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Starting a Business in Which an F-1 / H-1B Visa Holder is a Shareholder or Owner

Many international students want and are able to start their own businesses in America. However, because students in F-1 status are generally prohibited from working, many F-1 students fear that starting a business will jeopardize their status and their right to remain in the U.S. This article will clarify how starting a business affects F-1 visa status. Depending on whether an F-1 student is in class or in OPT, starting a business has different consequences. Thus, this article is divides the F-1 durational stay into two periods: when the student is studying and has no employment authorization; and the OPT period during which the student maintains F-1 status but has restricted employment authorization. Finally, this article will discuss how starting a business affects H1-B visa holders.

Studying period

Currently, F-1 students are generally prohibited from working while in F-1 status. However, immigration law does not expressly forbid any alien from to investing or establishing a new business in America. Thus, for students in F-1 status, investing or establishing their own companies in the U.S. is a viable option. However, such students cannot work for their own companies.

Can it be deemed volunteering instead of employment if I work for my company without pay? No, students in F-1 status cannot be involved in any job relating to the operation of the company or otherwise "engage in business." There is an exception if volunteering for churches or community service groups; but working without pay for a for-profit entity is never considered volunteering and will jeopardize an F-1 visa holder's status. Although an F-1 student is prevented from working for his or her own company, preliminary planning prior to start up should not be deemed to be "engaging in business," and thus, the F-1 student can also participate in limited preparation and planning for his or her own business.

Next, let's discuss which types of business entities will be suitable for an F-1 student. A "closely-held corporation" or its equivalent under state law may be a good option for students. A closely-held corporation is generally eligible for S-Corporation tax classification under the Internal Revenue Code (IRC). This will avoid "double taxation." S-Corporation requires its shareholders to be US residents for tax purpose. They include US citizens, Permanent Residents and other aliens who meet the substantive presence test. Thus, a student in F-1 status may be eligible as an S-Corporation shareholder if he can demonstrate his substantive presence in accordance with the test. An F-1 student can also consider other choices, such as various types of professional partnerships, which could be eligible for C-Corporation status under the IRC and, in limited circumstances, S-Corporation status. Finally, a student in F-1 status should not consider a sole proprietorship, because it would require the student to engage in business, as the owner will have to hire employees.

How can an F-1 student benefit from the company if he cannot engage in business and receive compensation? First, the student can receive dividends legally and freely as long as he files an income tax return. This is almost like buying public stock in Google and receiving dividends as a passive investor. Second, it will be more convenient for him after graduation if he uses his own company to file an H-1B petition for himself. We will talk about this in detail later.

OPT period

Once the OPT is approved, the student may still maintain his F-1 status and will be granted restricted employment authorization for the supplemental period of his study. An F-1 student can then usually work for his own company.

H-1B holders

How can an F-1 student continue on his career after the one-year OPT period? The common practice is to find a company to file an H-1B petition for him. Then he will be granted a 3-year durational H-1B visa to work for the petitioning company, with possibilities for extension.

In accordance with the USCIS Policy Memoranda issued on August 2, 2011, self-employed aliens cannot file an H-1B petition for themselves unless they meet all criteria below:

1. The company has independent control over the employment of the beneficiary
   The USCIS will look at a numbers of factors to determine whether the company has independent control over the employment. Based on USCIS's memo, these factors will include: (1) the skill required; (2) the source of the instrumentalities and tools; (3) the location of the work; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party, and other factors. Note that the USCIS exercises discretion as to whether this burden is met.

   For example, Tom set up a clinic with Jay in which Tom possesses 70% of the stocks. However, Tom built a perfect company structure and set up company rules that are binding on everyone in the clinic, including him. His personal discretion over the affairs and direction of the clinic is very limited. Under these circumstances, Tom can use the clinic to file an H-1B petition for himself.

   On the contrary, Lee built a sole proprietorship online -trading company. The whole company has only one employee: Lee. Under these circumstances, it will be difficult to persuade the USCIS that the company has any independent control over Lee.

2. Bona fide job

   The petitioning employer has to offer a bona fide job to the beneficiary. In other words, the position for the beneficiary is essential for the employer to be able to successfully run the business. Aliens cannot set up a company merely for the purpose of applying for an H-1B visa.

3. The position offered should be for a member of the professions

   The USCIS offers examples explaining what constitutes a "professional job," and lists positions like architects, physicians, and programmers. Generally, routine management of the company does not constitute a professional job. However, the USCIS recognizes that a self-employed H-1B beneficiary will more or less engage in daily management, especially if he is the owner of a sole proprietorship or very small businessowner. Regardless, the H-1B petitioner has to demonstrate that the offered position is for a professional.

4. The petitioner has to demonstrate the ability to pay the H-1B beneficiary more than the regional Prevailing Wage during the approved period.

5. The beneficiary has to possess at least a bachelor's degree relating to the area of his offered position, or the foreign equivalent. If he does not have one, the beneficiary may use work experience as a substitute, but only in limited circumstances.

6. Since the new policy enabling self-employed aliens to file H-1B petition for themselves is set designed to increase employment in the U.S., those who want to file an H-1B petition for themselves should also create job opportunities for U.S. workers. Again, an alien cannot set up a company solely to file for H-1B petition for himself.

H-1B portability rule

Some H-1B holders may want to start their own businesses while already working for their original H-1B petitioning employer.

There are two ways to do that:

The first option for an H-1B visa holder would be to create the company and file an H-1B petition for himself. The H-1B visa holder still has to file an H-1B petition for the new job, but can maintain his old job. After the approval of the new H-1B, he can work for both his original petitioning employer and his new company at the same time. Of course, the new job for his own company might have to be part-time if the original job is full-time, and, if so, he should notate that in the petition.

The second way is to take the advantage of the H-1B portability rule, so long as the beneficiary meets the requirements. If that is the case, then the H-1B visa holder can promptly work for his own company right after the new petition is filed. The requirements are as follows:
http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=1efbac8ec3d2f210VgnVCM100000082ca60aRCRD&vgnextchannel=6abe6d26d17df110VgnVCM1000004718190aRCRD

- • The beneficiary is currently in H-1B status when filing the new H-1B petition
  • The beneficiary was lawfully admitted into the United States
  • The new H-1B petition was filed before the end of the beneficiary's period of authorized stay
  • The beneficiary has not been employed without authorization

Note the change in policy; that there can no longer be gaps in the beneficiary's H-1B status if he wants to take advantage of the portability rule. This change in policy was announced on April 2, 2011. In other words,

if an H-1B visa holder acquired status under another category, such as F-1 or H-4, then he cannot take advantage of portability, and, as such, has to wait until the new petition is approved and his H-1B status is effective before he can begin working for his company.

Therefore, we suggest that those who want to file a new H-1B petition to work for their own companies maintain their original H-1B status until the new petition is approved. This will avoid periods of unauthorized stay or unlawful presence in the event the new H-1B is denied.

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