

Immigration Options for Entrepreneurial F-1s

The path from F-1 student to self-employed entrepreneur is often much less clear than the path of a graduate seeking traditional employment with a US company. In addition to our 1-pager on possible visa options for entrepreneurs here are some FAQs.

- Can I begin working on my startup while studying?

The focus is on work, and what is “work”, a term not defined within the immigration laws. There are certain permissible activities a foreign national can do towards building a company before obtaining work authorization and there are clearly impermissible activities when it comes to substantive work. People often think of being paid or incorporating as the line in the sand. It is more nuanced than that though. It is the individual activity or task that a person should analyze to determine whether that task is a permissible activity. For example, attending meetings and negotiating contracts are permissible activities. On the other hand, a person must have work authorization to build a product, sell a product, market a product, or hire and manage a team.

- After graduating, can I begin working on my company with OPT?

Yes. OPT is the most common point in which we see foreign national students launch their businesses. OPT allows for self-employment.

- If I launch my company while on OPT, what is next for my immigration status?

This is what the F-1 entrepreneur really needs to be planning for. If you consider practical training as a 1-3 year runway, it is really about building a strategy for what will happen next. It is important for the individual to think about this plan early, even though it may not require further action until down the road, because there may be steps that can be taken during OPT that will lay the groundwork for a future visa status. For example, the startup may put the founders in the H-1B lottery held in March of each year; or there may be opportunities to collect valuable O-1 evidence for the founders as the company organically grows over the OPT period; or there may be dilution factors to take into consideration when fundraising that could affect eligibility for E visas under applicable treaties.

- Can I use an H-1B if I am the co-founder of my company?

Yes. H-1Bs for traditional employees are more straightforward than for co-founders, but it is still a permissible visa category if certain conditions are met. Most notably, an employer-employee relationship must exist between the H-1B founder and the company. Usually this

takes the form of a Board of Directors that can control the employment of the H-1B founder. For this reason, and others, H-1Bs are not very entrepreneur friendly for early-stage companies, but they are still often used. Other considerations are that H-1B wages are set by the Department of Labor based on county and job type. So if an early stage company is trying to keep salaries low and basing compensation on equity than it may not be in the best interest of the company to pay an H-1B wage. For example, the CEO of a new startup may not want to take a salary in line with the average CEOs of all companies in the county.

- Are O-1 visas obtainable to run my startup or are they reserved for Nobel prize winners?

There is a misconception that O-1s are only available to Nobel prize winners and the like. The visa only requires that you demonstrate you are extraordinary within your respective field and that you do so by meeting three of eight specific criteria. O-1s are quite entrepreneur friendly because they do not require an employer-employee relationship or a DOL mandated wage. So co-founders bootstrapping their company may be more comfortable with the O-1 if they can meet its subjective criteria. A great note about O-1 visas is that often things a startup is naturally doing can help its founder obtain an O-1. For example, raising venture capital or angel investment can satisfy one of the criteria, receiving a national award. Media coverage about the company, its fundraising, product launches, and more can be the major media of a person's work to establish that criteria. Also, since the eight possible criteria for O-1 are known, a person can work to obtain those types of evidence while on OPT or in another status to build their profile for an eventual O-1 application. O-1s can also nicely lead to green cards under the EB-1A extraordinary ability category or the EB-2 national interest waiver.

- Are E-2 visas only available for investors?

E-2 visas are available for nationals of certain countries that have the requisite treaties in place with the US, so long as, the company is at least 50% owned by citizens of the treaty country. An E-2 requires that the US company involved have received a substantial investment. Substantial is not set at a specific dollar amount but is instead judged in relation to the cost of acquiring or launching the business. A misconception though is that only investors in the company or people who personally put capital in the business can obtain the visa. While foreign investors in the company are eligible, so are Executives, Managers, and Essential Employees. Therefore, founders of venture backed startups may be eligible for E-2 visas as Executives, even if the substantial investment came from another source, like a venture capital firm.

- Can I apply for the International Entrepreneur Parole program to run my US startup?

The International Entrepreneur Parole rule was created by the Obama administration and has been revived by the Biden Administration. A foreign national founder who owns at least 10% of a US company that was created in the last 5 years, may apply for parole if he or she is playing a central and active role and the company provides a significant public benefit to the US. The company must have received at least \$250k from a qualified US investor or a \$100k grant from a government agency or have compelling evidence for rapid growth that deserves a grant of USCIS discretion. Most founders who qualify will do so under the \$250k in venture capital. The crux then is demonstrating that the investor qualifies as well. In order to qualify, the US investor must have invested a total of at least

\$600,000 in start-ups in three different calendar years (within the preceding five years), and at least two of the start-ups must have created at least 5 qualified jobs or generated at least \$500,000 in revenue with average annualized revenue growth of 20% or more. Up to 3 co-founders may apply for IEP from one company which means it can be a cost effective way to find an immigration solution for multiple members of the founding team. While the program has hit many bumps getting off the ground it is notable that while many visa categories were created with traditional employees in mind, this program was created specifically for the foreign national entrepreneur.

Please feel free to reach out to Jason Susser at jsusser@visalaw.com and discuss your immigration strategy for building your company.

Jason Susser works with foreign founders to develop immigration strategies that balance the needs of an early-stage business with the challenges of the immigration system. As many of these companies go through rounds of funding and begin to scale, he helps them develop immigration policies and assists in the immigration needs of their employees. He works with companies ranging from the solo entrepreneur to the Fortune 500. He also advises startup accelerators and universities working with entrepreneurial students. Jason also represents a number of US and foreign venture capital firms. Jason co-authored the book, *Immigration for Startups: A Guide for Founders*, and was listed as a top immigration lawyer helping startups by *Business Insider* and a Thought Leader in Corporate Immigration by *Who's Who Legal*.