
Supporting innovation through visas: the Entrepreneur Visa

Department of Immigration and Border Protection

18 March 2016

Introduction

- 1 The Migration Law Committee responds to the Department of Immigration and Border Protection's consultation questions as follows.

Should the entrepreneur require nomination from a state or territory government in order to apply for the Entrepreneur visa, consistent with the other streams of the Business Innovation and Investment Programme (BIIP)?

- 2 The Migration Law Committee is aware that most state and territory governments have programs providing assistance to support the development of innovative technologies. These include for example:
- LaunchVic: <http://economicdevelopment.vic.gov.au/about-us/strategies-and-initiatives/launchvic>
 - Innovate NSW: <http://www.industry.nsw.gov.au/business-and-industry-in-nsw/innovation-and-research/innovate-nsw>
 - BioSA: <http://bioinnovationsa.com.au/about/missionstatement/>
 - Advance Queensland: <http://advanceqld.initiatives.qld.gov.au/entrepreneurs-startups.aspx>
 - InnovationACT: <http://www.business.act.gov.au/home>
- 3 However there is no need to limit Entrepreneur Visas to those nominated by state or territory governments. One of the key aims of the Australian Government's National Innovation and Science Agenda is to encourage more collaboration between primary researchers, universities, research institutes, and industry bodies.¹ Additional organisations capable of nominating a visa applicant should include universities and non-government organisations (including not-for-profits and corporations) as each of these types of organisation is a potential start-up partner or support organisation for the visa applicant. For example, universities should be able to support the application if the individual has been selected for a university incubator program like the Melbourne Accelerator Program (the MAP).²
- 4 Nominations should however, be required to also be assessed by an appropriate [Assessment Authority](#) as well as by the Department. The aims of the Entrepreneur Visa include promoting collaboration amongst businesses, universities and the research sector to commercialise ideas and solve problems, so potential visa applicants should be encouraged to reach out to potential collaborators when considering whether to apply to enter Australia to pursue their innovative ideas. Moreover, the provider of the funds supporting the start-up venture may already have links with organisations in Australia who may be willing to nominate and support the visa applicant. It is important that the integrity of the start-up proposal is thoroughly assessed however, and that can be done by an appropriate Assessment Authority.
- 5 The Migration Law Committee notes that [IP Australia](#) is not listed as an Assessment Authority on the Department's Website, and suggests that consideration should be given to whether IP Australia would be an appropriate Assessment Authority for Entrepreneur Visa applicants.

¹ The Hon Malcolm Turnbull, Prime Minister, Remarks at Bio21 Molecular Science and Biotechnology Institute, 7 March 2016: <https://www.pm.gov.au/media/2016-03-07/remarks-bio21-molecular-science-and-biotechnology-institute>.

² <http://themap.co/>

Is four years an appropriate period for the provisional visa to enable the entrepreneur to develop and commercialise their innovative idea in Australia?

- 6 The Migration Law Committee suggests that the appropriate timeframe for a temporary visa is 3 years, with an option for a further 1 year.
- 7 A start-up should be able to stabilise and grow within 3 or 4 years.
- 8 If a longer period is required, the venture would likely be considered a failed start-up.

Should an extension of the provisional visa be permitted for individuals who have not established a successful and innovative venture in the relevant time period, to allow them additional time to do so?

- 9 The Migration Law Committee suggests that the provisional visa period should be 3–4 years, within which the start-up should be able to demonstrate a success plan. An Entrepreneur Visa holder should be eligible for an extension if they can provide:
- financials for the previous 3 years;
 - projected financials (profit and loss statement and balance sheet) for the next 2 years;
 - cash flow for the next two years; and
 - investments secured for the next 2 years.
- 10 These documents should be assessed by an appropriate Assessment Authority which must certify the viability of the project for the next 2 years.

How would success of a venture be measured to enable the entrepreneur to progress to permanent residency, and is there an appropriate form of third party verification that could be used to verify the success of the business venture? For example, should measures include a specific level of business turnover, number of Australian employees *et cetera*?

- 11 The Migration Law Committee suggests that success should be measured on
- turnover;
 - the number of current ongoing employees appointed in the previous 3 years; and
 - capital investment in the last 3 years.

Should grant of permanent residence be contingent on success of the original idea put forward for development or would other successful business ventures in the timeframe also be considered? If so, how could this be defined?

- 12 The Migration Law Committee suggests that the visa applicant (co-founder) and the start-up enterprise should have the option of changing their original idea provided the idea and the projected financials of the new idea are reassessed by the relevant assessment authorities.
- 13 However the Committee also suggests that the visa holder should be required to work within or for the same legal entity during the validity of the visa and should be required to leave the country within 30 days if the original start-up project is

abandoned and an alternative idea is not proposed for approval within the visa conditions during that 30 days.

Are there particular sectors that should be targeted (or limited to) which demonstrate a high level of innovation and provide significant benefit to Australia such as Science, Technology, Engineering and Mathematics (STEM) and Information Communications Technology (ICT) sectors? Are there particular sectors which should be excluded, such as residential real estate development or residential real estate schemes?

- 14 The Migration Law Committee suggests that STEM sectors are the best option but that there should be flexibility in the sectors covered by the visa program as these may emerge from collaboration and innovation in specific regions. Austrade, for example, is promoting linkages with key economies through “landing pads” in Silicon Valley, Tel Aviv, Shanghai and other locations. These landing pads are designed to enable start-ups to “be immersed in an environment that will help them accelerate the design and development of their product or service business model by exploring in-market business development, investment, mentorship and strategic partnership opportunities”.³ These opportunities may not be limited to the STEM or ICT sectors.
- 15 The Law Council notes that participants in Australian Government programs such as “landing pads” should be advised of the critical importance of obtaining early legal advice concerning intellectual property protection, optimal corporate structures, corporate insolvency options etc.

What third party backing should be acceptable to ensure a robust process of assessment and investment has taken place? For example, some BIIP visa pathways require third party funding to come from members of [Australian Private Equity and Venture Capital Association Limited](#) (AVCAL).

- 16 The Migration Law Committee suggests that it would be unnecessarily restrictive to require third party funding to be provided by AVCAL members, and that AVCAL should not be given the monopoly on the provision of funds.
- 17 Overseas investors, venture capitalists, and even crowd-sourcing can fund start-ups. In the United States, in 2015 the U.S. Securities and Exchange Commission (SEC) adopted rules to permit companies to offer and sell securities through crowdfunding. The Business Start-up Act (the “Jobs Act”) was enacted on 5 April 2012. SEC voted and passed rules to implement Title III on 30 Oct 2015. The new Jobs Act Rules provide:
- The amount raised must not exceed \$1million in a period of 12 months;
 - Individual investors, over a 12-month period, are permitted to invest in the aggregate across all crowdfunding offerings up to:
 - If either their annual income or net worth is less than \$100,000, then the greater of:
 - \$2,000 or
 - 5 percent of the lesser of their annual income or net worth.
 - If both their annual income and net worth are equal to or more than \$100,000, 10 percent of the lesser of their annual income or net worth; and

³ Australia Unlimited, “Landing Pads”, <http://www.australiaunlimited.com/landing-pads>.

- during the 12-month period, the aggregate amount of securities sold to an investor through all crowdfunding offerings may not exceed \$100,000.⁴

Comparison with the United States

- 18 As the United States (US) can be considered the “tech start-up capital of the world” for both ideas and funding, and Australia’s new Entrepreneur visa will be competing for talent with the US, it is important to consider the USA visa system as a comparator, and its E2 Visa in particular. Venture capitalist (VC) investment in Silicon Valley in 2015 was around \$59billion.
- 19 The United States Citizenship and Immigration Services ([USCIS](#)) lists treaty countries for E2 visa applicants, and investors must have placed capital at a commercial risk in the applicants’ business or start-up, with the main objective being to generate a profit. Applicant must demonstrate that they hold at least US \$100,000 in invested capital. The individual must also show a clear and legitimate source of that capital.
- 20 The USCIS requires an applicant to provide a number of documents to support the business investment, including a 5-year business plan.
- 21 Individuals involved in start-ups use the E2 visa to enter the USA for a period of between 1 to 4 years. The duration of the stay is at the discretion of the interviewing officer.

What is the most desirable third party capital investment threshold to balance the attractiveness of the visa to genuine entrepreneurs, while promoting a high general standard of applicants?

- 22 The Migration Law Committee suggests that there are several options for thresholds, as follows:
- Option A
- An individual must hold 50% of the shares of the company when applying for the visa and during the assessment process; or
- Option B
- If applicant does not own 50% shares of the company, the visa applicant should hold at least 25% or more, and the turnover of the company should be \$1 million or more; or
- Option C
- In the year prior to lodgement of the visa application, venture capitalists should have invested \$1 million in the start-up.

Are there any specific integrity measures that should be considered being built into the initial visa assessment criteria, ongoing visa conditions, and criteria for permanent residence?

- 23 Given the potential for ‘scamming’ of the Entrepreneur Visa, the Migration Law Committee recommends the adoption of the following integrity measures:

⁴ US Securities and Exchange Commission, “SEC Adopts Rules to Permit Crowdfunding”, <<https://www.sec.gov/news/pressrelease/2015-249.html>>.

- A profile of the individual based on social media extraction (Gild.com USA extracts information from 80 + sites and provides a report on an individual);
- verifiable past experience;
- source of funds flow chart;
- funds must be retained in the enterprise for the validity of the temporary residence and 12 months after the grant of the visa; and
- an applicant must use the funds they bring in at the time of the visa grant for living expenses, and not draw a salary from the enterprise for at least 12 months. This would be consistent with the usual model for start-ups where the founders carry all the risk to get a start-up off the ground and only employ staff once the enterprise is financially stable.

24 The Migration Law Committee suggests the following assessment criteria should be built into the assessment process:

Personal characteristics:

- the individual intends setting up a start-up enterprise in Australia;
- the individual is the founder or a co-founder of the enterprise;
- the individual possess the nationality of the country approved under a Legal Instrument;
- the individual provides a resume with qualifications and experience (if any);
- the individual has a Degree in Business, Entrepreneurship, Engineering, Software Engineering, Information Technology recognised in Australia. Other qualification may be considered depending on the area of business the start-up will venture into. For example the health sector may require a medical qualification;
- if an individual is offshore, he/she must have 3 years' verifiable experience working in a start-up;
- international students will be granted a work experience waiver, provided they have completed a Bachelor Degree or Master Degree with at least 2 years (4 semester) study in Australia;
- the individual must have English-language competency reflected in an IELTS score of 6 in each or equivalent in other tests; and
- the individual must be less than 35 years old.

Investment:

- the applicant owns or controls a minimum \$100,000 asset to support the commercial initiative;
- the investment must be held in the enterprise during the validity of the temporary visa and for at least 1 year from the date of approval of a permanent visa;
- the investment is more than marginal and not one solely for earning a living;

- the applicant must demonstrate proof of available funding of \$60,000 living expenses for 2 years, as co-founders are not paid wages. Living expenses can be provided by the venture investors;
- a complete money trail of the \$100,000 investment fund and \$60,000 living costs must be produced at the time of the visa application; and
- documentation of the original source of the funds (sale of property, inheritance, loans, earnings, sale of business, etc.) must be provided.

Enterprise:

- the enterprise must be a real and operating commercial enterprise;
- the enterprise must have one local director who is a permanent resident or Australian citizen (the U.S. does not have this requirement);
- the visa applicant must be in a position to develop and direct the enterprise and hold at least 50 percent shares in the company which is held during the period of validity of the TR visa and at least 1 year from the date of approval of a permanent visa;
- the enterprise must produce a Pitch document commonly used in start-ups like Pitchdeck⁵ and a link to a you tube video pitching the idea;
- the enterprise must produce a Minimum Viable Product (MVP)⁶ document used by start-ups;
- the enterprise must provide a SWOT analysis of the idea;
- the enterprise must produce a 3 year business plan with projected profit and los, a balance sheet and cash flow;
- the enterprise must produce a breakdown of start-up costs necessary for the business to become operational; and
- the enterprise must produce a signed, dated, valid lease for business premises, which can be a domestic residence, including evidence of payments; and
- the enterprise must produce evidence of software, equipment and/or inventory purchased.

Enterprise documentation at the time of application

25 When applying for an Entrepreneur visa, the applicant should provide the following:

- an ASIC record if relevant;
- share certificates;
- a shareholder agreement;

⁵ <https://pitchdeck.improvepresentation.com/what-is-a-pitch-deck>

⁶ <http://startitup.co/guides/376/mvp-minimum-viable-product>
<https://www.cleveroad.com/blog/what-is-the-use-of-a-minimum-viable-product-infographic>

- an organisation chart;
- an organogram of the full ownership structure;
- the skills assessment approval;
- a Minimum Viable Product (MVP) statement;
- a pitch document;
- a SWOT analysis;
- a 3 year business plan;
- projected profit and loss, a balance sheet and cashflow projection for 3 years;
- a statement of start-up cost;
- the projected employment and salary statement for 3 years; and
- a nomination approval by an authorised authority (state government or university or other approved organisation).

Transition to permanent residency:

- 26 The Migration Law Committee suggests that an application for permanent residency should be able to be made between 24 and 36 months of the grant of the Entrepreneur visa.

Would the Business Talent (Permanent) (subclass 132) Venture Capital Entrepreneur visa stream still be required as a visa option once the Entrepreneur visa is implemented?

- 27 The Business Talent visa will still be required as a visa option for other Entrepreneurship activities as outlined in the criteria.
- 28 The new stream will be a similar model like the 457 visa transition to permanent residency without requiring points assessment.

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- Australian Capital Territory Law Society
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- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
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