

Overview

This resource was created for UW-Madison international students with F-1 or J-1 status. We want you to understand possible immigration impacts when starting a business.

Business vs Immigration

Entrepreneurs often have questions about how to set up their business, what they can do, and how they should do it. Business questions are different from immigration questions. The table below shows some examples of the differences.

	Business	Immigration
Laws	Created and enforced primarily at the <i>state</i> level	Created and enforced at the <i>federal</i> level
Business Ownership	Any person can <i>own</i> a company regardless of immigration status	A person's ability to <i>work</i> in the U.S. depends on their immigration status
Example Questions	How should I structure my business? What type of business entity should I form? What licenses/permits are required? How do I protect my intellectual property rights? How do I write a business plan?	Does my status allow me to own a business? Can I actively work for my own company under my current status? Can my own company sponsor me for a work visa in the future?

Balancing business vs. immigration needs:

Many business owners want to grow or promote their business. For example, listing your title as "CEO" on LinkedIn might help you or your business. However, USCIS or the Department of State may ask about this during immigration adjudications or social media reviews. This is why it is really important to get advice from qualified business and immigration attorneys before doing anything that could impact your business interests or immigration benefits.

What is work?

If you are not a permanent resident or U.S. citizen, you need to have work authorization to legally perform work while inside the U.S. The specifics of where and how much you can work depends on your immigration status.

It is not always clear when something becomes “work” for immigration purposes. The U.S. government considers starting your own business in the United States (also known as entrepreneurship) as work. See more details [here](#).

Work authorization is not needed to	Work authorization is needed to: (not an exhaustive list)
– Develop a business plan – Interview individuals in the field for research purposes – File documents to form a legal entity -Conduct research on the field/business sector	– Advertise and offer goods and services – Build a website – Conduct fundraising or crowdsourcing – Hire independent contractors or interns – Manufacture beyond a prototype – Sign contracts for services or sales

How do you know if something is work? Some questions to ask yourself:

- Would someone else performing these same activities expect to get something in return?
- Are you receiving any benefits by performing these duties, even if the benefits aren't monetary (experience, knowledge, etc.)?
- Could an outside individual reasonably consider the activities that you are doing to be work (even if you are not being paid)?

If the answer to one or more of these questions is yes, it may be considered work.

Passive vs. Active Income

Without work authorization you cannot earn active income. However, you may be able to earn passive income while in the U.S. without impacting your status as an international student. The table below provides some examples of passive vs active income.

Important: Talk to your ISS advisor before engaging in any activity that could be considered work. Government agencies may interpret activities and related income differently than the IRS does.

Brief overview of passive vs active income

	<u>Passive</u>	<u>Active</u>
Definition:	<u>Passive activities</u> include trade or business activities in which you are not involved in the operation of the activity on a regular, continuous, and substantial basis	Active income is income for services rendered such as salaries, wages, or income from the operation of a trade or business in which you are involved on a regular, continuous and substantial basis.
<u>Examples:</u>	• Income from personal portfolios (pensions, annuities, dividends, etc.) • Income from intangible property such as patents or copyrights • Rental property income	• Active business profits • Freelance and consulting fees • Wages and salaries • Bonuses

Do I need work authorization to earn passive income?

Government agencies may interpret certain activities and related income differently than the IRS does for tax purposes. Before engaging in any activity that could be considered employment, it is always best to talk with your ISS advisor.

Work Authorization Options

- J-1 Student: Self-employment is not allowed on pre or post Academic Training.
- F-1 Student:
 - Curricular Practical Training (CPT): self employment is not usually allowed. Talk to your ISS advisor for questions about what is allowed or is not allowed on CPT.
 - Optional Practical Training (OPT): self-employment is possible on OPT.
 - STEM OPT: self-employment is **NOT** possible.

Optional Practical Training (OPT) is a benefit for students in F-1 status. It allows students to work off-campus in a job directly related to their major field of study. OPT is for students to apply the knowledge and skills gained in the classroom to practical work experience in the U.S.

- Timeline:

- Post completion OPT: You can send your OPT application to USCIS 90 days before your date of program completion. The latest date USCIS can receive your OPT application is 60 days after your date of program completion.
- You will need your OPT EAD issued before you can start any work on your company.
- Talk to your ISS advisor if you have any questions about OPT and how to apply.

You must keep very detailed and complete records about employment if you use OPT for entrepreneurship. Some examples of the records you should keep are listed below:

- Business licenses showing you as an employer;
- Federal Employer Identification Number (EIN);
- Proof that you are actively engaged in the business; (20+ hours/week)
 - Email correspondence, contracts, business documentation etc.
- Bank account information for your business;
- Proof that the business is related to the student's (your) degree program.
- Payroll/Tax records

Looking Ahead: Immigration Pathways for Entrepreneurs

H-1B Specialty Occupations: H-1B is an employment based status designated for individuals working in a specialty occupation.

What is a specialty occupation? A specialty occupation requires [“theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor’s or higher degree, or its equivalent, as a minimum requirement.”](#)

How can I apply?

Only a business entity (an employer) can apply. Each year, there are 85,000 H-1B visas available. They are awarded through a lottery. Employers (the petitioner/petitioning entity) can register for the lottery. If selected, they can file their petition with USCIS for you to receive an H-1B visa.

You may have an ownership interest in the petitioning entity. However, generally the entity must file the petition as your employer.

Other factors to consider when you have ownership in the petitioning entity:

- Independent and structured governance: Management of the business should be structured so that an independent board of directors has the authority to hire and fire you.
- Specialty occupation role: Does the position you have at the company meet the definition of a “specialty occupation”?
- Financial means: Does the startup have the means and documentation to pay the [prevailing wage](#)?
- Clear need for expertise: Detailed documentation for why you are essential to the business.

You should consult an experienced business immigration attorney to discuss this option further.

National Interest Waiver (NIW)

The national interest waiver (NIW) is a pathway to permanent residency but it is not an immigration status and does not provide work authorization.

To qualify for an NIW, an individual must have an advanced degree* and be able to meet the three following criteria:

1. Show that their proposed work has substantial merit and national importance. *Submitting proof that their specific business addresses a gap or advances progress in a priority area*
2. Are well positioned to advance or succeed. *Investment commitments from firms or investors, government grants, patents etc.*
3. That it is beneficial to the U.S. to waive the labor certification requirement. *Proof traditional employer sponsorship would slow innovation or harm U.S. interests.*

*if an individual does not have an advanced degree they can meet the requirements by proving “exceptional ability”.

How does an NIW help in my immigration journey? An approved NIW provides a basis for which an individual can apply for permanent residency (also known as the green card).

O-1 Individuals with Extraordinary Ability

The O-1 is for individuals who possess extraordinary ability in the sciences, arts, education, business, or athletics, and has been recognized nationally or internationally for those achievements.

Extraordinary ability in the fields of science, education, business or athletics means a level of expertise showing **that you are one of the small percentage of people at the very top of your field**— This means most recent graduates will not meet the requirements for an O-1.

However, you can begin to work towards these accolades as a student and post graduation.

For entrepreneurs, the criteria can be difficult to meet. This is because there is a lack of customization of the criteria categories for business and business founders.

To qualify for an O-1, an individual must meet 3 of the 8 criteria:

Criteria	Examples
• Authorship	• Review Articles • Peer Reviewed Research Publications • Book Chapters
• Published Material written by others	• Review articles written by others (make a special mention if it is solely on your work) • Citation summary of published materials from Google Scholar/Scopus • List your top four citations by others in high impact journals. • Citations in book chapters
• Judge of others	Invitations to review articles in journals, to be a peer reviewer for funding proposals, to be on the conference selection committee etc.
• Original scholarly research contributions	Awards/Grants received, approved patents, media publications etc.

• Recipient of prizes	Awards given by national and internationally recognized institutions
• Outstanding memberships	membership is exclusive and limited solely to those who have been judged by their peers as having attained outstanding achievements in the field (e.g. National Academy of Sciences.)
• Employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation	Letters from current or former employer(s) with specific details regarding your role and how it was critical or essential, with emphasis on the specific accomplishments, how the accomplishments are attributed to you and your role, and why these accomplishments are important;
• Commanded a High Salary	Tax returns Pay stubs Contract letters showing a high salary for your field

Other Options for Entrepreneurs

For more information about opportunities for entrepreneurs, you can visit the USCIS website:

<https://www.uscis.gov/working-in-the-united-states/options-for-alien-entrepreneurs-to-work-in-the-united-states>

<https://www.uscis.gov/working-in-the-united-states/entrepreneur-employment-pathways/immigrant-pathways-for-entrepreneur-employment-in-the-united-states>

FAQs:

What if I volunteer for a startup owned by someone else?

The Department of Labor (DOL) defines volunteer work as: “An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours.”

If you are receiving compensation (pay) or practical experience, even if it is not in the form of money, this is considered work.

What if my spouse is the owner of the company? Can they sponsor my immigration status?

In most cases, it is best if there is an independent board that governs your employment and can make unbiased decisions.

Can I do all the work for the business outside of the US but have the business active while I am still in the U.S. studying?

While immigration regulations do not apply when you are physically outside the U.S., you must be able to document that no unauthorized work has occurred. If you are currently in F-1 status, you should speak with your ISS advisor about what's allowed while in student status. If needed, your advisor will refer you to an immigration attorney.