



CPLS, P.A. Attorneys & Counselors at Law

Guidelines for Foreign Investors

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SPECIAL POINTS OF INTEREST:

- How to Set Up a Business in the United States
- How to Apply for a Work Visa
- Other Important Considerations

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"We prepared these guidelines to give our foreign clients and associates an overview of the key issues in forming and operating an American enterprise, to help them understand the benefits of doing business in the United States, and to explain how they can begin the process."

A foreign investor should get legal advice before investing in the United States. Key issues in the formation and operation process of an American enterprise include, but are not limited to: 1) choosing the form of the business, such as sole proprietorship, partnership, corporation, or limited liability company ("LLC"); 2) choosing the best strategy to minimize American taxes; 3) choosing the right labor relationship (employees vs. independent contractors); 4) analyzing the importance of the immigration laws (in deciding who can work for the business); 5) analyzing how to supersize the relationship between the parent company and the U.S. subsidiary. Compared to open-



"Our attorneys have extensive experience in handling business and immigration matters. It is our philosophy to encourage our clients to be proactive. A major decision like the formation of a business abroad has to be effectively planned in order to archive maximum benefits of this venture."

United States, particularly Florida, is relatively easy. In Florida, an investor can open a company with a minimum amount of initial capital. The length of time it takes to register and organize the enterprise is relatively short, and the costs with government agencies are very low. A foreign citizen can be a shareholder of a Florida corporation, as well as its director, president, or secretary. These functions can be held by the same person; however, a Florida company or natural person must serve as the company's registered agent. When comparing this process with that in their home countries, foreign investors are often surprised by the lack of bureaucracy and short length of time required to open a business in Florida.

Forming a Business in the United States

Since there are various forms of business in the United States, a Florida attorney, who understands and practices business law, can form a company for less than \$2,000.00 (two thousand

dollars). In the United States, these business forms include sole proprietorships, partnerships, corporations, and limited liability companies (LLCs). Our guidelines focus on doing

business in the United States and Florida. Similar processes exist in other states, but we will give our foreign clients and associates a general overview without addressing issues particular to each state.



Although all types of U.S. business types are identified here, foreign investors should keep in mind that we discourage sole proprietorships or partnerships because of the liability aspects involved.

Corporations are entities separate from their owners. This form provides limited liability to all shareholders.



Types of Business Organizations

Sole Proprietorships

In the United States, a business enterprise owned by only one individual is called a sole proprietorship. To create a sole proprietorship, one must only comply with local codes and regulations, such as registering the business name to prevent fraud, obtaining a business loan, and opening a business bank account. Basically, the owner maintains the ultimate control over the

Partnerships (General or Limited)

When two or more people or entities have an agreement to engage in any business for a profit, a partnership is automatically formed. To formalize the relationship, they will need to journalize this agreement and follow the same steps taken by a sole proprietorship to have a business recognized by the local government. Once formed, partnerships share many of the same benefits

Corporations

In the United States, there are basically two types of corporations: publicly held corporations and closely held corporations. Both types are created under state laws and are subject to the same basic rules. However, they present some differences regarding ownership and operation. In addition, publicly held corporations are subject to federal regulation in a

entity, even in cases when he or she delegates management powers to employees. The benefits of a sole proprietorship include easy formation, tax advantages, and easy control; however, there are great risks as well. Sole proprietorships are not considered separate entities apart from their owners. As a result, the owner of the business is personally liable for all of the business' debts, and creditors will be

and risks as a sole proprietorship. In a general partnership, the partners are exposed to unlimited liability for the business's debts. The partners also act as agents for the company. As a result, their actions bind the partnership. In addition, partners are jointly and severally liable for all partnership obligations. After creditors seek the satisfaction of their credits from the company's assets, they can seek to

greater extent when compared to the closely held corporations. Publicly held corporations are those whose shares are traded by the general public in stock exchange markets. In those corporations, most shareholders buy shares as an investment and, generally, do not want to be involved with management activities. However, some shareholders can own major blocks of stock and can also

able to collect from the owner's personal assets. In addition, sole proprietorships are not considered separate taxable entities by the International Revenue Service (IRS), the federal income tax agency. That means that a sole proprietorship itself does not have to pay federal income taxes. Rather, the income and deductible expenses of the business are reported on the owner's personal tax return, which means lower taxes.

reach the personal partners' assets. In contrast, in a limited partnership, the limited partners are not subjected to unlimited liability for the debts of the business. If the business fails, the limited partners lose their initial capital and money invested in the enterprise. However, creditors cannot collect the business's debts from the limited partner's assets. Limited partners have limited control over the running of the business, and they are treated as investors.

serve as directors or officers. Closely held corporations (close corporations) are those whose shares are not publicly traded. Usually, close corporations have relatively few shareholders, who often times agree to not sell their shares to outside investors. Normally, the shareholders participate actively in the management decisions. Both types of corporations must comply with statutory requirements, but some American states have



enacted special statutes for close corporations in order to allow those corporations more flexibility. In contrast to sole proprietorships and partnerships, corporations are separate entities from their owners. Corporations also provide limited liability to their owners. If they comply with the required laws, corporate shareholders cannot be held personally liable for debts incurred by the company. In other words, shareholders will not lose more than the amount represented by the value of their interest in the corporation, regardless of the total of the corporation's debts. This is the main reason why investors decide to do business using the corporate form. Another advantage of choosing to incorporate is the perpetual existence of the corporation, or its survival beyond the lifetime

of its investors. In addition, the shares of a corporation can be easily transferred to new investors, and this transference of ownership interest will have no effect on the corporation. However, in small and closely held corporations, this transfer can be restricted, and it is very common to have provisions giving shareholders the right to buy back shares under certain circumstances. Regarding the tax treatment, corporations can bear a great tax burden. Since a corporation is considered a legal entity with existence separate from its owners, it is also taxed separately. As a practical matter, corporation earnings are subject to a double tax: when a corporation distributes earnings to its shareholders by the way of dividends, these earnings will be taxed through individual income taxation and before distribution at the corporate level. Some corporations can qualify to avoid the "double taxation" problem by electing to be treated as a "Subchapter S" corporation, but this option is not available for foreign investors. The double taxation result can be avoided where shareholders are also

employees or creditors. In these cases, a corporation can make "non-dividend" distributions in the form of salaries or interests in loans. These distributions can be deductible from corporate earnings. If these deductions equals the earnings, thereby causing a "zero-out" of corporate earnings, the corporate income will be taxed only once through the shareholder-employee or shareholder-creditor income, exactly like in partnerships or corporations' S distributions. Incorporation can be very opportune for big companies that wish raise money in the form of issuing shares or small companies that want to extend their operations. The first step to create a corporation in the U.S. is to file "articles of incorporation" with the appropriate state official. When the papers are in the proper form and the fee has been paid, a state official will issue a certificate of incorporation, and the corporation comes into legal existence. After obtaining the certificate of incorporation, the incorporators should complete the incorporation process by holding an initial meeting to adopt bylaws, issue stock certificates ,and for other formalities.

It is crucial to complete the formation process before commencing business to ensure that the benefits of incorporation are realized.

It is important to be aware that the biggest advantage of incorporation in the United States, limited liability, can be disregarded by a creditor if the corporation fails to follow essential formalities such conducting meetings and filling annual reports, which are not mandatory in partnerships. The involvement of an attorney is essential when incorporating in the United States.

Limited Liability Companies

A Limited Liability Company (LLC) is a type of business organization that now exists in all the American states. It is a mixed entity that combines features of a corporation and a partnership. LLCs have become very popular in the United States and preferred by many business people over partnerships and subchapter S corporations. Because of their flexibility, LLCs have several advantages over other business organizations. When compared to the limited partnership form, for example, LLCs have the same taxation and limited

liability advantages. However, LLC members, unlike limited partners, can participate of the business management. These members have control of the business instead of being treated as only investors. Moreover, there is no need for a general partner with an unlimited liability. When compared to close corporations, LLCs are easier to create and operate. State LLC statutes usually abandon the formalities required for corporations such as meetings and hierarchy of shareholders, directors, and officers. However, the most important advantage of an LLC over a corporation is that an LLC can avoid

double-taxation. The IRS has implemented a procedure know as a "check-the-box", which facilitates tax treatment for LLCs. LLCs can choose how they want to be treated for tax purposes: as a corporation or as a partnership or association. Finally, even a single-member LLC can be created in place of a sole proprietorship.

The Limited Liability Company form of business is strongly recommended as it can replace either sole proprietorships or partnerships, granting all the advantages of limited liability.

Immigration:

Because foreign investors may wish to live and work in the United States to better manage their businesses, it is important that they consider U.S. immigration laws. They may also prefer to send some of their employees to perform this task for them.

For management positions, two kinds of visas are available in the United States. The first is the LI visa and the second is the HIB visa. Moreover, if the country has a commercial or investment agreement with the United States, E1 or E2 visas are also available to foreign investors.

The LI visa is available to executives who have worked continually for at least one year for the foreign company, subsidiary, or affiliate, and is granted to



executives with knowledge and expertise with the company's operations.

The HIB visa is used to bring a foreign employee to the United States, temporally. This visa category requires that the applicant be a professional with exceptional ability or merits. In order to qualify for an HIB visa, the applicant must hold a bachelor's degree in an American or foreign university. Many years of experience in the field may substitute this requirement. The position the applicant will occupy must be related to his/her expertise.

Finally, E visas require a substantial investment in the United States or a business of import and export between a foreign treaty country and the United States. Jamaica, Argentina, Canada, and Chile are few examples of countries with treaties providing for trade and investment status (E visas).

Employment Relationship:

The default legal arrangement for most employment relationships in the United States is the "at-will" common law doctrine. In a practical matter, employers can fire employees for no cause, unless an employment contract provides otherwise and as long as the termination does not violate one of the employee's legally protected rights. Unlike countries with civil legal systems where employment relationships are basically regulated by civil and labor codes, in the United States, the employers and employees are freer to determine the terms of their contracts. However, exceptions do exist to the at-will rule, such as dismissal based on race, religion, sex, or other special conditions. Another exception is a dismissal in violation of public policy such as where an employee is fired for refusing to do an illegal act for his/her employer.



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Trademark Registration:

In order to register a trademark in all American states, it is necessary to register it first in Washington, D.C.. If a mark is registered only in one state, it will only be protected in that state. Once registered in Washington, no one else will be allowed to use the mark without previous authorization. In order to register a mark in the United States, it is also necessary to first search if the name has been already used in the country. If the mark was registered by someone else in some state (Florida, for example) but not registered in Washington, D.C., the investor can still register his mark in Washington, D.C., and will have the right to use it in the whole country, except in Florida. The registration process takes about one year.