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The Case For A New Immigrant Entrepreneur Visa

by Stuart Anderson

U.S. immigration policy is unkind to entrepreneurs. The recent uptick in the U.S. unemployment rate makes it more important than ever to get immigration policy right on entrepreneurs, since they are the lifeblood of the American economy. A 2008 study by the Small Business Administration found, "Immigrants are nearly 30 percent more likely to start a business than are nonimmigrants, and they represent 16.7 percent of all new business owners in the United States." Still, job creation through immigrant entrepreneurship receives little attention in most economic debates or immigration policy discussions.

When Congress created the immigrant investor visa category (EB-5) in 1990 it anticipated great use of the visa and substantial job creation. For a number of reasons, including the statute itself, the visa has not been widely used, nor has job creation from the visa been significant.

"The statutory requirements of the EB-5 visa category are onerous," note attorneys Stephen Yale-Loehr, Carolyn S. Lee, Nicolai Hinrichsen and Lindsay Schoonmaker. "Qualifying a person for EB-5 status is one of the most complicated subspecialties in immigration law. A sophisticated knowledge of corporate, tax, investment, and immigration law are all required."
In some ways, the requirements for large amounts of capital for the current immigrant investor visa category represent a backwards policy approach if one is interested in adding new jobs to the economy. By establishing such high capital requirements – $500,000 or more – the immigrant investor visa category is

facilitating only a portion of the businesses and jobs that otherwise could be created.

In reality, the recipient of an EB-5 visa is more an investor than an entrepreneur. While jobs are created, the significant capital requirements limit the use of the visas for entrepreneurs. “Approximately 90 to 95 percent of individual Form I-526 petitions filed each year are filed by Alien Investors who are investing in Regional Center-affiliated commercial enterprises,” according to U.S. Citizenship and Immigration Services. Such valuable investments should be facilitated, and EB-5 approvals have increased recently. However, these investments are primarily for existing projects or expanding ongoing ventures, rather than creating entirely new businesses.

One problem that has plagued EB-5 is the excessive discretion granted to government adjudicators. For example, in 2003 only 65 people immigrated under the category. Several members of Congress became alarmed when adjudications virtually halted in 1998 after four precedent decisions from the Administrative Appeals Office restricted several investment practices under EB-5. While nobody doubts fraud existed, Congress did not want to end the use of the visa entirely in an effort to prevent fraud. As a result Congress passed legislation that made it easier for investments to take place under the program.

To design a new visa to encourage job creation one needs to keep in mind that the higher the capital investment required by U.S. law, then the fewer businesses that will be created under a visa category. The average startup company begins with only approximately $31,000, according to the Ewing Marion Kauffman Foundation. Attracting large investments by third parties, such as venture capitalists, are unlikely for all but a few companies in the startup phase. While a step in the right direction, this may be a drawback or limiting factor in the bill S. 3029, sponsored by Senators John Kerry (D-MA) and Richard Lugar (R-IN). The

bill would permit venture capital funding in place of personal investment in a variation on the current EB-5 program. Under S. 3029, an individual must convince other people or entities to invest $250,000 or more to start the enterprise. If the purpose is to create jobs, then requiring such large amounts of capital can be an obstacle both to establishing the enterprise and creating jobs.

A new approach to an immigrant investor visa is outlined in a recent paper from the National Foundation for American Policy. Upon starting a business with the ability to employ 3 or more U.S. workers, an individual would either adjust status or enter the United States in conditional permanent residence. The ability to employ people based on plausible revenue streams would be permitted, based on an evaluation by the Small Business Administration. The individuals would then be checked after 2 years to remove the "conditional" status and receive permanent residence, similar to the current EB-5 category. The individual would only receive the green card if the conditions of employing at least 3 or more U.S. workers had been met. The employees must be U.S. workers (legally defined, in general, as U.S. citizens or lawful permanent residents) and not close relatives.

The Small Business Administration has much more expertise to evaluate business plans, which will help to gain approval for legitimate entrepreneurs and ferret out potentially fraudulent activity. Consular officers and adjudicators at U.S. Citizenship and Immigration Services would remain responsible for ensuring an individual's admissibility and conducting the required background and security checks. A quota of 10,000 immigrant visas a year would be permitted but with only principals, not dependents, would be counted against the limit. The 10,000 visas would not be taken from the EB-5 quota.

If the category is fully utilized, then the new visa could create 100,000 new jobs over 3 years. The visa would avoid the current contentious debates over illegal

immigration and government spending. It might be one of those rare policies in Washington, DC that attract genuine bipartisan support.

About The Author

Stuart Anderson, author of the book Immigration (Greenwood, 2010), is executive director of the National Foundation for American Policy, a nonpartisan policy research group based in Arlington, Va.

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