

Foreign Entrepreneurs, Nonimmigrants, Company Ownership and Labor Certification

If an alien has a nonimmigrant visa and wants to obtain ownership in a company, as a general rule, the alien must make sure he/she is simply a “silent investor” and NOT an active participant in the company. In other words, the nonimmigrant should not have any part in the running of the business or decision making authority at any level as an owner. This should be delineated in detail in the Operating Agreement (for LLCs) or Bylaws (for Corporations). Aliens should be particularly concerned with how the documents reflect their role in the company, because if they are seen as active participants, they will be violating immigration law. If the documents poorly reflect this, then they can be seen as being “self-employed” and thus engaging in unauthorized employment. If the purpose of company ownership is simply investing and receiving dividends, etc. as part of their investment, then, as a general rule, the alien may not be violating any rules of his/her visa. Of course, aliens who are thinking of investing in a small business should definitely seek out legal counsel to ensure they are protected.

Smaller companies have fallen under increased scrutiny in the past several years by immigration officials, especially if the alien has some company ownership (even as a silent investor) and that same company is attempting to file labor certification for the alien. Self-employment is found when there is no genuine bonafide job offer. Immigration uses several factors to determine whether an alien is self-employed and can be the basis of denial of a labor certification, such as whether the alien

1. Can control or influence hiring decisions
2. Is a relative of anyone in the company
3. Was an incorporator/founder
4. Has an ownership interest (any amount)
5. Is involved in management
6. Is on the board of directors
7. Is part of a small number of people employed
8. Has qualifications for the job that are identical to the specialized requirements on the labor certification
9. Is so inseparable from the sponsoring company because of his/her personal attributes that the company would cease to exist without him/her.

**Note that the totality of the circumstances, and no one factor, is taken into account*

Aliens should be aware of the subjectivity in the immigration system. Therefore, personal results may vary from application to application. Aliens considering investing in a company, starting a company or being hired by a company, should seek out legal counsel. Being above board and working within the parameters of the immigration system is the best way to obtain lasting legal status in the United States.

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