Disrupting Immigration: How Administrative Rulemaking Could Transform the Landscape for Immigrant Entrepreneurs

Abstract

Immigrant entrepreneurs come to the United States and start thriving companies that create jobs, drive the economy, and facilitate innovation. However, U.S. laws do not provide a clear path for immigrant entrepreneurs to lawfully enter and work in America. Therefore, immigrant entrepreneurs must seek lawful status in the United States through unusual routes. While Congress, the President, and the United States Citizenship and Immigration Services (USCIS) recognize the need for clear and accessible immigration standards for immigrant entrepreneurs, the politicized nature of immigration law has impeded significant change.

This Comment details how administrative rules could offer a less politicized and more certain route for immigrant entrepreneurs. Specifically, this Comment examines how nonbinding policy memoranda and interpretive rules could provide substantial benefits to immigrant entrepreneurs. This manner of promulgating rules fits within USCIS's administrative authority, and would enable immigrant entrepreneurs to focus on innovating their businesses rather than navigating the immigration system.

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I. INTRODUCTION

"More than 40 percent of Fortune 500 companies were founded by immigrants . . . or by their children,"[1] and "a third of venture-backed companies that went public between 2006 and 2012 had at least one immigrant founder at the helm."[2] Immigrant entrepreneurs are common household names in the United States, such as Elon Musk and Arianna Huffington.[3] Yet, no clear path exists for immigrant entrepreneurs to secure lawful status in the United States.[4] Consequently, innovative foreign workers who wish to set up shop in the United States either return home[5] or attempt to qualify for a different type of visa.[6] Immigrant entrepreneurs are often forced to manipulate the immigration system to make the shoe fit.[7] For example, immigrant entrepreneurs become lawful foreign students at American universities or valid H-1B[8] temporary workers for other companies.[9] Nonetheless, the options available are difficult for immigrant entrepreneurs to fit within, and although Congress and the President recognize the need for reform, immigrant entrepreneurs are left with discomforting uncertainty.[10]

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1. Yatin Mundkur, *Immigrant Entrepreneurs: Vital for American Innovation*, FORBES (Jan. 23, 2014, 11:55 AM), http://www.forbes.com/sites/techonomy/2014/01/23/immigrant-entrepreneurs-vital-for-american-innovation/.

2. Grace Nasri, *The Shocking Stats About Who's Really Starting Companies in America*, FAST COMPANY (Aug. 14, 2013, 6:02 AM), http://www.fastcompany.com/3015616/the-shocking-stats-about-whos-really-starting-companies-in-america.

3. *See id.* (featuring various high-profile immigrant entrepreneurs).

4. *See infra* Section II.B.

5. *See* President Barack Obama, President of the U.S., State of the Union Address (Jan. 25, 2011), (transcript available at https://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address) ("Others come here from abroad to study in our colleges and universities. But as soon as they obtain advanced degrees, we send them back home to compete against us. It makes no sense.").

6. *See infra* Section II.B.

7. *See Entrepreneur Visa Guide*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/eir/visa-guide/entrepreneur-visa-guide (last visited Oct. 12, 2016).

8. "The US H-1B visa is a non-immigrant visa that allows US companies to employ foreign workers in specialty occupations: those that require theoretical or technical expertise in specialized fields such as in IT, finance, accounting, architecture, engineering, mathematics, science, medicine, etc." *US H1-B Visa for Specialty Workers*, WORKPERMIT.COM, http://www.workpermit.com/immigration/usa/us-h-1b-visa-specialty-workers (last visited Nov. 14, 2016).

9. *See Entrepreneur Visa Guide*, *supra* note 7 (listing the types of visas entrepreneurs can attempt to pursue).

10. *See infra* Section II.D.

Many scholars and practitioners call for detailed statutory reform to accommodate immigrant entrepreneurs.[11] Congress has worked diligently to hammer out a bill that would create an Entrepreneur Visa for immigrants in viable venture-backed businesses.[12] In addition, President Barack Obama and administrative agencies, such as the Department of Homeland Security (DHS) and its subagency, the United States Citizenship and Immigration Services (USCIS), continually push for greater accommodation of immigrant entrepreneurs in the immigration system.[13] Nonetheless, significant statutory change appears stagnant.[14]

The current fragmented laws for immigrant entrepreneurs leave immigrants without a proverbial compass to navigate the open administrative law waters, and in turn, require entrepreneurs to allocate valuable resources and time that they could otherwise use to innovate in the United States.[15] The Startup Act effectively attempts to address this issue, but given the slow movement of immigration reform in the legislature, immigrant entrepreneurs cannot rely on the Startup Act's future success.[16] USCIS has recognized the need for a solution to this problem and recently proposed an International Entrepreneur Rule, essentially circumventing the gridlocked path through Congress.[17] However, practitioners argue that the outcome of the proposed rule is uncertain, and the provisions ultimately add to the confusion for immigrant entrepreneurs.[18] Thus, this Comment proposes that USCIS use its broad administrative rulemaking powers—through interpretive rules and policy memoranda—to carve out a more clear and immediate pathway for immigrant entrepreneurs to secure lawful status in the United States.[19] This Comment is about the process to effectuate change for immigrant entrepreneurs at this time.[20] The primary focus of this

11. *See, e.g.*, Dane Stangler & Jason Wiens, *The Economic Case for Welcoming Immigrant Entrepreneurs*, EWING MARION KAUFFMAN FOUND. (Sept. 8, 2015), http://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/the-economic-case-for-welcoming-immigrantentrepreneurs.

12. *See infra* Section II.B.2.

13. *See infra* Section II.D.

14. *See infra* Section II.B.2.

15. *See infra* Sections II.B–D.

16. *See infra* Section II.B.2.

17. *See infra* Section II.C.2.a.

18. *See infra* Section II.C.2.a.

19. *See infra* Section III.A.

20. *See infra* Section III.A.

Comment is not on *what* policies would be best for immigrant entrepreneurs, but instead on *how* change could most effectively occur.[21]

This Comment begins in Part II with a discussion of the historical backdrop of the United States' immigration laws that impact immigrant entrepreneurs.[22] Part II also contains an overview of Congress's attempts to reform the laws for immigrant entrepreneurs.[23] In addition, Part II examines how administrative rulemaking procedures have influenced laws that immigrant entrepreneurs must follow, and further, looks at USCIS's proposed International Entrepreneur Rule, as well as the U.S. government's expansion of alternative methods to aid immigrant entrepreneurs.[24] Part III proposes a procedure USCIS could use to reform administrative rules that apply to immigrant entrepreneurs.[25] Part III continues by examining the impact of the proposal on immigrants, practitioners, and administrative laws.[26] Part IV concludes.[27]

II. BACKGROUND

A. History of Immigrant Entrepreneurship

The history of U.S. immigration is a story of the entrepreneurial spirit.[28] From the outset, immigrants ventured to the United States to start up new lives, seek opportunities, and profit from reinvention.[29] Indeed, the immigrants that first came to America founded perhaps the most important venture—the United States as a nation.[30] Following the independence of the

21. *See infra* Section III.A.
22. *See infra* Sections II.A, II.B.1.
23. *See infra* Section II.B.
24. *See infra* Sections II.C–D.
25. *See infra* Section III.A.
26. *See infra* Section III.C.
27. *See infra* Part IV.
28. *See* STUART ANDERSON, IMMIGRATION 1 (Greenwood ed., 2010) (discussing the common storyline of American immigration: "Immigrants engage in heroic struggles to build a better future . . . . Foreign-born sojourners come to America inspired by opportunity.").
29. *See id.* American development was synonymous with immigration during the nation's founding. *See id.* at 1–2. Moreover, "the relative success of the first immigrants" in creating new lives for themselves encouraged additional immigration from new countries to the United States. *Id.* at 1.
30. *See id.* (noting that "the history of immigration to America is, in fact, the history of America").

United States, the country experienced several waves of immigration.[31] Each wave fueled economic expansion and created immigrant business owners, or in other words, immigrant entrepreneurs.[32]

In the mid-1800s, one of the first waves of immigration to the United States brought immigrants primarily from England, Scotland, Ireland, and Germany.[33] This wave included a Scottish immigrant who eventually built a $480 million steel company in the United States: Andrew Carnegie.[34] Carnegie was an archetypal bootstrapped immigrant.[35] His family arrived with no money, and Carnegie initially worked on the railroad in Pennsylvania, where his ambition was quickly recognized.[36] Carnegie rose through the ranks of the railroad division and then secured personal loans to invest in business opportunities.[37] The dividends from his investments allowed him to form the Carnegie Steel Company in 1892.[38] Carnegie implemented many technological advancements at the Carnegie Steel Company.[39] Thus, Carnegie pushed the industry—and the country—towards innovation.[40]

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31. *See* Don Blankenau, *Ecosystem Protection Versus Immigration: The Coming Conflict*, 12 GREAT PLAINS NAT. RESOURCES J. 1, 3–8 (2007).

32. *See* Mundkur, *supra* note 1.

33. *See* Blankenau, *supra* note 31, at 3–4.

34. *See Andrew Carnegie's Story*, CARNEGIE CORP. N.Y., https://www.carnegie.org/interactives/foundersstory/#!/ (last visited Sept. 27, 2016) (indicating that in 1901, Carnegie sold his steel company to J.P. Morgan for $480 million, which made Carnegie the richest man in the world).

35. *See id.* The editor of his autobiography described Carnegie's story as that of a "poor Scotch boy who came to America and step by step, through many trials and triumphs, became the great steel master, built up a colossal industry, amassed an enormous fortune, and then deliberately and systematically gave away the whole of it for the enlightenment and betterment of mankind." ANDREW CARNEGIE, AUTOBIOGRAPHY OF ANDREW CARNEGIE: WITH ILLUSTRATIONS vii (1920).

36. *See Andrew Carnegie's Story*, *supra* note 34.

37. *Id.* Carnegie's boss at the Pennsylvania Railroad asked him if he had $500 to invest in a privately traded company, which led to a ten-dollar monthly dividend check. *See* DAVID NASAW, ANDREW CARNEGIE 59–60 (Penguin Books ed., 2006). This small sum initiated Carnegie's veracious investing. *Id.* at 60 ("I shall remember that check as long as I live . . . It gave me the first penny of revenue from capital—something that I had not worked for with the sweat of my brow. 'Eureka!' I cried. 'Here's the goose that lays the golden eggs.'") (quoting Carnegie).

38. *See* NASAW, *supra* note 37; *see also Andrew Carnegie's Story*, *supra* note 34.

39. *See Andrew Carnegie's Story, supra* note 34. In his autobiography, Carnegie described his reputation for implementing new and, at times, risky innovations in the steel industry: "I had the reputation in the business of being a bold, fearless, and perhaps a somewhat reckless young man. Our operations had been extensive, our growth rapid and, although still young, I had been handling millions." CARNEGIE, *supra* note 35, at 193.

40. *See supra* note 39 and accompanying text.

Similarly, almost a century later, in the midst of another significant wave of immigration—this time comprised primarily of Asian immigrants[41]—An Wang arrived in the United States and established an innovative computer company.[42] However, unlike Carnegie, Wang emigrated from Shanghai to the United States to pursue a Ph.D. in applied physics at Harvard University.[43] Shortly after Wang completed his studies at Harvard, he invented a memory core, which was the first technology to provide memory for computers.[44] Wang patented this technology and then established Wang Laboratories.[45] In the 1950s, to launch his business, Wang licensed his memory core patent to International Business Machines (IBM) and secured $50,000 in equity funding from a corporate investor.[46] This enabled Wang to build a multibillion dollar company in the United States.[47] Although Wang Laboratories faced various challenges,[48] Wang secured forty patents, received a Medal of Liberty from President Reagan, and came in fifth on the Forbes richest men in America list.[49] Accordingly, Wang is considered "[o]ne of the pioneering giants of the computer industry."[50]

Carnegie and Wang demonstrate the historic link between immigration and innovation in the United States.[51] These innovators paved the way for modern immigrant entrepreneurs.[52] Further, their famous stories make

41. *See* Jie Zong & Jeanne Batalova, *Asian Immigrants in the United States*, MIGRATION POL'Y INST. (Jan. 6, 2016), http://www.migrationpolicy.org/article/asian-immigrants-united-states.

42. *See* Myrna Oliver, *An Wang; Founded Computer Company*, L.A. TIMES (Mar. 25, 1990), http://articles.latimes.com/1990-03-25/news/mn-214_1_wang-laboratories.

43. *See* Mike Brewster, *An Wang: The Core of the Computer Era*, BLOOMBERG BUS. (July 13, 2004, 9:00 PM), http://www.bloomberg.com/bw/stories/2004-07-13/an-wang-the-core-of-the-computer-era.

44. *See* Oliver, *supra* note 42. Wang's memory core was used in computers until the microchip was invented. *Id.*

45. *See* Brewster, *supra* note 43.

46. *See* KENNETH E. HENDRICKSON III, THE ENCYCLOPEDIA OF THE INDUSTRIAL REVOLUTION IN WORLD HISTORY, 24–25 (Rowman & Littlefield ed., 2015).

47. *See* Oliver, *supra* note 42.

48. *See* Brewster, *supra* note 43. In the 1970s and 1980s, as the computer revolution began, "Wang made two decisions that would later prove to be the company's undoing: He decided to concentrate on hardware, not software. And the pieces of hardware he chose to concentrate on were word processors and minicomputers . . . , not personal computers." *Id.*

49. *See* Oliver, *supra* note 42.

50. *Id.* (quoting Richard W. Miller, President of Wang Laboratories); *see generally* JIM HARGROVE, DR. AN WANG: COMPUTER PIONEER (Children's Press ed., 1993).

51. *See* Mundkur, *supra* note 1.

52. *See id.*; *see also* Jeff Desjardins, *The Most Entrepreneurial US Immigrants*, VISUAL

immigration synonymous with business innovation in America.[53] Today, immigrant entrepreneurs' paths are often more similar to Wang's because "[m]any of America's leading high-technology companies have utilized venture capital funding and grown successful enough to be traded on a U.S. stock exchange . . . . 'Over the past 15 years, immigrants have started 25 percent of U.S. public companies that were venture-backed . . . in America.'"[54] Consequently, while immigration for venture-backed entrepreneurs is a modern issue, it has deep roots in the past.[55]

B. Congressional Immigration Acts

Although the United States has never offered a specific visa or pathway to citizenship for a venture-backed entrepreneur,[56] immigration laws, and the visas that the laws have created, influence immigrant students and workers, and therefore, potential entrepreneurs.[57] Thus, while the story of immigration law for entrepreneurs is somewhat about the nonexistence of laws, the immigration laws that are in place shed light on the United States' commitment to attracting immigrant innovators.[58] Here, legislation that influences foreign students, skilled workers, and investors is generally the

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CAPITALIST (Oct. 21, 2014, 5:24 PM), http://www.visualcapitalist.com/entrepreneurial-us-immigrants/ (mapping out the significant amount of migrant entrepreneurs in the United States).

53. *See* Mundkur, *supra* note 1.

54. ANDERSON, *supra* note 28, at 25 (quoting Stuart Anderson & Michaela Platzer, *American Made: The Impact of Immigrant Entrepreneurs and Professionals on U.S. Competitiveness*, NAT'L VENTURE CAP. ASS'N 6 (Nov. 2006), http://www.contentfirst.com/AmericanMade_study.pdf).

55. *See id.*; *see also* Mundkur, *supra* note 1.

56. *See* David P. Weber, *Halting the Deportation of Businesses: A Pragmatic Paradigm for Dealing with Success*, 23 GEO. IMMIGR. L.J. 765, 785–88 (2009). Although the EB-5 visa is sometimes called the "entrepreneur visa" it does not cover venture-backed entrepreneurs, and therefore is somewhat of a misnomer. *See EB-5 Immigrant Investor Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-process (last updated June 25, 2014). Instead, the EB-5 visa is for foreign investors who use their own money to invest in a U.S. company. *See id.*

57. *See* Weber, *supra* note 56, at 785–88 (discussing how immigrant and nonimmigrant visas influence immigrant entrepreneurs).

58. *See* U.S. DEP'T OF JUSTICE, LABOR & STATE, U.S. INTERAGENCY TASK FORCE ON IMMIGRATION POLICY, STAFF REPORT 43 (1979) [hereinafter IMMIGRATION POLICY REPORT]. This can be described as the United States' commitment, or lack of commitment, to attracting immigrant innovators. *See id.* Many scholars would argue that the United States' immigration policy is concerned more with the exclusion of immigrants rather than attempts to facilitate immigration for desirable workers. *See, e.g.*, *id.*

most relevant.[59]

1. History of the Congressional Immigration Acts

Three main pieces of legislation established modern employment-based immigration:[60] the Immigration and Nationality Act of 1952 (1952 Act),[61] the Immigration and Nationality Act of 1965 (1965 Act),[62] and the Immigration Act of 1990 (1990 Act).[63] The 1952 Act, also referred to as the McCarran-Walter Act,[64] was the most restrictive of the three.[65] The purpose of the 1952 Act was to combat the influx of immigration and protect the domestic labor market.[66] The 1952 Act implemented strict quotas that limited immigration by nationality.[67] In addition, the 1952 Act set up a system to deny skilled workers entry to the United States if domestic workers were already available to perform the labor.[68] Specifically, the 1952 Act gave the United States broad power to deny immigrant workers who might "adversely affect the wages and working conditions of the workers in the United States similarly employed."[69] The restrictive provisions of the

59. *See DHS Announces Administrative Reforms to Attract and Retain Highly-Skilled Immigrants; USCIS to Launch Entrepreneurs in Residence Initiative with Information Summit*, 89 INTERPRETER RELEASES 309 (Feb. 6, 2012). This includes legislation that relates to both immigrant visas (visas with a path to U.S. citizenship, often referred to as green cards) and nonimmigrant visas (temporary-stay visas). *See id.* (discussing how reform for foreign student visas and highly skilled worker visas could benefit immigrant entrepreneurship).

60. *See* Anderson & Platzer, *supra* note 54, at 12 (emphasizing that the 1965 and 1990 Immigration Acts "opened the door of opportunity to immigrants").

61. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (2006)).

62. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C. (2006)).

63. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C. (2006)).

64. IMMIGRATION POLICY REPORT, *supra* note 58, at 46.

65. *See id.* at 42–43.

66. *See id.*

67. *See* IMMIGRATION POLICY REPORT, *supra* note 58; *see also Laws Governing Migration: The Immigration & Nationality Act of 1952 as Amended Through 1961*, THE INT'L MIGRATION DIGEST 34, 36 (1964) (explaining that the 1952 Act extended quotas for the first time to the Asia-Pacific Triangle and colonies in the Western Hemisphere).

68. *See* IMMIGRATION POLICY REPORT, *supra* note 58, at 46.

69. Immigration and Nationality Act of 1952 § 212(a)(14)(B) (codified as amended at 8 U.S.C. § 1182(a)(5)(A)(i)(II)(2013)).

1952 Act were immediately controversial.[70] President Harry Truman famously vetoed the 1952 Act, which Congress then overrode.[71] In his ancillary message to Congress, Truman passionately criticized the 1952 Act:

> In no other realm of our national life are we so hampered and stultified by the dead hand of the past, as we are in this field of immigration. We do not limit our cities to their 1920 boundaries—we do not hold our corporations to their 1920 capitalizations—we welcome progress and change to meet changing conditions in every sphere of life, except in the field of immigration.[72]

Unsurprisingly, reform to the 1952 Act came just over a decade later with the 1965 Act.[73] Nonetheless, despite the 1952 Act's restrictive, controversial, and perhaps seemingly outdated provisions, the 1952 Act was instrumental in establishing immigrant classes based on special skills—a method still used today.[74]

In response to the restrictive immigration laws of the 1952 Act, Congress passed sweeping reforms in 1965.[75] Consequently, the 1965 Immigration Act[76] left its own legacy of increased opportunity for immigrants.[77] At the outset, politicians intended the 1965 Act to be expansive.[78] When President Lyndon Johnson signed the 1965 Act, he proclaimed: "[F]rom this day forth, those wishing to emigrate into America shall be admitted on the basis of their skills."[79] To accomplish this, the 1965

70. *See* Harry N. Rosenfield, *The Prospects for Immigration Amendments*, 21 L. & CONTEMP. PROBS. 401, 404 (1956).

71. *See id.* at 402.

72. Harry S. Truman, Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, 1 PUB. PAPERS 441, 444 (June 25, 1952).

73. *See* Immigration and Nationality Act of 1965 §§ 201–281.

74. *See* Craig S. Morford, *H to B or Not to Be: What Gives Foreigners the Right to Come Here and Create American Jobs?*, 6 OHIO ST. ENTREP. BUS. L.J. 299, 306 (2011) (explaining that the 1952 Act was responsible for first creating the H-1B visa category of skilled workers).

75. *See* IMMIGRATION POLICY REPORT, *supra* note 58, at 49–50.

76. *See* Immigration and Nationality Act 1965 (codified as amended in scattered sections of 8 U.S.C.). The 1965 Act is also referred to as the 1965 Amendments to the Immigration and Nationality Act of 1952. *See id.*

77. *See* Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 170 (2006).

78. *See id.*

79. *Id.* (quoting President Lyndon Johnson).

Act's provisions removed the heavily criticized national-origin formula[80] and created preferences for immigrants with needed skills.[81] In turn, professional, technical, and kindred (PTK) immigrants, as well as immigrants of "exceptional ability," gained greater access to the United States.[82] In addition, immigrant students came to the United States to pursue higher education.[83] Foreign students recognized that they had a higher probability of securing a job in the United States if they pursued a U.S. academic degree in a specialized field, as indicated by the Act.[84] In sum, the 1965 Act "opened the door for qualified foreign applicants,"[85] and within one year, professional immigrants increased 11.5%.[86]

The 1990 Act carried over the ultimate purpose of the 1965 Act and streamlined the immigration system to continue to attract skilled foreign workers.[87] In 1990, the United States feared losing its place in the global economy and therefore sought to expand its highly skilled professional workforce.[88] The 1990 Act prioritized "professional attainment and excellence."[89] To accomplish this, the 1990 Act increased the allotment of highly skilled worker nonimmigrant and immigrant visas available each year.[90] This included expansion of the H-1B program, which permitted U.S.

80. *See* IMMIGRATION POLICY REPORT, *supra* note 58, at 43. The national-origin formula primarily discriminated against immigrants from the Asia–Pacific Triangle and gave priority to European immigrants. *Id.* Congress sought to abolish the national-origin formula in order to remove the racial-based barriers found in U.S. immigration policy. *See id.*; *see also* Shachar, *supra* note 77, at 170.

81. *See* Shachar, *supra* note 77, at 170.

82. *Id.*; *see also* Judith Fortney, *Immigrant Professionals: A Brief Historical Survey*, 6 INT'L MIGRATION REV. 50, 55 (1972) ("Under the [1965] act, preference was given to persons with skills which the Secretary of Labor deemed 'especially advantageous' to the United States.").

83. *See* Fortney, *supra* note 82, at 56–57.

84. *See id.* at 57 ("The more specialized the field and the higher the academic degree, the greater the probability that a [foreign] student will not return home after graduation. Looked at another way, an important proportion of immigration from developing countries consists of students who do not return—more than 70% of all professional immigration from Taiwan, Korea, India and Iran for example, consists of non-returning students.").

85. Shachar, *supra* note 77, at 170.

86. *See* Fortney, *supra* note 82, at 55–56 (summarizing the 1967 I.N.S. Annual Reports).

87. *See* Shachar, *supra* note 77, at 183.

88. *See* DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 30 (Thomas Reuters ed., 6th ed. 2011).

89. Shachar, *supra* note 77, at 183.

90. *See* WEISSBRODT & DANIELSON, *supra* note 88, at 30–31.

employers to sponsor a temporary three-year[91] employment visa for a foreign worker with an advanced degree in the particular field of employment.[92] Additionally, the 1990 Act created pathways for immigrants with advanced degrees and exceptional ability to secure U.S. citizenship.[93] With the new preference system, although an immigrant worker generally needed to demonstrate an outstanding employment offer and an approved labor certification from an employer,[94] an applicant with extraordinary ability could waive these requirements.[95] This further prioritized highly skilled workers over lower-skilled workers.[96] In fact, "[b]ecause employers have often been unwilling to wait for labor certification to employ low-skilled workers, and because of the low allocation of 10,000 visas, the 1990 Act offered limited opportunities for individuals without skills or formal education."[97] Finally, the 1990 Act created a green card for foreign investors.[98] The preference category, titled the "Employment Creation" preference, required an immigrant to invest $1 million in a U.S. business and employ at least ten U.S. citizen workers.[99] In totality, the 1990 Act laid the modern foundation of immigration law for skilled workers.[100]

Since 1990, Congress has implemented various amendments to the Immigration and Nationality Act (INA).[101] For example, from 1998 to 2000, Congress increased the number of visas available to skilled workers in order to meet the high demand for technology-focused employees.[102] With the

91. *See* Immigration and Nationality Act § 214(g), 8 U.S.C. § 1184(g) (2015). The three-year H-1B visa can be extended for a total of six years. *See* Immigration and Nationality Act § 214(g)(4), 8 U.S.C. § 1184(g)(4).

92. *See* Immigration and Nationality Act § 214(g)(5), 8 U.S.C. §§ 1101(a)(15)(H)(i), 1184.

93. *See* Shachar, *supra* note 77, at 183.

94. *See* WEISSBRODT & DANIELSON, *supra* note 88, at 32–33 ("The 1990 Act did not substantially change the Labor Department's certification process which requires showing that no qualified U.S. workers are available to work in the position sought.").

95. *See id.*

96. *Id.* at 32.

97. *Id.*

98. *See* Immigration Act of 1990 § 121(b)(5) (codified as amended at 8 U.S.C. § 1153(b)(5)).

99. *See id.*; *see also* WEISSBRODT & DANIELSON, *supra* note 88, at 31.

100. *See* Morford, *supra* note 74, at 301.

101. *See* Immigration and Nationality Act, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/laws/immigration-and-nationality-act (last updated Sept. 10, 2013). Since 1952, Congress has compiled its immigration acts into one piece of law entitled the Immigration and Nationality Act, codified in 8 U.S.C. *See id.*

102. *See* American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-

enactment of the amendments, Congress emphasized "[t]he needs of the high-technology sector for foreign workers with specific skills."[103] However, some of the most notable congressional amendments to the INA emerged after 9/11.[104] After the 9/11 attacks, the United States discovered that "the 9/11 hijackers were legally in the U.S. on visas that should have never been granted."[105] Congress immediately responded by replacing the current immigration agency system—getting rid of the Immigration and Naturalization Service (INS) by creating the Department of Homeland Security, establishing new roles for the Department of Justice, and increasing the total budget allocated to immigration agencies.[106] Consequently, the agencies, equipped with strong resources, more carefully scrutinized student and employment-based visa applications.[107] Indeed, "[d]enials of highly skilled employment visa applications nearly doubled and J-1 visas (used by university professors and other researchers) more than doubled."[108] This was also a result of Congress's implementation of the Student and Exchange Visitor Information System (SEVIS), a "cumbersome security-motivated tracking system[] . . . imposed by the United States upon foreign students, researchers and other skilled workers."[109] Congress further limited skilled workers' access to the U.S. immigration system in the aftermath of 9/11 by decreasing the annual number of H-1B visas from 195,000 to 65,000.[110] Today, Congress continues to uphold these strict statutory limitations on immigration for skilled workers.[111]

Each piece of immigration legislation discussed above has left an indelible mark on today's immigration system for skilled workers.[112] First, the 1952 Act initially distinguished between skilled and unskilled workers and codified the United States' intent to give preference to skilled immigrant

277, 112 Stat. 2681 (1998); American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

103. American Competitiveness and Workforce Improvement Act of 1998 § 418(a)(1)(F).

104. *See* Julia Funke, *Supply and Demand: Immigration of the Highly Skilled and Educated in the Post-9/11 Market*, 48 J. MARSHALL L. REV. 419, 420 (2015).

105. *Id.*

106. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

107. *See* Funke, *supra* note 104, at 420–21.

108. *Id.* at 424.

109. Shachar, *supra* note 76, at 169.

110. *See* H-1B Visa Reform Act of 2004, Pub. L. No. 108-441, 118 Stat. 2630 (2004).

111. *See* Funke, *supra* note 104, at 422.

112. *See supra* notes 60–111 and accompanying text.

workers while still protecting American jobs.[113] Second, the 1965 Act removed priority based on national origin and instead prioritized immigrants with advanced degrees and needed skills.[114] Third, the 1990 Act increased temporary work visas for skilled workers and created pathways to citizenship for foreign investors and individuals with extraordinary ability in art, science, or business.[115] Fourth, Congress's amendments to the INA after 9/11 instigated lasting restrictive measures on student and employment-based immigration.[116] Since implementing the restrictive post-9/11 immigration policies, Congress has not made any significant changes to the INA.[117]

2. The Failed Startup Act

Congress has recognized that the current immigration acts fail to appropriately accommodate immigrant entrepreneurs.[118] Since 2010, Congress has attempted to pass the Startup Act five separate times.[119] The Startup Act, a bipartisan proposal, would create clear pathways for immigrant entrepreneurs to secure temporary and permanent work visas in the United States.[120] Two key provisions of the Startup Act would directly affect immigrant entrepreneurs: (1) a new Entrepreneur Visa; and (2) conditional permanent resident status for immigrants with advanced degrees in science, technology, engineering, and math (STEM) fields.[121] The

113. *See supra* notes 64–74 and accompanying text.

114. *See supra* notes 75–86 and accompanying text.

115. *See supra* notes 87–100 and accompanying text.

116. *See supra* notes 104–11 and accompanying text.

117. *See* REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 302 (2005).

118. *See* J.D. Harrison, *Senators Take Another Shot at Startup Act, Pitching Tax Tweaks and Immigration Reform*, WASH. POST (Jan. 18, 2015), https://www.washingtonpost.com/business/on-small-business/senators-take-another-shot-at-startup-act-pitching-tax-tweaks-and-immigration-reform/2015/01/16/3ff2a584-9db1-11e4-a7ee-526210d665b4_story.html ("We need entrepreneurs and start-ups, and they need this kind of legislation.") (quoting Senator Jerry Moran).

119. *See* StartUp Visa Act of 2010, S. 3029, 111th Cong. (2010); StartUp Visa Act of 2011, S. 565, 112th Cong. (2011); StartUp Act 2.0, S. 3217, 112th Cong. (2012); StartUp Act 3.0, S. 310, 113th Cong. (2013); StartUp Act, S. 181, 114th Cong. (2015).

120. *See supra* note 119 and accompanying text; *see also* Harrison, *supra* note 118 ("[The Startup Act] features changes to the immigration system, including the creation of an entrepreneur visa that would enable up to 75,000 non-citizens to start and attempt to grow a business in the United States. Should the company meet certain investment and hiring benchmarks within the first three years, the entrepreneur can eventually apply for a permanent visa.").

121. *See* S. 181; *see also Startup Act*, JERRY MORAN: U.S. SENATOR FOR KAN.

Entrepreneur Visa provision would establish 75,000 visas per year for qualified alien entrepreneurs.[122] To be eligible for the Entrepreneur Visa, an applicant would need to be a valid F-1[123] or H-1B visa holder.[124] Then, within the first year as an Entrepreneur Visa holder, the alien would need to register a business, invest or raise at least $100,000, and hire at least two full-time employees.[125] Once the first-year requirements are satisfied, the Entrepreneur Visa would be extended for three years, and at the end of the three years, the entrepreneur would be eligible to remove the conditional status of the visa.[126] The STEM provision would make 50,000 visas available for foreign students with a Master's or Ph.D. degree in the STEM fields.[127] Proponents of the Startup Act contend that its provisions would create up to 1,600,000 new U.S. jobs.[128] Although the Startup Act is a product of bipartisan efforts[129] and has received strong lobbying support,[130] the bill continues to flounder[131]—leaving the immigration system with only the original immigration acts, which have not been updated for over a

http://www.moran.senate.gov/public/index.cfm?p=startup-act (last visited Oct. 13, 2016).

122. *See* S. 181.

123. "An F1 visa is issued to international students who are attending an academic program or English Language Program at a US college or university." *F1 Student Visa*, INT'L STUDENT, http://www.internationalstudent.com/immigration/f1-student-visa/ (last visited Nov. 5, 2016).

124. *See* StartUp Act § 210(A)(e)(A)(i)–(ii) (defining "qualified alien entrepreneur").

125. *See id.* § 210(B) (outlining the requirements for the first year as an Entrepreneur Visa holder).

126. *See id.* § 210(C) (requiring that the entrepreneur employ at least five full-time employees during the three-year period); *see also id.* § 210(A)(d) (discussing eligibility to remove conditional status).

127. *See id.* § 3. "Visa recipients would be granted conditional status contingent upon their remaining actively engaged in a STEM field for five consecutive years. Once conditional status is lifted, the visa holder becomes a permanent legal resident with the option to naturalize." *Startup Act*, *supra* note 121.

128. *See* Kauffman Foundation, *Startup Act 3.0: Employment Impact of an Entrepreneur Visa*, JERRY MORAN: U.S. SENATOR FOR KAN. (Feb. 2013) http://www.moran.senate.gov/public/index.cfm/files/serve?File_id=d96346bc-2125-4439-99b3-23e7910114a5. In a 2013 study, the Kauffman Foundation, an independent entrepreneur-focused organization, established that the Startup Act would create up to 1,600,000 new jobs. *Id.*

129. *Id.* (listing the Startup Act's authors, who are both Democratic and Republican).

130. *See* Evelyn M. Rusli, *Facebook's Mark Zuckerberg Starting Political Group*, WALL STREET J. (Mar. 26, 2013, 5:21 PM), http://www.wsj.com/articles/SB10001424127887324105204578384781088854740 (reporting on Mark Zuckerberg's political advocacy group's pressure on Congress to pass the Startup Act).

131. Adam Bluestein, *The Most Entrepreneurial Group in America Wasn't Born in America,* INC. (Feb. 2015), http://www.inc.com/magazine/201502/adam-bluestein/the-most-entrepreneurial-group-in-america-wasnt-born-in-america.html.

decade.[132]

Despite Congress's continual efforts to define the immigration system, the congressional acts are just the starting blocks of immigration law.[133] In fact, the body of immigration law relies heavily on administrative rules to implement and interpret the immigration system.[134] Consequently, the legislative laws arguably hold less weight in immigration than in other fields of law.[135]

C. The Role of Administrative Law

1. Administrative Law Rulemaking

As a federal administrative agency, USCIS performs legislative-like duties.[136] In establishing USCIS, Congress endowed the agency with the power to formulate rules to enforce the congressional immigration statutes.[137] Although Congress cannot constitutionally delegate legislative power,[138] the rulemaking power granted to federal agencies, and in this case, USCIS, provides agencies with broad discretionary authority.[139] Under the Administrative Procedure Act (APA), an administrative rule encompasses "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."[140] In practice, the APA's rule definition essentially can cover any agency statement.[141] Federal agencies use this

132. *See supra* notes 111–32 and accompanying text.

133. *See supra* notes 104–10 and accompanying text.

134. *See* Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 566 (2012) (situating immigration law within administrative law and underscoring the frequent use of nonlegislative rulemaking in immigration law).

135. *See id.* ("Immigration law can seem to be in its own world, divorced from the evolution of important legal concepts.").

136. *Id.* at 569.

137. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 § Subtitle E (2002).

138. *See, e.g.*, Field v. Clark, 143 U.S. 649, 692 (1892).

139. Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1311 (2015); *see also* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 50–51 (ABA ed., 2006).

140. 5 U.S.C. § 551(4) (2016).

141. William S. Jordan, III, *Rulemaking*, A.B.A 1, http://www.americanbar.org/content/dam/aba/events/administrative_law/2011/11/2011_fall_administrativelawconference/rulemaking_chapter

definition to create far-reaching rules that clarify statutes, set priorities, and establish procedures.[142] Nonetheless, agencies' rulemaking powers are at least theoretically limited by their inability to bind the public without satisfying strict procedural requirements.[143]

Agencies make binding rules through formal and informal rulemaking.[144] However, today, formal rulemaking is seldom used.[145] Courts, agencies, and scholars have found formal rulemaking unnecessarily burdensome to implement regularly.[146] Thus, in the alternative, for a federal agency rule to bind the public, the agency typically should implement an informal rule, which is a rule that complies with notice-and-comment requirements.[147] Notice-and-comment rulemaking requires that the agency publish the proposed rule in the Federal Register,[148] provide interested parties an opportunity to submit written comments regarding the substance of the proposed rule,[149] and publish a final version of the rule after considering the public's comments.[150] The notice-and-comment rulemaking process attempts to protect the public from agencies making sweeping new requirements without giving them warning or the opportunity to object.[151] However, agencies criticize notice-and-comment rulemaking as restrictive

_2011.authcheckdam.pdf (last visited Oct. 11, 2016).

142. Cass, *supra* note 139, at 1312–13.

143. *See* Family, *supra* note 134, at 571.

144. *See* LUBBERS, *supra* note 139, at 58–61.

145. *See* Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 251–52 (explaining that *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973) greatly limited the scope of formal rulemaking, because the Court established that formal rulemaking is not triggered unless a statute explicitly states that rules must be made "on the record"); *see also* LUBBERS, *supra* note 139, at 59. Formal rulemaking occurs when an agency is required by statute to make rules "on the record after [the] opportunity for an agency hearing." 5 U.S.C. § 553(c) (2012). To satisfy formal rulemaking procedures, an agency must undergo a quasi-trial. *See* LUBBERS, *supra* note 139, at 58–59. The agency must support the rule with substantial evidence, present the rule at an oral hearing, and be subject to cross-examination. *See* 5 U.S.C. §§ 556–557 (2012); *see also* LUBBERS, *supra* note 139, at 58–59.

146. *See* LUBBERS, *supra* note 139, at 59 ("Formal rulemaking always has been the exception rather than the norm."); *cf.* Nielson, *supra* note 145, at 242.

147. *See* LUBBERS, *supra* note 139, at 60 (stating that agencies primarily use informal rulemaking to create rules).

148. *See* 5 U.S.C. § 553(b); *see also* LUBBERS, *supra* note 139, at 275–94.

149. *See* 5 U.S.C. § 553(c); *see also* LUBBERS, *supra* note 139, at 295–313.

150. *See* 5 U.S.C. § 552(a)(1)(D) (2012); *see also* LUBBERS, *supra* note 139, at 385–94.

151. *See* Jordan, *supra* note 141, at 1.

and burdensome, much like formal rulemaking.[152] Agencies reason that notice-and-comment rulemaking can unduly inhibit an agency from quickly disseminating necessary information throughout the agency and to the public.[153] Consequently, agencies often turn to statutory exceptions to notice-and-comment rulemaking to implement agency directives.[154]

The APA provides for two main exceptions to notice-and-comment rulemaking: (1) when an agency interprets a rule; or (2) when an agency provides a general statement of policy.[155] The interpretive-rule prong allows agencies to advise the public about how the agency will construe a statute or regulation,[156] and similarly, the policy-statement prong allows agencies to inform the public on how the agency will approach a particular issue.[157] Agencies generously use interpretive rules and policy statements to promulgate rules.[158] Nonetheless, agencies do need to demonstrate that their rules fall within these specific exceptions.[159]

The overarching theme in courts' determinations of whether interpretive rules or policy statements satisfy an exception to notice-and-comment requirements generally revolves around whether the rule's language or the agency's actions make the rule legally binding on the public; because, if a rule is legally binding, then it will not satisfy the exception to notice-and-

152. *See* Family, *supra* note 134, at 578–79.

153. *See id.*

154. *See id. But see* International Entrepreneur Rule, 81 Fed. Reg. 60,130 (proposed Aug. 31, 2016) (to be codified at 8 C.F.R. pts. 103, 212, 274a) [hereinafter International Entrepreneur Rule]; *infra* Section II.C.2.a. DHS published a notice-and-comment rule to grant immigration benefits to immigrant entrepreneurs on August 31, 2016, demonstrating USCIS's willingness to employ the seldom-used notice-and-comment rulemaking procedures. *See infra* Section II.C.2.a.

155. *See* 5 U.S.C. § 553(b)(3)(A)–(B) (2012). The APA also provides an exception to notice-and-comment rulemaking when an agency finds the notice-and-comment process "impracticable, unnecessary, or contrary to the public interest" for good cause. *Id.* § 553(b)(3)(B). However, the good cause exception is used much less than interpretive rules and policy statements, because courts construe good cause as exceedingly narrow. *See* Jordan, *supra* note 141, at 10 (quoting San Diego Navy Broadway Complex Coal. v. U.S. Coast Guard, No. 10CV2565–IEG RBB, 2011 WL 1212888, at *3 (S.D. Cal. Mar. 30, 2011) ("The courts generally articulate a demanding test under which the exception 'is to be narrowly construed' and will apply 'only when delay would do real harm.'"). Indeed, USCIS generally uses interpretive rules and policy statements. *See* Family, *supra* note 134, at 568.

156. *See* LUBBERS, *supra* note 139, at 74 (indicating that the purpose of the interpretive rule exemption is to provide agencies with flexibility to clarify ambiguous statutes without extensive proceedings).

157. *See* Family, *supra* note 134, at 572.

158. *See id.* at 568.

159. *See id.*

comment requirements.[160] Courts use a four-factor "legal effects" test to determine whether an interpretive rule is legally binding:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, [and] (4) whether the rule effectively amends a prior legislative rule.[161]

In addition, scholars point to supplemental factors that courts seriously consider, such as: whether the rule interprets a legal standard or makes a policy; whether the interpretive rule is inconsistent with a prior rule; and whether the agency contemporaneously indicated that it was using an interpretive rule.[162] Finally, in making this fact-specific inquiry, courts closely examine the language of the statute versus the language of the agency's interpretive rule.[163] Because of the detailed factors necessary to satisfy the legal effects test, there is no bright-line standard to determine whether a rule is legally binding.[164]

Just as with interpretive rules, courts equitably weigh the circumstances to determine if an agency's general policy statement is legally binding.[165]

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160. *See* William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1326 (2001).

161. Am. Mining Cong. v. Mine Safety Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993).

162. *See* Funk, *supra* note 160, at 1328–30.

163. *Compare Am. Mining Cong.*, 995 F.2d at 1112 (finding that the Mine Safety and Health Administration's statement that certain x-ray readings qualify as a "diagnosis" constituted a valid interpretive rule because the agency was interpreting the ambiguous term "diagnosis" from the Code of Federal Regulations), *with* Erringer v. Thompson, 371 F.3d 625, 630 (9th Cir. 2004) (finding that the Medicare statute did not contain ambiguous standards of approval; and therefore, Health and Human Services' new denial rules for payment of health services could not satisfy the interpretive rule exception). Perhaps a simple, but more straightforward approach to deciphering if an interpretive rule is valid is to look at whether it is truly interpretive, or is instead a new substantive rule. *See* Jordan, *supra* note 141, at 4 ("Almost hidden in the [*American Mining Congress*] court's formulation is a simpler approach suggested (indeed dictated) by the language of the APA. Under the APA, the question is whether the statement is 'interpretive'—an interpretation.").

164. *See* Jordan, *supra* note 141, at 3–9; *see also* Family, *supra* note 134, at 575 ("[D]etermining whether an agency appropriately applied the interpretive rule label is an intensively case-specific inquiry.").

165. *See* Funk, *supra* note 160, at 1332–37. Courts look at these circumstances whether the agency announces an order to inform the public or provides guidance to employees within the agency. *Id.*

As a result, an agency again cannot rely on a bright-line standard to determine whether it exceeded agency rulemaking powers when it issues a policy statement.[166] One key factor courts use to judge whether a policy statement is binding is whether the agency will indiscriminately use the policy statement to decide future cases.[167] The U.S. Court of Appeals for the District of Columbia Circuit outlined this fundamental element by explaining: "When the agency states that in subsequent proceedings it will thoroughly consider not only the policy's applicability to the facts of a given case but also the underlying validity of the policy itself, then the agency intends to treat the order as a general statement of policy."[168] Specifically, in making this equitable evaluation, courts look at the nature of the agency's announcement, the agency's motivation in making the policy statement, and the agency's actions in carrying out the policy.[169]

Agencies recognize the need to demonstrate at least a modicum of discretion in implementing policy statements.[170] Consequently, agencies combat judicial challenges to their policy statements by including detailed language emphasizing that an agency employee can always elect to execute discretion in carrying out the policy statement.[171]

Scholars argue that language about discretion in policy statements is typically a façade that allows agencies to fly binding norms under the radar of the courts, masking them as discretionary policy statements.[172] As Professor William Funk aptly noted:

> [A]gencies publish[] enforcement policies with elaborate caveats that they are tentative, may change at any time, may not be followed in any particular case, and should not be relied upon. Taken at face

166. *See id.*

167. *See* Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (explaining that a general statement of policy "announces the agency's *tentative* intentions for the future") (emphasis added).

168. *Id.* at 39.

169. *See id.*; *see also* Funk, *supra* note 160, at 1332.

170. *See* Funk, *supra* note 160, at 1335; *see also* Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 949–50 (D.C. Cir. 1987) (finding that the Food and Drug Administration (FDA) policy statement was binding and therefore invalid, because the FDA assured the public that it would always follow the statement and did not include any indication in the policy statement that the FDA agents reserved discretion in enforcing it).

171. *See* Funk, *supra* note 160, at 1335; *see also* Family, *supra* note 134, at 569 (discussing the impact of the *Pacific Gas and Electric Company* decision on agency rulemaking).

172. *See* Funk, *supra* note 160, at 1335.

> value these policy statements then become useless because they do not communicate any intention at all. As a practical matter, however, the agency "winks;" that is, it lets it be understood that you can rely on the policy statement and avoid enforcement if you act in conformance with the policy statement.[173]

With this "wink," agencies effectively bind the public without using the requisite notice-and-comment rulemaking.[174]

In sum, agencies are theoretically prohibited from using the interpretive-rule and policy-statement exceptions to bind the public while skirting around the notice-and-comment rulemaking process.[175] Indeed, as noted above, courts consistently find that without notice-and-comment rulemaking, agencies have no authority to bind the public.[176] Nonetheless, courts and agencies struggle to distinguish between rules subject to notice-and-comment rulemaking and rules that are exempt from the process.[177] Therefore, in practice, many interpretive and policy statement rules function as legally binding rules.[178] As a result, the exceptions to notice-and-comment requirements have become useful tools for agencies to swiftly bind the public.[179]

173. *Id.*; *see also* Family, *supra* note 134, at 579 (highlighting the "nagging concern that when an agency issues a nonlegislative rule, it is cutting procedural corners").

174. Funk, *supra* note 160, at 1335. Scholars heavily criticize the practical binding effect of policy statements with discretionary language. *See* Family, *supra* note 134, at 579 (outlining various arguments against "binding" policy statements); *see also* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1319 (1992).

175. *See* Funk, *supra* note 160, at 1335.

176. *See supra* notes 144–75 and accompanying text.

177. *See* Family, *supra* note 134, at 570 ("Distinguishing between nonlegislative and legislative rules is one of the most complex tasks in administrative law.").

178. *See id.* at 570–71. It is common for agencies to treat an interpretive rule as binding within the agency—expecting internal personnel to always comply with the particular interpretation. LUBBERS, *supra* note 139, at 82.

179. *See* Family, *supra* note 134, at 566 (explaining that agency rulemaking, whether legally binding, has a "practical binding effect").

2. USCIS & Administrative Law

a. The Proposed International Entrepreneur Rule

Despite the rigidity of the notice-and-comment requirements, USCIS recently submitted a rule for notice-and-comment that is specifically designed for immigrant entrepreneurs.[180] The International Entrepreneur Rule, which DHS published in the Federal Register on August 31, 2016 for public comment, would provide immigrant entrepreneurs with an option to temporarily enter the United States and work as entrepreneurs.[181] The rule would permit an immigrant entrepreneur with substantial ownership and an "active and central role" in a startup company[182] to remain in the United States for an initial stay of two years, with the potential to renew for an additional three years.[183] In addition, to be eligible under the rule, an applicant would need to prove that the startup entity formed within the past three years has "substantial and demonstrated potential for rapid growth and job creation."[184] The entrepreneur must demonstrate this growth with evidence of an investment of $345,000 from qualified investors, $100,000 from qualified government awards, or a partial amount of a qualified investment along with "'reliable and compelling' evidence of the entity's substantial potential for rapid growth and job creation."[185]

DHS proposed this rule under its existing statutory authority to grant parole on a "case-by-case basis for urgent humanitarian reasons or significant public benefit [to] any individual applying for admission to the

180. International Entrepreneur Rule, *supra* note 154, at 60,130 ("[T]his proposal would encourage foreign entrepreneurs to create and develop start-up entities with high growth potential in the United States, which are expected to facilitate research and development in the country, create jobs for U.S. workers, and otherwise benefit the U.S. economy through increased business activity, innovation and dynamism.").

181. *Id.*

182. *Id.* at 60,138. The proposed rule seeks to define an eligible "entrepreneur" as an applicant who: "(1) Possesses a substantial ownership interest in the start-up entity, and (2) has a central and active role in the operations of that entity, such that his or her knowledge, skills, or experience will substantially assist the entity with the growth and success of its business." *Id.*

183. *See id.* at 60,136 ("If granted, parole would be authorized for up to 2 years to facilitate the entrepreneur's ability to oversee and grow his or her start-up entity in the United States."). DHS will evaluate the applicant's request for a three-year extension by examining whether the applicant's entrepreneurship continues to provide a significant public benefit to the United States. *Id.* at 60,137.

184. *Id.* at 60,131.

185. *Id.* at 60,139–42.

United States."[186] Specifically, DHS reasons that immigrant entrepreneurs generate significant public benefit for the United States by fueling innovation and economic growth.[187] While the proposed rule potentially creates a viable option for immigrant entrepreneurs, it is not an immigrant entrepreneur visa; instead, it is a type of temporary parole status.[188] This means that the parolee is limited to the temporary period granted and cannot qualify to adjust status to lawful permanent residence based on the parole status.[189]

Practitioners admire DHS's proactive International Entrepreneur Rule, applauding the efforts of DHS and USCIS to offer a tangible change to the current restrictive landscape for immigrant entrepreneurs.[190] However, in the same breath, practitioners point out the many downfalls of the proposed rule.[191] In a public comment on the proposed rule, the American Immigration Lawyers Association (AILA) criticizes various provisions of the proposed rule, including its temporary nature, its prohibitively high investment requirements, its narrow interpretation of a "qualified investor," and its overly burdensome evidentiary requirements.[192] Thus, despite DHS's laudable effort to establish clear rules for immigrant entrepreneurs, practitioners ultimately regard the proposed International Entrepreneur Rule as a "path fraught with uncertainty."[193]

Adding to this uncertainty, no one knows how the comments to the

186. 8 U.S.C. § 1182(d)(5)(A) (2013).

187. International Entrepreneur Rule, *supra* note 154, at 60,135 ("DHS believes that enabling foreign entrepreneurs to establish and grow their start-up entities in the United States, rather than abroad, would yield a significant public benefit in certain cases.").

188. *Id.* at 60,134 ("Parole does not provide a parolee with temporary nonimmigrant status or lawful permanent resident status. Nor does it provide the parolee with a basis for changing status to that of a nonimmigrant or adjusting status to that of a lawful permanent resident, unless the parolee is otherwise eligible.").

189. *Id.*

190. American Immigration Lawyers Association, Comment Letter on Proposed International Entrepreneur Rule (Oct. 17, 2016), https://www.regulations.gov/document?D=USCIS-2015-0006-0422 [hereinafter AILA Comment] ("The efforts of the Administration to find ways to support and retain foreign entrepreneurs is an important recognition that our immigration laws have not kept pace with modern business practices and that immigrants play a significant role in business creation.").

191. *See id.* ("[W]e are deeply concerned that the proposed regulation, as currently written, will not be a practical tool for attracting and retaining promising businesses and their founders.").

192. *Id.*

193. *Id.*

proposed rule will influence the outcome of the final rule[194]—whether DHS will finalize the rule as is, substantially alter it, or throw it out completely.[195] Consequently, while this is a substantial and innovative first step for DHS and USCIS to use administrative rulemaking to create change for immigrant entrepreneurs, it still leaves practitioners and immigrant entrepreneurs wanting more.[196] Here, exceptions to the notice-and-comment rulemaking requirements, i.e. nonbinding rules, provide a potential alternative route.[197]

b. Nonbinding Rules

USCIS is no stranger to nonbinding rules.[198] The key laws and rules that guide USCIS adjudicators' decisions include: (1) the Immigration and Nationality Acts; (2) precedential decisions by the Administrative Appeals Office (AAO); (3) the Adjudicator's Field Manual (AFM); and (4) individual policy memoranda produced by USCIS officials.[199] Only two of the four above innately bind the public: the Immigration and Nationality Acts and precedential AAO decisions.[200] Although the INA is the fundamental basis for USCIS adjudicators' decisions, the laws have not been

194. DHS accepted comments on the rule until October 17, 2016. International Entrepreneur Rule, *supra* note 154, at 60,130. At the time this Comment was completed for publication on November 8, 2016, DHS had not finalized any provisions of the rule. *See International Entrepreneurs*, REGULATIONS.GOV, https://www.regulations.gov/document?D=USCIS-2015-0006-0001 (last visited Oct. 27, 2016).

195. *See Proposed Rule to Expand Entrepreneur Parole*, MURTHY L. FIRM (Sept. 9 2016), https://www.murthy.com/2016/09/09/proposed-rule-to-expand-entrepreneur-parole/.

196. *See* AILA Comment, *supra* note 190.

197. *See infra* Section II.C.2.b.

198. *See* Family, *supra* note 134, at 593 ("USCIS relies on guidance to a great extent. . . . [S]ignificant immigration law issues [] are governed by nonlegislative rules.").

199. U.S. Citizenship & Immigration Servs., Adjudicator's Field Manual § 3.4(a) (2013) [hereinafter AFM]. The AFM "comprehensively details USCIS policies and procedures for adjudicating applications and petitions." *Introduction to the Adjudicator's Field Manual*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1.html (last visited Oct. 12, 2016) [hereinafter AFM Introduction]. As a part of this, the AFM provides a full list of materials that a USCIS adjudicator must consider when evaluating an application: "statutes and regulations, field and administrative manuals, handbooks and operations instructions, published precedent decisions, [and] memoranda and cables from Headquarters specifically designated as policy." AFM § 3.4(a). In addition, the AFM provides a long list of other materials that USCIS adjudicators can use—but are not bound by—to adjudicate an application, such as training materials, letters from USCIS Headquarters to the public, unpublished AAO decisions, and legislative history. *Id.*

200. *See* Family, *supra* note 134, at 590–92.

substantively updated for over a decade.[201] Meanwhile, the AAO has only published eleven precedential decisions in the past twenty years.[202] Further, USCIS proposed less than fifty rules to be submitted for notice-and-comment rulemaking.[203] This has resulted in an abundance of nonbinding rules promulgated by the AFM and USCIS policy memoranda.[204]

USCIS adjudicators' decisions are dominated by these nonbinding rules.[205] The AFM is the most influential guide for USCIS adjudicators.[206] While the AFM articulates binding laws, such as relevant statutes and AAO decisions, it is also constantly outlining nonbinding interpretive rules or policy statements.[207] Further, unlike the sparse AAO decisions and notice-and-comment rules, USCIS has set forth hundreds of policy statements since its inception in 2003.[208] Not only is immigration law bursting with nonbinding rules, USCIS—perhaps more than any other agency—continually enforces these "nonbinding" rules with the full force of the law.[209] The text of the AFM itself demonstrates how USCIS actually implements the nonbinding rules: "[P]olicy material is binding on all USCIS officers and must be adhered to unless and until revised, rescinded or superseded by law, regulation or subsequent policy, either specifically or by application of more recent policy material."[210] Confusingly, the AFM also indicates that its contents cannot be construed as establishing a binding right

201. *See supra* Section II.B.1.

202. *See DHS/AAO/INS Decisions*, U.S. DEP'T JUST., http://www.justice.gov/eoir/dhs-aao-ins-decisions (last updated Apr. 23, 2015). Precedential AAO decisions rarely occur, because to earn this distinction, a decision must undergo a long process that includes approval by the Attorney General. *See* 8 C.F.R. § 103.3(c) (2011).

203. *See* Family, *supra* note 134, at 593.

204. *See* AFM § 3.4(a); *see also* Family, *supra* note 134, at 593.

205. *See* Family, *supra* note 134, at 593.

206. *See* AFM § 1.1 ("The AFM will provide ready access to procedural and policy materials relating to every aspect of the Adjudications Program. In addition, the AFM will incorporate all currently valid policy wires and memoranda. The AFM is an ever-evolving document which will be updated on a regular basis, incorporating new policies or procedures which may have been implemented by USCIS.").

207. *See* Family, *supra* note 134, at 570; *see also supra* Section II.C.1.

208. *See Policy Memoranda*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/laws/policy-memoranda (last visited Oct. 12, 2016).

209. *See* Family, *supra* note 134, at 567 ("[USCIS] . . . employs nonlegislative rules on a massive scale.").

210. AFM § 3.4(a). The AFM and policy memoranda are included in the definition of binding "policy" outlined in the AFM. *See supra* note 199 and accompanying text.

of any kind.[211] Nonetheless, practitioners and scholars agree that the AFM and policy memoranda function much more like binding laws than discretionary rules.[212]

Allegedly "nonbinding" policy memoranda have intimately impacted immigrant entrepreneurs' USCIS petitions and applications.[213] The best example of this is the January 8, 2010 Neufeld Memorandum (Neufeld Memo), which, for the first time, defined a standard for the employer–employee relationship required for an H-1B temporary work visa.[214]

Specifically, the Neufeld Memo provides guidance on how USCIS interprets the INA's H-1B requirement that a sponsoring U.S. employer "[h]as an employer–employee relationship with respect to employees . . . as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee."[215] These factors listed in the INA are often collectively called the "control test."[216] Prior to the Neufeld Memo, practitioners pressured USCIS to provide guidance on how the control test applied to an H-1B visa holder at a third-party jobsite—arguing that USCIS inconsistently interpreted what it meant for a U.S. employer to have the requisite control to sponsor an H-1B visa.[217] Nonetheless,

211. *See* AFM Introduction, *supra* note 199 ("Nothing in the AFM shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.").

212. *See* Family, *supra* note 134, at 587 ("USCIS's use of nonlegislative rules frustrates private immigration attorneys. AILA has expressed its concern over the use of such rules in immigration law. AILA has complained to USCIS about changing adjudication standards, confusion as to the binding effect of guidance documents, and a lack of transparency accompanying the use of guidance.").

213. *See* Morford, *supra* note 74, at 310.

214. Memorandum from Donald Neufeld, Acting Assoc. Dir. Domestic Operations Directorate, U.S. Citizenship & Immigration Servs., on Determining Employer–Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements (Jan. 8, 2010), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf [hereinafter Neufeld Memo].

215. *Id.* at 2 (quoting 8 C.F.R. § 214.2(h)(4)(ii) (2011)).

216. *District Court Rejects Challenge to Neufeld Memo Regarding H-1B Control Test*, 87 INTERPRETER RELEASES 1646, 1646 (Jan. 18, 2010).

217. *See* Austin T. Fragomen, Jr., *The Impact of the Neufeld H-1B Memorandum on Third-Party Placements*, 87 INTERPRETER RELEASES 637, 637 (Mar. 22, 2010) ("Though the business immigration community had long been promised policy guidance on the placement of H-1B workers at third-party worksites . . . , practitioners were shocked that the agency focused instead on its view of what constitutes employment for purposes of the H-1B category."). Third-party jobsites continually caused problems for H-1B applicants, because in some cases USCIS would require employers to supervise the H-1B worker at all times, and in other cases, USCIS would permit an

practitioners received more than they bargained for with the Neufeld Memo, which set out exacting standards to establish a valid employer–employee relationship.[218] First, the Neufeld Memo added additional factors to the control test—for a total of eleven factors—that USCIS weighs to determine whether an employer controls its employees.[219] Second, the Neufeld Memo called attention to independent contractors, self-employed workers, and consulting firms as likely to fail the employer–employee relationship standard.[220] Third, the memo detailed a long list of evidentiary requirements that employers must meet to establish an employer–employee relationship.[221] In sum, the Neufeld Memo changed how many practitioners advised their clients and added a heavy evidentiary burden for employers who intended to employ temporary foreign workers.[222]

The Neufeld Memo claimed that it simply clarified already existing policy.[223] However, critics argue that it violated the APA, because it created a higher standard than the INA allows and therefore could not be classified as a policy statement or a collection of interpretive rules.[224] Indeed, just a few months after the Neufeld Memo, technology companies challenged the memo in court.[225] The information technology (IT) firms—which continually relied on foreign citizens to fulfill the IT needs of off-site small

H-1B worker to visit jobsites without any supervision. *See id.* Thus, practitioners simply sought a more uniform standard for third-party jobsites. *Id.*

218. *See id.*

219. *See* Neufeld Memo, *supra* note 214, at 3–4. Along with the original control test factors of whether the employer can hire, pay, fire, or supervise its employees, the Neufeld Memo indicated that USCIS considers whether the employer: supervises off-site workers, documents off-site supervision, controls the day-to-day work, provides tools for the employment duties, evaluates work-product, claims the beneficiary for tax purposes, provides employment benefits to the beneficiary, receives an end-product from the beneficiary that is in its line of business, and controls the manner and means of the work. *Id.*

220. *See id.* at 5–7 ("The following scenario[] would *not* present a valid employer–employee relationship: Self-Employed Beneficiaries.") (emphasis added).

221. *See id.* at 8–9. The Neufeld Memo provides an extensive list of evidence petitioners should use to demonstrate an employer–employee relationship. *Id.* For example, the list suggests that a petitioner should submit to USCIS: "[a] complete itinerary of services" for every date the employee will be off-site, and copies of "relevant portions of valid contracts" that establish where the employee will be placed. *Id.* at 8.

222. *See* Fragomen, *supra* note 217, at 637.

223. *See* Neufeld Memo, *supra* note 214, at 1; *see also* Fragomen, *supra* note 217, at 637.

224. *See* Morford, *supra* note 74, at 315.

225. *See* Broadgate Inc. v. U.S. Citizenship & Immigration Servs., 730 F. Supp. 2d 240, 241 (D.D.C. 2010).

businesses—contended that the Neufeld Memo was binding "on its face and as applied."[226] The IT firms argued that the policies outlined in the Neufeld Memo must undergo notice-and-comment scrutiny before USCIS implements the memo's regulatory requirements.[227] The court firmly dismissed the IT companies' argument.[228] The court found that the Neufeld Memo was within the purview of USCIS's power to provide discretionary policy statements and interpretive rules.[229] In validating the Neufeld Memo, the court focused on the memo's discretionary language.[230] The court emphasized that the Neufeld Memo's stated purpose was to provide guidance, not establish new substantive rules.[231] The court pointed to the memo's specific language: "[T]he [Neufeld Memo] explains that the impetus for its issuance was the 'lack of guidance' on the Regulation's application, which in some contexts, including third-party employment, 'has raised problems.'"[232] Further, the court cited the Neufeld Memo's assurance that USCIS will flexibly weigh all the employer–employee control test factors.[233] Consequently, the court left USCIS, practitioners, employers of foreign

226. *Id.* at 245.

227. *See id.* at 242 ("Plaintiffs argue . . . that the Neufeld Memorandum establishes a different standard from the [INA's] control test, and therefore constitutes a new, binding rule. Because the Memorandum was not issued in accordance with the APA's procedures for agency rulemaking, Plaintiffs argue that this new 'rule' must be invalidated.").

228. *See id.* at 245.

229. *See id.* at 247. While the court analyzed the question in terms of whether the Neufeld Memo was a final agency action (i.e., a legislative rule that needed to undergo notice-and-comment rulemaking), the court also used the definitions of policy statements and interpretive rules to disqualify it as a legislative rule. *Id.* at 242–44 ("If the [Neufeld Memo] is a legislative rule, then it is final agency action under the APA subject to judicial review, and it is subject to notice and comment rulemaking under § 553. However, as just stated, if the [Neufeld Memo] is an interpretive rule or general policy statement, the opposite is true: it is not final agency action.").

230. *See id.* at 245. The court looks at the language of the Neufeld Memo in its analysis of whether the Memo is binding in its application:

> Turning to the Memorandum's application, there is no evidence that it . . . binds USCIS adjudicators . . . . In fact, in addition to emphasizing that no single factor among the eleven is dispositive, the Memorandum instructs USCIS adjudicators to look to the totality of the circumstances in each case to determine whether there is an employer–employee relationship.

Id.

231. *See id.*

232. *Id.* (quoting Neufeld Memo, *supra* note 214, at 2).

233. *Id.* ("The [Neufeld Memo] states that its eleven factors are derived from the common law, and the Memorandum emphasizes that 'no one factor [is] decisive' and that 'the common law is flexible about how [they] are to be weighed.'") (quoting Neufeld Memo, *supra* note 214, at 5).

workers, and immigrants with a clear-cut answer: USCIS can use policy memos to outline additional regulatory factors and enforce heightened evidentiary standards.[234]

Although the D.C. District Court found that the Neufeld Memo did not change substantive law, the memo drastically altered the landscape for self-employed foreign workers in its application.[235] Prior to the Neufeld Memo, both the Board of Immigration Appeals (BIA) and the AAO directly addressed the issue of whether a corporation could sponsor its sole owner for an immigrant or nonimmigrant visa multiple times.[236] Each time, the BIA and AAO interpreted the employer–employee relationship broadly, continually finding business owners, owner–managers, directors, and stockholders eligible for immigration benefits.[237] For example, in *Matter of M*, the BIA held that a corporation was not precluded from petitioning for its sole owner.[238] The Neufeld Memo narrowed, or arguably removed, this kind of allowance for corporations to sponsor their owners.[239]

Since 2010, USCIS has issued additional nonbinding regulatory guidance for immigrant business owners and entrepreneurs, but nothing as influential as the Neufeld Memo.[240] In 2011 and later in 2012, USCIS

234. *See id.* at 247.

235. Memorandum from AILA-USCIS HQ Liaison Comm., Am. Immigration Lawyers Ass'n, to Roxana Bacon, Chief Counsel, U.S. Citizenship and Immigration Servs. (Jan. 26, 2010), http://www.aila.org/infonet/aila-liaison-memo-re-niv-owners-beneficiaries [hereinafter Memo to Roxana Bacon] (arguing that the Neufeld Memo overturned a long history of precedent).

236. *See, e.g.*, Matter of Aphrodite Invs. Ltd., 17 I. & N. Dec. 530 (BIA 1980); Matter of Allan Gee, Inc., 17 I. & N. Dec. 296 (BIA 1979); Matter of M, 8 I. & N. Dec. 24 (BIA 1958).

237. *See Matter of M*, 8 I. & N. Dec. at 50–51; *see also* Memo to Roxana Bacon, *supra* note 235, at 11–14 ("These various agency interpretations of the term 'employee' are remarkably consistent in that they all include working owners, irrespective of the degree of control they have over the entity, as persons who are included in the class of beneficiaries for employment based immigrant and non-immigrant visas.").

238. *Matter of M*, 8 I. & N. Dec. at 42 ("[T]he fact that the beneficiary is the major stockholder of the corporation would not prevent the corporation from filing a petition on your client's behalf.").

239. *See* Memo to Roxana Bacon, *supra* note 235, at 19.

240. *See* Morford, *supra* note 74, at 323; *cf.* Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (2015) (to be codified at 8 C.F.R. pts. 214, 274a). In 2015, DHS amended regulations to provide work authorization for H-1B visa-holder spouses (H-4 visa holders). *Id.* The authorization of H-4 employment is considered an indirect benefit to immigrant entrepreneurs, because prior to the DHS's action, H-4 visa holders often held advanced degrees from their home countries but could not put their degrees to use, because they were not permitted to work in any capacity in the United States. *See id.* ("This is an important goal considering the contributions such individuals make to entrepreneurship and research and development, which are highly correlated with overall economic growth and job creation.").

provided guidance on its website that purported to update the Neufeld Memo.[241] The revised guidance stated that a company sponsoring an immigrant-owner of the business may demonstrate that a valid employer–employee relationship exists by showing that the company has a separate board of directors that can control the owner's employment.[242] Nonetheless, this online question-and-answer guidance is much less formal than the published Neufeld Memo and arguably holds little power over USCIS adjudicators' decisions.[243] This use of informal guidance appears to be a trend for USCIS, especially in regard to immigrant entrepreneurs.[244] Although DHS and USCIS appear to be on board with reform for immigrant entrepreneurs, since the Neufeld Memo, many of the agencies' actions have lacked teeth[245]—instead of relying on straightforward USCIS policy memoranda, DHS has published numerous vague press releases on the topic.[246]

D. Expansion of Alternative Methods to Alter Immigration Laws

This recent trend of vague and informal guidance for immigrant entrepreneurs appears throughout the U.S. government.[247] Especially up

241. *See Questions & Answers: USCIS Issues Guidance Memorandum on Establishing the "Employee–Employer Relationship" in H-1B Petitions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 12, 2012), https://www.uscis.gov/news/questions-answers-uscis-issues-guidance-memorandum-establishing-employee-employer-relationship-h-1b-petitions [hereinafter *USCIS Q&A*].

242. *See id.*

243. *Compare* Neufeld Memo, *supra* note 214, *with USCIS Q&A*, *supra* note 241.

244. *See USCIS Introduces Online Resource for Immigrant Entrepreneurs; White House Responds with Praise and Expresses Support for "Start-Up Visa" for Entrepreneurs*, 89 INTERPRETER RELEASES 2204 (Dec. 3, 2012); *see also DHS Reforms to Attract and Retain Highly Skilled Immigrants*, U.S. DEP'T HOMELAND SECURITY (Jan. 31, 2012), http://www.dhs.gov/news/2012/01/31/dhs-reforms-attract-and-retain-highly-skilled-immigrants; *DHS Announces Proposals to Attract and Retain Highly Skilled Immigrants*, U.S. DEP'T HOMELAND SECURITY (May 6, 2014), http://www.dhs.gov/news/2014/05/06/dhs-announces-proposals-attract-and-retain-highly-skilled-immigrants.

245. *But see supra* Section II.C.2.a.

246. *See, e.g.*, *Secretary Napolitano Announces Initiatives to Promote Startup Enterprises and Spur Job Creation*, U.S. DEP'T HOMELAND SECURITY (Aug. 2, 2011), https://www.dhs.gov/news/2011/08/02/secretary-napolitano-announces-initiatives-promote-startup-enterprises-and-spur-job.

247. *See, e.g.*, *The President's Immigration Accountability Executive Actions Announced November 20–21, 2014*, AM. IMMIGR. LAWS. ASS'N (Nov. 24, 2014), http://www.aila.org/infonet/wh-summary-of-the-presidents-exec-action [hereinafter AILA, *President's Immigration*] ("President Obama addressed the nation with a framework for his plans, and released a number of

until the proposed International Entrepreneur Rule, the President, DHS, and USCIS continually called for reform for immigrant entrepreneurs, but failed to outline specific terms for the reform.[248] This alternative guidance has typically occurred through initiatives, programs, or directives.[249]

President Obama is no stranger to pushing reform for immigrant entrepreneurs through informal guidance.[250] For example, in 2012, at the President's direction, USCIS hosted an Entrepreneurship in Residence (EIR) Information Summit where USCIS hosted "150 high-level representatives from the entrepreneurial community, academia, and government" to foster immigrant entrepreneurship in the United States.[251] The EIR program also included a tactical team of entrepreneurs who worked directly with USCIS personnel.[252] The stakeholder summit and tactical team intended to provide USCIS with the framework to understand the business realities facing entrepreneurs.[253] However, few measurable actions resulted from the EIR program.[254]

Similar to the EIR program's smoke-and-mirrors approach to immigration reform for entrepreneurs, the President has issued various executive actions[255] that aimed to aid immigrant entrepreneurs, but instead

Department of Homeland Security directives providing additional, but in many cases still limited, details.").

248. *See supra* notes 241–47 and accompanying text.

249. *See* AILA, *President's Immigration*, *supra* note 247; *see also* Tom Kalil & Doug Rand, *Entrepreneurs Wanted: The President's Actions on Immigration*, WHITE HOUSE (Nov. 26, 2014, 1:34 PM), https://www.whitehouse.gov/blog/2014/11/26/entrepreneurs-wanted-president-s-actions-immigration ("The initial details of this action are spelled out in a directive."); *Startup America*, WHITE HOUSE, https://www.whitehouse.gov/economy/business/startup-america (last visited Sept. 26, 2016) ("Startup America is a White House initiative that was launched to celebrate, inspire, and accelerate high-growth entrepreneurship throughout the nation.").

250. *See supra* note 249 and accompanying text.

251. *USCIS Releases Executive Summary of Its Entrepreneurs in Residence Information Summit*, 89 INTERPRETER RELEASES 617 (Feb. 22, 2012).

252. *See id.*

253. *See id.* (indicating that the purpose of the EIR summit was "to ensure that immigration pathways for foreign entrepreneurs are clear and consistent and better reflect current business realities").

254. *See USCIS—American Immigration Lawyers Association (AILA) Meeting, Questions & Answers*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 9, 2012), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/October%202012/AILA-Liaison-Committee-meetingQA.pdf [hereinafter USCIS, *AILA Meeting Q&A*] (demonstrating AILA's concern that the EIR program did not effectively inform USCIS policy).

255. *See President's Executive Actions for U.S. Businesses and Highly Skilled Workers,* MURTHY L. FIRM (Nov. 21, 2014), https://www.murthy.com/2014/11/21/presidents-executive-actions-for-u-s-

further complicated the landscape.[256] The President's executive actions on immigrant entrepreneurs are narrow in scope and therefore have not made a significant impact.[257] Although many would argue that the President's recent executive actions on immigration have been too specific and proactive, going outside the bounds of the President's authority,[258] this is not the case for the executive actions that specifically address immigrant entrepreneurs.[259] At President Obama's direction, DHS implemented one executive action with the specific goal of promoting immigrant entrepreneurship.[260] The executive action set forth five objectives: (1) modernize the employment-based immigration visa system; (2) reform Optional Practical Training (OPT);[261] (3) promote research and development

businesses-and-highly-skilled-workers/. An executive action includes "basically any type of action taken by the president. Some actions, such as directing an executive agency to make regulatory change, take time to implement and must go through a formal process." *Id.*

256. *See* Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., on Policies Supporting U.S. High-Skilled Businesses and Workers to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., and Thomas S. Winkowski, Acting Dir., U.S. Customs & Immigration Enf't 4 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_business_actions.pdf [hereinafter Johnson Memo].

257. *See id.* (discussing goals to modernize the employment-based immigrant visa system, reform Optional Practical Training (OPT), promote research and development in the United States, bring greater consistency to the L-1B visa program, and increase worker portability).

258. *See* Texas v. United States, 809 F.3d 134, 184 (5th Cir. 2015) (finding the President's executive actions on Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA) unlawful, because it vested the Secretary of Homeland Security with the power "to grant lawful presence and work authorization to any illegal alien in the United States—an untenable position in light of the INA's intricate system of immigration classifications and employment eligibility"), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). The President's DAPA and DACA executive actions are situated front and center within the immigration debate. *See* Matt Ford, *A Ruling Against the Obama Administration on Immigration*, ATLANTIC (Nov. 10, 2015, 12:08 PM), http://www.theatlantic.com/politics/archive/2015/11/fifth-circuit-obama-immigration/415077/. Because of the Supreme Court's 4–4 decision, the specificity and scope of these executive actions will continue to be at the forefront of the current immigration debate. *See* United States v. Texas, 136 S. Ct. 2271 (2016); *see also* Ford, *supra*.

259. *See supra* notes 256–57 and accompanying text.

260. *See Immigration Executive Actions*, U.S. DEP'T HOMELAND SECURITY (July 14, 2015), http://www.dhs.gov/publication/immigration-executive-actions (listing each executive action DHS drafted in response to the President's recommendation to reform the broken immigration system).

261. *See* Johnson Memo, *supra* note 256, at 3. OPT allows foreign students who graduate from an American university to stay in the United States for twelve to twenty-nine months to gain practical experience in their fields. *See* 8 U.S.C. § 101 (a)(l5)(F)(i) (2012). Consequently, in certain situations, OPT allows foreign students to stay in the United States to work on a new business venture. *See* Entrepreneur Visa Guide, *supra* note 7 (listing OPT within a "menu of potential visa pathways for foreign entrepreneurs").

in the United States; (4) bring greater consistency to the L-1B visa program;[262] and (5) increase worker portability.[263] At first glance, the executive action memorandum appears to outline an impressive and detailed agenda for reform.[264] However, upon a deeper review, the executive action ultimately leaves reform in the uncertain hands of USCIS.[265]

For example, the executive action directed USCIS to expand the scope of the National Interest Waiver (a way to pursue a self-sponsored green card) to promote inventors, researchers, and founders of startup enterprises to use this pathway to citizenship.[266] But, the executive action did not outline how to evaluate this kind of application in light of the National Interest Waiver criteria, thus leaving it up to USCIS's discretion.[267] Consequently, even the President's executive actions are not as clear-cut as one might think.[268]

Although the President's initiatives, such as the EIR program and the executive actions, set forth aggressive, and at times, specific agendas,[269] practitioners agree that USCIS continues to enforce more restrictive policies for immigrant entrepreneurs.[270] Specifically, practitioners point to the lack

262. *See* Johnson Memo, *supra* note 256, at 4. The L-1B visa program provides a temporary work visa for intracompany transferees of multinational companies. *Id.*

263. *See id.* at 1–5. Employer portability refers to a foreign worker's ability to move from a current visa-sponsored job, to another job in the "same or similar" field within the United States. *Id.* at 5.

264. *See id.*

265. *See AILA's Take on President Obama's "Immigration Accountability Executive Action" Plan*, AM. IMMIGR. LAWS. ASS'N (Nov. 24, 2014), http://www.aila.org/infonet/ailas-take-on-obamas-immigration-executive-action [hereinafter *AILA's Take*] ("[D]etails are still not settled."); *cf.* Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. at 10,287; Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and CapGap Relief for All Eligible F-1 Students, 80 Fed. Reg. 63,379 (Oct. 19, 2015) (to be codified at 8 C.F.R. pts. 214, 274a).

266. *See* Johnson Memo, *supra* note 256, at 3–4.

267. *See id.*

268. *See AILA's Take*, *supra* note 265, at 7.

269. *See USCIS Announces "Entrepreneurs in Residence" Initiative*, 88 INTERPRETER RELEASES 2496 (Oct. 17, 2011) (explaining that the EIR program aimed to generate concrete results for immigrant entrepreneurs in regard to the EB-5 process, the EB-2 visa classification, and the L-1B for nonimmigrant intracompany transferees).

270. *See* Angelo A. Paparelli & Ted J. Chiappari, *Intubation and Incubation: Two Remedies for an Ailing Immigration Agency*, SEYFARTH & SHAW LLP, (June 22, 2011), http://www.seyfarth.com/dir_docs/publications/AttorneyPubs/Immigration_Paparelli.pdf (arguing that "[a]lthough Director Mayorkas has laudably embarked on numerous salutary improvements and reforms [such as the EIR program] like no predecessor at INS or USCIS before him," many

of guidance on employment-based immigration adjudications and "[t]he proclivity of numerous USCIS adjudicators to go beyond the requirements," creating a heightened standard for immigrant entrepreneurs.[271] Practitioners argue that the informal nature of the guidance offered by the President and the agencies causes USCIS officials to give the guidance little weight when adjudicating an application.[272] Practitioners chastise this unclear policy framework:

> Because these policies . . . are often poorly reasoned, incomplete, contradictory or wholly non-existent, the stakeholder community has been at the mercy of agency adjudicators who are free to menu-pick or simply "boldly assert and plausibly maintain" the ostensive legal basis underlying a denial of eligibility for the requested immigration benefit.[273]

To address USCIS's shortfalls, practitioners and scholars call for greater transparency in USCIS's adjudicative policies.[274] Without this transparency, immigrant entrepreneurs must be satisfied with only the government's good intentions and slow process, instead of swift and substantial action.[275]

The U.S. government's informal guidance, the unclear future of the International Entrepreneur Rule, and Congress's stagnant Startup Act, along with outdated congressional immigration acts and USCIS policy memoranda, leave immigrant entrepreneurs with a patchwork of uncertainty.[276] Nonetheless, USCIS's proposed rule and the U.S. government's frequent use of alternative methods to reform immigration laws for entrepreneurs demonstrates a readiness to embrace an unconventional pathway to accomplish reform.[277]

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problems within the agency persist).

271. *Id.*

272. *See id.*

273. *Id.* (quoting Aaron Burr, Jr.); *see also* Weber, *supra* note 56, at 795 ("Clearly-defined requirements are essential to the successful implementation of any new visa program.").

274. *See* Paparelli & Chiappari, *supra* note 270 ("Greater transparency at USCIS is sorely needed—particularly in connection with rulemaking and adjudicatory requirements and procedures. But for USCIS to be a healthy, vibrant participant in federal initiatives to make our nation stronger and more competitive, bolder steps must be taken.").

275. *See id.* (discussing the current DHS director's honorable desire to solve problems for immigrant entrepreneurs but also the lack of real reform policies).

276. *See id.* (outlining USCIS's, the President's, and Congress's conflicting guidance).

277. *See* Felicia Escobar & Doug Rand, *Strengthening Immigrant Pathways for Job-Creating*

III. ANALYSIS & SIGNIFICANCE

A. Proposal to Use Nonbinding Administrative Rulemaking

Each attempt at change has left immigrant entrepreneurs wanting—the failed Startup Act, the informal agency guidance, the limited executive actions, and the long-awaited but still uncertain proposed International Entrepreneur Rule.[278] Thus, although there are multiple channels to accomplish change for immigrant entrepreneurs,[279] this Comment contends that USCIS should issue new policy memoranda to achieve reform. Because of the policy memoranda's effectively binding nature, new policy memoranda would provide a clear, lawful roadmap for immigrant entrepreneurs as they await legislative action.[280] Nonetheless, USCIS must proceed cautiously in crafting the policy memoranda, retaining discretion so that the agency's rules stand up to any legal challenges.[281] With this eye on caution, policy memoranda likely provide the path of least resistance to implement reform for immigrant entrepreneurs and therefore offer the best current procedure for change.[282]

1. USCIS Lawfully Can and Should Institute Revised Policy Memoranda to Aid Immigrant Entrepreneurs

USCIS can lawfully effect change for immigrant entrepreneurs through policy memoranda.[283] Policy memoranda publication falls within USCIS's

Entrepreneurs, WHITE HOUSE (Feb. 28, 2012, 7:12 PM), https://www.whitehouse.gov/blog/2012/02/28/strengthening-immigrant-pathways-job-creating-entre preneurs (emphasizing that "[t]hinking outside the box is exactly what the new EIR initiative is all about").

278. *See supra* Part II.

279. *See supra* Part II.

280. *See supra* Section II.C.2.b.

281. *See* Broadgate Inc. v. U.S. Citizenship & Immigration Servs., 730 F. Supp. 2d 240, 245 (D.D.C. 2010) (explaining that "a good indication of a general policy statement is the agency's use of permissive, rather than binding, language; if the 'rule' leaves the agency free to exercise discretion, it is likely a [valid] policy statement").

282. *Compare supra* note 119 and accompanying text (demonstrating the continued failure of the Startup Act in Congress), *with Broadgate Inc.*, 730 F. Supp. 2d at 241 (D.D.C. 2010) (upholding USCIS's broad power to interpret statutes by issuing detailed policy memoranda).

283. *See Broadgate Inc.*, 730 F. Supp. 2d at 246 (finding USCIS's policy memorandum on the employer–employee relationship a valid exercise of agency rulemaking power).

power to make administrative rules.[284] USCIS's policy memoranda are typically classified as policy statements or as a compilation of interpretive rules.[285] Under the APA, courts grant administrative agencies, such as USCIS, broad authority to institute policy statements and interpretive rules.[286] With a keen awareness of the requirements needed to implement valid nonlegislative rules, USCIS can enforce significant change for immigrant entrepreneurs through policy statements and interpretive rules.[287]

In order to implement policy memoranda for immigrant entrepreneurs, USCIS should work to satisfy the maximum amount of factors that a court weighs in determining whether a rule is not legally binding and thus a valid policy statement or interpretive rule.[288] First, USCIS will need to demonstrate that even in the absence of a policy memorandum, USCIS would still have the authority to enforce the commands of the rules that the policy memorandum would address.[289] This is an achievable goal for USCIS in regard to immigrant entrepreneur policy, because much of the statutory language that indirectly influences immigrant entrepreneurs is vague.[290] For example, USCIS recognizes that it has authority to view evidence, such as venture capital funding, in determining whether an entrepreneur's employer qualifies as a valid H-1B sponsor, because the definition of the employer–employee relationship is broad under 8 C.F.R. § 214.2(h)(4)(ii).[291]

Second, USCIS will need to interpret an existing legal standard, rather

284. *See* 5 U.S.C. § 553(b)(3)(A) (2012) (providing exceptions to notice-and-comment rulemaking for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice").

285. *See* Family, *supra* note 134, at 567 (emphasizing USCIS's frequent use of nonlegislative rules through policy memoranda).

286. *See supra* Section II.C.2.b.

287. *See* Family, *supra* note 134, at 593–605 (discussing two cases where courts upheld USCIS's policy memoranda even though the memoranda drastically changed the way that USCIS interpreted existing laws).

288. *See* Funk, *supra* note 160, at 1326; *see also supra* Section II.C.1 (laying out the factors that courts consider to determine whether an interpretive rule is legally binding).

289. *See* Funk, *supra* note 160, at 1327 ("[A] non-legally binding interpretive rule does not add to the agency's legal authority. With or without the rule, the agency can enforce the commands of the statute as it interprets them."); *see also supra* Section II.C.1.

290. *See supra* Section II.B (explaining how Congress has never implemented immigration statutes that directly address immigrant entrepreneurs).

291. *See* USCIS, *AILA Meeting Q&A*, *supra* note 254, at 5 (explaining that USCIS can consider "forms of evidence that the agency has not traditionally asked for, and that entrepreneurs may be able to provide, to help determine eligibility for certain nonimmigrant visa classifications").

than create a new standard.[292] Specifically, USCIS can establish this factor if it "derives the meaning for its claimed interpretive rule by using traditional means of interpreting a legal document—legislative history, tools of statutory construction, grammatical inferences, etc."[293] Again, this is an achievable goal for USCIS policy memoranda.[294] One specific way USCIS could use this factor to aid immigrant entrepreneurs is to perform statutory interpretation of the meaning of "same or similar" job—how it is used by other agencies, or how courts have interpreted it in the past—with respect to an employment-based green card applicant's ability to change jobs after securing the original green card sponsored position.[295] In turn, this could provide a potential green card holder some flexibility to shift into a position with an emerging business.[296] Thus, USCIS could demonstrate through the policy memorandum how "same or similar" can be construed to include positions with emerging businesses.[297]

Third, a USCIS policy memorandum outlining updated guidance for immigrant entrepreneurs cannot be inconsistent with a prior statutory law.[298] Here, USCIS could satisfy this factor to establish new interpretive rules that apply to immigrant entrepreneurs.[299] Similar to the first factor, the vague statutory language that indirectly applies to immigrant entrepreneurs makes

292. *See* Funk, *supra* note 160, at 1326, 1328.

293. *Id.* at 1328.

294. *See* Family, *supra* note 134, at 598 (discussing how USCIS has used statutory interpretation in its policy memoranda). For example, "USCIS has used nonlegislative rules to implement the application of the crucial statutory term 'unlawful presence.'" *Id.*

295. *See* Johnson Memo, *supra* note 256, at 5 (directing USCIS to rectify the "uncertainty surrounding what constitutes a 'same or similar' job").

296. *See id.* (highlighting the problem caused by the lack of guidance on what constitutes a "same or similar" job, which prohibits employees from seeking new job opportunities).

297. *See id.* USCIS is considering reform through a policy memorandum on this point. *See Draft Policy Memorandum: Determining Whether a New Job Is in "the Same or a Similar Occupational Classification" for Purposes of Section 204(j) Job Portability*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 20, 2015), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/PED-Draft_Same_or_Similar_Policy_Memorandum_-_11.20.15.pdf [hereinafter Draft Policy Memo]. In November 2015, USCIS issued a draft policy memorandum for comment specifically on this issue. *Id.*

298. *See* Funk, *supra* note 160, at 1326, 1329–30 (explaining that when a court states that an interpretive rule cannot be inconsistent with a prior rule, the court means that the interpretive rule cannot be inconsistent with a rule that holds the force of the law).

299. *See* Broadgate Inc. v. U.S. Citizenship & Immigration Servs., 730 F. Supp. 2d 240 (D.D.C. 2010) (permitting USCIS to create new requirements for the employer–employee relationship).

it easy for USCIS to satisfy this requirement.[300] For instance, the Neufeld Memo's employer–employee guidance was inconsistent with prior USCIS guidance and AAO precedent, but a court found it was valid because it was not inconsistent with prior law.[301] Thus, as just one example, if USCIS made adjustments to the employer–employee relationship definition in order to aid immigrant entrepreneur petitions, this action would likely be valid.[302]

Fourth, USCIS would need to contemporaneously indicate that any policy memorandum constitutes interpretive rules.[303] This is perhaps the easiest factor to satisfy, if it is on the agency's radar.[304] Here, USCIS could satisfy this factor by simply stating within the policy memorandum that it constituted interpretive rules.[305] Finally, USCIS policy memoranda for immigrant entrepreneurs would benefit from including language from an applicable statute.[306]

On balance, although this factor test does not provide a bright-line rule, if USCIS aimed to issue policy memoranda to reform the law for immigrant entrepreneurs, it would be well situated to satisfy all the factors to classify the policy memoranda as valid non-legislative rules.[307]

2. USCIS Must Proceed Cautiously and Include Room for Discretion

Although USCIS may satisfy the above factors with a policy memorandum that aids immigrant entrepreneurs, USCIS could still run into challenges if the agency does not implement the policy memorandum with a

300. *See supra* notes 290–91 and accompanying text.

301. *See Broadgate Inc.*, 730 F. Supp. 2d at 246; *see also* Memo to Roxana Bacon, *supra* note 235, at 12.

302. *See Broadgate Inc.*, 730 F. Supp. 2d at 246.

303. *See* Funk, *supra* note 160, at 1326, 1330.

304. *See id.*

305. *See id.* (explaining that by announcing agency guidance as an interpretive rule "the agency is telling the public that the rule is not binding").

306. *See supra* note 163 and accompanying text (demonstrating how courts look at the language of the policy statement and applicable statutes side by side).

307. *See* Funk, *supra* note 160, at 1326–32. Courts have also indicated that they consider whether the challenged rule was published in the Code of Federal Regulations (C.F.R.), but scholars argue that this factor is insignificant because courts have flip-flopped on how the publication in the C.F.R. influences the legally binding status of the rule. *See id.* at 1330 ("The D.C. Circuit at one point concluded that an interpretive rule should not be published in the C.F.R. because it is not supposed to have 'legal effect.'. . . Subsequently, the D.C. Circuit rejected (or at least severely limited the weight of) this factor, arguing that 'legal effect' is not the same as 'binding legal effect.'").

degree of discretion.[308] Thus, USCIS would need to follow the trend of many agencies and include detailed language in the policy memoranda highlighting to the public that the agency retains discretion in executing the policy.[309] Courts rely heavily on the discretionary language the agency announces with its rules, weighing both the discretion apparent on the face of the document and in its application.[310] Consequently, with the correct language in the policy memoranda, this would hardly become a limiting factor.[311]

Further, USCIS is well-practiced in the art of discretionary language.[312] The Neufeld Memo demonstrates how USCIS can push the envelope on policy reform.[313] The Neufeld Memo indicated within the document that USCIS must look at "the totality of the circumstances" and evaluate the factors in a way that makes "no one factor . . . decisive."[314] Therefore, if USCIS used similar language in a new policy memorandum, it would likely protect itself against challenges about whether USCIS overstepped its agency powers.[315] Moreover, by following the Neufeld Memo's lead, USCIS policy memoranda that address reform for immigrant entrepreneurs could reach the periphery on what is permitted for an agency to enact.[316] One way USCIS could use this to specifically reform policies for immigrant entrepreneurs would be to revise the Neufeld Memo itself.[317] USCIS could use the original Neufeld Memo as a guide to issue a modern definition of the employer–employee relationship.[318] With similar structure and language to

308. *See* Broadgate Inc. v. U.S. Citizenship & Immigration Servs., 730 F. Supp. 2d 240, 245 (D.D.C. 2010).

309. *See supra* Section II.C.1.

310. *See Broadgate Inc.*, 730 F. Supp. 2d at 245–46; *see also supra* Section II.C.1.

311. *See supra* Section II.C.1.

312. *See Broadgate Inc.*, 730 F. Supp. 2d at 245–46; *see also supra* notes 173–74 and accompanying text.

313. *See* Neufeld Memo, *supra* note 214; *see also* Section II.C.2.b.

314. Neufeld Memo, *supra* note 214, at 3–4; *see also Broadgate Inc.*, 730 F. Supp. 2d at 245–46 (concluding that this language demonstrated USCIS's proper use of discretion).

315. *See Broadgate Inc.*, 730 F. Supp. 2d at 245–46; *see also* Section II.C.2.

316. *See* Family, *supra* note 134, at 603–04 ("The lawsuit challenging the Neufeld Memo alleged that the Memo 'changed existing law' in the absence of rulemaking. This allegation shows frustration with the Neufeld Memo, and also displays the general confusion wrought by guidance documents. Guidance documents do not change law.").

317. *See* Morford, *supra* note 74, at 314–20 (explaining how the Neufeld Memo negatively impacted innovation and immigrant entrepreneurs).

318. *See* Family, *supra* note 134, at 601–02; *see also Broadgate Inc.*, 730 F. Supp. 2d at 245–46.

the original Neufeld Memo, USCIS could reinterpret the employer–employee relationship to be more inclusive of self-employed or venture-backed foreign workers.[319] In sum, USCIS is poised to fulfill the legal requirements to address significant reform for immigrant entrepreneurs through policy memoranda.[320]

Not only are policy memoranda publications within the lawful power of USCIS, the memoranda also provide necessary flexibility for USCIS to administer immigration laws that reflect current statutes and policy directives.[321] As Professor Jill Family explains:

> [N]onlegislative rules can serve a positive purpose. An area of the law as technical and as fast-moving as immigration law could never be administered effectively by only notice-and-comment rulemaking. USCIS needs flexible tools to keep up with the demands of extremely complex statutes . . . and guidance documents are at least more transparent than word-of-mouth conversations between low-level adjudicators and supervisors.[322]

Consequently, if USCIS published policy memoranda to update how USCIS adjudicators handle immigrant entrepreneur petitions and applications, this would be within the ultimate purpose of administrative rulemaking power.[323] Here, USCIS can look to the constant pressure lawmakers place on the government to adapt the immigration laws to better accommodate immigrant entrepreneurs.[324] Therefore, USCIS would not be stepping out of bounds by revising policy memoranda to reflect the current state of the law for immigrant entrepreneurs.[325]

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319. *See* Morford, *supra* note 74, at 314–20; *see also* Family, *supra* note 134, at 599–604.

320. *See supra* notes 283–319 and accompanying text.

321. *See* Family, *supra* note 134, at 589.

322. *Id.* (discussing general frustration with USCIS's constant use of policy guidance, but reminding readers to consider the positive role that nonlegislative rules can serve).

323. *See id.*

324. *See supra* Sections II.B.1, II.D.

325. *See Oversight of the Administration's Misdirected Immigration Enforcement Policies: Examining the Impact on Public Safety and Honoring the Victims: Hearing before the S. Comm. on Judiciary*, 114th Cong. 1–2 (2015) (statement of León Rodríguez, Director of U.S. Citizenship & Immigration Services) ("I fully understand just how critical it is for USCIS to successfully deliver on its mission in support of the fundamental values of our nation, whether they are economic, humanitarian, or for other national interests.").

B. Argument Against Using Administrative Rulemaking

Opponents to administrative rulemaking reform likely fall into two main camps: (1) those who believe the rulemaking would usurp congressional power,[326] and (2) those who believe that change within USCIS is impractical.[327] First, advocates of the point of view that USCIS should not create significant reform through administrative rules argue that the reform would rise to the level of legislative power—a power that only Congress can perform.[328] However, this view discredits the role of agencies in formulating policy.[329] Further, this view ignores the case law, which upholds USCIS's aggressive enforcement actions via policy memoranda.[330] Agencies, such as USCIS, need forgiving wiggle room to revise and reform interpretations of the law; otherwise, all minute changes would need to go through the laborious process of legislative action.[331]

Second, critics who argue it would be highly unlikely for USCIS to implement this kind of proposal for immigrant entrepreneurs contend that USCIS rarely modernizes its policies.[332] Critics point to practitioners' continual pressure on USCIS to revise policy memoranda and USCIS's failure to reply to these demands.[333] But this is not completely true.[334] The proposed International Entrepreneur Rule demonstrates USCIS's readiness to alter its policies to benefit immigrant entrepreneurs.[335] Moreover, USCIS has also recently recognized the need to modernize policy memoranda.[336]

326. *See* Texas v. United States, 787 F.3d 733, 745–46 (5th Cir. 2015) (criticizing the President, DHS, and USCIS as unlawfully usurping Congress's power over immigration reform), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

327. *See* Paparelli & Chiappari, *supra* note 270.

328. *See Texas*, 787 F.3d at 733; *see also* Family, *supra* note 134, at 578 ("Scholars and others have questioned whether agencies use the exemptions from notice-and-comment rulemaking too frequently to bind practically, even if not legally, and have also tied the use of nonlegislative rules to a concern about a shift away from notice-and-comment rulemaking.").

329. *See Texas*, 787 F.3d at 757 (explaining how an agency has broad discretion in the enforcement of statutes).

330. *See* Broadgate Inc. v. U.S. Citizenship & Immigration Servs., 730 F. Supp. 2d 240, 245 (D.D.C. 2010).

331. *See supra* Section III.A.2.

332. *See* Paparelli & Chiappari, *supra* note 270, at 3; *see also supra* Section II.D.

333. *See, e.g.*, Memo to Roxana Bacon, *supra* note 235.

334. *See* Draft Policy Memo, *supra* note 297.

335. *See supra* Section II.C.2.a.

336. *See* Draft Policy Memo, *supra* note 297.

For example, in November 2015, USCIS released a draft policy memorandum for comment, which would revise the meaning of "same or similar" job for green card applicants.[337] Thus, revisions of other policy memoranda that impact immigrant entrepreneurs may be a natural next step for USCIS.[338]

C. Significance of Proposal: Unpoliticized Change and Interim Certainty

Ultimately, without Congress, USCIS cannot wholly shift the laws to favor immigrant entrepreneurs (e.g., USCIS cannot create a new entrepreneur visa), but USCIS can offer interim reform.[339] Because Congress is at a stalemate with regard to the Startup Act,[340] USCIS can circumvent the politically fueled debate to accomplish more immediate changes.[341] Additionally, USCIS's policy memoranda become quasi-binding in application, which would grant practitioners and immigrant entrepreneur applicants some needed certainty in the wake of contradicting and confusing informal guidance.[342] In turn, using administrative rulemaking via policy memoranda is an imperfect solution, but the best current option for immigrant entrepreneurs.[343]

Looking forward, USCIS policy memoranda will likely not be the final word on immigrant entrepreneur reform.[344] Nonetheless, the guidance could direct immigrant entrepreneurs for the next few years, or decades, while

337. *See id.*

338. *See id.*

339. *See* Weber, *supra* note 56, at 794–813 (advocating for Congress to make substantial statutory changes for immigrant entrepreneurs).

340. *See* Harrison, *supra* note 118.

341. *See* Bluestein, *supra* note 131 ("Despite the bipartisan popularity of business-friendly proposals, including increasing the cap on H-1B work visas for skilled workers and creating a visa category for venture-backed entrepreneurs, the public debate frequently devolves into shouting matches over whether people should be deported and how quickly.").

342. *See* Family, *supra* note 212 and accompanying text. Although many scholars and practitioners argue that USCIS oversteps its authority with agency guidance, courts continually uphold USCIS's power to essentially bind the public through policy memoranda. *See* Family, *supra* note 134, at 592–603 (discussing "USCIS's [c]ontroversial [u]ses of [n]onlegislative [r]ules").

343. *Cf.* Weber, *supra* note 56, at 794–813 (arguing that statutory reform is necessary to aid immigrant entrepreneurs).

344. *See* Harrison, *supra* note 118 (reporting on Congress's continual attempts to pass the Startup Act).

Congress continues to debate the Startup Act.[345] This change could have a lasting effect, because USCIS policy memoranda actually have quite a long shelf life.[346] For example, the Neufeld Memo—which reformed and restricted the definition of the employer–employee relationship to reflect the more protectionist times post-9/11—remains enforceable law.[347] An additional impact of this type of administrative change might be that advocates of other highly politicized issues could use USCIS's policy memoranda as an example to institute swift interim reform.[348] In other words, advocates may recognize that administrative rulemaking is a workable alternative route to accomplishing change.[349]

IV. CONCLUSION

The overwhelming sentiment in the United States is that immigrants who innovate and create jobs in America should have a clear pathway to citizenship.[350] Nonetheless, Congress is at a stalemate on the issue, and the President's and USCIS's attempts at reform for immigrant entrepreneurs have failed to make an effective impact.[351] To make headway in accomplishing reform for immigrant entrepreneurs, USCIS should issue policy memoranda to aid immigrant entrepreneurs.[352] This unusual route to reform will provide immigrant entrepreneurs with the certainty necessary for them to pursue their business ventures in the United States.[353] In the context

345. *See id.* (discussing the ongoing heated debates surrounding the Startup Act). If immigrant entrepreneurs are forced to wait for Congress to take significant action, more immigrants may return to their home countries to start innovative businesses, or even move to a different country that is more welcoming to immigrant entrepreneurs. *See Entrepreneurs in Latin America: The Lure of Chilecon Valley*, ECONOMIST (Oct. 13, 2012), http://www.economist.com/node/21564589. For example, Chile attracts immigrant entrepreneurs by providing promising entrepreneurs with the equivalent of $40,000 and a yearlong visa to work on their business ideas. *Id.*

346. *See* Morford, *supra* note 74, 314–20 (discussing the ongoing impact of the Neufeld Memo on immigrant entrepreneurs).

347. *See* Neufeld Memo, *supra* note 214; *see also supra* Section II.C.2.b.

348. *See* Family, *supra* note 134, at 566 (situating immigration law within the broader field of administrative law).

349. *See id.* (contending that administrative law and other administrative agencies can learn from immigration law).

350. *See* Stangler & Wiens, *supra* note 11 (detailing research that demonstrates the economic advantages of welcoming immigrant entrepreneurs in the United States).

351. *See supra* Sections II.B.2, II.D, II.C.2.a.

352. *See supra* Section III.A.

353. *See supra* Section III.C.

of today's political climate, immigrant entrepreneurs need a disruptive solution.[354] Much like Uber altered an industry by revamping the process of an already existing service, the United States can initiate reform for immigrant entrepreneurs by changing the process, rather than the underlying substantive law.[355] Indeed, our innovators deserve an innovative solution.

Tess Douglas*

354. *See supra* Part III.

355. *See* UBER, https://www.uber.com/ (last visited Sept. 24, 2016); *see also* Brad Stone, *Invasion of the Taxi Snatchers: Uber Leads an Industry's Disruption*, BLOOMBERG (Feb. 20, 2014, 11:26 AM), http://www.bloomberg.com/news/articles/2014-02-20/uber-leads-taxi-industry-disruption-amid-fight-for-riders-drivers.

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