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PHANTOM VISA STATUSES

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While life is fortunately not always so dull and single dimensional, a rigid immigration system may force you into a straightjacket. Is there any leeway in the US visa system that might enable foreign nationals to pursue interests outside the narrow purpose of their entry without jeopardizing their visa status?

One who comes on an H-1B visa to work for a specific employer as a software engineer may not be prevented from also pursuing activities that are permissible under a tourist visa – such as participating in a community orchestra as an amateur violinist or taking rock climbing lessons in Yosemite national park. Similarly, someone visiting the United States on a tourist visa should not be prevented from also participating on a business conference call relating to one's occupation in his home country. I for one have furiously sent business e mails back and forth in relation to my law practice in the United States while waiting in an immigration line of another country's airport to enter as a tourist. Even before the age of smart phones and Skype, nothing prevented a tourist in the United States from jotting notes on a yellow pad in preparation for a business meeting that would take place in his or her home country after he returned.

There is nothing in the Immigration and Nationality Act that prevents one from engaging in activities in what I call a "phantom" status, provided they do not constitute unauthorized unemployment. This is recognized in the State Department's Foreign Affairs Manual (FAM) at 9 FAM 41.11 N3.1, which states that "n alien desiring to come to the United States for one principal, and one or more incidental, purposes should be classified in accordance with the principal purpose." The FAM note provides the example of a student who prior to entering an approved school wishes to first make a tourist trip of not more than 30 days. The FAM instructs that the person should receive the F-1 or M-1

student visa rather than a B-2 tourist visa.

The H-1B employee in the above example while working for her employer as a software engineer may decide to invest in a startup company. Preparatory activities such as meeting with corporate lawyers to incorporate the company and to market the business idea to venture capitalists would arguably be permissible under the B-1 business visa. Since one cannot hold H-1B and B-1 status at the same time, she can potentially engage in permissible business activities through this phantom B-1 status even while actually being in H-1B status. One must be careful, though, not to cross the line. Once the startup is established and the H-1B worker manages its day to day affairs, she may engage in activities that would not be permissible under the B-1 visa and this would constitute unauthorized employment.

There is a clear prohibition against unauthorized unemployment. 8 CFR 214.1(e) provides:

Employment. A nonimmigrant in the United States in a class defined in section 101(a)(15)(B) of the Act as a temporary visitor for pleasure, or section 101(a)(15)(C) of the Act as an alien in transit through this country, may not engage in any employment. Any other nonimmigrant in the United States may not engage in any employment unless he has been accorded a nonimmigrant classification which authorizes employment or he has been granted permission to engage in employment in accordance with the provisions of this chapter. A nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.

The question is when does one cross that line so that it constitutes unauthorized employment? This is hard to tell, but the best way to gauge this is whether the activity would be permissible under the B-1 visa for businessor the B-2 visa for pleasure. Thus, our H-1B employee may regularly participate as a violinist in an amateur orchestra as such an activity would be permissible under the B-2 tourist visa. If the H-1B worker was also a professional violinist, and was paid to play in a professional philharmonic orchestra in the United States while on an H-1B visa, that would be an impermissible activity as it would constitute unauthorized employment. The most appropriate visa for a performer would be an O-1 visa (an H-1B visa claim for a violinist was turned down a few years ago, *see Louisiana Philharmonic Orchestra v. INS*). When there are two competing

work activities that can only be done under different visa statuses, the person must choose to either be in the United States on an H-1B visa or an O-1 visa. It is unfortunate that our visa policy cannot accommodate a renaissance woman like our H-1B employee and violinist. On the other hand, if the work activities can be done under the same visa, the H-1B worker who is employed as a software engineer can also potentially be employed concurrently in H-1B status through her startup entity.

The ability to engage in activities under a phantom status is especially crucial in light of the USCIS policy to attract entrepreneurs to the United States under the existing visa system, and in the absence of a specific startup visa. One encounters many students who desire to establish startups while still in F-1 student status, or H-1B workers too who have dreams of leaving their existing jobs for the companies they have founded So long as their activities are preparatory in nature and otherwise permissible under the B-1 visa, they have arguably not violated their F-1 status. The USCIS Entrepreneur Pathway Portal provides a good explanation of activities permissible under the B-1 visa that could arguably be undertaken even while in another nonimmigrant status such as an F-1 or H-1B:

The B-1 visa is intended only for business activities that are a "necessary incident" to your business abroad. This covers a wide range of activities such as attending meetings, consulting with associates, engaging in negotiations, taking orders for goods produced and located outside the United States, attending conferences, and researching options for opening a business in the United States (such as locating or entering into a lease for office space). Generally speaking, you cannot engage in any activity or perform a service that would constitute local employment for hire within the United States. What constitutes local employment for hire will depend on the circumstances of each case, but generally speaking, any activity you perform in the United States must be directly connected with and part of your work abroad.

If you are coming to secure funding for a new business, you cannot remain in the United States after securing the funding to start actual operations or to manage the business, unless you change status to another classification that authorizes employment in the United States.

In *Garavito v. INS*, the First Circuit shed further light on activities that might not constitute unauthorized employment in the context of one who had established a gas station in contemplation of later applying for an E-2 visa:

The INS nowhere explains, however, what law would prevent a business visitor from making phone calls, giving employees instructions, or taking clients to their cars. Indeed, were the INS regulations to make such activity unlawful, it is difficult to see how foreign businessmen could conduct business within the United States, and it is equally difficult to see how any such regulation could fall within the lawful scope of the relevant statute.

Once the line is crossed from starting to managing the business, the individual in F-1 status must change to H-1B visa status through the startup, or if already in an H-1B status must file a concurrent H-1B visa through the startup. There are other reasons why it is good policy to permit activities under a phantom status. A person admitted on a B-1 visa to participate in business meetings should also be permitted to engage in tourism. Likewise, someone who primarily enters the United States to visit family members should be permitted to participate in an incidental one hour business meeting without having to switch status from B-2 to B-1. In the same vein, it would be preposterous to penalize a tourist who engages in communications through her iPhone relating to professional activities outside the United States while rock climbing in Yosemite!