

FAQ BUSINESS FORMATION FOR IMMIGRATION PURPOSES

What are the benefits of incorporation?

Several considerations drive the decision to incorporate, including ownership and control, asset protection, and taxation. Incorporation can help limit your personal liability as a business owner. This is because, in general, a corporation's creditors must look to the corporation's assets to satisfy their claims rather than the personal assets of shareholders. In contrast, all partners in a partnership are financially responsible for all business liabilities of their partnership, and each partner's personal assets are subject to attachment or lien by creditors. Likewise, a sole proprietor's assets are subject to similar exposure, as are those of anyone who joins in an unincorporated venture.

Other benefits of incorporation include favorable pass-through tax treatment, increased tax deductions for health insurance and medical expenses, and lower payments for Social Security and Medicare taxes. The following discussion addresses some rudimentary tax considerations associated with forming a business in the United States. If your plans require more sophisticated tax advice, we can refer you to qualified tax professionals.

Who owns the corporation?

In the U.S., each corporation is owned by one or more shareholders. In general, the shareholders ultimately control their corporation because shareholders determine who serves on the Board of Directors. In turn, subject to the instructions of the Board of Directors, a corporation's officers manage its operations from day to day.

How you structure the ownership and control of your business may affect your immigration proceedings. For example, with regard to L-1 and E-1/E-2 visa applications, corporate ownership and control are especially relevant.

How many directors and officers are required to form a corporation?

In most states, one person is enough to form a for-profit corporation. The same person may hold the offices of President, Secretary and Treasurer and may be the corporation's only Director. However, in Florida and other states, a non-profit corporation's Board must consist of at least three Directors.

What are the requirements for foreign ownership of a U.S. company?

Generally, there are no restrictions on foreign ownership of a company formed in the U.S. In the U.S., a foreign citizen may use the same procedure to form a company as would a U.S. citizen. Indeed, with very few exceptions, whether an owner holds U.S. citizenship or a "Green Card" or a nonimmigrant visa is irrelevant with regard to the right to own a business formed in the U.S. However, how you structure your business may affect your application for a U.S. visa. Likewise, your immigration status will affect whether your business is eligible to receive favorable federal tax treatment on pass-through profit distributions as an "S Corporation." We will discuss the distinction between organizing your business as an "S Corporation" and a "C Corporation" in another FAQ.

May I receive compensation from my U.S. business?

A foreign citizen may be a corporate officer and/or director. However, unless the foreign citizen has a work permit such as a "Green Card" or nonimmigrant visa, he or she may not

receive a salary or compensation for services provided in the U.S. Furthermore, most U.S. work permits only allow a foreign citizen to work for a sponsoring employer. So, even if you have a work permit, as a foreign citizen you may not be allowed to receive a salary from your newly-formed company.

Are there annual filings if I incorporate?

Yes. In general, corporations file an annual federal tax return (IRS Form 1120 or 1120S), as well as a simple one page annual state report. The latter updates information such as the address of the corporation and the names of its current officers and directors. (The names of the shareholders are generally not listed in the annual state report.) Annual federal tax returns are also filed by sole proprietorships (Schedule C to IRS Form 1040), limited liability companies (IRS Form 1065) and general partnerships (IRS Form 1065). In addition, your corporation may be required to file annual tax returns with the state, counties and/or municipalities in which it operates.

Must I form a corporation to do business in the U.S.?

There are many different forms of business organizations in the U.S. They range from a simple "sole proprietorship" to a sophisticated conglomeration of incorporations, and include unincorporated associations, partnerships, limited liability companies and nonprofit organizations. Thus, the corporate form is but one of many alternatives for doing business in the U.S. And if you chose to organize your business as a corporation, there are different classes of corporate organizations. For example, the U.S. Internal Revenue Service (or "IRS") allows businesses to organize as either an "S Corporation" or a "C Corporation." So, as you consider your choices as to the form your business will take, it is best to consult an attorney.

What is a nonprofit corporation?

A nonprofit corporation is one organized for charitable, religious or educational purposes. The process of forming a "for profit" versus "nonprofit" corporation is similar. In general, a nonprofit corporation is exempt from federal income tax, except with respect to unrelated business income. There are no owners in a nonprofit corporation. Instead, a Board of Directors has complete control of a nonprofit corporation.

A nonprofit corporation may not pay any profits or make distributions its "founders." However, assuming their immigration status permits, a nonprofit corporation's founders may receive compensation for the fair market value of actual services provided to that corporation. If a nonprofit corporation will seek charitable contributions from the public, the nonprofit must apply with the IRS for 501(c)(3) recognition. That requires a separate application which should be filed within 15 months after incorporation of the nonprofit.

What is a C corporation?

You and your business may be treated as different "persons" for federal taxes. Long before it is time for your business to pay federal taxes, you will want to determine whether you can adjust your immigration status to avoid such "double taxation." This is because, under U.S. tax law, a nonresident alien may only own shares in a C corporation.

The term "C Corporation" refers to the way in which the corporation is taxed. There is a corporate level income tax on the profits of a C corporation. In addition, if a dividend is paid

to shareholders from retained earnings, the dividend is included on the personal tax return of each shareholder. Thus, the profits of a C corporation are potentially subject to double taxation. Your corporation will be taxed as a C corporation unless you timely file IRS Form 2553 to elect tax treatment as an S corporation.

What is an S corporation?

The term "S corporation" refers to an alternative in which the IRS will treat the corporation as a "pass through entity." In that case, there is no corporate level income tax. Instead, a pro rata portion of the annual profit or loss of the S corporation is included on the personal tax return of each shareholder. Many start-up businesses benefit by making the election to be taxed as an S corporation. If it files IRS Form 2553 within 75 days of its incorporation, a corporation may be treated as an S corporation for tax purposes. However, if any owner of the company is another business or nonresident alien (who is neither a Green Card holder nor U.S. citizen), a corporation will fail to qualify for S corporation status.

What is an LLC ?

A Limited Liability Company's basic features are that its owners have limited liability for the entity's debts and obligations, similar to the status of shareholders in a corporation. Most importantly, a foreign citizen may form a limited liability company to receive pass-through profit distributions. In contrast, all dividends made by a C corporation are subject to double taxation. (Under U.S. tax law, a nonresident alien may own shares in a C corporation, but may not own any shares in an S corporation.) For this reason, many foreign citizens form a limited liability company instead of a C corporation.

Can Ellen von Geyso, P.A., form corporations in all U.S. states?

We can assist you in determining the appropriate structure for organizing your business. If you choose to incorporate, we are available to file the appropriate documents to form corporations, limited liability companies, and partnerships in each of the fifty U.S. states. On average our turnaround time for completing such filings is less than 48 hours. To do business in the U.S., you will also need to obtain a separate Federal Employer Identification Number (FEIN) from the IRS. (Any employer who wishes to sponsor a visa application must have a FEIN.)

In which state should I incorporate?

The general rule is that a business should incorporate in the state where its primary office is located. Unless your business has an office in the state where it is incorporated, and only operates in that state, it may need to submit an application to qualify as a foreign corporation. If need be, we can assist your business with the foreign qualification application.

What is a registered agent?

A company must have a registered agent in each state where it does business. A registered agent receives legal papers (including subpoenas and service of process) on behalf of the company. Ellen von Geyso, P.A., can make arrangements for reasonably priced registered agent services.