HALTING THE DEPORTATION OF BUSINESSES:
A PRAGMATIC PARADIGM FOR DEALING WITH SUCCESS

DAVID P. WEBER*

INTRODUCTION ........................................ 766

I. THE NUMBERS BEHIND IMMIGRANT ENTREPRENEURS .......... 768
   A. The General Economics of Immigration ............. 768
   B. The Economics of Immigrant Entrepreneurs ........ 776
      1. The Benefits of Business Creation .......... 776
      2. Taxes, Taxes, Taxes ........................ 777
      3. Incentivizing Business Creation ........... 780
   C. Incorporation, Entity Selection, Business Negotiations and the Undocumented Immigrant ........ 782
      1. Incorporation and Entity Selection ........... 782
      2. Business Negotiations and Undocumented Immigrants ................................ 783

II. HISTORICAL ASPECTS AND PURPOSES OF INVESTOR VISAS ...... 784
   A. Immigrant Visas .................................. 784
   B. Nonimmigrant Visas ................................ 788
   C. Encumbering Policies—Apples to Oranges .......... 790

III. STRUCTURING THE VISA .................................. 794
   A. Bright-Lines are Most Easily Seen ............... 795
      1. Revenue and Profitability Requirements ........ 795
      2. Joint Ownership and Substantial Participation .... 801

* Assistant Professor at Creighton University School of Law. The author would like to give special thanks to Professor Jack Krogstad for his insights and suggestions. The author would also like to thank researchers Robert Stark and Patrick Mack for their countless hours of effort. © 2009, David P. Weber.
"Unless the stream of their importation can be turned from this to other Colonies, they will soon so outnumber us, that all the advantages we have will not (in my Opinion) be able to preserve our language, and even our government will become precarious."

—Benjamin Franklin

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

—John F. Kennedy

INTRODUCTION

Inhabitants of the United States have had opposing views on immigration dating back to colonial times. The actors have changed over the decades, but the arguments remain much the same. Proponents of increased immigration have argued for a larger labor pool, family unity and humanitarian concerns. While opponents have argued about the costs of immigrants through direct and indirect government aid and public service programs, the displacement of native employees with cheaper foreign labor and the concern of rewarding "illegal" behavior with the right to reside legally in the United States. These tensions traditionally ebb and flow with the overall condition of the U.S.
economy. As a result, immigration law has largely (r)evolved over time depending on the economic condition of the United States.

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

6. See Higham, supra note 3, at 216, 219 (noting that the anti-Chinese movement in California began in earnest simultaneously with the occurrence of a general depression; and that the restrictionist movement gained nation-wide momentum in the midst of another, deeper depression in the 1890s). A few years following the depression of the early 1890s, prosperity returned and, consequently, the restrictionist movement "ceased to be a political possibility." Id. at 221.

7. Early in its history, the United States sought immigrants to populate the land and provide laborers to work it. See Higham, supra note 3, at 215 (stating that Congress itself attempted to stimulate immigration levels from 1864 to 1868 and that individual states had "developed programs to lure new settlers from overseas"). Eventually, national origin quotas were adopted to ensure that the stream of immigrants reflected the current population mix. 1 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 2.02[3] (2004) (outlining the origins of the U.S. immigration quota system). Continuous schizophrenia of U.S. immigration is not a relic of history. In the more recent past, the Immigration Reform and Control Act of 1986 (IRCA) was passed into law with a legalization or so-called amnesty feature that allowed approximately three million undocumented immigrants to legalize their presence. See Hiroshi Motomura, Immigration Outside the Law, 108 Colum. L. Rev. 2037, 2048-49 (2008) (citing U.S. Immigration & Naturalization Serv., U.S. Dep't of Justice, 1993 Statistical Yearbook of the Immigration and Naturalization Service 183 (1994) (stating that approximately 3 million individuals attempted to legalize their immigration status through IRCA in 1987-88)). However, just ten years later, the Illegal Immigration Reform and Immigrant Responsibility Act (together with the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Personal Responsibility and Work Opportunity and Reconciliation Act (PRWORA)) put into law some of the harshest immigration reforms ever, including far greater grounds for removal, the denial of most federal means-tested benefits, a restriction on the granting of discretionary relief as well as the insulation of many immigration-related decisions from judicial review. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 and 18 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.); Personal Responsibility and Work Opportunity and Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105.

8. See, e.g., STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 1.2 (2009) (noting that a corporate charter "creates an 'artificial entity' to be operated by private citizens").

9. It is estimated that approximately 20,000 undocumented immigrants earn six-figure or higher salaries. See John Buchanan, Illegal Immigrants Grown Rich Fret over U.S. Deportation Laws, Reuters (Feb. 6, 2008), available at http://www.reuters.com/article/domesticNews/idUSN2533661620080206 (noting that, though difficult to ascertain, there may be up to 20,000 undocumented immigrants in the United States earning over $100,000 per year). It is also well-documented that immigrants are consistently more entrepreneurial than nonimmigrants. Rafael Efrat, Immigrant Entrepreneurs in Bankruptcy, 82 Am. Bankr. L.J. 693, 695 (2008); Robert W. Fairlie, Kauffman
This article proposes the creation of a new class of entrepreneurial visas that is specifically targeted at those successful immigrant entrepreneurs who have entered without inspection or who have overstayed a visa. Part I of this article discusses the economic effect of immigrants, and more specifically, immigrant entrepreneurs, on the U.S. economy. Part II of this article explores the historical role of immigrant investors in the United States, and Part III proposes the creation of a new class of visa to specifically encourage and reward successful entrepreneurs while outlining certain criteria necessary for visa eligibility.

I. THE NUMBERS BEHIND IMMIGRANT ENTREPRENEURS

A. The General Economics of Immigration

The costs and benefits of immigration have long been debated. Economists have devised many models for analyzing the net benefit or burden of immigration, and unsurprisingly, there is no definitive answer. Depending on the different methods of modeling and forecasting used, immigration may represent anywhere from a net cost to the United States of $42.5 billion per year to a net benefit of $37 billion per year. These figures are inclusive of all immigrants, meaning that they represent the economic effects of documented immigrants and nonimmigrants as well as undocumented immigrants.

---


10. See George J. Borjas, The Labor Demand Curve is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market, 118 Q. J. of Econ., No. 4, at 1335-74 (concluding that immigrant labor decreases wages in the American labor pool) (June 2003); but see The New Americans: Economic, Demographic, and Fiscal Effects of Immigration 220 (James P. Smith & Barry Edmonston eds., 1997) (noting that immigrants have a very small impact on wages in the American labor pool).

11. Donald Huddle, The Cost of Immigration (1993). The underlying economic assumption made in this study has been heavily criticized. See, Passel, infra note 79.

12. See White House Council of Economic Advisers, Immigration’s Economic Impact, Washington, DC: Executive Office of the President, The White House, June 20, 2007, at 3 (noting that using a simple economic model that likely underreports the actual benefits immigrants provide, the current net benefit provided by immigrants is approximately 0.28% of GDP, approximately $37 billion per year). Immigration also appears to positively impact wages and salaries in the United States of at least ninety percent of the native born population. See Gianmarco I.P. Ottaviano & Giovanni Peri, Rethinking the Effects of Immigration on Wages 34 (Nat’l Bureau of Econ. Research, Working Paper No. 12497, 2006).

13. See Jeffrey S. Passel & D’Vera Cohn, Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow 1 (2008) (noting that there were approximately 11.9 million undocumented immigrants residing in the United States as of March 2008, which is approximately four percent of the U.S. population). Undocumented immigrants are those who do not have permission to reside in the United States, such as naturalized citizens, lawful permanent residents, temporary legal residents, temporary protected status immigrants and refugees. The total size of the undocumented immigration population may be decreasing; however, it is clear that the rate of growth of such population has fallen dramatically. Id. at 5 (noting that average annual growth has
However, even within those states that have been most negatively affected by immigration, one can clearly see that different types of immigrants affect the receiving populations differently. As might be expected, low-skilled immigrants (documented or otherwise) present the most costly (or least beneficial) segment of the immigrant community to the receiving country. These low-income, low-skilled (documented or otherwise) laborers also typically create a negative fiscal impact on the local state economy by receiving more state-provided benefits than they contribute in taxes. Studies have shown that while even immigration of this kind typically increases overall societal wealth by reducing the cost of goods and labor, the immigration of low-skilled laborers generally provokes two fears: that immigrants will adversely affect the domestic labor market, and that they will increase the fiscal burden of native-born residents.

simplifications used in the economic models. The majority seems to have reached a consensus that, whether positive or negative, immigration's overall impact on wages is small, but if immigration's impact on native wage levels is in fact quite small, from whence come the vociferous arguments regarding decreases in wages and loss of jobs formerly held by natives?

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

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

---

20. See George J. Borjas, Heaven's Door: Immigration Policy and the American Economy 68 (1999) (observing that:

[the various studies] offer something for everyone. If one believes that immigrants adversely affect native economic outcomes, the evidence reported in some reputable academic publications substantiates that claim. If, in contrast, one believes that immigrants do not change native economic outcomes—or perhaps even improve them—there are equally reputable studies substantiating that claim."

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


24. See George J. Borjas, Native Internal Migration and the Labor Market Impact of Immigration, 41(2) J. of Hum. Res., 221, 238-42 (2006); Borjas, supra note 10, at 1369 (arguing that wage levels could drop up to nine percent in the short run for native workers without a high school degree). But see Ottaviano & Peri, supra note 12, at 30 (noting that from 1990 to 2004 natives without a high school diploma experienced a drop in wages of only 1.1%).

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

These arguments against a free influx of foreign-born workers, especially for natives without high school diplomas, tend to assume that such workers are replacing, instead of complementing, the U.S. labor force.27 Though that appears to be the case for low-skilled positions,28 applying the same reasoning across the entire workforce is incorrect.29 While there may be some overlap in the demand for positions in the financial and accounting industries, foreign-born workers are much more likely to study and work in the fields of mathematics, science, computer programming, physics, and engineering;30 U.S.-born workers are more likely to enter fields such as law, business, and management.31 If such evidence holds up, the concerns that immigrants are displacing native-born workers would be incorrect as to most skilled positions, and, as a result, more flexibility should be allowed under the current laws to admit the individuals who complement and improve the U.S. labor force. Indeed, some changes have already been incorporated.32

The second principle economic argument against immigration is that it will increase the fiscal burden of lawfully present individuals. On a federal level this appears to be incorrect as immigrants receive few federal benefits.33

26. One alleviating factor is that native-born workers without a high school diploma represent ten percent or less of total U.S. workers. See Peri, supra note 12, at 1, 5.


28. See Borjas, supra note 24, at 238-42 (noting immigration's negative impact on the salary levels of native-born workers).


32. See, e.g., 8 U.S.C. § 1184(g) (2009) (providing for an additional 20,000 H-1B visas that may be granted to holders of advanced degrees from U.S. universities); 8 U.S.C. § 1101(A)(15)(H) (2009) (providing for 500 H-1C visas that may be granted to nurses, on a temporary basis, provided that certain requirements are met). This is not to say that arguments of displacement are incorrect. Even though only approximately ten percent of native-born workers are seeing their salaries negatively affected by immigration, they are seeing a disproportionate amount of the effects, as the vast majority of immigrants are unskilled. See Crouse, supra note 25, at 597.

while paying taxes and helping fund Social Security. Any argument that undocumented immigrants are a drain at the federal level is inaccurate as these individuals usually have taxes and social security payments withheld directly from their paychecks, with the exception of those who are paid solely in cash. In addition, undocumented immigrants also file year-end federal tax returns.

The numbers outlining the net gains or losses to the U.S. economy from immigration, especially when viewed as a percentage of U.S. gross domestic product, are broad generalizations, and, as the old saying goes, "all politics is local." Certain states, especially those along the southwest border, feel the effects of immigration more than others. Therefore, although immigration may confer a net benefit at the federal level, it presents high costs to states with a disproportionate number of immigrants. The discrepancy presents a conundrum for the states, which are powerless to effect change to federal immigration policy.

Many states feel compelled to take action, as it is the states that traditionally bear the majority of costs incurred by immigrants through the provision of education, health care, food, and housing assistance. Although immigrants typically avail themselves of these programs less frequently than their

35. See Trebilcock, supra note 18, at 289 (noting that undocumented immigrants "generate considerable tax revenues" through payment of a variety of mandatory taxes).
37. This saying was used frequently by former Speaker of the House Thomas P. "Tip" O'Neill, U.S. Speaker of the House, 1977-1986. It is unlikely that he coined the phrase, though it is part of the title of his 1995 book, All Politics Is Local (and Other Rules of the Game). The expression actually "appeared much earlier, such as in the Frederick News (Md.) July 1, 1932." The Yale Book of Quotations 566 (Fred R. Shapiro ed., 2006).
38. See Lora L. Grandrath, Note, Illegal Immigrants and Public Education: Is There a Right to the 3 Rs?, 30 VAL. U. L. REV. 749, 784-85 (1996) (noting that states along the southwest border such as California and Arizona have unsuccessfully sued the federal government for compensation for fiscal burdens imposed by undocumented immigrants). See also California v. United States, 104 F.3d 1086, 1089 (9th Cir. 1997) (affirming the district court's dismissal of the case); Arizona v. United States, 104 F.3d 1095, 1096 (9th Cir. 1997) (affirming the district court's dismissal of the case).
40. Some states, with Arizona leading the charge, have begun to enact aggressive legislation to combat the problem of undocumented immigration and its associated costs. See Sarita A. Mohanty, Health Care Expenditures of Immigrants in the United States: A Nationally Representative Analysis, AM. J. PUB. HEALTH 95(8), Aug. 2005, at 1431-38 (noting that although immigrants received an average of $1,139 worth of health care services per person in 1998, immigrants have lower expenditures for emergency room visits, doctor's office visits, and prescription drugs. During the same year, native-born residents received approximately $2,546 worth of health care services per person). See, also Ariz. Rev. Stat. Ann. § 23-214 (2009) (requiring employers, in order to maintain a valid state license, to participate in the federal e-verify program that allows employers to obtain employees' work authorization status electronically).
41. See Hanson, supra note 36, at 25.
native-born counterparts, it is clear that the immigrant groups that do utilize these services tend to be low-skilled laborers, and often, when the benefits are education and emergency medical care, undocumented immigrants.

Therefore, the calculus of the states is simple: by reducing the number of consumers of state-provided goods, the states can reduce the cost of providing such services.

All of the above calculations have focused on the most expensive segment of the immigrant population—the low-skilled workers. However, as there is a group of immigrants that tends to represent a net expense at the local level, there are also groups that represent net benefits. In terms of economic utility, one clearly sees that some immigrant groups are more economically beneficial than others. The groups that are most beneficial are those that raise U.S. productivity and pay more in taxes than they receive in government benefits (direct and indirect). Not surprisingly, this group tends to include highly-skilled or otherwise successful newcomers who are usually temporary immigrants, or employment-based permanent immigrants.

This group of workers is tremendously important as the United States has long prized itself as the center of technological innovation and invention. It is estimated that the foreign-born share of all Ph.D.-holding workers in the science, engineering, and technology fields is approximately thirty percent.

This group of highly-skilled individuals has overseen innovations that

42. See, e.g., Alexander N. Ortega et al., Health Care Access, Use of Services, and Experiences Among Undocumented Mexicans and Other Latinos, 167(21) ARCHIVES INTERNAL MED. 2354, 2354 (2007) (noting that undocumented non-Mexican Latinos averaged 2.1 fewer doctor visits compared to their U.S.-born counterparts).

43. See, e.g., Mohanty, supra note 40, at 5 (noting that non-citizen immigrants "typically work in less-skilled jobs" and jobs that do not offer health insurance which tends to decrease preventive services, and increase emergency room visits). See generally Plyler v. Doe, 457 U.S. 202 (1982) (holding that prohibited undocumented immigrant children from attending elementary school violated the Fourteenth Amendment as Texas was unable to show a substantial state interest). Nationally, Section 1011 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, requires hospitals to offer emergency healthcare including at a minimum a medical exam and stabilizing treatment to uninsured immigrants. 117 Stat. 2066, Public Law 108-173 (Dec. 8, 2003).


45. See Hanson, supra note 36, at 21.

46. Davis, supra note 29, at 367 (noting that it is widely accepted that skilled immigrants generally increase productivity and growth in the United States); see Peri, supra note 14, at 50 (noting that immigrants with higher education, and advanced skills generally increase productivity at a higher rate than other immigrants).

47. See Tyler Grimm, Using Employer Sanctions to Open the Border and End Undocumented Immigration, 12 J. GENDER RACE & JUST. 415, 418 (2009) (stating that undocumented immigrants pay more in taxes than they receive in public benefits).

48. See Peri, supra note 14, at 4-5 (noting the U-shaped distribution of immigrants and the fact that immigrants tend to arrive in two distinct education categories: "less than high school" and "college or more").

49. Id. at 2. In fact, the percentage of foreign-born workers with doctorates in science, engineering and technology as a percentage of the U.S. labor force is approximately seven percent.
directly led to increased productivity and economic growth.\textsuperscript{50} However, fewer native-born workers enter these technological fields. In 2003, approximately thirty to fifty percent of all physics, mathematics, computer science and engineering doctorates were awarded to students born outside of the United States, and the percentages were even higher at the most elite universities.\textsuperscript{51} Allowing (and maintaining) this inflow of highly-skilled human capital provides U.S. industry and universities with leaders in technological fields and ensures that the newly-developed technology will continue to reside in the United States.\textsuperscript{52}

Currently, these highly-skilled individuals may enter the country as permanent residents, or adjust to permanent resident status if lawfully present, once they have satisfied all necessary requirements.\textsuperscript{53} Alternatively, the individual may enter as a nonimmigrant under a variety of visas of which the most well-known is the H-1B.\textsuperscript{54} One recent study has found "a positive and statistically significant association" between the number of H-1B petitions solicited and the percentage change in overall employment the following year.\textsuperscript{55} The study opined that "for every H-1B position requested, U.S. technology companies increase their employment by five workers" on average in the following year,\textsuperscript{56} and the benefits were even larger for technology companies with fewer than 5,000 employees.\textsuperscript{57}

Clearly it is difficult to precisely gauge the full economic value of the greater than the comparable rate of high-school dropouts, and more than twenty percent greater than the comparable percentage of high-school graduates. \textit{Id.}

\textsuperscript{50} \textit{Id.} at 6.

\textsuperscript{51} \textit{Id.} at 7.

\textsuperscript{52} In terms of human capital this is a zero-sum game. For every foreign-born worker holding a Ph.D. who remains in the United States, there is one fewer to return to his or her country of origin. Other than this brief note, a discussion of the fairness of a policy that encourages "brain-drain" from other nations is beyond the scope of this article; however, it should be noted that Canada and Australia have both developed successful programs targeting these highly-skilled individuals. \textit{See infra} note 187 and accompanying text; \textit{see also} Jagdeep S. Bhandari, \textit{Economic Analysis of Labor and Employment Law in the New Economy: Proceedings of the 2008 Annual Meeting, Association of American Law Schools, Section on Law and Economics}, 12 EMPLOYEE RTS. & EMP. POL'Y J. 327, fn. 174 (noting that England, Canada and Australia have implemented immigration policies that are primarily merit-based).

\textsuperscript{53} Immigration and Nationality Act of 1952 (INA) §§203(b)(1)(A), (B); 203(b)(2)(A) and 203(b)(3), 8 U.S.C.S. § 1153 (2006). Each of these categories is numerically limited. \textit{Id.} In addition, some of the visas require a U.S. employer to sponsor the petition. \textit{See} INA §§ 203(b)(2), (3), 8 U.S.C. § 1153 (1952).

\textsuperscript{54} INA §101(a)(15)(H)(i)(b), 8 U.S.C. 1101 (2009) (aliens with specialized knowledge and the attainment of a bachelor's or higher degree (or its equivalent), and §101(a)(15)(O), 8 U.S.C. 1101 (1952) (aliens with extraordinary abilities in the sciences, arts, education, business or athletics with sustained national or international acclaim).


\textsuperscript{56} \textit{See id.} These numbers should be taken with a grain of salt, as it is difficult to assess causality in this correlation. Additional factors such as sustained growth in the economy or a particular segment of the economy would likewise tend to cause growth in one or both categories simultaneously.

\textsuperscript{57} \textit{Id.} (noting the average job gain to be approximately 7.5 workers per H-1B petition).
benefits that these immigrants provide to the United States. A study by the National Research Council estimated that the average immigrant produced a net fiscal benefit of $80,000 for natives of the United States in 1996 present value dollars, and that highly-skilled immigrants produced a net fiscal benefit of $198,000 each. Therefore, relative to the average immigrant, the highly-skilled or successful immigrant produces a much greater economic benefit.

This brief discussion highlights two key points: first, immigration in general (marginally) and especially immigration of highly-skilled or otherwise successful individuals (much more significantly) benefits the overall U.S. economy and its natives; and second, even faced with clear evidence outlining the economic benefit of these highly-skilled immigrants, U.S. policy-makers have chosen to impose strict numerical limits on the ability to immigrate to the United States, which means that policy justifications for the limits must outweigh the pure fiscal benefits of this type of immigration.

The analysis above seems to greatly favor highly-skilled immigration so long as certain limits are imposed; however, it has largely been limited to highly-skilled employees. While the United States certainly has a strong tradition of successful professionals in the fields of science, technology,
medicine, law, and academia, it has consistently prided itself on the entrepre-
neurial spirit of its inhabitants.\footnote{See generally \textit{Thomas J. Lorenzo, How Capitalism Saved America: The Untold History of Our Country, from the Pilgrims to the Present} (2004).} The "American Dream"\footnote{Id.} has often focused on the rags to riches stories of entrepreneurs.\footnote{Id.} So, how then should U.S. immigration policy treat those individuals who have successfully embodied the spirit of the American Dream both in terms of idealism and pecuniary gain?

B. \textit{The Economics of Immigrant Entrepreneurs}

1. \textit{The Benefits of Business Creation}

Immigrants are and have historically been very successful entrepreneurs.\footnote{See \textit{James Truslow Adams, The Epic of America} 404 (1931)} In the United States, immigrants have taken to entrepreneurship at higher rates than native-born individuals.\footnote{Id.} Recently, a Kauffman study found that immigrants' rate of entrepreneurial activity was almost twice as high as native-born individuals.\footnote{See Robert W. Fairlie, \textit{Kauffman Index of Entrepreneurial Activity: 1996-2008} 2, 11 (2009), http://www.kauffman.org/uploadedFiles/kiea_042709.pdf. (noting that the continued increase in the immigrant rate of entrepreneurial activity to 0.53% compared to a native-born rate of 0.28%).} Immigrant entrepreneurial activity is likely the result of a combination of many factors, including: a cultural preference for self-employment;\footnote{Id.} language barriers;\footnote{Id.} the inability to find like-paying or better job opportunities in the United States;\footnote{See Efrat, supra note 9, at 695 (noting that foreign-born entrepreneurs have outstripped native-born entrepreneurs as evidenced by every decennial census between 1880 and 1980).} discrimination; a higher chance for tolerance coupled with a willingness to work longer hours; and

---

64. \textit{James Truslow Adams, The Epic of America} 404 (1931)
65. \textit{Id.}
67. See \textit{Efrat, supra} note 9, at 695 (noting that foreign-born entrepreneurs have outstripped native-born entrepreneurs as evidenced by every decennial census between 1880 and 1980).
68. See \textit{Robert W. Fairlie, Kauffman Index of Entrepreneurial Activity: 1996-2008} 2, 11 (2009), http://www.kauffman.org/uploadedFiles/kiea_042709.pdf. (noting that the continued increase in the immigrant rate of entrepreneurial activity to 0.53% compared to a native-born rate of 0.28%).
70. \textit{Id.}
71. See \textit{N.C. Aizenman, Untapped Talents of Educated Immigrants: 20% with Degrees in Unskilled Jobs or Jobless, Study Finds}, \textit{Wash. Post}, Oct. 23, 2008, at B01 (noting that 20% of all college-educated immigrants, and nearly half of all college-educated Latin Americans, are either unemployed or underemployed in menial labor positions).
community- or family-based support networks that encourage and assist with the entrepreneurial activity.\textsuperscript{72}

Regardless of the reason, immigrants are much more likely to be entrepreneurs than native-born individuals, and their success is a boon to the U.S. economy.\textsuperscript{73} For example, as noted above, immigrants provide much of the human capital necessary for technological growth.\textsuperscript{74} Small businesses are another area in which immigrants have demonstrated considerable success. Somewhat ironically, it appears that immigrants have provided many jobs to native-born laborers. Even historically disadvantaged communities have experienced at worst a neutral effect when incoming immigrants begin to establish businesses in what were traditionally nonimmigrant neighborhoods.\textsuperscript{75}

2. Taxes, Taxes, Taxes

As a corollary to the economic benefits cited above, immigrant businesses appear to fail at a lower rate than nonimmigrant businesses, despite being overrepresented in the entrepreneurial sector.\textsuperscript{76} Additionally, the owners of these businesses typically enjoy higher annual incomes than salaried employees, as well as a higher net worth.\textsuperscript{77} In net terms, these contributions add


\textsuperscript{73} See Kane & Litan, supra note 61, at 5 (citing Vivek Wadhwa et al., America's New Immigrant Entrepreneurs, Duke University, Jan. 2007, available at http://people.ischool.berkeley.edu/ann0/Papers/Americas_new_immigrant_entrepreneurs_I.pdf (noting that during the 1995-2005 period, twenty-five percent of all newly-founded technology and engineering companies had at least one immigrant founder, while in Silicon Valley it was over fifty percent)).

\textsuperscript{74} See Kloosterman, Rath & Russell, supra note 72, at 17 (noting that foreign-born individuals have typically had higher rates of self-employment in the United States than their native-born counterparts). According to the U.S. Small Business Administration, approximately ninety-nine percent of businesses in the United States are small businesses, and these businesses employ approximately half of the adult workforce. Office of Advocacy, Small Business Admin., Annual Rep. on Small Bus. and Competition 17 (2001), available at http://www.sba.gov/advo/research/stateofsb99_00.pdf (“Small businesses represent [ninety-nine] percent of businesses, employ more than half of the American work force, and create two-thirds of the net new jobs.”).

\textsuperscript{75} A recent study has found that “the ratio of immigrants to natives declines as companies mature, indicating immigrants are creating opportunities for U.S. workers born here.” Kloosterman & Rath, supra note 72, at 17. The data bear out this assertion, as a recent study estimates that immigrant-owned venture-capital firms have provided more than 400,000 jobs in the last two decades. See Kane and Litan, supra note 61, at 5 (citing Stuart Anderson & Michaela Platzer, American Made: The Impact of Immigrants and Professionals on U.S. Competitiveness, National Venture Capital Association, 2006, available at http://www.sandhill.com/grafix/content/NVCA.pdf).

\textsuperscript{76} See Ivan Light & Carolyn Rosenstein, Race, Ethnicity, and Entrepreneurship in Urban America 197 (1995) (noting that immigrant entrepreneurs do not detrimentally affect white or African American entrepreneurs); see Borjas, supra note 20, at 68-69 concluding likewise.

\textsuperscript{77} See Efrat, supra note 9, at 705-06 (noting with a ninety-five percent confidence level that “small business owners born outside the United States are less likely to file bankruptcy, and small business owners born in the United States are more likely to do so”).

significantly to U.S. coffers through income taxes paid by immigrant entrepreneurs. It is estimated that immigrants contribute well over $30 billion in tax revenue every year.  

Those contributions would be significantly higher if the U.S. immigration quota system had not driven away federal revenues in the range of $2.7 billion to $6.2 billion from 2003 to 2007.  

One of the most common arguments against immigrant legalization programs, in addition to the argument against rewarding illegal activity, is that these individuals have unfairly benefitted from the U.S. economy by working within the United States without paying any income tax (neither state nor federal). While this argument may be accurate for the undocumented immigrants who are paid only in cash, it is simply untrue for those who are paid in the standard fashion. So, how can an undocumented immigrant pay income taxes? The majority pay them in the same way that most other individuals pay taxes—by withholding social security taxes from their paychecks. Many also file their income tax statements annually just as individuals authorized to work do. In fact, undocumented immigrants typically face higher effective tax rates on their income than similarly situated native-born workers or documented immigrants due to their inability to take advantage of certain tax benefits in the Internal Revenue Code.  

In addition to the standard withholding benefits, undocumented immi-

79. See, e.g., JEFFREY S. PASSEL & MICHAEL E. FIX, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 6 (1994), http://www.urban.org/UploadedPDF/305184_immigration_immigrants.pdf (noting that the net fiscal benefits of immigration were $25 to $30 billion per year in 1994, and analyzing and disproving a similar study sponsored by an entity favoring reduced immigration).  

80. See ARLENE HOLEN, THE BUDGETARY EFFECTS OF HIGH-SKILLED IMMIGRATION REFORM 2 (2009), http://techpolicyinstitute.org/files/the%20budgetary%effects%20of%20high-skilled%20immigration%20reform.pdf (detailing the actual revenue lost by the U.S. due to the forced removal of certain high-skilled immigrants). The foregoing figure represents only the income lost to the United States through taxes paid, not the loss of human capital or resulting profits for the employing companies nor the U.S. economy as a whole.  


82. See Youngro Lee, Note, To Dream or not to Dream: A Cost-Benefit Analysis of the Development, Relief, and Education for Alien Minors (Dream) Act, 16 CORNELL J.L. & PUB. POL’Y 231, 246 n.112 (2006) (noting that certain taxes such as sales tax, payroll withholding taxes and property taxes are applied mandatorily, and that they are unavoidable by undocumented immigrants).  

83. Id.  

84. Colleen DeBaise, For Illegal-Alien Entrepreneurs, Tax Time is Tricky, SMARTMONEY, Mar. 12, 2007, http://www.smartmoney.com/personal-finance/taxes/for-illegal-alien-entrepreneurs-tax-time-is-tricky-20920/ (noting that undocumented individuals are often counseled to file taxes and comply with U.S. tax laws, and that payment of taxes may provide undocumented immigrants the ability to document presence in the United States should the need arise for immigration-related purposes such as cancellation of removal or Nicaraguan Adjustment and Central American Relief Act (NACARA) relief; see also Lipman, supra note 66, at 5 (citing Paula N. Singer & Linda Dodd-Major, Indentification Numbers and U.S. Government Compliance Initiatives, 104 Tax Notes 1429, 1433 (Sept. 20, 2004) (noting the more than 500,000 tax returns filed by undocumented individuals who were without work authorization)).  

grants also contribute to the health of the U.S. Social Security system. As of 2005, undocumented individuals were contributing approximately $7 billion dollars annually to Social Security for which they will never receive any benefit. These annual contributions have continued to grow, and projections by the Social Security Administration estimate that raising net immigration to 1.3 million individuals a year as opposed to 900,000 would yield a saving of approximately half a trillion dollars in 2005 dollars.

Documented immigrants also pay substantial taxes. Evidence has shown that documented immigrants tend to do as well or better financially as their native-born counterparts, especially when assessed over time in order to account for the assimilation process. Predictably, the tax benefit of documented immigrants is much higher than that of undocumented immigrants as their annual salaries typically tend to be from two to eight times higher, because of the benefit of being lawfully present, and their effective tax rate is likewise higher. Therefore, whatever policy arguments may be made against immigration in general, there appears to be a consensus forming that economically, and especially fiscally, immigrants, both documented and undocumented, represent an overall benefit to the U.S. economy.

It is estimated that approximately seventy-five percent of undocumented individuals who have a job in the United States use valid, existing Social Security Numbers (SSN) belonging to third parties. See Eduardo Porter, *Illegal Immigrants are Bolstering Social Security with Billions*, N.Y. Times, Apr. 5, 2005, at A1 (quoting the Social Security Administration’s Chief Actuary Stephen C. Gross, “Our assumption is that about three-quarters of other-than-legal immigrants pay payroll taxes.”). Most undocumented immigrants use either SSNs or government-issued Individual Taxpayer Identification Numbers (ITIN). See Jessica Sharron, *Passing the Dream Act: Opportunities for Undocumented Americans*, 47 SANTA CLARA L. REV. 599, 641 (2007) (noting that the IRS issues ITINs to persons who do not possess a social security number so they may pay federal income taxes). The immigrants using SSNs may use existing SSNs belonging to another individual, or fabricated numbers that belong to no one. See Eduardo Porter, *Illegal Immigrants are Bolstering Social Security with Billions*, N.Y. Times, Apr. 5, 2005, at A1. ITINs are the creation of the IRS and have been utilized since 1996 to allow individuals who are not eligible for SSNs but who nevertheless have income tax liability in the United States to file their taxes with an identifying number. The IRS *INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER, AN OPERATIONAL GUIDE TO THE ITIN PROGRAM* 3 (2004), available at http://www.nilc.org/immsemploymnt/ITINs/ITIN_Paper_2004-web.pdf.

The funds accruing to the Social Security Administration with incorrect SSNs continue to accrue to this “earnings suspense file.” This file does not contain funds where there is no mistake, i.e., the name and SSN match. Therefore, any earnings by undocumented immigrants who use both false names and their corresponding SSNs will not appear in this category; and such benefits will accrue to the actual individual involved. See, e.g., Social Security Administration, *Identity Theft and your Social Security Number*, available at http://www.ssa.gov/pubs/10064.htm#theif (noting that even if a third person is utilizing another individual’s SSN, that individual still must show “that [he or she] still [is] being disadvantaged by the misuse” in order to obtain a different SSN).

Citing a simulation by actuaries in the Social Security Administration that noted the Social Security Systems’ seventy-five-year funding gap would narrow from 1.92% of total payroll to 1.67%.

See Lipman, supra note 66, at 17 (noting the average family income of documented immigrants ($47,800) versus native-born families ($47,700)).

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

See supra Part I.A. (discussing the overall positive economic impact of immigration on the U.S. economy); see also JULIAN L. SIMON, IMMIGRATION: THE DEMOGRAPHIC & ECONOMIC FACTS 47-48 (1995) (noting that at least eighty percent of surveyed economists believed that immigration in the last one-hundred years has had a very favorable effect on the U.S. economy); contra George J.
3. *Incentivizing Business Creation*

Given that successful business creation confers many benefits on the U.S. economy, it follows that promoting this entrepreneurship is a desirable policy goal. In fact, for this very purpose, the U.S. government created the U.S. Small Business Administration (SBA) in 1953.\(^{92}\) The purpose of the SBA was to "aid, counsel, assist and protect, insofar as possible, the interests of small business concerns."\(^{93}\) As far back as 1964, the SBA began focusing specifically on encouraging promising applicants with annual incomes below the federal poverty lines to start new businesses.\(^{94}\) It has more recently begun to focus on minority and female prospective entrepreneurs.\(^{95}\) However, although the United States has recognized the benefit of incentivizing business creation, the SBA is expressly precluded by statute from providing funding to undocumented individuals,\(^{96}\) leaving undocumented entrepreneurs looking for alternative forms of investment capital.

For prospective investors, any cost-benefit analysis of investing capital in new businesses will inevitably vary greatly depending on many factors such as: type of business, location, customer-base, owner-involvement, and debt servicing.\(^{97}\) Failure is not uncommon with roughly half of all new small businesses failing within their first five years.\(^{98}\) Legalizing owners' immigration status and allowing successful entrepreneurs to continue operating their businesses, rather than closing them or forcing them to relinquish control, is a much better alternative than the creation of new businesses given the typical rates of failure.\(^{99}\)

---

Borjas, *Know the Flow, in IMMIGRATION: DEBATING THE ISSUES 194-95 (1997)* (arguing that immigrants create a negative effect on the wage levels of low-skilled native born employees).

92. U.S. Small Business Administration, *Overview & History*, http://www.sba.gov/aboutsba/history/index.html (last accessed Sept. 11, 2009) (noting the official establishment of the SBA in 1953, but also referring to its predecessor, the Reconstruction Finance Corporation, which was established by President Hoover in 1932 in response to the economic times prevalent during the Great Depression).


94. See U.S. Small Business Administration, *supra* note 92.


None of the funds made available pursuant to this chapter may be used to provide any direct benefit or assistance to any individual in the United States if the Administrator or the official to which the funds are made available receives notification that the individual is not lawfully within the United States.

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


99. *Id.*
HALTING THE DEPORTATION OF BUSINESSES

Where a typical new business may operate at a loss for an initial period of months or years, an ongoing business that satisfies the requirements of eligibility for the proposed entrepreneur visa has already, crossed the threshold of profitability for at least two consecutive years thereby reducing the risk of failure from fifty percent to something much lower. Additionally, legalizing the immigration status of the owners of these businesses will allow them to seek areas of traditional financing that may otherwise have been foreclosed to them. Traditionally, bank loans, angel investors, mezzanine financing, revolving credit lines, letters of credit, or even a public or private offering, will then be more readily available to these business owners at comparable rates as to traditional domestic businesses.

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

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

100. See infra Part III.A. (discussing certain minimum qualifications necessary to be eligible for the undocumented entrepreneur visa).


102. See, e.g., ISBISTER, supra note 58, at 166-68 (arguing that increases in immigration, even if the increase has no effect on wages, profitability rates or natives income, will expand the overall size of the economy, and that such expansion is beneficial in economic and political terms).

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

States since the earliest days of settlement, and a multitude of interests and stakeholders view the issue through an entirely different lens, and with many different motivations.

C. Incorporation, Entity Selection, Business Negotiations and the Undocumented Immigrant

1. Incorporation and Entity Selection

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

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

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

107. A business that is owned by a single individual where there is no legal distinction between the owner and the business is known as a sole proprietor. See Robert W. Hamilton & Jonathan R. Macey, Corporations Including Partnerships and Limited Liability Companies 10 (8th ed. 2003).


110. Undocumented immigrants, however, are prohibited from working in the United States, even if they are self-employed. See Immigration and Nationality Act § 274A (a)(1), 8 U.S.C. § 1324a(a)(1) (2006) (“making employment of unauthorized aliens unlawful”). For the purposes of Immigration and Nationality Act § 274A, “entity” is defined to include any legal entity including proprietorships, associations and partnerships. 8 C.F.R. 274a.1(b).


112. The creation of an entity is typically dependent on the undocumented immigrant obtaining an ITIN. Federal form SS-4, which is required to obtain an Employer Identification Number (EINs), requires the primary applicant to provide his or her social security number. The form states that the applicant “[u]nder penalties of perjury, . . . declare[s] that [the applicant] has examined this application, and to the best of [the applicant’s] knowledge and belief, it is true, correct and complete.” Internal Revenue Service, Application For Employer Identification Number, Form SS-4 (Rev. Jan. 2009), http://www.irs.gov/pub/irs-pdf/fss4.pdf. Any use of a social security number not belonging to the applicant is prohibited and possibly illegal. Such use could cause the applicant and any attorney or accountant assisting the applicant to incur serious adverse consequences. Federal law provides that
cursory summary is beyond the scope of this article.

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

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

2. Business Negotiations and Undocumented Immigrants

Similar to the commercial disadvantage undocumented immigrants face by being unable to take advantage of all corporate vehicles available to U.S. citizens and lawful permanent residents, undocumented immigrants, employers, and employees are also at a tremendous disadvantage when conducting everyday business negotiations due to their immigration status. On the employee front, the examples are many and have been the subject of much literature. There are fewer examples, and no reported decisions, on the

anyone guilty of perjury shall "be fined under this title or imprisoned not more than [five] years, or both." 18 U.S.C. § 1621 (2006). The IRS appears to expressly allow this procedure as the IRS online application for an EIN states "Foreign filers without an Individual Taxpayer Identification Number (ITIN) cannot use this assistant to obtain an EIN." See Internal Revenue Service, EIN Assistant, https://sa2.ww4.irs.gov/modiein/individual/index.jsp.


See infra notes 120-21 and accompanying text.

business-owner front, which is likely indicative of the actual pressure felt by the undocumented entrepreneurs and the lengths the affected undocumented individuals are willing to go to avoid actual or threatened legal challenges.

The quintessential scenario is one in which an interested party learns of the undocumented immigrant status of the entrepreneur and then uses that knowledge to its advantage. Whether there is a breach of contract complaint, lease issue, trademark infringement or other legal dispute, most, if not all, undocumented entrepreneurs are willing to accept monetary losses to avoid the disclosure of their immigration status rather than risk removal and pursue or defend any just claims they may have in court. The situation presents an economic harm to the undocumented immigrant as well as to the consumers of the immigrant’s services or products as the immigrant’s cost of business increases. The gains in such a transaction are enjoyed by the business controlled by an individual with no immigration-status concerns who is willing to employ morally-questionable business practices. In these cases at least, the additional social and moral justifications used to argue against legalizing the status of undocumented entrepreneurs122 would appear to have been ceded away as the end result appears to be both economically and morally deleterious. The proposed legalized pathway for undocumented entrepreneurs could resolve the issue entirely.123

II. HISTORICAL ASPECTS AND PURPOSES OF INVESTOR VISAS

A. Immigrant Visas

The concept of attracting immigrant investors to the United States is not new.124 As far back as 1952 there has been a formalized process to grant residency to individuals meeting certain financial criteria.125 Although critics

---


121. The issue has been largely unreported. While in private practice, the author encountered this issue in two separate situations: one involving an independent contractor’s non-competition agreement, and the other a trademark dispute.

122. See infra Part II.C. (discussing social and moral policy justifications for limiting immigration and/or prohibiting the legalization of individuals who are unlawfully present).

123. See infra Part III.


125. See Beth MacDonald, The Immigrant Investor Program: Proposed Solutions to Particular Problems, 31 LAW & POL’Y INT’L BUS. 403, 406-07 (2000) (noting that the Immigration and Nationality Act of 1952 provided a non-preference visa category to investors which was exempt from the labor certification process). However, although the pathway technically existed, the visas were only made available if there were any unused visas left over from the six preference categories. Id. From 1977 until the enactment of 8 U.S.C. 1153(b)(5) in 1990, no visas had been left over. Id.
decried the program as the equivalent of selling U.S. citizenship.\textsuperscript{126} Congress easily passed the law containing the current immigrant investor visa (the EB-5).\textsuperscript{127} Regardless of its relatively smooth passage, the law has never obtained the predicted results in terms of immigrant flows to the United States.\textsuperscript{128} Many of the problems in recruiting viable foreign investors come from the rules and regulations regarding the EB-5 investor visa. While its predecessor had fewer financial requirements, perhaps due to the limiting nature of the quota,\textsuperscript{129} the new law has proven much more onerous\textsuperscript{130} due to "regulatory and administrative obstacles,"\textsuperscript{131} inconsistent application of the law, and the resulting uncertainty facing the immigrant investor.

The principal requirements of the EB-5 visa are the investment of one million dollars, and the creation of not less than ten full-time jobs for individuals lawfully authorized for employment in the United States.\textsuperscript{132} The one million dollars figure has not been adjusted since the enactment of the statute,\textsuperscript{133} and it is also worthwhile to note that, at the time of its enactment, comparable investor visa laws in Canada and Australia had investment requirements of $250,000 and $365,000, respectively.\textsuperscript{134} In addition to the

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{126}]
\item While the number of fifth employment-based immigrant visas, the so-called investor visas, is capped at approximately 10,000 annually (7.1\% of worldwide employment-based immigration), less than one-tenth of that amount are issued yearly. \textit{See} INA §203(b)(5); 8 U.S.C. 1153(b)(5); \textit{see also} Office of Immigration Statistics, U.S. Dep’t of Homeland Security, 2007 Yearbook of Immigration Statistics 18-19 (2008) (Table 6), available at http://www.dhs.gov/ximgtn/statistics/publications/yearbook.shtm. In the last ten years, annual EB-5 admissions varied from a low of sixty-four in 2003, to a high of 1,360 in 2008. \textit{Id.}
\item The former law regarding immigrant investors required:

\begin{itemize}
\item an alien [to] establish [...] that he ha[d] invested, or [was] actively in the process of investing, capital totaling at least $40,000 in an enterprise in the U.S. of which he will be a principal manager and that the enterprise will employ a person or persons in the U.S.
\end{itemize}

\textit{See} 8 C.F.R. § 212.8(b)(4) (1980).
\item \textit{See} 8 U.S.C. § 1153(b)(5)(C) (requiring an investment of one million dollars (or a lower $500,000 if the investment was made in a “targeted employment area”).
\item \textit{Id.} The statute provides additional restrictions regarding the creation of jobs and prohibits the inclusion of any jobs for the immigrant and the immigrant’s immediate family in calculating whether the ten employment positions have been created. 8 U.S.C. § 1153(b)(5)(A)(ii) (2006).
\item It should be noted, however, that the one million dollar requirement may be adjusted at any time by the Secretary of Homeland Security in consultation with the Secretary of Labor and the Secretary of State. 8 U.S.C. § 1153(b)(5)(C)(i) (2006).
\item \textit{See} Rose, supra note 124, at 616 (citing Section 2 of the Canada Immigration Act (1978), which required an investment of $250,000 Canadian dollars and the requisite business experience; and Department of Immigration, Local Government and Ethnic Affairs, Migrating to Australia, Business Skills Migration Requirements (1992), which required an investment of $500,000 Australian dollars, equivalent to approximately $365,000 U.S. dollars). Currently, Canada requires a passive investment of $400,000 Canadian which is guaranteed to be returned by the Canadian government in
\end{enumerate}
\end{footnotesize}
higher comparative cost to potential immigrants presented by U.S. immigration law, U.S. tax law was and continues to be of primary importance for immigrant investors selecting a country of destination, as the Internal Revenue Code taxes U.S. residents on their worldwide income, rather than just U.S.-sourced income.

Although the EB-5 program purports to provide a bright-line test, in practice it has done anything but that. The EB-5 visa requires: documentation of the source of the investment capital, investment or active involvement in prior investment, proof that all capital contributions have been invested rather than provided in any sort of debt arrangement, demonstration that the investment is "at-risk," and proof that the investor is "engaged in the management of the new commercial exercise . . . through the exercise of day-to-day managerial control or . . . policy formulation, as opposed to maintain[ing] a purely passive role . . . ." Lamentably, U.S. Citizenship and Immigration Services (USCIS) has struggled since the visa's inception to apply the rules uniformly and provide decisions in a timely manner.


135. See Rose, supra note 124, at 621-22 ("Professionals involved with this program agree that the biggest problem with the immigrant investor visa is the worldwide taxation effect.").

136. See I.R.C. § 61(a) (defining income from any source as gross income); see also 26 U.S.C. § 7701(b)(1)(A) (2009) (defining Resident Alien, and noting that resident aliens are taxed on worldwide income whereas non-resident aliens are taxed only on U.S.-based income). Canada, by comparison, taxes only Canadian-sourced income. See Rose, supra note 124 (citing Nathan Boidman, Tax Havens Encyclopedia, 29 Can. L. & Prac. 8 (Butterworth & Co. ed., 1990)).

137. See Rose, supra note 124, at 627 (noting that the bright-line test is "one of the great advantages of the immigrant investor visa").

138. See Gordon, Mailman & Yale-Loehr, supra note 7, at § 39.07[1][b]-[j].

139. See 8 C.F.R. § 204.6(g)(1) (requiring the source of all invested capital to be identified and shown to have been derived by lawful means).

140. See 8 C.F.R. § 204.6(j)(2). Although the statutory language provides that an immigrant investor may be in the process of investing his or her capital, currently, only those petitioners who have actually invested prior to the petition are being considered. See Immigration and Nationality Act § 203(b)(5)(A)(i), 8 U.S.C. § 1153(b)(5)(A)(i); see also 8 C.F.R. § 216.6(a)(4)(ii); Gordon, Mailman & Yale-Loehr, supra note 7, at §39.07[1][c] n.16 (noting that although the precedent relied upon by the immigration agency in requiring payment prior to filing seems inapplicable, the USCIS has continued to stand by the requirement).

141. See 8 C.F.R. § 204.6(e).

142. See 8 C.F.R. § 204.6(j)(2).

143. See 8 C.F.R. § 204.6(j)(5).

144. See Gordon, Mailman & Yale-Loehr, supra note 7, at §39.07[1][a] (noting how the predecessor to the USCIS, the Immigration and Naturalization Service (INS), issued four decisions in 1998 restricting eligibility for the EB-5 visa, and applying the decisions retroactively, though Congress legislatively undid some of the harm through a new law in 2002). See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), §§ 11031-11037. Prior to issuing the four precedential decisions cited above, the INS General Counsel issued a thirty-six page memorandum criticizing what he deemed to be many of the flaws in the EB-5 program, and thereafter imposing a moratorium on all EB-5 processing until after the four cases were decided. See Gordon, Mailman & Yale-Loehr, supra note 7, at §39.07[1][g] (discussing the INS General Counsel opinion as well as the precedential 1998 opinions). The four precedential
In addition to the conditions precedent involved in filing an EB-5 petition, the permanent residency granted to the investor is conditional for a period of two years. As well as demonstrating the necessary jobs creation, the applicant must show that he or she "sustained the actions required for removal of the condition ... in good faith, [and has] substantially met the capital investment requirement of the statute and continuously maintained his or her capital investment over the two years of conditional residence." As mentioned above, this pathway to permanent residency has proven perilous to potential investors, so much so that the Homeland Security Act of 2002 created the office of the Citizenship and Immigration Services Ombudsman to provide recommendations to improve the processing and handling of EB-5 petitions. In framing his recommendations, the Ombudsman noted the relative lack of success of the EB-5 program and concluded that this result was caused, at least partially, by administratively-imposed impediments.

In short, the EB-5 program has had a brief and tumultuous history; but it was created for very specific reasons, namely to benefit the U.S. economy and create full-time employment for its residents. Senator Gramm summed up his belief of the program's purpose by stating, "if people have been successful in business—if they can bring that talent and the fruits of that talent, a million dollars[,] to this country, and if they meet the criteria of job creation and ability to sustain that business—they then have a right to come here and to practice that business." In short, the paradigm of the EB-5 program is to reward success in business while also capturing a portion of that success for the benefit of the U.S. economy, and this program gained


146. 8 C.F.R. § 216.6(a)(4)(iii).

147. There are approximately 700 investors in the EB-5 program that have been awaiting adjudication of their petitions, including some from as early as 1995, which has caused one commentator to remark that the "legal quagmire these foreign investors are in is unconscionable ... and continues to cast doubt about the integrity of the EB-5 program." Lee, Hinrichsen, & Yale-Loehr, supra note 131, at 658.


149. See EMPLOYMENT CREATION IMMIGRANT VISA (EB-5) PROGRAM RECOMMENDATIONS, supra note 134; see generally Lee, Hinrichsen, & Yale-Loehr, supra note 131, at 657 (summarizing the Ombudsman's recommendations and providing additional recommendations).

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

Congressional support with relative ease. The same paradigm is the essence of the proposal presented here, with one major caveat: eligibility should be extended to unauthorized immigrant entrepreneurs already in the U.S.\textsuperscript{152}

B. Nonimmigrant Visas

While U.S. immigration law has long provided an avenue for investor immigrants, it has generally favored nonimmigrant investors to a greater extent provided that the nonimmigrant comes from a country which has a treaty in place with the United States.\textsuperscript{153} It has favored nonimmigrant investors in the same manner as it has favored other nonimmigrants, by imposing fewer burdens on them than on their immigrant counterparts.\textsuperscript{154} Principally, the nonimmigrant investors (known as treaty investors or E-2s) must show that they are investing a "substantial amount of capital" to allow them to direct and grow the intended business enterprise.\textsuperscript{155}

Whereas immigrant investors are required to invest one million dollars, treaty investors are only required to invest a "substantial amount of capital."\textsuperscript{156} The term "substantial amount of capital" is defined in the regulations, but the definition itself omits any specific dollar amounts,\textsuperscript{157} and instead relies on a proportionality test.\textsuperscript{158} As the required investment is relative to the size of the

\begin{itemize}
  \item \textsuperscript{152} See infra notes 176-85 and accompanying text and Part III.D.2 (discussing the genesis of arguments against immigration reform based on unlawful presence).
  \item \textsuperscript{153} See Immigration and Nationality Act § 101(a)(15)(E)(ii) (describing so-called "treaty investors") (the eligibility of the nonimmigrant to enter the United States initially hinges on the terms of the treaty involved).
  \item \textsuperscript{154} See, e.g., Immigration and Nationality Act § 101(a)(15)(B) (noting fairly minimal requirements to establish initial eligibility for entrance as a business visitor compared to § 203(b)(1)-(3), which provides much stricter credentialing requirements and labor certification prior to visa issuance). Contra Immigration and Nationality Act § 101(a)(15)(H) (requiring labor condition application and a bachelor's degree or equivalent for admittance as a temporary visitor (up to six years)).
  \item \textsuperscript{155} 8 C.F.R. § 214.2(e)(2)(i)-(iii). The treaty investor regulation requires that the investor:
    \begin{enumerate}
      \item Has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living;
      \item Is seeking entry solely to develop and direct the enterprise; and
      \item Intends to depart the United States upon the expiration or termination of treaty investor (E-2) status.
    \end{enumerate}
  \item \textsuperscript{156} See 8 C.F.R. § 214.2(e)(2)(i).
  \item \textsuperscript{157} See 8 C.F.R. § 214.2(e)(2)(i). A substantial amount of capital is:
    \begin{enumerate}
      \item Substantial in relationship to the total cost of either purchasing an established enterprise or creating the type of enterprise under consideration;
      \item Sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and
      \item Of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise. Generally, the lower the cost of the enterprise, the higher, proportionately, the investment must be to be considered a substantial amount of capital.
    \end{enumerate}
  \item \textsuperscript{158} Gordon, Mailman & Yale-Loehr, supra note 7, at § 17.06[3][b] ("What constitutes a substantial investment is a relative matter and is not determined alone by size of investment" (citing 6
business, even modest amounts may suffice,\textsuperscript{159} provided that they meet all additional criteria.\textsuperscript{160} Given the less-restrictive requirements, it is unsurprising that the E-2 visa program has been numerically more successful than the EB-5 program. In terms of sheer volume, in 2006 over 40,000 E visas were issued\textsuperscript{161} compared to less than one thousand EB-5 immigrant investor visas.\textsuperscript{162}

Initially created in 1952,\textsuperscript{163} the E-2 visa category yielded no debate on the floors of Congress.\textsuperscript{164} One of the E-2 program's primary goals was to attract foreign investment to the United States.\textsuperscript{165} As a result, U.S. immigration law has treated nonimmigrant investors more generously than immigrant investors for a variety of reasons: the investors are granted only temporary residency,\textsuperscript{166} they come from countries that are on friendly terms with the United States,\textsuperscript{167} at least to the extent that the necessary treaty is in force;\textsuperscript{168} and by allowing these investors access to U.S. soil, the United States is able

\textsuperscript{159}For a discussion of the substantiality of the amount invested, the State Department compares the amount invested to the value of the business. 9 Foreign Affairs Manual § 41.51 nn.10.2–10.4, as amended, TL: VISA-322 (Oct. 10, 2001). The Foreign Affairs Manual notes, by example, that some smaller, less capital-intensive businesses may require an investment of as little as $50,000. Id.

\textsuperscript{160}As the business in which the nonimmigrant invests must be real and active, and the investor come to the United States "solely to develop and direct" the commercial venture. Immigration and Nationality Act § 101(a)(15)(E)(ii), 8 U.S.C. § 1101(a)(15)(E)(ii) (2006). The investor's money must be at risk (i.e., subject to loss) rather than loaned to the enterprise, and the money must be under the investor's control. See Gordon, Mailman & Yale-Loehr, supra note 7, at 17.06[2][a]. Additionally, and significantly, the investment "must have the present or future capacity to generate more than enough income to provide a minimal living for the treaty investor and his or her family. . . ." 8 C.F.R. § 214.2(e)(15).

\textsuperscript{161}See U.S. DEPARTMENT OF STATE, REPORT OF THE VISA OFFICE 2006, TABLE 17 (PART I) NONIMMIGRANT VISAS ISSUED (PRELIMINARY DATA), http://travel.state.gov/pdf/FY06AnnualReport TableXVII.pdf (noting that 40,439 E visas were issued in fiscal year 2006). E visas include treaty investors (E-2s) as well as treaty traders (E-1s), and the available data do not provide a breakdown for the two subcategories. Id.

\textsuperscript{162}See OFFICE OF THE CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN, supra note 134 (noting annual rates of EB-5 issuance).


\textsuperscript{164}See H.R. REP. NO. 1365, 82D CONG., 2D SESS. 44 (1952). (committee report outlining the E-2 visa program simply stating, "[t]he [E-2 Visa] category is intended to provide for the temporary admission of such aliens who will be engaged in developing or directing the operations of a real operating enterprise and not a fictitious paper operation"). No mention of the treaty investor program appears in the Congressional Record; see also Nice v. Turnage, 752 F.2d 431, 432 (9th Cir. 1985) (quoting Kun Young Kim v. INS, 586 F.2d 713, 716 (9th Cir. 1978) (noting the spare legislative history surrounding the E-2 visa category gives "little assistance" for the formulation of E-2 visa requirements)).


\textsuperscript{167}See Immigration and Nationality Act § 101(a)(15)(E). The availability of an E-2 visa is dependent on the existence of an authorizing treaty between the United States and the alien's country. The number of countries that have enacted Bilateral Investment Treaties (BITs) with the United States continues to grow. See Gordon, Mailman & Yale-Loehr, supra note 7, at § 17.03[2][b] (listing the countries that have enacted BITs and providing additional commentary regarding each).
to foster international relations while increasing its own economic growth.\textsuperscript{169}

While differing considerably in structure from the EB-5 immigrant investor program, the principal objective of both investor programs is the same—to enhance the economic condition of the United States through the immigration of individuals with the ability to create operating businesses in the United States. Because both programs provide significant limitations,\textsuperscript{170} they were able to garner sufficient support for passage, and while the volume of incoming investors appears to present some concern, it appears that a more important concern surrounding the programs is one of volume coupled with permanence.\textsuperscript{171} Any permanent increase in the number of immigrants, coupled with the purported economic and non-economic concerns that attach to such an increase have been the primary arguments expounding against investor visa programs.\textsuperscript{172}

C. \textit{Encumbering Policies—Apples to Oranges}

For immigration law, as with any other, competing interests and compromises affect the final structure and provisions contained within the law.\textsuperscript{173} Inevitably, the relative priority of the competing concerns determine the final

\textsuperscript{168}. \textit{See} GORDON, MAILMAN \& YALE-LOEHR, \textit{supra} note 7, at § 17.03[2][b] (noting that in certain circumstances, treaties may be cancelled, terminated or revoked as was the case with Iran in 1980, and Nicaragua in 1986).

\textsuperscript{169}. \textit{See} MARK A. IVENER, \textit{REGULATIONS AND CASE STUDIES IN REPRESENTING E-1 TREATY TRADERS, AND E-2 TREATY INVESTORS, IN 25TH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 452 (PLI Litig. \& Admin. Practice Course Handbook Series No. 355, 1992) ("The purpose of . . . Treaty Investor visas are to stimulate the economy of our countries through the operation of successful businesses.").

\textsuperscript{170}. \textit{See} Immigration and Nationality Act § 203(b)(5)(A), 101(a)(15)(E)(ii) (noting numerical limitations on the EB-5 program and the nonimmigrant aspect of the E-2 program). \textit{Contra} 8 C.F.R. § 214.2(e)(20) (noting that although E-2 treaty investors may not be permanent residents under immigration law, they may in fact reside indefinitely in the United States provided that they meet their visa requirements).

\textsuperscript{171}. Significantly, although the EB-5 visas are statutorily capped, there is no annual limit of E-2 visas that may be granted. As compared to the annual EB-5 cap of approximately 10,000, in 2007, over 177,000 E-2 immigrants were admitted to the United States. \textit{See} U.S. DEPARTMENT OF HOMELAND SECURITY OFFICE OF IMMIGRATION STATISTICS, 2007 YEARBOOK OF IMMIGRATION STATISTICS, NONIMMIGRANT SUPPLEMENTAL TABLE 1, http://www.dhs.gov/ximgtn/statistics/publications/YrBk07NI.shtm. The 177,000 figure only represents separate admissions and not necessarily separate individuals.

\textsuperscript{172}. \textit{See} Endelman \& Hardy, \textit{supra} note 126, at 675 (citing Senator Dale Bumpers (D-Ark.) who argued against the EB-5 investor program because many foreign investors were already purchasing U.S.-based property at an impressive pace, an investor-visa program cheapened American citizenship, and would attract undesirable immigrants). Senator Bumpers went on to note:

[we] all know that business is important to the creation of jobs. But I can tell you one thing, that the business of America is just not business. It is jobs. It is housing. It is education. It is health care. It is compassion for those who have not been as well-born as others. It is concern. And it is liberty and justice. That is what America stands for. Those are things that people here understand and that is the reason they love it.


outcome of the law as the more important concerns, insofar as their magnitude and scope of application, come to outweigh the concerns that are deemed to be of lesser importance to the majority of voting individuals. For purely economic legislation such as federal funding bills, the economic value and cost of the proposed bills are readily understood and easily debatable.\(^{174}\) However, with legislation that touches on more than economic grounds, any economic effects must be balanced against competing interests and values that are not easily monetized. Such is the case with immigration law which touches on concerns of family unity, democratic ideals, and the opportunity for meritorious advancement.\(^{175}\)

The social concerns mentioned above have typically been addressed in the drafting of U.S. immigration laws at the committee level as well as through debate on the floors of Congress.\(^{176}\) In addition to these social concerns, another paramount concern continues to be the treatment of individuals who are unlawfully present in the United States. While the Immigration Reform and Control Act (IRCA) implemented a legalization program for many undocumented immigrants in 1986,\(^ {177}\) current comprehensive immigration reform tends to stumble on this point.\(^ {178}\) As a precondition for even considering a comprehensive legalization provision, opponents of comprehensive reform have advocated for additional preventative measures such as increased border fencing, stricter employer sanctions, a guest worker program, and stricter enforcement of current immigration laws.\(^ {179}\)

There is no persuasive rebuttal to the contention that a legalization program rewards unlawful presence. It would, but the incentive created would not be one for additional generalized undocumented immigration as is

\(^{174}\) Additionally, for federal regulations the process is even more straightforward. The President may request the Office of Management and Budget, Office of Information and Regulatory Affairs (OMB-OIRA) to analyze the cost effectiveness of proposed regulations and provide a report detailing the study’s outcome. See OMB-OIRA, Q&A's, available at http://www.whitehouse.gov/omb/OIRA_QsandAs/ (noting the OIRA’s duty of reviewing draft regulations and commenting on the proposed regulation’s effects on society).


\(^{178}\) See Natsu Taylor Saito, Crossing the Line? Examining Current U.S. Immigration & Border Policy: Border Constructions: Immigration Enforcement and Territorial Presumptions, 10 J. GENDER RACE & JUST. 193, 194 (2007), see also, President George W. Bush, Address to the Nation on Immigration Reform, (May 15, 2006) (transcript available at The White House Office of the Press Secretary—News Releases, http://georgewbush-whitehouse.archives.gov/news/releases/2006/05/20060515-8.html) (noting the inherent perceived tension between the granting of “amnesty” to undocumented immigrants while simultaneously rewarding their unlawful activity). “People who meet [certain residency and penalty] conditions should be able to apply for citizenship, but approval would not be automatic, and they will have to wait in line behind those who played by the rules and followed the law.” Id.

\(^{179}\) Saito, supra note 178, at 194.
typically contended, but rather the incentives would be for additional undocumented immigration by entrepreneurs and increased rates of business creation by undocumented immigrants already present. This issue, as with most immigration issues, is not black and white. Instead of grappling with the multitude of social and economic concerns of a mass legalization program, for the purposes of this article, a better approach is to examine a legalization program for the specific population subset at issue, undocumented entrepreneurs. The same concerns of rewarding unlawful presence and allowing a visa to be obtained through investment are present for these undocumented entrepreneurs; however, the identity of this benefiting population is significant.

While foreign investors had their motives questioned and were criticized for “purchasing” their residency, undocumented entrepreneurs have demonstrated a commitment to the ideal of U.S. capitalism by creating new business and wealth while knowing that they were subject to removal at any moment. Undocumented immigrants in general have also been criticized for displacing lawfully authorized workers and lowering the level of domestic wages, but undocumented entrepreneurs do not compete in the labor market inasmuch as they are employers providing employment opportunities to individuals authorized to work in the United States.

The most defensible criticism of these undocumented entrepreneurs would be that they displace or negatively affect lawfully-present entrepreneurs, or both. Other than anecdotal evidence to the contrary, this does not appear to be the case. It appears rather, that a zero-sum argument is incorrect, and that undocumented entrepreneurs increase the overall size of the economy rather than displace other similarly-situated entrepreneurs.

In addition to the social concerns regarding unlawful presence, the United States also has an historic tradition of favoring family unification and other intangible values. The fact that immigration is not treated solely as an economic issue is the reason merit-based immigration programs favored in


181. See Statement of Sen. Bumpers, 135 CONG. REC. S14292 (1989) (“I would rather have a plumber or a carpenter who is coming here for the right reasons than a Ph.D. or a guy with a million bucks coming here for the wrong reasons” and noting that “the business of America is ... jobs, ... compassion for those who have not been as well-born as others ... liberty[,] and justice.”).

182. See Dobbs, supra note 29.


184. See Kane and Litan, supra note 61, at 5 (citing AMAR BHIDÉ, THE VENTURESOME ECONOMY: HOW INNOVATION SUSTAINS PROSPERITY IN A MORE CONNECTED WORLD (2008)).

185. See LIGHT & ROSENSTEIN, supra note 76, at 193, 197 (noting that immigrant entrepreneurs do not detrimentally affect white or African American entrepreneurs).

186. See supra note 102 and accompanying text.
other countries\textsuperscript{187} have failed to garner the necessary amount of support in the United States to bring about change.\textsuperscript{188} However, the type of visa at issue should play a role in determining which priorities should ultimately prevail. For an economically-oriented visa category, the idea of placing economic concerns ahead of others follows logically. In fact, this order of prioritization has typically been the norm for the investor visa categories discussed above, as well as for essentially every employment-based visa category.\textsuperscript{189}

As noted above, perhaps the most potent argument against providing additional visa categories or visa allotments for workers, investors, or entrepreneurs is the potential displacement of opportunities for U.S. citizens or permanent residents.\textsuperscript{190} The complaint, at its core, is an economic one, though it portends a more social concern of unemployed, underemployed or disadvantaged individuals who were present in the United States prior to the entry of any perceived interlopers. If that hypothesis is correct and the argument is primarily economic in nature, we should be left with a situation in which we are indeed comparing apples to apples, that is, whether a proposed visa provides a greater economic benefit than cost.\textsuperscript{191} Additionally, moving beyond the net effect of a visa to society as a whole, at a micro level the question would be, are the populations claiming a disadvantage truly, negatively affected in net terms? For the specific case of the proposed visa category for undocumented entrepreneurs, if we are able to answer the last question by showing no economic detriment for the populations that have supposedly been harmed as has been contended,\textsuperscript{192} the remaining arguments against such a visa category, including any arguments based primarily upon unlawful presence,\textsuperscript{193} should be of secondary importance.

Even if we are to concede that creating an entrepreneur visa category for undocumented individuals is economically beneficial, the criteria for any

\textsuperscript{187} Canada, in addition to a more traditional family sponsorship approach, employs a merit-based system for skilled immigrants. For an enjoyable exercise in determining immigrant eligibility, the Canadian test is available online at http://www.cic.gc.ca/english/immigrate/skilled/assess/index.asp; significantly, the test provides a near-immediate clear indicator of immigrant eligibility, though every case will be reviewed upon application by a Canadian immigration officer.

\textsuperscript{188} Professors Papademetriou and Yale-Loehr proposed a similar points-based test for certain immigrants and for temporary skilled nonimmigrants in 1996. \textit{See Demetrious G. Papademetriou \& Stephen Yale-Loehr, Balancing Interests: Rethinking U.S. Selection of Skilled Immigrants} 15-34, 141-61 (1996).

\textsuperscript{189} H-1B nonimmigrant professional worker visas, EB-2 immigrant visas for aliens with advanced degrees or extraordinary ability, and EB-3 immigrant visas for skilled workers, professionals and other workers all have a component that requires a U.S. employer petitioning or offering employment to the potential alien. \textit{See Immigration and Nationality Act} §§ 101(a)(15)(h)(i)(b), 203(b)(2), (3).

\textsuperscript{190} \textit{See}, e.g., Dobbs, \textit{supra} note 29 (arguing that undocumented immigrants have displaced more than two million American workers from their jobs).

\textsuperscript{191} \textit{See supra} Part I.A.-B. (outlining and identifying the overall economic benefit of immigration, as well as the specific additional benefits of immigration of certain desired classes of individuals including skilled workers and investors).

\textsuperscript{192} \textit{See Light \& Rosenstein, supra} note 76, at 193, 197 (noting that immigrant entrepreneurs do not detrimentally affect white or African American entrepreneurs).

\textsuperscript{193} \textit{See supra} Part II.C.
visa—in order to be effective—will likely need to be significantly lower than those for EB-5 immigrant investors. In that sense, the entrepreneur visa would in effect, treat undocumented entrepreneurs more favorably than "lawful" immigrant investors. While that argument is not without merit, the two categories are not equal. While EB-5 investors do face significant requirements, they have already demonstrated financial success by being in a position to invest one million dollars in a U.S. enterprise. Most undocumented entrepreneurs on the other hand, have created their businesses knowing that the risk of removal is ever present. This entrepreneurial spirit has long been recognized as a cornerstone of the U.S. economy. In that sense, undocumented entrepreneurs who have fulfilled the visa requirements proposed below may be even more deserving of a visa than any prospective EB-5 investor.

III. STRUCTURING THE VISA

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

194. Immigration and Nationality Act § 203(b)(5), 8 C.F.R § 204.6(g).
195. See Immigration and Nationality Act § 203(b)(5), see also GORDON, MAILMAN & YALE-LOEHR, supra note 7, at § 39.07(1)(a), 39–65 (noting that the “statutory requirements of the EB-5 visa category are onerous”).
196. See Immigration and Nationality Act § 203(b)(5)(C).
198. See infra Part III.A.
199. See, e.g. Immigration and Nationality Act § 245 (providing for the adjustment of status of certain nonimmigrants who meet the statutory requirements to that of lawful permanent resident).
200. 8 C.F.R. § 214.2(e)(19)-(20); see also Robert C. Groven, Setting Our Sights: The United States and Canadian Investor Visa Programs, 4 MINN. J. GLOBAL TRADE 271, 279 (1995) (noting that E-2 visa holders may remain in the United States indefinitely provided they continue their investment activities).
pursue corporate structuring similar to other domestic businesses such that it could compete fairly, or would it otherwise restrict or discourage further investment by the applicant?

By providing a more permanent solution, an immigrant entrepreneur visa would resolve many of these issues. Concerns regarding stability would abate, and the applicant would be able to seek financing on comparable terms as received by other similarly-situated business owners. The applicant would also be able to diversify and change the investments in which he or she was involved to maximize economic gain rather than inefficiently modify his or her activities to conform to visa renewal requirements. Implementing a permanent solution removes the need to determine the appropriate length of an initial visa term, incentivizes the applicant to increase investment in his or her business and, assimilate his or her family more quickly into the United States with the knowledge that they will not be forced to leave the country in the near future by immigration officials.

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

A. Bright-Lines are Most Easily Seen

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

1. Revenue and Profitability Requirements

The revenue or profitability requirement, or both, for an entrepreneur visa

---

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

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

Profitability for corporations will be different than profitability for LLCs with flow-through taxation or individual proprietorships. On an individual level, wages or dividends can clearly state the amount an individual has received in a year, but if a corporation is successful and retaining all profits for improvements, the individual's year-end tax statement would reflect only wages received, which may or may not be an accurate portrayal of that individual's annual gain in net worth. The problems are compounded if there is an entity owned by more than one individual. Allocating gains will typically represent nothing more than an exercise in mathematics. But what of the case where a certain annual income requirement is missed because the

204. See Immigration and Nationality Act § 245(a), (c) (noting that adjustment of status is not available to individuals who have not been admitted to the United States or to those who are unlawfully present).

205. Revenue is the total dollar amount received by the individual or company in a given time period (which may be offset by any returns). See A DICTIONARY OF ACCOUNTING (Jonathan Law & Gary Owe eds., 1999) (defining revenue), available at http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t17.e2886. Profit is the positive difference between revenue and the cost of the goods sold or services provided. See id. (defining profit).


207. See supra note 115 and accompanying text.
majority of owners failed to agree to declare a dividend?208 The owner-applicant is essentially "worth" the same amount whether or not the dividend is declared, but depending on the required metric, his or her eligibility for an entrepreneur visa may evaporate.

A net worth requirement also feels unsatisfactory.209 While Generally Accepted Accounting Principles210 may provide standardization in determining net worth, portfolios are still subject to volatility as key assets gain or lose value over time. Furthermore, regardless of any fluctuations in value, net worth is a gauge that does not necessarily reflect entrepreneurial activity nor the health of any given entity, and it is not a good fit for determining eligibility for an entrepreneur visa. Whether high net-worth, undocumented individuals should be allowed to adjust their immigration status solely because of their net worth or a large investment is a question better considered in connection with an evaluation of the EB-5 program and is beyond the scope of this article.

The bright lines that would be easiest to implement and easiest to understand would be those that first distinguish the type of corporate vehicle utilized by the entrepreneur. Comparing like vehicles, be they corporations or sole proprietors, should yield more consistent results and readily determinable guidelines. Treating entities, pass-through entities, and individuals separately should allow for more consistent results with the ideal goal being that entity selection should not positively or negatively impact an entrepreneur’s visa application.211 Furthermore, as to entities owned by more than one individual, provided that the applicant’s percentage of ownership multiplied by the stated metric exceeds the visa requirement, common ownership should not preclude the visa issuance provided certain other criteria are met.212

This article proposes using data readily available from the immediately preceding two years of filed U.S. tax returns to determine whether the profitability threshold has been satisfied. This requirement has multiple benefits including: standardized format; proof of U.S. tax filings; and reliance on a third-party specialist, the Internal Revenue Service (IRS), for policing of the data. As the integrity of any information included on a tax return is only as good as the integrity of the return preparer, there is a risk that some

208. Dividends are earnings that a company distributes to its shareholders pro rata in accordance with share ownership. BLACK’S LAW DICTIONARY 512 (8th ed. 2004).
209. Net worth is defined as “[a] measure of one’s wealth, usually calculated as the excess of total assets over total liabilities.” BLACK’S LAW DICTIONARY 1639 (8th ed. 2004).
211. Equivalent treatment based on readily available income or profitability metrics is practically impossible. In addition, corporations typically allow for more beneficial tax treatment of fringe benefits which further clouds the issue and renders impossible an equivalent metric across all entity types. See Lee supra note 98, at 907-08.
212. See infra Part II.A.4 (noting requirements that entrepreneur be primarily engaged in the management and day-to-day operations of the business in question).
numbers may be inflated to meet the threshold requirements.\textsuperscript{213} In order to avoid rewarding individuals who overstate income and profitability with an entrepreneur visa, additional requirements such as employee generation have been added. While the additional requirements provided below and the standard policing by the IRS do not make the attainment of an entrepreneur visa through a sham businesses vehicle impossible, they greatly increase the cost of doing so.

\textit{a. Sole Proprietors}

Arguably the easiest category to determine the profitability requirement is for sole proprietors. Schedule C to Form 1040\textsuperscript{214} provides a line item for net profitability that allows for quick determination of profitability. This requirement will require that the applicant file a Schedule C rather than just a 1040 which may have been the form used in the past due to preparer error. At most, this problem should represent a delay of two years.\textsuperscript{215} Allowing sole proprietors to circumvent the requirement of the use of Schedule C by using information contained in their standard 1040 tax supplement would place the visa reviewers in the unfortunate position of needing to pass judgment on the supplemental information as to its accuracy, veracity, and propriety inasmuch as the information documented gains and expenses accruing to the business. These categories are all areas requiring a certain degree of financial sophistication that may be beyond the training of the visa reviewers.\textsuperscript{216}

According to IRS statistics, households filing income tax returns with $100,000 or more in adjusted gross income represented approximately twelve percent of the population in 2006.\textsuperscript{217} Therefore, this article proposes to establish the profitability threshold at $100,000. This $100,000 threshold

\begin{itemize}
\item \textsuperscript{213} While typically there is some incentive for individuals to under-report income in order to avoid taxation on the under-reported portion, an entrepreneur visa presents an incentive to over-report, and therefore over-pay any taxes owed. While some may not see over-reporting of income as problematic, it threatens the integrity of the visa program if it is done when there has been no business created or there is one that is less profitable than necessary.
\item \textsuperscript{215} See infra Part II.B.1. (detailing the requirement that business show profitability over a two-year period as evidenced by federal tax returns). In the alternative, the applicant could seek to file form 1040X, Amended U.S. Individual Income Tax Return for the required two years prior to applying for an entrepreneur visa. The tax implications of doing so will necessarily vary on a case by case basis, and the immigrant may be entitled to additional credits or subject to additional tax owed as the case may be.
\item \textsuperscript{216} Cf. U.S. Citizenship and Immigration Services, USCIS Update: USCIS Changes Filing Location for EB-5 Related Items (Jan. 12, 2009), http://www.uscis.gov/portal/site/uscis/menuitem. 5af9b95919f35e66f614176543f6d1a/?vgnextoid=848cb172ebce110VgnVCM1000004718190a RCRD&vgnextchannel=68439c775c9b9010VgnVCM10000045f3d6a1RCRD (noting that all EB-5 filings were to be reviewed by the California Service Center as it has established a unit "comprised of specially-trained adjudicators dedicated to EB-5 adjudications").
\item \textsuperscript{217} See Individual Income Tax Returns Filed and Sources of Income, Table 1.1—Selected Income and Tax Items, by Size and Accumulated Size of Adjusted Gross Income, Tax Year 2006, http://www.irs.gov/statistics/indtaxstats/article/0,,id=96981,00.html (Follow Individual Complete Report (Publication 1304), Table 1.1, year 2006 hyperlink).
\end{itemize}
is not just the adjusted gross income of an individual (or spouse if filing jointly), but must represent the profitability of the created business. Given that the vast majority of the individuals in the twelve percent mentioned above (approximately 16.5 million of approximately 138 million total returns) are lawfully present, the exact number of individuals eligible for this type of visa will likely be relatively small. In addition, the figure will act as a positive incentive to earn at least the minimum required to obtain the visa, and as employment generation is an additional requirement, each visa received will represent a significant net benefit to the U.S. economy as a whole.

b. Flow-through Entities and Partnerships

Individuals establishing an LLC may elect to be taxed as a partnership, that is, the earnings "flow through" the entity and are taxed only at the individual level. In this manner, partnerships and LLCs share similar tax effects. The only slightly technical aspect that this article needs to address is special allocations: when profits are distributed in a manner not equal to ownership percentage. In such cases, the IRS may either accept or reject the special allocation. Provided the special allocation is accepted, the members are taxed according to their portion of the pre-agreed allocation. Otherwise, the earnings (or losses) are deemed to be distributed according to actual ownership percentages. Additionally, any retained earnings problem present with C corporations is eliminated with LLCs and partnerships as the IRS annually assesses the tax owed on the members’ or partners’ distributive

218. See supra Part III.A.1.

219. Any discussion of a single-member LLC is unnecessary as the IRS treats the entity as a sole proprietorship. See 26 C.F.R. § 301.7701-3(a) (2009). As with the sole proprietorship, the single member would file Schedule C with his or her 1040 filing. As a result, the analysis and eligibility guidelines for the investor visa would be the same as for sole proprietors. See supra notes 214-218 and accompanying text. Members may also “check the box” and elect to be treated as a C corporation or an S corporation. See James C. Chudy, Federal Income Tax Issues in the Acquisition or Sale of a Privately-Held Company, in PRACTICING LAW INSTITUTE, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES, PLI Order NO. 18988, 429 (May-June 2009). As undocumented individuals are ineligible to be shareholders in an S corporation, only the effects electing treatment as a C corporation are discussed below. See infra Part III.A.1.iii.

220. LLCs and partnerships both file Form 1065 with the IRS for their annual reporting. Likewise, both LLCs and partnerships issue their members Schedule K-1s which detail each member’s share of profits and losses. LLC members, like partners, report their share of profits on Schedule E of their personal tax returns. Profits are easily calculated and typically distributed according to ownership percentage. See Gregg D. Polsky, Can Treasury Overrule the Supreme Court?, 84 B.U.L. REV. 185, 241 n.330 (2004) (citing I.R.C. § 702(a) (providing for distributive share taxation of a partner’s loss or income)).


222. In order to avoid individuals assigning greater amounts of losses to members in the highest income bracket, or, to a lesser extent, gains to an individual in a lower income bracket, the IRS will analyze the special allocation to ensure that it was entered into for legitimate business reasons. Generally speaking, the special allocation will be accepted if the allocation has an economic effect and that economic effect is substantial. Treas. Reg. § 1.704-1(b)(2)(i)(a) (2008).

223. Id.

224. I.R.C. § 702(a).
share whether or not such share is actually issued. As with sole proprietors' use of net profitability, the members' and partners' share of profits as set forth in Parts II and III of Schedule K-1 provide a satisfactory metric for determining visa eligibility as to the profitability requirement. Therefore, as with sole proprietors, a $100,000 profitability threshold per member or partner as demonstrated by Schedule K-1 provides a simple, understandable metric for visa adjudicators. The only supporting documentation necessary would be the appropriate annual tax forms, which would then be verified by USCIS.

The primary substantive difference between sole proprietors (and single-member LLCs) and pass-through entities such as LLCs and partnerships for the sake of determining eligibility for an entrepreneur visa is the question of any given individual's participation. When only a single individual is involved, presumably that individual is responsible for all income generation. As more individuals become involved, it becomes more and more difficult to assess the degree of participation and the importance of that individual's participation to the entity. As this visa category is intended to reward entrepreneurs, the additional tests discussed below should mitigate concerns over potential abuse of the visa program by selling ownership interests solely to confer visa benefits.

c. Corporations

Corporations (and LLCs treated as corporations) present a much more difficult situation given the role of retained earnings in any corporation and the varying tax rates regarding corporate income. As the entrepreneur visa category should, to the extent possible, treat all applicants equally, there needs to be a metric that is easily derived and equivalent to the $100,000 profitability metrics imposed on sole proprietors, partnerships and pass-through LLCs. The best way to establish such a metric is to incorporate three separate data points. The first two, wages and dividends received, are clearly the easiest to determine and document. Presumably for many small, family-owned corporations, these two categories will often be the only two used for the visa application process as the corporation will attempt to zero-out any

225. See Polsky, supra note 220, at n.330.
227. By submitting IRS Form 4506 along with the entrepreneur visa petition, all applicants grant consent to the IRS to release a copy of the tax return actually filed. See IRS Form 4506 (Rev. Oct. 2008), Request for Copy of Tax Return, available at http://www.irs.gov/pub/irs-pdf/f4506.pdf. Form 4506 can be used for both individuals and entities. Id.
228. See infra Part III.A.4.
229. For example, the corporate income tax rates may be lower than individual rates that would apply to most LLC owners due to certain FICA deductions. See F. Owen Evans III & William J. Hyland, Jr., The LLC Envelope, 77 FLA. BAR J. 50, 52 (2003). Though beyond the scope of this article, owners of an LLC electing S corporation tax treatment may also receive minor tax benefits regarding Social Security, Medicare and other self-employment taxes. Id.
gains through wages and fringe benefits.\textsuperscript{230} In this scenario it is easy enough to provide that the individual must document wages and dividends \textit{received from the entity} in excess of $100,000. Accounting problems arise, however, when the corporation needs to retain earnings for future growth, cash flow, or any other business concern. In such case, the earnings are \textit{not} taxed to the individual until a dividend is declared and sent to the individual.\textsuperscript{231}

Since retained earnings have not been distributed, and therefore not taxed at the individual level, one dollar of retained earnings is not equivalent to one dollar held by an investor after a dividend has been declared.\textsuperscript{232} One possible way to measure retained earnings for the purpose of determining eligibility for the entrepreneur visa could be to simply divide the retained earnings declared on the most recent tax filing by the number of outstanding shares and multiply that quotient by the number of shares held by the applicant. While the resulting product does represent retained earnings per shareholder, the corporation metric is not exactly equivalent to the previous metrics due to the differing tax treatment mentioned above. This estimation, however, may provide the most easily-determinable close approximation.

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

2. \textit{Joint Ownership and Substantial Participation}

The most significant problem with the joint ownership of any entity in the context of the proposed entrepreneur visa is that it may serve to obfuscate the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{230} Daryll K. Jones & David Kirk, \textit{Choice of Entity Planning After JGTRRA: Brainstorming the Triple Split}, 6 No. 2 Bus. Entities 4, 2004 WL 887424, n.37 (2004). Retained earnings are more likely to be used when the health or goals of the business outweigh the need to provide easily determinable tax information to adjust the immigration status of the co-owner(s) applying for the entrepreneur visa.
\item \textsuperscript{231} I.R.C. § 301(c)(1) (2006).
\item \textsuperscript{232} The one dollar in the investor’s hands is worth something less than one dollar due to the tax imposed on the amount at the individual level. I.R.C. § 301(c)(1) (2006). The actual amount of the tax imposed will depend on the income bracket of the investor. \textit{Id.} Therefore, any calculation that uses retained earnings may have the unintended consequence of encouraging immigrants to establish their business as a C corporation as it may reflect slightly higher profitability due to the beneficial tax treatment of self-employment taxes. See Evans & Hyland, supra note 229, at 52. If the individual is allowed to leave the earnings in the company and include such amount (or such percentage as corresponds to the individual), then on the margin some businesses may meet the profitability threshold requirement were they to be established as C corporations rather than LLCs or partnerships. That being said, the individual owner will, at some point, be taxed individually on the money. I.R.C. § 301(c)(1) (2006). The second level of taxation is likely to be a sufficient enough deterrent to counteract the marginal incentive for C corporations created here.
\end{itemize}
\end{footnotesize}
particular role of any particular owner.\textsuperscript{233} Were the proposed visa an entrepreneur or investor visa, then, provided the entity was successful enough to support multiple visa petitions, there would be no problem. However, where the primary purpose of the visa is to encourage entrepreneurs and entrepreneurial activity, passive investment, though important, should not suffice for the granting of this type of visa. The problem, then, is how to eliminate the possibility that an individual will purchase an ownership interest that is significant enough to qualify for an entrepreneur visa while maintaining clear, bright-line rules for visa petition examiners.

One possibility would be to limit the dilution of ownership interests. For example, there could be a presumption (or prohibition) that any individual who owns less than fifty-one percent of a business is not significantly enough involved in the entity to merit an entrepreneur visa. The benefit of such a rule would be ease of implementation. Ownership percentages are typically contained in the tax forms that are already required to be submitted, and are readily understandable by non-tax individuals. The negative would be that it may operate as a barrier to the most successful entrepreneurs.\textsuperscript{234}

Another possibility is a requirement of substantial participation. The E-2 visa requires that the investor come "solely to develop and direct the operations of [the] enterprise."\textsuperscript{235} Some case law exists surrounding this language so that the test would not be entirely new,\textsuperscript{236} but there appears to be a history of policy and case law requiring at least fifty percent ownership in order to meet this requirement.\textsuperscript{237} For those cases in which an entity is utilized, this type of control may be demonstrated through "a managerial position or other corporate device . . ."\textsuperscript{238} Determining control of joint ventures and equal partnerships is treated similarly, provided that there are no

\textsuperscript{233} See supra Part III.A.1.b (noting the inherent difficulty in assessing an individual’s actual role in a business enterprise).
\textsuperscript{234} See infra note 249 and accompanying text.
\textsuperscript{235} Although it is possible for employees of a qualified E-2 employer to also receive an E visa, this type of arrangement is not contemplated in the proposed entrepreneur visa as it would reward employees rather than the entrepreneurs. See, e.g., Immigration and Nationality Act § 101(a)(15)(E) (2009); 8 C.F.R. 214.2(e) (2009).
\textsuperscript{236} See, e.g., Matter of Lee, 15 I. & N. Dec. 187, 189-190 (Reg. Comm'r 1975) (holding that an investor that owned less than half of a partnership lacked sufficient control to develop and direct operations).
\textsuperscript{237} 9 F.A.M. § 41.51 n.12.1 (2008) "In all treaty investor cases, it must be shown that nationals of a treaty country own at least 50 percent of an enterprise." See also Matter of Lee, 15 I. & N. Dec. 187; 8 C.F.R. § 214.2(e)(16).

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

8 C.F.R. § 214.2(e)(16).
\textsuperscript{238} 8 C.F.R. § 214.2(e)(16) (2009); 9 F.A.M. 41.51 n.12.4. (2008).
more than two co-owners or partners.\textsuperscript{239}

Within these criteria there is room for additional interpretation. The Foreign Affairs Manual (FAM) notes the constant evolution of corporate structuring and the inherent difficulty of predetermining which owners may qualify as having control.\textsuperscript{240} Outside of percentage ownership, immigration regulations and the FAM emphasize managerial control for determining if the owner is sufficiently able to direct the enterprise.\textsuperscript{241} Ownership of the largest block of shares in a company with diffuse ownership, proxy rights, and shareholder voting agreements may all be utilized to prove control.\textsuperscript{242}

The EB-5 investor visa has a similar, though not identical, requirement.\textsuperscript{243} For an EB-5 visa, the applicant must show that he or she is engaged in a day-to-day managerial role in the company or is a policy maker.\textsuperscript{244} In order to establish that this requirement has been fulfilled, the applicant may submit evidence including a written statement describing the position, proof of role as officer or director of the entity, or, if the entity is a partnership, proof that the applicant is directly involved in the management or policy-making of the partnership, or both.\textsuperscript{245} While the requirements are fairly clear, substantial discretion is given to the visa petition examiner in determining whether a given role or position is sufficiently involved in the management and control of the enterprise, except when documentation establishes a role as director or officer.\textsuperscript{246}

For the entrepreneur visa, this article proposes a combination of ownership and control be used to satisfy the substantial participation requirement. First, the individual must be an officer, director or managing member of the entity (for corporations or LLCs), or a partner with management rights set forth in the partnership agreement.\textsuperscript{247} While a "substantial participation" requirement

\textsuperscript{239} See GORDON, MAILMAN & YALE-LOEHR, supra note 7, at § 17.06(4), 17-42 (noting also that any control in equal partnerships with more than two partners has been deemed "too remote").

\textsuperscript{240} 9 F.A.M. § 41.51 n.12.1 (2008).


\textsuperscript{242} See GORDON, MAILMAN & YALE-LOEHR, supra note 7, at § 17.06(4), 17-42 fn. 45 (citing agency definitions of control provided in 8 C.F.R. § 214.2(l)(1)(ii)(K) (2009)). The regulations and FAM briefly mention the issue of a diffuse group of individuals consolidating their power to obtain a position of control over the entity with regards to employee hiring. 9 F.A.M. § 41.51 n.12.3 (2008). The FAM is also clear that the consolidation of diffuse ownership interests is only sufficient to establish control in order to obtain an E-2 visa for an employee, not for the purported owner. Id.

\textsuperscript{243} Immigration and Nationality Act § 203(b)(5) (2009); 8 C.F.R. § 204.6(j)(5) (2009).

\textsuperscript{244} 8 C.F.R. § 204.6(j)(5) (2009). One of the primary purposes of this regulation is to ensure that the petitioner is not simply a passive investor. Id. Due to the initially disappointing results of the EB-5 visa, Congress created a pilot program that allowed for investors to pool their investments in approved regional economic growth programs without the managerial involvement requirement. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, § 610, 106 Stat. 1828; S. Rep. No. 102-918 (1992). The regional pilot program is limited to 3,000 visas annually. Id. § 610(b).

\textsuperscript{245} 8 C.F.R. § 204.6(j)(5)(i)-(iii) (2009).

\textsuperscript{246} Id.

\textsuperscript{247} The partner may be either a general or limited partner. This requirement, which follows state law on the subject, better establishes that the partner is indeed involved in the day-to-day operations. See, e.g., NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM LIMITED PARTNERSHIP ACT
is appealing, requiring proof of substantial participation leads down the path of uncertainty. The type of evidence acceptable to prove participation would necessarily increase, and as the types of possible evidence increase, the discretion to validate the information given to the visa petition examiner must also increase. Given the history of the current investment visa categories, predictability of results and uniformity in documentary requirements dictate a bright-line standard for the proposed visa.

Second, in order to ensure that the individuals receiving the visas are sufficiently entrepreneurial, the visas should be limited to owners of at least twenty-five percent of an entity. By requiring twenty-five percent ownership, no more than four individuals may qualify for an investor visa for any given entity. This requirement ensures that the ability to purchase an entrepreneur visa remains cost-prohibitive for the vast majority of individuals. Twenty-five percent ownership would require that any eligible entity must show profitability of at least $400,000 per year, as well as the creation and maintenance of at least twelve full-time employees\(^2\) for any twenty-five percent owner to qualify for an entrepreneur visa. While limiting the visa to owners of twenty-five percent or more may negatively affect the most successful enterprises,\(^2\) it serves to better establish the true entrepreneurs involved in the day-to-day operations.

The two elements taken together provide clear, concise rules that should ensure that the applicant is significantly involved in the business enterprise. Even given the requirements above, it is clear that this visa category, as with any other, is susceptible to fraud. However, given the documentary, profitability, employee generation, and tax compliance requirements, it should be no more (and hopefully less) susceptible to fraud than any other visa category.

3. Employee Generation

In addition to profitability, this article proposes that the entrepreneur visa also contain an employee generation requirement.\(^2\) While the profitability requirement clearly acknowledges that the business must be successful, an

---

\(^2\) See infra Section III.A.3.

\(^2\) If, for example, ten individuals formed an entity with ten percent ownership each, in order to qualify for the entrepreneur visa the entity would have to show profitability of one million dollars and the creation of thirty full-time positions. See infra Part III.A.3. Obviously this type of company is successful; however, the problem of determining each individual’s degree of participation necessitates a cap that is easily understood and applied.

\(^2\) While the EB-5 immigrant investor visa requires the creation of at least ten full-time positions, the E-2 visa has no employment creation requirement. Immigration and Nationality Act, §§101(a)(15)(E), 203(b)(5). One reason that the E-2 has no employment creation requirement is that the purpose of the provision is to foster trade, friendship, and commerce between countries. See GORDON, MAILMAN & YALE-LOEHR, supra note 7, at § 17.06, n. 1.1 (noting that in meeting its purpose
employee generation requirement serves two purposes: one, it ensures that a portion of the benefit the applicant's company provides the U.S. economy goes to authorized workers; and two, it makes the entrepreneur visa proposal more palatable to a wider range of individuals given that there are clear, direct beneficiaries lawfully present in the United States. In order to better ensure compliance with the stated goal of providing a direct benefit to additional authorized workers in the United States, the employee generation requirement should exclude from the applicant's application any positions which are held by any member of the applicant's immediate family or any positions held by unauthorized workers. The question of employee generation then becomes one of degree.

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

Another way to approach the problem is by analyzing cost. For example, a minimum-wage employee currently earns $7.25 per hour. On an annual basis, that amounts to approximately $15,000 pre-tax for the employee. The cost to the employer will be higher than just wages, as it will include deductions for the Federal Insurance Contributions Act, the Federal Unemployment Tax Act and State Unemployment Tax Act, worker's
compensation, health insurance, vacation time, holidays, and sick pay. A conservative estimate would be approximately fifty percent of one’s salary. In that case, every full-time employee earning minimum wage would cost approximately $22,500. When dealing with a profitability metric of $100,000, that represents a significant portion of profitability. In essence, requiring one full-time employee would require that the business have a profitability of at least $122,500 prior to deducting the employee’s expense, and requiring five full-time employees would require the business to have a profitability of at least $212,500 prior to deducting the employees’ expenses, or more than twice the stated requirement.

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

4. Tax Compliance

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

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

257. See, e.g., Immigration and Nationality Act § 246(a) (noting that the Secretary of Homeland Security may, at any time within five years of adjustment of status under § 1255, rescind the permanent residency or naturalization granted if the Secretary is satisfied that the individual was not eligible for adjustment of status). ICE may instead chose to initiate removal proceedings under § 240,
the possible revocation of any lawful permanent residency or naturalization benefit in addition to any fines or criminal actions instigated by the IRS. 258

B. No "Condition" Necessary

In a way, both the immigrant and nonimmigrant investor visas are conditional. As the E-2 nonimmigrant visa must be renewed every two years, the applicant must continually prove that all necessary requirements are being met in order to maintain E-2 status. 259 Additionally, the EB-5 visa provides a traditional, formal condition that must be removed after two years of conditional permanent residency. 260 The conditions for both visa types serve to confirm the bona fides of the investor in first establishing and then maintaining his or her investment in the United States. 261 By structuring the entrepreneur visa to require two years of profitability and at least two years of operation, the purpose for any similar condition is eviscerated.

While the argument against such an approach is that there would be no requirement for the immigrant entrepreneur to remain in business upon attaining the visa, such argument seems superficial at best as it largely overlooks the role of the applicant's own self-interest. By qualifying for the visa, the applicant has already demonstrated a profitable, stable commercial enterprise that provides the applicant an income level that is approximately equal to the top ten percent of all income tax filers. 262 Additionally, even if the entrepreneur were to sell or, more improbably, close the business, by imposing a condition precedent on the granting of the visa, many benefits have already accrued to the U.S. economy and the employees hired by the applicant, especially during the period in which the applicant has proven his or her eligibility for the visa.

Requiring eligibility at the time of application may mean that some undocumented entrepreneurs will have an additional waiting period in order to receive the visa if they lack one or more of the outlined requirements. Requiring initial eligibility upon application also means that there is no need to create a bureaucratic system of review to ensure compliance with any conditions that may involve additional levels of discretion and delay, and it also means that the residency initially granted is permanent. Of course, even though such lawful permanent residency may be granted initially, it would still be subject to rescission 263 if all statements and documents submitted in

---

and any final order of removal would also serve to rescind the alien's permanent resident status. Immigration and Nationality Act §§ 240, 246(a).

258. See Immigration and Nationality Act § 340(a).
260. See supra note 145 and accompanying text (noting that the condition is largely used to deter fraud).
261. See supra notes 145 and 259.
262. See supra note 217 and accompanying text.
263. See, e.g., Immigration and Nationality Act §§ 246(a), (b), 8 U.S.C. § 1256; 8 C.F.R. § 216.3.
connection with the visa petition were not true and accurate, if the applicant failed to fulfill the requirements that no illicit funds be used in the establishment and operation of the enterprise, or if the commercial enterprise was established solely to evade immigration laws.

C. Numerical Limitations—A Necessary Evil?

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

If faced with the decision to reallocate visas rather than create new ones, difficult choices must be made: In the past three years, total employment-based visas have averaged approximately 160,000 per year. In terms of visa issuance, of the five employment-based visa categories, the fifth category (investor visa) and first category (priority workers) are generally the most undersubscribed in terms of percentage used. Additionally, in the

264. See supra note 257 and accompanying text.
265. This could be done easily by establishing a requirement similar to 8 C.F.R. § 216.3 requiring an immigrant to document the providence of any funds used in the business enterprise upon request prior to granting the visa. See 8 C.F.R. § 216.3(a).
266. 8 U.S.C. § 1325(d).
267. Immigration and Nationality Act § 203(b).
268. Immigration and Nationality Act § 201(d).
270. See, e.g., YEARBOOK OF IMMIGRATION STATISTICS 2008, supra note 269, tbl. 6 (noting high rates of use for the second, third and fourth employment-based visa categories). Absolute numbers are somewhat misleading as the visa categories provide a cascading effect for usage. Immigration and Nationality Act § 201(d). All unused fourth and fifth preference visas are allocated to the first preference category. Id. Therefore, the first preference which is already underutilized, appears even more so. The second preference, then receives any unused first preference allocations (which included the unused fourth and fifth preference allocations), and the third preference lastly receives any unused second preference allocations. Id. Given the higher rates of usage, even with the additional allocations, among the second and third preference categories, they appear to be utilized more often than the first preference priority worker category.
most recent Visa Bulletin, the only preference category that was not current
was the third preference for skilled workers, professionals and other work-
ers. Therefore, the question becomes which preference or combination of
preferences should be reduced—oversubscribed categories for which there is
great demand, or undersubscribed categories that generally represent aliens
with extraordinary ability and multimillionaire investors that are deemed
desirable.

For example, if a 7.1% allocation, currently the allocation for investor
visas, is seen as an informal ceiling, implementing the visa reallocation could
be a fairly painless process. One solution to implement it would be to reduce
the fifth preference category by four percent, and the first, second, and third
preferences could each be reduced by one percent. Given that hard data on
the number of undocumented immigrants is difficult to come by, it is
difficult to determine what number of visas would be inadequate and what
number would be politically unacceptable. For the first years of the program,
a sliding scale could be used so that for each of the first seven years in which
one hundred percent of the entrepreneur visas were allocated, by operation of
law, the entrepreneur visa allocation shall increase by one percent, and, based
on actual allocations, the other visa categories would be reduced in some
combination equal to one percent. This method would serve to provide a
ceiling of approximately fourteen percent of worldwide employment-based
entrepreneur visas which would amount to approximately 19,000 to 25,000
visas each year. Likewise, if the visa category were underused, it could
similarly be reduced with a simple mathematical formula redistributing the
visa allocation to the remaining five preference categories to a floor as low as
one percent annually.

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

272. See Immigration and Nationality Act §§ 203(b)(1), 205(b)(5).
273. Due to the composition of the fourth-preference, special immigrant category, the fourth
274. See Buchanan, supra note 9.
275. A comparative approach was adopted in the 1986 IRCA legislation dealing with the
legalization of undocumented immigrants. Immigration and Nationality Act § 245A(d)(1).
reallocation of existing visa allocations in order to make the visa category politically viable.

D. "Adjusting" to a New Life

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

1. Removing Barriers to Adjustment and Ancillary Removability Issues

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

Any visa category that provides an avenue to permanent residency, especially one that does so mandatorily, should include sufficient safeguards to ensure that no otherwise inadmissible aliens are granted adjustment. INA § 245A, created by IRCA and better known as the "amnesty" provision, dealt specifically with the problem of encouraging adjustment of those who qualified while prohibiting those who were inadmissible based on certain, specified statutory grounds. Simply stated, except for inadmissibility

---

276. See Immigration and Nationality Act § 245 (detailing the requirements for adjusting immigration status to that of a lawful permanent resident).
277. See Immigration and Nationality Act §§ 245(a), 245(c) (the lawful presence requirement does not apply to immediate relatives).
278. See Immigration and Nationality Act § 245(i), 8 U.S.C. § 1255(i), added by Pub. L. 103-317, § 506(b), 108 Stat. 1724, 1765-66 (Aug. 26, 1994) (creating Immigration and Nationality Act § 245(i) which provided a mechanism for individuals who had entered the United States without inspection or who were not lawfully present to adjust their immigration status upon payment of a fee of one thousand dollars provided that certain other criteria were met and they received a favorable exercise of discretion).
279. Immigration and Nationality Act § 245(i).
280. Contra Immigration and Nationality Act § 245(a) (noting that for eligible aliens, the Secretary of Homeland Security may, "in his discretion and under such regulations as he may prescribe" adjust the alien's status).
281. See Immigration and Nationality Act §§ 245A(a)(4)(A), 245(d)(2) (noting specific grounds of exclusion that were not applicable, which were subject to waiver, and which were non-waivable).
HALTING THE DEPORTATION OF BUSINESSES

relating to unlawful presence or the failure to have necessary documentation as discussed below,\textsuperscript{282} all other grounds for inadmissibility shall continue to apply. For those grounds which provide waivers, such waivers should be available to the entrepreneur visa applicant provided he or she qualifies for them.\textsuperscript{283}

2. Dealing with Unlawful Presence and Prior Removal Orders

In discussing unlawful presence, it seems that the act of being present is no more or less culpable simply due to repetition. While one may argue that repeat offenders demonstrating high rates of recidivism are qualitatively and quantitatively “worse” than those who commit an offense once, it seems that the type of crime at issue is relevant. If the crime is one normally deemed bad or offensive, \textit{malum per se},\textsuperscript{284} that analysis appears unassailable. However, if the crime is one which has been determined to be illegal because society dislikes it, \textit{malum prohibitum},\textsuperscript{285} the analysis is not as convincing. Repeat jaywalkers and repeat speeders, provided no accidents occur, are not looked at as inherently more culpable or evil in the eyes of society than those who are caught just once or not at all.

Presence in the United States is similar. The act of being present in the United States is not in and of itself illegal. Presence is only illegal when certain documentary requirements have not been met. As we saw with adjustment of status for immediate relatives, an individual unlawfully present in the United States can rectify the situation without leaving the United States by obtaining the necessary documents.\textsuperscript{286} It is for this reason that this article proposes treating all individuals who are unlawfully present similarly regardless of past orders of removal if those removal orders were based solely on unlawful presence.

Therefore, if the entrepreneur visa is accepted, language should be provided to explicitly note the inapplicability of INA §§ 212(a)(6)(A), \textit{Aliens present without admission or parole};\textsuperscript{287} 212(a)(7), \textit{Documentation require-

\textsuperscript{282} See infra Part III.D.2 (discussing inapplicability of §§ 212(a)(6)(A), (7), and (9), of the Immigration and Nationality Act, to the extent that any previous removal was based solely on unlawful presence, in determining eligibility for entrepreneur visas).

\textsuperscript{283} See, e.g., Immigration and Nationality Act § 212(h), Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E). Many waivers are likely to be unavailable to undocumented entrepreneurs as they require a showing of hardship by a U.S. citizen or permanent resident. Immigration and Nationality Act § 212(h)(1)(B) (noting denial of waiver must result in “extreme hardship” to U.S. citizen or lawful permanent resident).

\textsuperscript{284} “A crime that is inherently immoral, such as murder, arson, or rape.” \textsc{Black’s Law Dictionary} 978 (8th ed. 2004).

\textsuperscript{285} “An act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral.” \textit{Id.} at 978-79.

\textsuperscript{286} See, e.g., Immigration and Nationality Act § 245(c) (providing the remedy of adjustment of status even to those who are unlawfully present if they are immediate relatives).

\textsuperscript{287} Immigration and Nationality Act § 212(a)(6)(A).
ments;\textsuperscript{288} and 212(a)(9), \textit{Aliens previously removed} in determining entrepreneur visa eligibility.\textsuperscript{289} INA § 212(a)(9) should only be inapplicable only if the underlying removal order at issue was based solely on unlawful presence. By removing these barriers to adjustment which would otherwise render the entrepreneur visa program meaningless, the entrepreneur visa will best be able to serve the intended population of visa applicants, and hopefully maximize its benefit to the U.S. economy.

IV. CONCLUSION

It makes very little economic sense to essentially deport productive U.S. businesses, especially in the midst of a worldwide recession. Undocumented entrepreneurs who have established viable and profitable enterprises at considerable personal risk have demonstrated through their actions a commitment to traditional U.S. ideals of capitalism and meritocracy. These undocumented individuals and their commercial enterprises clearly provide the type of benefits foreseen under both the immigrant and nonimmigrant investor visas,\textsuperscript{290} and do so in a way that resonates with our nation's history of promoting Horatio Alger stories of success against all odds. By providing a pathway to legal residency for these individuals, the United States will allow the individuals to expand their enterprises on similar economic terms, encourage further investment in the United States, and assist in and incentivize the creation of new businesses and jobs throughout the country.\textsuperscript{291}

While some may argue that immigration inflows are too great for the country's capacity to assimilate these immigrants,\textsuperscript{292} it is difficult to maintain the same argument for individuals who have already demonstrated the capability of creating businesses and jobs for themselves and others,\textsuperscript{293} have not detrimentally affected lawful present individuals,\textsuperscript{294} have earnings in the top income brackets of all U.S. households,\textsuperscript{295} and have provided a substantial contribution to the U.S. economy.\textsuperscript{296} If the only arguments against the

\begin{itemize}
  \item \textsuperscript{288} Immigration and Nationality Act § 212(a)(7) generally requires that immigrants and nonimmigrants in the United States be in possession of valid, unexpired travel documents. As many undocumented individuals entered without inspection rather than overstaying a visa, such a requirement would severely curtail the functionality of a visa directed at undocumented individuals. \textit{Id.}
  \item \textsuperscript{289} Immigration and Nationality Act § 212(a)(9).
  \item \textsuperscript{290} See supra Part II.A., Part II.B. and accompanying text.
  \item \textsuperscript{291} See supra Part I.B.3. and accompanying text.
  \item \textsuperscript{292} See \textit{Federation for American Immigration Reform, Immigration and Population Growth} (2008), \textit{available at http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters7d78?&printer-friendly=1} (contending that “[i]mmigration-driven population growth is straining our environment and quality of life”).
  \item \textsuperscript{293} See supra Part III.A.3. (noting the employee generation requirement of the entrepreneur visa).
  \item \textsuperscript{294} See supra notes 46-48 and accompanying text.
  \item \textsuperscript{295} See supra note 217 and accompanying text.
  \item \textsuperscript{296} See supra Part III.A. (outlining substantial economic performance requirements for entrepreneur visa eligibility).
\end{itemize}
entrepreneur visa category are based on immigration volume or rewarding unlawful actions, this visa category should be strongly considered either in connection with comprehensive immigration reform or as a stand alone amendment to the INA.

297. See supra Part II.C. (discussing the pros and cons of a legalization program, and more specifically the argument that such a program would reward and encourage additional unlawful entries in the future).