Who's afraid of big bad U.S. immigration policies?

By Elizabeth M. Klarin

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The U.S. system of immigration is, right now, a story of well-intentioned players and the wolf lurking in the woods. While the media loves to focus on asylum and refugee issues, the impact of shifting U.S. immigration policies on businesses is being largely ignored on the pages of history. It's a dangerous oversight, and one that will likely come back to bite the U.S. if policymakers are not savvy enough to see that their policies might devour what they love most — economic success and the country's position as the home of some of the most successful businesses in the world.

Many industries in the U.S. rely on the innovation and expertise of foreign labour to drive their research, design their products, provide unique services and augment their U.S. workforce with unique skills and knowledge. Immigrants and temporary workers bring valuable intellectual assets to U.S. businesses and the U.S. economy, including expertise and education from other countries and cultures, and often, a drive and motivation that is an echo of a time long past in America. As the world's largest free market economy, the U.S. relies on the best and brightest to remain dominant domestically and on the world stage.

However, a dramatic shift in immigration policies away from welcoming foreign talent is putting intense pressure on U.S. companies, particularly entrepreneurs and businesses in certain industries such as the tech sector, medicine, transportation and even academia.

Let's start with entrepreneurs. A 2019 study by New American Economy — a bipartisan research and immigration advocacy organization — showed that based on the most recent data available, 3.2 million immigrants run their own businesses in the U.S., and immigrant-owned businesses employ approximately eight million Americans. But despite findings showing that immigration creates economic opportunities for Americans, visa and immigrant options for entrepreneurs continue to remain extremely limited. While investor visas are available to entrepreneurs from certain (treaty) countries, the financial investment requirements can be staggering, and the entrepreneur often needs to spend a significant amount of money before even knowing whether he or she qualifies for a visa based on that investment.

The U.S. government's EB-5 immigrant investor program does offer permanent residence to qualifying individuals and their families. However, it just went through a major overhaul last November, which raised the minimum required investment amounts for many investors to just under US$1 million for those investing in projects in targeted employment areas (TEA) in the U.S., or close to US$2 million for investments in projects that aren't TEA-designated by the U.S. government. Many foreign investors don't have a million dollars lying around to spend to get U.S. status — and don't want to wait the years that it takes for the government to adjudicate these types of applications.

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Technology companies make up another major business group that relies enormously on foreign talent. In fact, for one of the most sought-after nonimmigrant visas used by businesses — the H-1B specialty occupation visa — seven out of the top 10 companies sponsoring these visas were technology companies, according to the most recent data published by U.S. Citizenship and Immigration Services (USCIS) on its H-1B Data Hub. However, only 85,000 of these types of visas are issued per year (and not just to technology companies), with demand historically in the hundreds of thousands during the first week of the application filing period alone. Not that this is the only type of visa available to technology industry businesses and their workers; other usable categories include the TN (Trade NAFTA), O-1 (extraordinary ability) and L-1 (intracompany transferee) visa categories.

Don't get too excited, though. Out of the 63 professions eligible for a TN visa based on the North American Free Trade Agreement (NAFTA) and the new U.S. Mexico Canada Agreement (USMCA), only three job categories directly relate to technology industry jobs: Computer Systems Analysts, Graphic Designers and Engineers. As with most types of visas, O-1 visas have become harder to get: the number of Requests for Additional Evidence (RFEs) issued on O-1 petitions increased 15 per cent from 2018 to 2019, while the number of approvals slipped two percentage points in the same time period. L-1 visas often require some long-term planning by businesses, since foreign workers are only eligible once they have had one year of full-time employment for a company with an appropriate qualify corporate relationship to the U.S. sponsoring entity, and have to be executives, managers, or "specialized knowledge" individuals. The definition of specialized knowledge has constricted to a nearly unattainable standard, based on policy changes over the last decade, creating a significant hurdle to companies attempting to employ workers in this category.

The sad result of these and similar policies for the U.S., is that tech companies are choosing to move their operations abroad to the next most obvious choice for operations in North America — Canada — or out of North America altogether. As noted in the 2019 Time magazine article "Tech Companies Say it's Too Hard to Hire High-Skilled Immigrants in the U.S. — So They're Growing in Canada Instead," delays and backlogs in U.S. work status and visa processing for nearly all foreign workers applying for U.S. work status are making it inviable to hire foreign workers, both from an financial and timing perspective. Add to that rising U.S. government filing fees for most visa and permanent residence options. A proposed rule currently pending finalization would raise fees more than 50 per cent for many business-related applications, as well as for applications related to permanent residence and even citizenship. Lawyers' fees for assistance with these complicated processes are also on the rise, as the government rate of denials and issuance of RFEs has skyrocketed over the past several years.

The U.S. government is being about as subtle as a brick-in-the-face about its intentions: we don't value foreign workers, and will continue to take steps to keep them out or discourage them from coming to or staying in the U.S. As a result, industries that rely heavily on foreign workers are making strategic changes to their organizations in order to remain competitive both domestically and globally. By the time the U.S. wakes up and sees what sharp teeth its policies have, it may be too late to save its relationships with the businesses that have nurtured its success.

Elizabeth M. Klarin, partner with Lippes Mathias Wexler Friedman LLP, has more than 15 years of immigration experience assisting clients with the full spectrum of U.S. immigration matters. She represents clients from around the globe across virtually every industry, as well as individuals seeking strategic immigration options and solutions.

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