

Immigration Impact of Small Business Ownership

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Starting a Business

For many new immigrants, starting a small business is a great way to earn a living and contribute to the community

The United States has a long history of welcoming immigrants from all parts of the world.

America values the contributions of immigrants, who continue to enrich this country and preserve its legacy as a land of freedom and opportunity.

For more information regarding starting a business in the U.S.:

http://www.welcometousa.gov/Employment/Starting_a_business.htm



Overview

- ▶ If you want to start or run a business in the United States, you must first obtain authorization from USCIS through the immigrant or nonimmigrant visa process to live and work here. It is important to determine upfront which visa classification works best for you. Not every classification that USCIS administers will allow you to work in the United States. Most employment-based visa petitions are issued for a specific type of activity with a specific employer.
- ▶ When considering which option may apply best to your situation and your desired activities in the United States, it is important to plan ahead and keep in mind that there may be a variety of options available to you. Immigrant visas, and certain nonimmigrant visas, are subject to annual numerical limitations. These limitations may affect the amount of time it may take for you to obtain authorization to live and work here, so it is important to determine if the classification you are considering is subject to a numerical limitation in order to plan accordingly.
- ▶ Employers sometimes need to hire foreign labor when there is a shortage of available U.S. workers. To help satisfy their labor needs, employers may be able to assist foreign laborers to legally enter the U.S. temporarily. There are several employment-based nonimmigrant and immigrant visa categories that permit a foreign worker to enter the U.S. and work temporarily for a specific employer or company. Under each category, the foreign national must meet specific requirements related to the occupation for which an employer is petitioning.

I. Immigration Options for Employment

There are a variety of options that may be available to you as an entrepreneur to come to the United States to start or expand a business. To plan accordingly for your particular circumstances, you should consider your immigration options as early as possible when conceptualizing your business plans and goals. To identify the visa pathways that are most appropriate for your circumstances and plans, it may be helpful to consult with an immigration attorney.

There are several potential visa pathways for foreign entrepreneurs. The nonimmigrant visa pathways may allow foreign entrepreneurs to explore or start a new business in the United States. The immigrant visa pathways may allow foreign entrepreneurs who have already started or are about to start a new business in the United States to immigrate permanently to the United States.

Nonimmigrant Visas

- ▶ B-1: You may be eligible for a B-1 visa if you are coming to the United States as a business visitor in order to secure funding or office space, negotiate a contract, or attend certain business meetings in connection with opening a new business in this country.
- ▶ H-1B: You may be eligible for an H-1B visa if you are planning to work for the business you start in the United States in an occupation that normally requires a bachelor's degree or higher in a related field of study (e.g., engineers, scientists or mathematicians), and you have at least a bachelor's degree or equivalent in a field related to the position.
- ▶ O-1: You may be eligible for an O-1A visa if you have extraordinary ability in the sciences, arts, education, business or athletics, which can be demonstrated by sustained acclaim and recognition, and you will be coming to the United States to start a business in your field. Extraordinary ability means you have a level of expertise indicating you are one of the small percentage of people who have risen to the very top of your field.

Nonimmigrant Visa

- ▶ E: You may be eligible for an E-2 visa if you invest a substantial amount of money in a new or existing U.S. business. You must be from a country that has a treaty of commerce and navigation with the United States or a country designated by Congress as eligible for participation in the E-2 nonimmigrant visa program. For a list of treaty countries, visit the Department of State website.
- ▶ L: You may be eligible for an L-1 visa for “intracompany transferees” if you are an executive, manager, or a worker with specialized knowledge who has worked abroad for a qualifying organization (including an affiliate, parent, subsidiary or branch of your foreign employer) for at least one year within the 3 years preceding the filing of your L-1 petition (or in some cases your admission to the United States). The organization must seek to transfer you to the United States to work in one of the capacities listed above.
- ▶ For more information regarding working in the US: <http://www.uscis.gov/working-united-states/working-us>

Immigrant Visa

- ▶ **EB-1 Extraordinary Ability Immigrant:** You may be eligible for the EB-1 extraordinary ability immigrant classification if you have extraordinary ability in the sciences, arts, education, business, or athletics as demonstrated by sustained national or international acclaim and recognized achievements in the field of expertise. In addition, you must show that you will continue working in your area of extraordinary ability. Extraordinary ability means that your level of expertise indicates that you are one of the small percentage of individuals who have risen to the very top of your field. You may self-petition as an extraordinary ability individual since a job offer is not required for this classification.
- ▶ **EB-2 Classification and National Interest Waiver:** The EB-2 classification is divided into two sub-categories: professionals with advanced degrees and individuals with exceptional ability in the sciences, arts or business. Although a job offer from an employer and a labor certification from the Department of Labor are generally required for the EB-2 classification, you may be eligible to self-petition if you are asking for a waiver of the labor certification requirement based on the national interest.

Immigrant Visa

- ▶ EB5
- ▶ New Commercial Enterprise: investors must invest in a new commercial enterprise, which is a commercial enterprise: established after Nov. 29, 1990, or established on or before Nov. 29, 1990, that is: 1. purchased and the existing business is restructured or reorganized in such a way that a new commercial enterprise results, or 2. expanded through the investment so that a 40-percent increase in the net worth or number of employees occurs
- ▶ **Job Creation Requirements:** create or preserve at least 10 full-time jobs for qualifying U.S. workers within two years (or under certain circumstances, within a reasonable time after the two-year period) of the immigrant investor's admission to the United States as a Conditional Permanent Resident.
- ▶ **Capital Investment Requirements:** capital means cash, equipment, inventory, other tangible property, cash equivalents and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair-market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act. Required minimum investments are \$1 million unless the new commercial enterprise is a targeted employment area (High Unemployment or Rural Area). The minimum qualifying investment either within a high-unemployment area or rural area in the United States is \$500,000.

II. Hiring Foreign Nationals

Employers sometimes need to hire foreign labor when there is a shortage of available U.S. workers. To help satisfy their labor needs, employers may be able to assist foreign laborers to legally enter the U.S. temporarily. There are several employment-based nonimmigrant visa categories that permit a foreign worker to enter the U.S. and work temporarily for a specific employer or company. Under each category, the foreign national must meet specific requirements related to the occupation for which an employer is petitioning.

Employers must verify that an individual whom they plan to employ or continue to employ in the United States is authorized to accept employment in the United States. Individuals, such as those who have been admitted as permanent residents, granted asylum or refugee status, or admitted in work-related nonimmigrant classifications, may have employment authorization as a direct result of their immigration status. Other aliens may need to apply individually for employment authorization.

For more information regarding hiring foreign nationals:

<http://www.uscis.gov/sites/default/files/USCIS/Resources/E1en.pdf>

<http://www.uscis.gov/working-united-states/information-employers-employees/employer-information>

Employer Responsibility

- ▶ Employers must verify that an individual whom they plan to employ or continue to employ in the United States is authorized to accept employment in the United States. For more information about the employment authorization verification process, I-9 Processing is discussed below.
- ▶ As an employer, you may require the services of a foreign national (alien) to work at your company or business. If the individual is already a permanent resident (green card holder), you may hire that individual, but you must comply with the employment verification requirements.
- ▶ If the alien is not already a permanent resident, you will need to file a petition so that the individual may obtain the appropriate immigrant or nonimmigrant classification. You may choose to file an immigrant petition (permanent) or a nonimmigrant petition (temporary) on behalf of that employee.
- ▶ For more information regarding Employer responsibility:
http://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Customer%20Service%20Reference%20Guide/Employer_Responsibility.pdf

How to avoid discrimination against individuals who have been authorized to work in the U.S.

Form I-9 lists the acceptable documents that a prospective employee may provide to the employer in order to establish his eligibility to work in the United States. The prospective employee is entitled to choose the document or documents that he presents to the employer. The employer cannot demand specific documents from a prospective employee or specify which documents the individual must provide.

To avoid discrimination based on an individual's immigration status or citizenship, the employer should treat all people equally when announcing a job, taking applications, performing interviews, making job offers, verifying the individual's eligibility to work, hiring of the individual, and termination of the individual's employment. U.S. Immigration law prohibits discrimination, on the basis of citizenship, against protected individuals. Protected individuals include citizens or nationals of the United States, lawful permanent residents, temporary residents, and persons who have been granted refugee or asylee status. The U.S. Department of Justice has an Office of Special Counsel. This Office investigates and prosecutes charges of unlawful employment practices related to immigration.

Information about the requirement to pay for an employee's transportation costs to return overseas if the employer dismisses the employee

- ▶ USCIS grants certain alien workers an H-1B, H-2B, or H-2R immigration status. If the employer dismisses an alien with such a status prior to the expiration date of the individual's authorized period of stay, the employer is required to pay the reasonable costs for the individual's return transportation abroad. If the alien employee voluntarily terminates his employment prior to the expiration date of his authorized period of stay, the alien is not considered as having been "dismissed," and the employer is not required to pay for the individual's return transportation.

Information about the requirement to pay employees fair and equitable wages

All workers, regardless of their immigration status, are afforded the full benefits and protections of U.S. labor laws.

In certain cases, to employ foreign nationals, the employer must file a Labor Condition Application or an Application for Alien Employment Certification with the Department of Labor. On these applications, the employer must attest that, at a minimum, the employer will pay the prevailing wage for the position and the employer will maintain the working conditions that are being offered.

Any petition filed on behalf of a foreign national, which requires an offer of employment, must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage.

Employee Responsibility

- ▶ No alien may accept employment in the United States unless they have been authorized to do so. Some aliens, such as those who have been admitted as permanent residents, granted asylum or refugee status, or admitted in work-related nonimmigrant classifications, may have employment authorization as a direct result of their immigration status. Other aliens may need to apply individually for employment authorization.
- ▶ There are many ways in which a person may be able to work in the United States. You may seek an immigration classification that permits you to live and work in the United States permanently or temporarily. In most instances, your employer or potential employer must petition for you. In the links to your left, you will find more information about coming to the United States to work temporarily or permanently and the many different eligibility categories for working in the United States.

US Federal Tax Information

- ▶ Employers who employ foreign workers may be subject to special U.S. Tax withholding rules.
- ▶ Aliens employed in the U.S. may have a U.S. tax obligation.
- ▶ Please see the Internal Revenue Service (IRS) for more information.

Questions?