see also infra* Part V.A (providing further analysis of the Startup Act 3.0).

148. Sens. Moran, Warner, Coons, and Blunt Press Release, *supra* note 137; DHS Reforms to Attract and Retain Highly Skilled Immigrants, DEP’T OF HOMELAND SECURITY (Jan. 31, 2012), *available at* <http://www.dhs.gov/news/2012/01/31/dhs-reforms-attract-and-retain-highly-skilled-immigrants> [hereinafter DEPARTMENT OF HOMELAND SECURITY] (on file with the *McGeorge Law Review*) (describing a number of President Obama’s initiatives and proposed changes); *see also Entrepreneurs in Residence*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, [http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243\\_c6a7543f6d1a/](http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243_c6a7543f6d1a/) (last visited Jan. 4, 2013) [hereinafter *Entrepreneurs in Residence*] (on file with the *McGeorge Law Review*) (describing the Entrepreneurs in Residence initiative).

149. *See Entrepreneurs in Residence*, *supra* note 148 (describing the Entrepreneurs in Residence initiative); *see also Entrepreneurs in Residence Tactical Team*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES,



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close the information gap between USCIS and the entrepreneurial community.”<sup>150</sup> As a result of the program, “the EIR team has . . . [t]rained a team of specialized immigration officers to handle entrepreneur and startup nonimmigrant visa cases . . . .”<sup>151</sup> The program focuses on making it easier to navigate the “existing immigrant visa pathways that may enable foreign entrepreneurs to create a business and pursue a path to permanent residency in the United States.”<sup>152</sup>

In addition to making administrative changes, President Obama is advocating for comprehensive reform of the “out of date and badly broken” US immigration system.<sup>153</sup> Despite these aspirations, a partisan divide has resulted in little change.<sup>154</sup> Both a bipartisan group of Senators and President Obama, however, agree that the current immigration system “discourages the world’s best and brightest citizens from coming to the United States and remaining in our country to contribute to our economy.”<sup>155</sup> Many bipartisan Senate groups are preparing and introducing entrepreneur-friendly legislation to address the barriers faced by immigrant entrepreneurs.<sup>156</sup> In his 2013 State of the Union Address, President Obama said “leaders from the business, labor, law enforcement, and faith communities all agree that the time has come to pass comprehensive immigration reform.”<sup>157</sup> It remains to be seen whether immigration reform will be incremental or comprehensive.<sup>158</sup> Regardless of the approach, many are hopeful for entrepreneurial-friendly change.<sup>159</sup>

#### V. ANALYSIS OF RECENT LEGISLATION AND THE NEXT STEP

Congress would significantly reduce the immigration barriers faced by FBEs if legislation like Startup Act 3.0 passes.<sup>160</sup> This Comment, however, focuses on the next step in immigration reform and proposes legislation that would provide

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<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=8edac7e8a38a6310VgnVCM100000082ca60aRCRD&vgnnextchannel=d44eee876cb85310VgnVCM100000082ca60aRCRD> (last visited Jan. 4, 2013) (on file with the *McGeorge Law Review*) (describing the team of entrepreneurs).

150. *Entrepreneurs in Residence*, *supra* note 148.

151. *Id.*

152. *Id.*

153. Lothian, *supra* note 7.

154. *Id.*; *see also* Harrison, *supra* note 3 (describing the “bitter partisan divide” over immigration policy).

155. Schumer, et al., *supra* note 7; *see also Building a 21st Century Immigration System*, *supra* note 8 (supporting a startup visa act).

156. *See* Michelle Quinn, *Immigration Reform and Startups*, POLITICO (Feb. 4, 2013 4:44 AM), <http://www.politico.com/story/2013/02/in-immigration-push-dont-leave-startups-behind-87112.html> (on file with the *McGeorge Law Review*) (describing early 2013 Senate proposals for immigration reform).

157. Obama’s 2013 State of the Union Address, *supra* note 6.

158. *See, e.g.*, Lothian, *supra* note 7 (describing the unclear state of bipartisan and comprehensive immigration reform).

159. *See, e.g.*, Sengupta, *supra* note 9 (“And as momentum builds in Washington for a broad revamping, the tech industry has more hope than ever that it will finally achieve its goal: the expanded access to visas . . .”).

160. *See infra* Part V.A (analyzing recently proposed legislation).

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communities with the ability to foster startup ecosystems.<sup>161</sup> Section A discusses the progress of proposed legislation and the advantages of Startup Act 3.0.<sup>162</sup> Section B then discusses the next step beyond Startup Act 3.0.<sup>163</sup> This Part concludes with Section C connecting the principles of startup communities and immigration reform.<sup>164</sup>

#### A. *Progress to Startup Act 3.0*

Proposed startup visa legislation has progressed in an entrepreneurial-friendly way from the original criticisms of the StartUp Visa Act of 2010.<sup>165</sup> The proposed conditions in the StartUp Visa Act of 2011 cut the investment and revenue requirements in half, partially addressing the criticism that the conditions in the 2010 Act were nearly unobtainable.<sup>166</sup> Startup Act 2.0 constituted an even more significant departure from the 2010 Act.<sup>167</sup> In addition to proposing an entirely new category for FBEs who earned their masters or doctorate in a STEM field, Startup Act 2.0 completely eliminated the requirement of an initial investment to qualify for a startup visa.<sup>168</sup> Startup Act 2.0 simply required an H-1B visa or a graduate level STEM degree to qualify for the conditional visa.<sup>169</sup> Furthermore, Startup Act 2.0 proposed lowering the revenue or investment requirement to \$100,000 in the first year.<sup>170</sup> Startup Act 2.0 also tailored the hiring conditions to be more realistic with the expected slow growth “while the startup tries to figure out what it’s doing.”<sup>171</sup>

Despite the entrepreneurial-friendly conditions proposed in Startup Act 2.0, the Act was still criticized for requiring either a STEM degree or an H-1B visa to qualify for a startup visa.<sup>172</sup> Analysts pointed out that there are many non-STEM

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161. *See infra* Part V.C (combining the principles of startup communities and immigration reform).

162. *See infra* Part V.A (analyzing recently proposed legislation).

163. *See infra* Part V.B (discussing what should be next for immigration reform).

164. *See infra* Part V.C (combining the principles of startup communities and immigration reform).

165. *See supra* Part IV.B (discussing the criticisms of the StartUp Act of 2010).

166. *Compare* S. 565, 112th Cong. § 2 (2011) (requiring investment or revenue of \$500,000 over a 2-year period), *with* H.R. 5193, 111th Cong. § 2 (2010) (requiring \$1,000,000 in revenue or investment).

167. S. 3217 112th Cong. § 2 (2012).

168. *Id.*

169. *Id.*

170. *Compare id.* (requiring \$100,000 revenue or investment in the first year), *with* S. 565, 112th Cong. § 1 (2011) (requiring both an initial investment of \$100,000 and an investment or revenue of \$500,000 over the first 2-year period).

171. Graham, *supra* note 31, at 4; *see also* S. 3217 112th Cong. § 3 (2012) (requiring two full-time employees in the first year and an average of five full-time employees in the three years subsequent).

172. *See* LUPPINO, ET AL., *supra* note 80, at 23 (recommending that the Startup Act allow non-STEM students to qualify for a startup visa); *see also* Yuri Ammosov, *Startup Act 2.0: Great for Foreign Graduate Students, But Not Foreign Tech Entrepreneurs*, TECHCRUNCH.COM (June 10, 2012), <http://techcrunch.com/2012/06/10/startup-act-2-0-great-for-foreign-graduate-students-but-not-foreign-tech-entrepreneurs/> (on file with the *McGeorge Law Review*) (criticizing the limited reach of the Startup Act 2.0).

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degree founders that create successful ventures.<sup>173</sup> Under Startup Act 2.0, for example, the founders of PayPal, YouTube, and Skype would not have qualified because of the STEM requirement.<sup>174</sup> The qualifications for a startup visa proposed in Startup Act 3.0, however, eliminated the need for a STEM degree.<sup>175</sup> While the requirements and conditions for a startup visa under Startup Act 3.0 mirror Startup Act 2.0 in almost every other way, Startup Act 3.0 proposed qualifying with an H-1B visa or an F-1 student visa instead of an H-1B or a STEM degree.<sup>176</sup> As a result, more FBEs should qualify under the Startup Act 3.0 because foreign students under an F-1 visa are not limited in their choice of degrees.<sup>177</sup>

Startup Act 3.0 is significantly more inclusive of FBEs than previously proposed legislation.<sup>178</sup> Therefore, passing legislation like Startup Act 3.0 would significantly reduce the barriers FBEs encounter in the current immigration system.<sup>179</sup> Under current immigration law, highly skilled immigrants account for only three percent of the total number of Green Card recipients each year.<sup>180</sup> The Startup Act 3.0 may increase the number of highly skilled immigrants in the U.S. by providing a new path for immigrant entrepreneurs to “remain in the United States, launch businesses and create jobs.”<sup>181</sup> Whether immigration reform is incremental or comprehensive, Congress is better off compromising to pass legislation like Startup Act 3.0 and move forward entrepreneurial-friendly immigration law.<sup>182</sup> According to researcher Vivek Wadhwa, “[i]f we wait five years to fix the immigration system . . . the high-skilled immigrants will be long gone . . . [t]hey’ll be back home building the next Googles and Intels in other

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173. See LUPPINO, ET AL., *supra* note 80, at 7 (“. . . while the majority of successful ventures may have innovative elements, most were created by people who were not students of science, technology, engineering, or mathematics. A significant number were created by actors, musicians, or people with backgrounds in finance, law, art, or accountancy.”).

174. Ammosov, *supra* note 172.

175. S. 310, 113th Cong. § 4 (2013).

176. *Compare id.*, with S. 3217 112th Cong. § 4 (2012).

177. See generally LUPPINO, ET AL., *supra* note 80, at 10–12 (Aug. 2012) (describing the conditions of an F-1 student visa).

178. See Schuck & Tyler, *supra* note 92, at 356–57 (2010) (criticizing the original StartUp Visa Act 2010).

179. See generally Sens. Moran, Warner, Coons, and Blunt Press Release, *supra* note 137 (describing the benefits of the Startup Act 3.0).

180. Schuck & Tyler, *supra* note 92, at 347.

181. Sens. Moran, Warner, Coons, and Blunt Press Release, *supra* note 137.

182. See generally Vivek Wadhwa, *Why Immigration Reform Is Destined to Be Another Obamacare*, FORBES (Dec. 3, 2012, 10:35 AM), <http://www.forbes.com/sites/singularity/2012/12/03/why-immigration-reform-is-destined-to-be-another-obamacare/> (on file with the *McGeorge Law Review*) (“I hope that the President doesn’t sacrifice another crop of science, technology, and engineering graduates in the hope that he can get the perfect immigration bill.”).

countries, and we will wake up five years from now and wonder how we let this happen.”<sup>183</sup>

### *B. Beyond Startup Act 3.0*

The primary purpose of Startup Act 3.0 is “[t]o jump-start economic recovery through the formation and growth of new business.”<sup>184</sup> Whether or not Startup 3.0 passes, or Congress agrees to incremental or comprehensive immigration reform, this Comment proposes that the purpose of Startup Act 3.0 can be further enhanced by connecting legislation with the actual dynamics and needs of growing startups and startup communities.<sup>185</sup>

Lack of flexibility in recent legislation may lead to either missed opportunity for successful FBEs to innovate in the United States or result in the FBEs taking their business and skills elsewhere.<sup>186</sup> For example, while qualifying criteria for a conditional visa under Startup Act 3.0 are broader than Startup Act 2.0, the visa still does not apply to FBEs that do not already have an H-1B or F-1 visa unless they have a masters or doctorate in a STEM field from a qualified institution.<sup>187</sup> Startup Act 3.0 does not provide any waiver for FBEs that do not fit the conditional criteria regardless of their proven entrepreneurial abilities.<sup>188</sup>

Recently proposed legislation also uses strict standards and the market to identify FBEs that should receive permanent residency.<sup>189</sup> Qualifying for permanent residency under Startup Act 3.0, for example, is conditioned on raising or earning \$100,000 and hiring at least two employees in the first year of the startup.<sup>190</sup> Furthermore, the FBE is not eligible for permanent residency until four years after registering the startup because it is still contingent on hiring an average of at least five employees between year one and year four.<sup>191</sup> If the market does not allow the FBE to meet the investment, income, or employee requirements, the FBE will lose his or her conditional visa under the Startup Act

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183. Harrison, *supra* note 3.

184. S. 310, 113th Cong. § 1 (2013).

185. *See generally* FELD, *supra* note 10, at 34–36 (describing the role of government in entrepreneurial ecosystems).

186. *See* WADHWA, *supra* note 4, at 65–72 (describing how Start-Up Chile gives incentives for startups that establish their business in Chile.); *see also* Richtel, *supra* note 90 (illustrating the waiting for a permanent visa may cause entrepreneurs to go elsewhere).

187. *See* S. 310, 113th Cong. § 3 (2013) (offering a conditional visa to FBEs who have an H-1B or F-1 visa and offering a different category of visa to FBEs who “have earned a master’s degree or a doctorate degree at an institution of higher education in a STEM field”).

188. *See id.* at § 3 (noting the absence of a waiver for the qualifying criteria).

189. *See* Paul Graham, *The Founder Visa*, PAULGRAHAM.COM (Apr. 2009), <http://www.paulgraham.com/foundervisa.html> (on file with the *McGeorge Law Review*) (suggesting that the market can decide how to define a startup).

190. S. 310, 113th Cong. § 4 (2013).

191. *Id.* at § 4.

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3.0.<sup>192</sup> The separate STEM visa in Startup Act 3.0 does not have the same market conditions but is limited only to FBEs with a masters or doctorate in a STEM field from an approved institution and who also remain “actively engaged” in a STEM field for five years.<sup>193</sup> This STEM visa would be a great option for those who qualify, but it is also not a pure “startup visa” for entrepreneurs because remaining “actively engaged” in a STEM field also includes “teaching 1 or more STEM field courses at an institution of higher education,” or being employed “by a Federal, State, or local government entity.”<sup>194</sup>

It takes a significant amount of time, energy, trial, and error for a startup to reach a point where it is funded with a significant amount of money.<sup>195</sup> The failure to reach \$100,000 in the first year does not mean the startup itself is doomed for failure.<sup>196</sup> In addition, “very few ventures succeed,” but most entrepreneurs can start another venture.<sup>197</sup> With a conditional visa like the one under Startup Act 3.0, however, failure to meet the conditions will result in either “voluntary depart[ure] from the United States” or “removal proceedings.”<sup>198</sup> With the threat of losing their visa, FBEs with an H-1B visa may have little encouragement to assume the risks associated with a conditional visa in addition to the risks already inherent in a startup venture.<sup>199</sup> For example, Sanjay Mavinkurve, an FBE working for Google, opted to move to Canada, continue to work for Google, and wait years for a Green Card to protect the security of his family rather than begin a startup venture that could jeopardize his H-1B visa altogether.<sup>200</sup> A more realistic approach would offer FBEs room for error.<sup>201</sup>

Furthermore, startups are dynamic and flexible.<sup>202</sup> Some startups may be acquired very early in the funding process.<sup>203</sup> Other startups may experience a

192. *See id.* at § 4.

193. *Id.* at § 3.

194. *Id.* at § 3.

195. *See* Paul Graham, *How to Fund a Startup*, PAULGRAHAM.COM (Nov. 2005), <http://www.paulgraham.com/startupfunding.html> (on file with the *McGeorge Law Review*) (describing the difficulty of acquiring funding for a startup).

196. *See e.g.*, Loten, *supra* note 64 (quoting one Silicon Valley consultant saying that she typically sees “people raising maybe \$50,000 or \$100,000 at the most”).

197. *See* RULES FOR GROWTH, *supra* note 61, at 104–05 (“About one-third of the 500,000 firms created each year will close within the first two years and only about 50 percent will make it to year five.”).

198. S. 310, 113th Cong. § 4 (2013).

199. *See* Richtel, *supra* note 90 (describing the story of Sanjay Mavinkurve where he was unable to take the risk of losing his H-1B visa to found a startup). Mavinkurve “helped lay the foundation for Facebook” as a Harvard student before becoming a product manager at Google and playing a significant role in Google’s success. *Id.* He has also made significant contributions to the U.S. economy, paying over \$200,000 in taxes after Google’s IPO. *Id.*

200. *Id.*

201. *See infra* Part VI (discussing proposed legislation).

202. *See* FELD, *supra* note 10 at 56 (describing the popular “lean startup methodology” as “one that needs to try lots of experiments, measure the results, and pivot when things aren’t working”).

203. *See How to Fund a Startup*, *supra* note 195, at 13 (describing how startups can be bought early in the funding process).

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high rate of turnover or be bought by a large company.<sup>204</sup> In addition, a conditional visa may “induce [FBEs] to sustain failed businesses rather than moving on to the next venture” in order to attain permanent residency.<sup>205</sup> According to Brad Feld, both entrepreneurs and communities must “embrace failure as part of the process.”<sup>206</sup>

A conditional visa that uses the market to identify qualified FBEs may have the consequence of limiting the pool of eligible FBEs to those with the highest chance of success.<sup>207</sup> However, identifying FBEs with the highest chances of success in legislation is very difficult.<sup>208</sup> Even the top venture capital firms in the country might only profit on one or two out of ten of the startups they identify and fund.<sup>209</sup> In addition to the unpredictability of the startup market, entrepreneurs are a unique class of immigrants because they do not fit into easily identifiable categories of highly skilled immigrants.<sup>210</sup> A successful FBE could be on a student visa, a work visa, or living overseas.<sup>211</sup> One study, for example, found that 52.3 percent of the immigrant founders studied entered the United States for education, 39.8 percent entered the United States for work and 1.6 percent entered the United States for the purpose of entrepreneurship.<sup>212</sup> Studies also find some commonalities between immigrants that became key founders of technology and engineering startups.<sup>213</sup> For example, ninety-six percent of the technology and engineering startup founders in one study had completed college, while seventy-five percent of these individuals had completed their college degree in a STEM field.<sup>214</sup> Fifty-three percent of these founders received their highest degree at a US university.<sup>215</sup>

Given the actual dynamics of startups and the difficulty of identifying FBEs who start successful ventures, more flexibility—rather than strict market standards—should be welcomed to achieve the goal of “jump-start[ing] economic recovery through the formation and growth of new business.”<sup>216</sup>

204. *See id.* at 4 (describing the “exit strategy” of some startups).

205. RULES FOR GROWTH, *supra* note 61, at 104.

206. FELD, *supra* note 10, at 57.

207. *See generally* RULES FOR GROWTH, *supra* note 61, at 96 (discussing the “provisional” visa).

208. *See id.* at 97–98 (discussing the recruitment of successful foreign entrepreneurs).

209. *See* Deborah Gage, *The Venture Capital Secret: 3 Out of 4 Start-Ups Fail*, WALL ST. J. (Sept. 19, 2012), [http://online.wsj.com/article/SB10000872396390443720204578004980476429190.html#articleTabs\\_comments%3D%26articleTabs%3Darticle](http://online.wsj.com/article/SB10000872396390443720204578004980476429190.html#articleTabs_comments%3D%26articleTabs%3Darticle) (on file with the *McGeorge Law Review*) (citing studies showing that three or four startups out of ten fail and that a rule of thumb for venture capitalists is to only expect one or two out of ten startup ventures to produce returns).

210. *See generally* EDUCATION, ENTREPRENEURSHIP, AND IMMIGRATION, *supra* note 76, at 2 (describing the impetus for a background study of immigrant entrepreneurs).

211. *Id.* at 8.

212. *Id.*

213. *Id.* at 6.

214. *Id.*

215. *Id.*

216. S. 310, 113th Cong. (2013).

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Community involvement in addition to legislation like Startup Act 3.0 would fulfill the needed flexibility in immigration legislation, better serve the needs of startups, and allow the legislation to encompass talented FBEs who would not otherwise qualify for permanent residency under Startup Act 3.0.<sup>217</sup>

#### *C. Startup Visa Legislation and Startup Communities*

Recently proposed legislation misses the opportunity to promote startup communities by failing to allow communities to have involvement in the selection and retention of FBEs.<sup>218</sup> The goal of startup community advocates like the Startup America Partnership is parallel with the purpose of Startup Visa legislation.<sup>219</sup> The Startup America Partnership was initiated by the Obama Administration “to fuel innovative, high-growth U.S. startups.”<sup>220</sup> Similarly, the primary purpose of Startup Act 3.0 is “[t]o jump-start economic recovery through the formation and growth of new business.”<sup>221</sup> By giving communities a role in Startup Visa legislation, Congress could align these parallel goals and enact legislation that both serves the needs of FBEs and encourages startup communities.

The Startup America Partnership has found that the most successful approach to creating startup communities is to move away from a controlling approach and toward an entrepreneurial-focused, regional approach.<sup>222</sup> Similarly, Brad Feld advocates entrepreneurial-focused policies that allow communities to “foster a philosophy of inclusiveness.”<sup>223</sup> Immigration reform has the opportunity to build on the successful methods of the startup community movement by moving away from a strict “top-down” approach to immigration law.<sup>224</sup> Immigration legislation can instead allow communities to be involved in supporting FBEs that provide human capital to their startup ecosystems regardless of arbitrary funding levels.<sup>225</sup>

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217. See *infra* Part VI (discussing proposed legislation).

218. See Schuck & Tyler, *supra* note 92, at 349–52 (advocating for “American states and local communities [to] be allowed to actively advertise for and recruit [highly skilled immigrants] with preferred characteristics, experiences, and skills.”).

219. Compare *Startup America*, *supra* note 51, with S. 310, 113th Cong. § 1 (2013).

220. *Startup America*, *supra* note 51.

221. S. 310, 113th Cong. (2013).

222. See e.g., *White House Announces*, *supra* note 50 (describing the Startup America Partnership); see also *THE START UPRISING*, *supra* note 14, at 15 (explaining the lessons learned after 18 months of the partnership).

223. FELD, *supra* note 10, at 27–28.

224. See Blank, *supra* note 43 (describing Brad Feld’s book and perspective on government intervention in startup communities); see also *THE START UPRISING*, *supra* note 14, at 17 (quoting Scott Case “[t]he old top-down methods of economic development are broken”).

225. See *supra* Part II.B (describing the FBE and their entrepreneurial talent); see generally Bruce Corrie, *A New Paradigm For Immigrant Policy: Immigrant Capital*, 35 WM. MITCHELL L. REV. 283, 284 (2008) (describing “[i]mmigrant capital” as “the various avenues through which immigrants add wealth to society”); FELD, *supra* note 10, at 33 (describing the need for entrepreneurial leaders in startup communities).

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Government policy is generally geared toward control, while the “key word for all entrepreneurs” is “[i]mpact.”<sup>226</sup> Allowing communities to support FBEs with the potential to impact their community, even if they do not fulfill the conditions of startup visa legislation, will increase the sharing of ideas and creation of networks that are essential to the startup community.<sup>227</sup>

When given the opportunity, communities are very successful at creating entrepreneurial ecosystems.<sup>228</sup> For example, the program Startup Weekend, which brings entrepreneurs together to share ideas, “is truly making an extraordinary dent in the U.S. jobs crisis.”<sup>229</sup> According to the communications manager at Startup Weekend, “[t]o have a lasting impact on the job market,” it is “crucial” to create “better and more capable entrepreneurs.”<sup>230</sup> FBEs have proven entrepreneurial abilities and the social incentive for communities to support FBEs may be even higher, given their diverse backgrounds.<sup>231</sup> Immigration reform that allows communities to support FBEs that do not meet the strict standards of recent legislation may help communities attract FBEs and satisfy the need for more entrepreneurs.<sup>232</sup>

Furthermore, competition among foreign nations for highly skilled immigrants is increasing.<sup>233</sup> The United States may lose this “race” if it fails to provide communities with the ability to “attract and retain talented immigrants.”<sup>234</sup> Even if proposed legislation passes, the incentives offered to immigrant entrepreneurs in other countries may outweigh the appeal of a conditional US startup visa with strict capital benchmarks. Many other countries

226. FELD, *supra* note 10, at 145.

227. See FELD, *supra* note 10, at 47 (2012) (“Anyone, regardless of experience, background, education, ethnicity, or perspective should be welcomed into the startup community if they want to engage with it.”).

228. See THE START UPRISING, *supra* note 14, at 12 (describing the regional strategy of the Startup America Partnership).

229. Claire Topalian, *Solving the Jobs Crisis Begins with Empowering One Another*, HUFFINGTON POST (Jan. 24, 2013 11:00 AM), [http://www.huffingtonpost.com/startup-weekend/entrepreneurs-job-creation\\_b\\_2542244.html](http://www.huffingtonpost.com/startup-weekend/entrepreneurs-job-creation_b_2542244.html) (on file with the *McGeorge Law Review*) (“Startup Weekend generates a self-empowerment strategy that has led to a chain-reaction in the startup world; new entrepreneurs are helping others become entrepreneurs.”).

230. *Id.*

231. See *supra* Part II.B (describing the FBE and their entrepreneurial talent); see also Corrie, *supra* note 225, at 305 (“It is time to go beyond the narrow debate on immigration policy in the United States to a more comprehensive portrait of Immigrant Capital in America.”).

232. See generally FELD, *supra* note 10, at 31–46 (discussing the dynamics of a startup community).

233. See Schuck & Tyler, *supra* note 92, at 336–39 (describing the increased competition from other countries); see also Vivek Wadhwa, *Chile Wants Your Poor, Your Huddled Masses, Your Tech Entrepreneurs*, TECHCRUNCH.COM (Oct. 10, 2009), <http://techcrunch.com/2009/10/10/chile-wants-your-poor-your-huddled-masses-your-tech-entrepreneurs/> (on file with the *McGeorge Law Review*) (Chile will “welcome you with open arms and offer you incentives . . .”); *Immigrant Entrepreneurs: The Chilean Valley Challenge*, THE ECONOMIST (Oct. 13, 2012), <http://www.economist.com/node/21564564> (on file with the *McGeorge Law Review*) (“For more than a decade America has been choking off its supply of foreign talent.”).

234. See generally WADHWA, *supra* note 4, at 69–72 (describing the “[r]ace to capture entrepreneurial talent”).



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have easier capital benchmarks than the proposed US legislation.<sup>235</sup> Proportional to their population, for example, Australia “grants 13 times as many permanent visas on the basis of skills” compared to the United States.<sup>236</sup> According to Vivek Wadhwa, the United States “can no longer expect [foreign nationals] to endure the indignities and inefficiencies of an indifferent immigration system, and it must now actively compete to attract these people with good jobs, security, and other amenities.”<sup>237</sup> With the ability to recruit FBEs and foster an entrepreneurial ecosystem, US communities may be better equipped to compete with foreign markets.<sup>238</sup>

Congress has the opportunity to change the paradigm of startup immigration law by modeling the success of startup communities. In addition to proposed legislation like Startup Act 3.0, ideal legislation would include the ability for communities to “actively compete to attract” FBEs that will contribute to their startup ecosystem.<sup>239</sup> Such legislation would allow communities the flexibility to take advantage of the human capital that FBEs offer startup ecosystems even if they fall short of the conditional visa requirements.<sup>240</sup> Finally, ideal legislation would allow communities to give FBEs the security to work on successful startups without the strict conditions of citizenship hanging over their heads.<sup>241</sup>

## VI. PROPOSED REFORM

This Comment proposes bringing immigration reform in line with the startup community movement by giving communities a voice. The proposal includes adding a community board of entrepreneurs with the authority to recommend exemptions and waivers that will help make recently proposed legislation more flexible and community-oriented.<sup>242</sup> This Comment also suggests expanding the

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235. See *Let the Job-Creators In*, THE ECONOMIST (June 9, 2012), <http://www.economist.com/node/21556579> (on file with the *McGeorge Law Review*) (Britain offers visas for FBEs with \$77,000 in capital, Singapore requires \$40,000, and “New Zealand demands no specific sum, but grants permanent residency after two years if the business is ‘beneficial to New Zealand.’”).

236. *Id.*

237. VIVEK WADHWA, A REVERSE BRAIN DRAIN, ISSUES IN SCIENCE AND TECHNOLOGY 13 (Mar. 12, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1358382](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1358382) (on file with the *McGeorge Law Review*).

238. See generally *id.* at 14 (“At the very least, the United States should remove any barriers to talented foreign nationals who want to work in the United States.”).

239. *Id.* at 13.

240. See *supra* Part II.B (describing the FBE and their entrepreneurial talent); see also Corrie, *supra* note 225, at 305 (describing the human capital advantage of talented immigrants).

241. See e.g., Richtel, *supra* note 90 (describing the story of Sanjay Mavinkurve where he was unable to take the risk of losing his H-1B visa to found a startup).

242. See *infra* Part V.1.A (proposing legislation involving the addition of a regionally based community board of entrepreneurs).

eligibility for an automatic Green Card by adding categories such as community award winners.<sup>243</sup>

#### A. *Community Board of Entrepreneurs*

This Comment proposes adding a regionally-based community board of entrepreneurs to recently proposed legislation. The community board would be oriented around current USCIS regional offices and would provide more flexibility to account for talented FBEs that may not meet qualifying or conditional requirements.<sup>244</sup> Nobody knows the needs and goals of each region better than the local entrepreneurs and community members living in a startup ecosystem.<sup>245</sup> With the ability to make recommendations to USCIS, communities could recruit specific entrepreneurs and promote certain startup sectors by requesting exemptions and waivers from the inflexible criteria in proposed legislation like Startup Act 3.0.<sup>246</sup> For example, under Startup Act 3.0, FBEs that are not “lawfully present in the United States” or do not hold either an H-1B or an F-1 visa are not eligible for a conditional visa.<sup>247</sup> Congress, however, could authorize communities to recommend that USCIS exempt specific FBEs from the qualifying conditions because of their exceptional ability to contribute to the startup ecosystem.<sup>248</sup> A board composed of regional entrepreneurs and community experts would assess the ability of the FBE to contribute to the

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243. See *infra* Part VI.B (proposing legislation involving the expansion of criteria that would qualify and FBE for a startup visa).

244. See *e.g.*, Press Release, Message from Director Alejandro N. Mayorkas on Proposed Changes to EB-5 Processing, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (May 19, 2011), available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a8647b52e5800310VgnVCM100000082ca60aRCRD&vgnnextchannel=e7801c2c9be44210VgnVCM100000082ca60aRCRD> (on file with the *McGeorge Law Review*) (describing a related 2011 proposal by USCIS to establish an “expert Decision Board” to help process applications within USCIS); Press Release, USCIS Proposes Significant Enhancements to EB-5 Visa Processing to Help America Win the Future, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (May 19, 2011), available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a4b57b52e5800310VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD> (on file with the *McGeorge Law Review*) (further describing the 2011 proposal by USCIS “to convene an expert Decision Board to render decisions regarding EB-5 Regional Center applications. The Decision Board will be composed of an economist and adjudicators and will be supported by legal counsel.”).

245. See generally FELD, *supra* note 10, at 31–46 (describing the key participants in startup communities); see also Christina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 641 (2008) (“Questions of who should belong to a political community, and who should be allowed to cross borders, are also both global and local in scope.”).

246. See S. 310, 113th Cong. § 4 (2013) (requiring a qualified FBE to have an H-1B or F-1 Visa and meet capital and employment requirements); see also RULES FOR GROWTH, *supra* note 61, at 97 (“[S]tates and local communities should also be encouraged to actively advertise for and recruit [highly skilled immigrants] with preferred characteristics, experiences, and skills . . . that they deem important to their area’s economic future.”).

247. S. 310, 113th Cong. § 4 (2013).

248. See FELD, *supra* note 10, at 27–28 (describing how successful communities “foster a philosophy of inclusiveness”).

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startup ecosystem and add human capital value beyond the qualifying criteria in Startup Act 3.0.<sup>249</sup>

Under this proposal, Congress could also authorize a community board of entrepreneurs to recommend that USCIS exempt specific FBEs from the market requirements of the conditional visa proposed in legislation like Startup Act 3.0.<sup>250</sup> For example, even the most promising FBE may fail to meet the \$100,000 investment or revenue requirement under Startup Act 3.0.<sup>251</sup> Congress, however, could authorize a community board of entrepreneurs to recommend that USCIS exempt specific FBEs from the requirement and allow for more time that may be healthier for the growth of the startup.<sup>252</sup> Furthermore, a talented FBE may fail in his or her startup venture entirely.<sup>253</sup> A community board of entrepreneurs could recommend that a startup visa be re-issued, allowing the FBE to use his or her experiences and begin a new venture that can benefit the startup ecosystem.<sup>254</sup> Involving the community can provide more flexibility for FBEs and limit the risks that are attached to conditional market requirements such as those outlined in Startup Act 3.0.<sup>255</sup> A community board could allow otherwise ineligible but talented FBEs to become lawful permanent residents who meet the legislative goal of “jump-start[ing] economic recovery through the formation and growth of new businesses.”<sup>256</sup>

Establishing community boards would not be difficult for the current immigration system to implement. The EIR initiative indicates that USCIS is already willing to seriously consider recommendations that further entrepreneurship.<sup>257</sup> Furthermore, the Obama Administration established Startup America with regional affiliates, indicating that there are groups of entrepreneurial-focused individuals with the willingness to work with

249. *See id.* (describing the importance of “inclusiveness”); Corrie, *supra* note 256, at 305 (describing “immigrant capital” added to communities).

250. *See* S. 310, 113th Cong. § 4 (2013) (requiring \$100,000 in investment or revenue during the first year).

251. *See id.* (noting the requirements of Startup Act 3.0); Loten, *supra* note 63 (quoting one Silicon Valley consultant saying that she typically sees “people raising maybe \$50,000 or \$100,000 at the most”).

252. *See e.g.*, 8 U.S.C. § 1186(c)(4) (2006) (outlining the hardship waiver for spouses in immigration law); *See How to Fund a Startup*, *supra* note 195, at 1 (describing how “a typical startup goes through several rounds of funding, and at each round you want to take just enough money to reach the speed where you can shift into the next gear”).

253. *See* Gage, *supra* note 209 (citing studies showing that three out of four startups fail and that a rule of thumb for venture capitalists is to only expect one or two out of ten startup ventures to produce returns).

254. *See* FELD, *supra* note 10, at 57 (discussing the need to “embrace failure as part of the process.”); RULES FOR GROWTH, *supra* note 61, at 104 (“Temporary status or conditions based on success may perversely induce people to sustain failed businesses rather than moving on to the next venture.”).

255. S. 310, 113th Cong. § 4 (2013); *see also* RULES FOR GROWTH, *supra* note 61, at 104 (under a temporary visa, “[i]nvestors and creditors willing to accept normal market risks may be less inclined to tolerate enhanced risks of deportation or nonrenewal”).

256. S. 310, 113th Cong. (2013).

257. *See Entrepreneurs in Residence*, *supra* note 148 (describing the Entrepreneurs in Residence initiative).

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government officials to promote startups.<sup>258</sup> In addition, the USCIS has 250 domestic offices, giving it the ability to review recommendations by the community board on a regional basis.<sup>259</sup> All final decisions could still be made by USCIS to standardize the immigration process, but the decision would take into account the best interest of specific startup ecosystems rather than impersonal legislative criteria.<sup>260</sup>

*B. Community Award Winners*

Another addition to legislation could be the expansion of criteria that would qualify an FBE for a startup visa. The Startup Act 3.0 already proposes a Green Card to FBEs with a masters or doctorate in a STEM field who remain “actively engaged” in a STEM field for five years.<sup>261</sup> Congress could add other categories for FBEs who have reached a certain measure of success in their community.<sup>262</sup> For example, Jerome Schlichter, an attorney who helped start Arch Grants in St. Louis, proposed that FBEs who “[w]in a startup competition, win a visa.”<sup>263</sup> Arch Grants was started “to host an Annual Global Startup Competition and attract startups to [St. Louis].”<sup>264</sup> Schlichter noted that it “wasn’t easy” for a very talented FBE to obtain his visa after receiving funding at a startup competition and suggested issuing visas to winners of approved community competitions.<sup>265</sup> There are many regional startup competitions and “accelerators” around the country that reward entrepreneurs with seed money or help establish the startup.<sup>266</sup> Austin, Texas, for example, has a competition where the winner receives moving expenses, housing, an office, a \$35,000 investment, server space, storage, and groceries.<sup>267</sup> These competitions are extremely competitive and, if the winner of this competition was an FBE, a Green Card would be a

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258. See *White House Announces Startup America Partnership to Foster Innovative, High-Growth Firms in United States*, *supra* note 50 (describing the Startup America Partnership).

259. *Our Locations: USCIS Domestic Offices*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=274115e196419110VgnVCM1000004718190aRCRD&vgnnextchannel=a374b363bf568110VgnVCM1000004718190aRCRD> (last visited Jan. 3, 2013) (on file with the *McGeorge Law Review*).

260. See S. 310, 113th Cong. § 4 (2013) (describing the proposed requirements in Startup Act 3.0).

261. *Id.* at § 3.

262. See, e.g., Jerry Schlichter, *Startup Act 2.0 Will Create Jobs, Boost Economy*, WASH. TIMES, Feb. 2, 2013, <http://www.washingtontimes.com/news/2013/feb/2/startup-act-20-will-create-jobs-boost-economy/> (on file with the *McGeorge Law Review*) (proposing a community competition approach).

263. *Id.*

264. *Id.*

265. *Id.*

266. See, e.g., *id.* (Noting TechStars, MassChallenge, and Arch Grants).

267. Meghan Casserly, *Move Your Startup to Austin (For Free): The City's Full-Court Press on Founders*, FORBES (Mar. 8, 2013), <http://www.forbes.com/sites/meghancasserly/2013/03/08/move-your-startup-to-austin-for-free-the-citys-full-court-press-on-founders-sxsw/> (on file with the *McGeorge Law Review*).

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logical prize from a US community willing to invest in his or her talent.<sup>268</sup> This proposal could provide incentive for communities to create startup competitions and increase recruiting efforts that could better result in the legislative goal of “jump-start[ing] economic recovery through the formation and growth of new businesses.”<sup>269</sup>

VII. CONCLUSION

Silicon Valley venture capitalist John Doerr once said “Silicon Valley is not a place, but a state of mind.”<sup>270</sup> Immigration reform provides the opportunity to help communities create their own startup “state of mind” with flexible policies that allow communities to help FBEs establish startups in their community. This Comment proposes immigration reform that gives communities the ability to recruit<sup>271</sup> and develop relationships<sup>272</sup> with FBEs in their community.<sup>273</sup> Adding community involvement to recently proposed legislation like Startup Act 3.0 would bring immigration reform in line with the regional-based and entrepreneurial-focused method of building startup communities.<sup>274</sup> Increasing the community voice in immigration legislation would enable communities to follow Brad Feld’s recommendation to “focus on creating the best startup community for their city.”<sup>275</sup>

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268. *See, e.g., id.* (indicating the desire for communities to support these competition winners).

269. S. 310, 113th Cong. (2013).

270. THE START UPRISING, *supra* note 14, at 7.

271. *See* Schuck & Tyler, *supra* note 92, at 349–52 (advocating for “American states and local communities [to] be allowed to actively advertise for and recruit [highly skilled immigrants] with preferred characteristics, experiences, and skills”).

272. *See* THE START UPRISING, *supra* note 14, at 15 (quoting the CEO of the Startup America Partnership as saying that they learned of the “power and importance of relationships . . . [i]f we help them with that, the money, customers, and talent will come”).

273. *See supra* Part VI (proposing the reformation of immigration law by aligning immigration reform and community movement).

274. *See supra* Part II.A (describing new approaches to the creation of startup communities).

275. Richard Florida, *What It Really Takes to Foster an Entrepreneurial Ecosystem*, THE ATLANTIC CITIES (Dec. 11, 2012), <http://www.theatlanticcities.com/technology/2012/12/what-it-really-takes-foster-entrepreneurial-ecosystem/4062/> (on file with the *McGeorge Law Review*).