Immigration Considerations for Entrepreneurial International Students
Considerations

• What is employment
• When am I an “employee”
• What types of employment authorization may be available
• Where do I find help
Employment

- 8 CFR 274a.1(f) defines “employee” as an individual who provides services or labor for an employer for wages or other remuneration.

- Broad definition of employment: includes any labor or service performed in return for remuneration; which includes anything of value such as food and lodging (see pg. 3, M-274 I-9 Handbook).

- Applicant entered the U.S. as a nonimmigrant student, F-1. The applicant purchased a franchised restaurant in CA. Director found the applicant failed to maintain his nonimmigrant student status and worked without authorization. Matter of Kung (1978)
Volunteering

- Volunteers may receive certain benefits from the “employer” as long as the work was entered into without any expectation of compensation/benefit and that the compensation/benefit may not have been offered in exchange for the work.
- Volunteering is not appropriate for work/services for which one would normally pay someone (or should pay someone) or one for which someone will be paid in the future.
Employment Options for International Students

- Academic Training (AT)
- Curricular Practical Training (CPT)
- Optional Practical Training (OPT)
Academic Training

• J-1 non-immigrant visa in a student category
• 18 months for all degree levels
  - Can be used pre- or post- graduation
• Additional 18 months for PhDs (36 months total)
  - Can only be used post-graduation
• May be authorized for any job that can be documented as directly related to degree program
Academic Training - Authorization

• Authorized by MSU OISS
• Process fairly quick
  - 1 – 2 weeks, depending on volume of requests
• Required documentation
  - http://www.internationalcenter.umich.edu/immig/jvisa/j_emplac_adtrng.html
• Authorization is employer specific
Curricular Practical Training

• F-1 non-immigrant visa
  • Must continue to maintain a full course of study in F-1 status during the period of employment
  • No limit
  • Students who have received one year or more of full time curricular practical training are ineligible for post-completion academic training.
• May be used for internships and other off-campus work opportunities *before* completing degree requirements.
  – Job responsibilities must be *integral* to degree program
  – Employment must be part of the student's major course of study
Curricular Practical Training – Authorization

- Authorized by MSU Office of International Students and Scholars if approved by Academic Department/Academic Advisor
- Process fairly quick
  - 1 – 2 weeks, depending on volume of requests
- CPT course, approved by the Registrar’s Office, required for CPT authorization
- Will need employer offer letter with specific information (dates, location, description, # of hours/wk)
- Authorization is employer specific
Optional Practical Training

• F-1 non-immigrant visa
• 12 month limit –
  • Part-time OPT is deducted from the 12-month limit at 50%.
  • Students in an approved STEM field may be eligible for 17 additional months (29 total)
• Usually used for internships and other full time employment after completing degree requirements.
• However, pre-completion OPT is an option for students wishing to pursue employment part-time during studies. May be good solution for self-employment eligibility.
Optional Practical Training

• Job responsibilities must be directly related to degree program
• Self-employment is specifically permitted for students on OPT.
• Must work >20hrs/wk
• May not surpass 90 days of unemployment during OPT authorization period
Optional Practical Training - Authorization

- Authorized by US Citizenship & Immigration Services (USCIS)
- Process can take up to 3 months
- Required documentation
  - I-765 Application for Employment Authorization
- Authorization is **not** employer specific
  - Job responsibilities must be related to degree program
Options after Graduation (Non-immigrant)

**Most Common:**
- H-1B Temporary Worker
- TN NAFTA Trade National
  - Canadian and Mexican citizens only

**Less Common:**
- E-3 - Australian citizens only
- H-1B1 - Chile and Singapore citizens only
- O-1 Extraordinary Ability
- J-1 Trainee
Employee/Employer Relationship

• Q: ........ Are there any examples of when a beneficiary, who is the sole owner of the petitioner, may be able to establish a valid employer-employee relationship?

• A. Yes. USCIS indicates that while a corporation may be a separate legal entity from its stockholders or sole owner, it may be difficult for that corporation to establish the requisite employer-employee relationship for purposes of an H-1B petition. However, if the facts show that there is a right to control by the petitioner over the employment of the beneficiary, then a valid employer-employee relationship may be established.

• For example, if the petitioner provides evidence that there is a separate Board of Directors which has the ability to hire, fire, pay, supervise or otherwise control the beneficiary, the petitioner may be able to establish an employer-employee relationship with the beneficiary.
The H-1B Cap

- 65,000 H-1B plus 20,000 for US advanced degrees
- Cycle follows federal fiscal year (Oct. 1)
- Does not apply to all employers
  - Extensions, changes of employers
  - Higher Ed & affiliated research institutions; non-profit & government research institutions
  - Working concurrently for both exempt and non-exempt employer
  - Those counted against the cap within the past six years, whether or not they currently are H-1B
  - Those employed “at” an exempt employer working for the benefit of the cap exempt employer
  - Those who can recapture time spent outside of the U.S. during their H-1B petition periods
Trade Categories

- **TN-1/2 Canadian or Mexican Professional**
  - Three years, renewable in 3-year increments
  - Work in profession listed on NAFTA schedule
  - Generally requires a Bachelors degree in field

- **E-3 Australian Professional**
  - 2-year validity; renewable indefinitely
  - Job must be for a “specialty occupation” as for H-1B

- **H-1B1 Chile or Singapore Professional**
  - 2-year validity; renewable indefinitely
  - 6,400 per year available for professional positions
  - Job must be for a “specialty occupation” as for H-1B
Additional Non-Immigrant Options

• O-1 Extraordinary Ability
  - Time? (3 years, renewable 1 year at a time indefinitely?)
  - Must show sustained national or international acclaim

• E-1/E-2 Treaty Trader/Investor
  - 2 years; no limit on extensions
  - Must be owner, executive, manager, or key employee and “citizens” of country with qualifying treaty with U.S.
  - Investment: substantial, active, non-marginal
Employer-Sponsored Permanent Residence (E-PR)

- Length and cost of process determined by type of position
- Typically requires a test of availability of US workers but there are exceptions
- Employee may be able to self-sponsor if extraordinary or in the national interest
Typical Categories of E-PR Sponsorship

- **EB1**: Priority workers
  - No labor market test required
  - Extraordinary Ability *(Employee may self-sponsor)*
  - Outstanding Professors & Researchers
  - Multinational Managers

- **EB2**: Advanced degree holders & exceptional ability
  - Labor market test typically required
    - National interest, nurses & physical therapists, and renown exempt from labor market test

- **EB3**: Bachelor-level professionals
  - Labor market test required except nurses, physical therapists & those of renown
  - No national interest exception
  - Bachelors level professional
National Interest Waivers

• EB2 - Waiver of labor certification in the National Interest

• Eligible if applicant holds advanced degree or is of exceptional ability; AND work is deemed to be in the national interest

• Ordinarily, job offer and labor certification required for EB2 advanced degree or exceptional ability - waived if job is in the “national interest”

• To establish national interest, must show:
  - employment will be in an area of substantial intrinsic merit;
  - benefit of alien’s skills will be national in scope
  - national interest would be adversely affected if labor certification required
National Interest Waivers

- Not sufficient to show a shortage of qualified workers in a particular area
- Must also show a record of alien’s achievements/ skills
- May be self petitioned
- Portable to new employer or self-employment if still in national interest
- Better chance of success with support from interested government agency
- USCIS will balance contribution of alien against protection of U.S. workforce
- *Obama Administration policy intends to liberalize where job creation is involved*
EB5 Alien Entrepreneurs

- Investment in a business which creates or saves at least 10 jobs for US workers
- $1,000,000 investment or $500,000 in an impacted geographic area with higher unemployment or rural area
- Regional Centers created to permit pooling of investor funds with $500,000 minimum
  - Permits indirect job creation
- 2 year conditional resident status requiring petition at end to demonstrate funds remain invested and jobs created
- Investment funds must be “at risk” so no guarantee of return of investment permitted
- Investment must be made and business plan must convince USCIS that jobs are likely to be created
Where to Look for Info

Many sites exist – law firms, AILA, and others:

- [www.uscis.gov](http://www.uscis.gov)
- [www.travel.state.gov](http://www.travel.state.gov)
- [www.aila.org](http://www.aila.org)
- [http://oiss.isp.msu.edu/](http://oiss.isp.msu.edu/)