

REPRINTED
International Educator
NAFSA: Association of International Educators
Sept./Oct. 05

MURKY F-1 EMPLOYMENT QUESTIONS

by
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I participated in a panel at this year's NAFSA's Annual Conference entitled "When There is No Answer, Who You Gonna Call?" During the panel, we answered many of the difficult questions relating to F-1 employment issues that I had been asked by advisers and students over many years.

The following are some of those questions:

Can an F-1 student start her own business working from her dorm room?

The answer is relatively straightforward if the student will be working more than 20 hours per week or if the place of employment is not "on campus". In that event, it is rather clear that United States Citizenship and Immigration Services ("USCIS") would consider this "self employment" to be "employment" in which a student may not engage while in F-1 status. There is support in the case law for the Service's position. A solution might be a part-time H-1B petition if the business incorporates, in which event the student would be able to continue to study since there is no prohibition against a student studying while in H-1B status.

Assuming the dormitory is on campus and the work is limited to 20 hours per week, the question is somewhat more complex. We must make reference to the USCIS regulation at 8 C.F.R. 214.2(f)(9) regarding "on-campus employment". Of course, an F-1 student may work up to 20 hours per week on campus. The issue is whether the student's business that is physically on campus qualifies for "on-campus employment". The regulations exempt "on-site commercial firms...which do not provide direct student services" from on-campus employment. Arguably, if this student's website business relates, for example, to the sale of used textbooks, the employment would qualify as on-campus employment. Otherwise, it may not meet the requirements of the regulation. The regulation also requires that the on-campus employment not displace U.S. residents. This is a fairly subjective and unenforced

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(and likely unenforceable) regulatory provision that is highly unlikely to arise in any immigration proceeding.

Can an F-1 student invest in a business but not actually work in the business?

There is no restriction whatsoever on a student investing in a business. The only restriction comes into play if the student wants to work for the business in which he invests.

What if the student wanted to sell her own products, such as jewelry?

Clearly there is no problem if she is selling jewelry that she purchased and no longer wants or needs. However, what if she made the jewelry herself? If she made it for her own use and subsequently decides that she doesn't want it and wants to sell it, again there would seem to be no problem. However, if she makes jewelry expressly for the purpose of selling it and making a profit, it begins to look like self-employment, which is not authorized.

What if the F-1 student sells not her products, but her time?

For example, what if she is compensated for participating in medical experiments or modeling for an art school? It is likely that the USCIS position would be that such an individual would be engaged in unauthorized employment even though the person does not have an "employer", does not receive a W-2 and is a 1099 independent contractor.

What if the F-1 wants to work off campus to get experience, but not be paid?

The issue of the so-called "volunteer" arises frequently. The short answer is that this is usually a bad idea. The employer is at risk of a Department of Labor penalty for employing an individual below minimum wage. (Zero is clearly below minimum wage.) Although there are arguments that could be made that the alien is not "employed" under immigration law, the government position in the past has been adverse to this position. There is case law that supports the government's position.

Defining Employment

Surprisingly, many of these issues arise because the term "employment" is never defined in the Immigration and Nationality Act or in the regulations (other than a specific definition limited to I-9 and employer sanctions matters). Case law and legacy INS pronouncements on the question of what is and what is not "employment" are by no means consistent. As such, the adviser and the immigration counsel are left to provide advice as best they can under the circumstances.

Proposed and Actual Conduct

As an immigration attorney, I advise in two different contexts. The advice spelled out in this article is the advice that I provide to students or advisers to guide a student's proposed conduct. However, what if a student has already taken the action and is now filing for another benefit, such as adjustment of status to permanent residence? Has the student in these examples clearly engaged in "unauthorized employment" such as to render her ineligible for adjustment of status? Preliminarily, I must explain that an attorney has two sometimes competing ethical obligations. One obligation is to answer all questions on government forms honestly and not to file for a benefit to which the alien is clearly not entitled. An equally important ethical obligation is for the attorney to "zealously" represent his client. As part of this zealous representation, the attorney must prepare a case and answer questions on a form in a manner most

favorable to the alien as long as there is an “arguable legal basis” for the position the attorney is taking, even if the attorney believes that the USCIS position might be different.

How does this translate into an actual application? The only place in the adjustment of status application process where the issue is addressed is in the G-325, Biographic Information Form. That form asks the alien to provide specified information for all “employers”. If, for example, an alien had no “employer” but rather was an independent contractor, there may be an arguable legal basis for not including that information on a form that asks for information about “employers”.

If the person is self-employed, must the form be completed with “self” under the name of employer? Different attorneys have different views on this, but it is relevant to note that the Service does not consider self-employment to be allowable for an H-1B petition since one’s self cannot be one’s own “employer”. (This is different from the situation of an alien who forms a sole shareholder corporation, in which case the corporation may be the employer for H-1B purposes).

In summary, conservative advice when the action has not been taken is certainly prudent. However, if the F-1 has already acted, immigration counsel’s advice as an advocate for the student may be somewhat more aggressive, especially given the ambiguity of the existing law.