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Entrepreneurs often dream of breaking in to the vast U.S. market to sell their goods and services

For an entrepreneur accustomed to conducting business in English, a transition to the U.S. market is particularly appealing given the ability to use existing technical, sales and marketing materials. In this article, Stephan Grynwajc explains what to prepare for when planning a successful entry into the U.S. market.

Despite this cultural and linguistic accessibility, entrepreneurs should understand that the U.S. is a unique and highly competitive market and many foreign entrants become disillusioned once they realize some of the day to day complexities and challenges associated with doing business there.

Preparation and awareness are key to a successful entry into the U.S. market.

To be successful, the entrepreneur must understand the specificities of the local market and adjust their marketing strategy accordingly.

Admitted to practice law in the United States, Canada, and the UK, we focus our practice on assisting foreign entrepreneurs, startups and small to mid-size companies in their U.S. operations.

We have created this mini-guide to provide some preliminary guidance on how to successfully establish your business in the U.S. market.

We are confident that our mini-guide will help you better understand some of the key aspects of doing business in the U.S. and will be the starting point to prepare you and your business for the next phase of your growth!

Strategy

There are several options for entry into the U.S. market, some of which require physical presence on U.S. soil and others which do not. Understanding these options is key to making the right decisions and to adopting the most appropriate market entry strategy for your business.

1: Entry without a local presence

Many foreign entrepreneurs assume that succeeding in the U.S requires establishing a physical presence. They proceed by incorporating a local legal entity, usually in the U.S. state where they intend to base their operations. These entrepreneurs also often assume that setting up a corporation in the U.S. is essential to a successful local sales strategy. It is not always the case and, especially for early stage startups without significant business experience, setting up a corporation can actually create unnecessary financial setback and operational difficulties, particularly at the outset.

Establishing a business in the United States is administratively demanding and carries with it tax obligations both at the Federal and at the State level.

By contrast, foreign entrepreneurs can easily position themselves in the U.S market from their country of origin by simply leveraging their English language website. Through creating a parallel website for the American market or appropriately localising an existing website for the U.S., businesses can enter the U.S. market remotely. By making adjustments to comply with U.S. standards (including localising their website or mobile app Terms of Use, and drafting a Privacy Policy that complies with U.S. federal and state laws), entrepreneurs can begin to conduct business in America with a very modest up front expenditure.

Taking additional steps, such as creating U.S. templates; bringing their foreign business documents into compliance with U.S. law; and adjusting software licence agreements, distribution agreements, partnership agreements, NDAs

and other key legal instruments allows foreign entrepreneurs to engage and build trust with U.S. prospects and clients not inclined to transact under foreign laws. These moves also signal that you are serious about doing business in the U.S., even if you continue to use your foreign company structure until you are ready to formalise your American operations through establishing a local business entity.

2: Entry without a local presence through a local representative

A second option for the foreign entrepreneur is to augment Option 1 with the appointment of a local representative with or without a local office. Such a representative, often an independent contractor, would be responsible for meeting potential clients and promoting the company's products or services within the U.S. One method is to sign a contract with a commission-only business referrer with experience in the local market and knowledge of your industry.

3: Entry through a local presence

This third option is best for entrepreneurs who have already had a chance to test the U.S. market for their products or services and who wish to further develop their local presence through a U.S. location, an American workforce, and local financing from American angel investors or VCs. This could also be an effective strategy for foreign entrepreneurs who are already well-established in their country of origin and intend to set up a wholly-owned subsidiary in the U.S. market.

Corporate law

The main forms of commercial legal entity in the United States are unincorporated Sole Proprietorships, Partnerships, Corporations, and LLCs.

Sole Proprietorships are the ideal solution for independent contractors, as they do not require incorporation as a separate legal entity. Conducting business through a Sole Proprietorship still requires you to verify that you have the necessary authorisations or permits to do business in your specific industry if that industry falls under a category regulated at the state and/or federal level. Sole Proprietorships are not taxed separately from their owners, so that business income is included in the personal income of the owner. As the owner, you are responsible for all income taxes, all profits, and all your business's debts, losses and liabilities.

Businesses with two or more owners should consider the partnership as another option. In a Partnership, each partner shares in the profits and losses

of the business.

There are two basic types of Partnerships: the General Partnership and the Limited Partnership. The Partnership is not a separate tax entity from its owners but a “pass-through entity” where business income “passes through” the business to the partners. Partnerships are not the ideal type of business vehicle if you are seeking to limit your liability, if you and your partner don’t see eye to eye, or if your objective is a fair distribution of business profits.

Businesses with shareholders (individual or corporate), or entrepreneurs intending to open their registered capital to shareholders should use a corporate structure despite the added complexity that comes with it. Corporations are distinct from their owners for both tax and liability purposes. The two corporate types are the C Corp and the S Corp. Foreign entities or nationals are prohibited from forming or holding shares in an S Corp, making it inapplicable for your purposes. Consequently, the C Corp is the only form available to foreign shareholders without a permanent resident visa. A corporation’s responsibility is distinct from that of its shareholders’. Whereas the shareholders’ financial liability is limited to the value of their respective contribution to the share capital, only the corporation is responsible legally for its actions and debts. Shareholders who are also employed by the corporation pay taxes on their salaries. Corporate income can be taxed twice: the corporation pays taxes on any profits, while shareholders pay personal taxes on dividends they receive.

It is the preferred vehicle for businesses seeking venture capital or outside investment.

The final type of commercial legal entity, the LLC (Limited Liability Company), is a hybrid combining elements of the partnership and corporation. The LLC provides the same limited liability as a corporation while preserving the tax efficiencies and operational flexibility of a partnership. Depending on the state, the “Members” of the LLC can be a single individual, two or more individuals, corporations, or even other LLCs. Like partnerships, LLCs are “pass-through” entities and are not taxed separately from their owners. In every other aspect, LLCs function like corporations.

Choosing the appropriate form of a commercial legal entity is an important decision that must be made based on the entrepreneur’s goals and development plans (i.e., external funding needs, desire to recruit local shareholders, intent to hire local employees, etc.)

Work visas

Once you have established that you intend to be physically present in the U.S., the first step is to apply for a work visa. Any person seeking to legally enter the United States must demonstrate evidence of his right to live and work in the country. Requirements vary based on status: US citizen, foreign national intending to immigrate, a non-immigrant alien, or other type of entrant, e.g., a refugee.

American immigration regulations provide for more than 34 non-immigrant visa categories to choose from. Some of those categories, including most work visas, require prior approval from the Immigration and Naturalisation Service or consular authorities.

Please note that a visa doesn't automatically grant its holder the right to enter and reside in the United States. Most visas only permit their recipients a limited stay during which the visitor may seek a way to obtain the right to remain or re-enter the United States.

The most appropriate non-immigrant visa for a foreign entrepreneur is the L-1 visa (Intracompany Transfer).

L-1 visas are reserved for employees of foreign companies who wish to come to the U.S. and work for their employer, the parent company of their employer, a branch office, a subsidiary or other entity from the same conglomerate as their employer. As a result, this option is limited to those with a U.S.-based host company. One method of fulfilling this requirement is establishing a U.S. commercial entity before initiating the visa process. The L-1 Visa applicant must have worked for his foreign company for at least one out of the three years immediately preceding the application.

The processing time for the application can take anywhere from a few days to a few months but can be fast-tracked (15 days) through payment of an additional $1,225. L-1 Visas are granted for up to 3-years and, can be renewed for another year if the employee then relocates to another office inside the company or conglomerate. Two-year extensions are occasionally granted. However, the maximum period of residence cannot exceed 5 or 7 years, depending on the case, after which the employee must leave the U.S. for a minimum of one year before re-applying for a visa.

Other visa categories entrepreneurs should consider include the E-1/E-2 "investor" visas. In order to be eligible for the E-1/E-2 visas, a treaty of commerce and navigation must exist between the U.S. and applicant's country of origin authorising the E-1 and/or E-2 Visa. In addition, the applicant must be sponsored by a U.S. employer of the same origin as the applicant. This can be achieved by the applicant creating a U.S. subsidiary owned 100% by its foreign parent. To qualify for the E-1 visa ("*Treaty Trader*"), the U.S. company must engage in substantial trade with the treaty country. The E-2 visa ("*Treaty*

Investor") requires that a substantial investment be made in the U.S. employer by an investor of the treaty country, on the basis of a business plan committing him to hire local staff and to grow the company's U.S. operations. An individual investor may get E-2 status to direct and develop the individual's own investment in the U.S. market.

Note: Foreign nationals visiting the United States as tourists, whether through the Visa Waiver Program (allowing visa-free visits for up to 90 days), or otherwise, are prohibited from doing work or even seeking employment in the U.S. during their visit. Great caution must be taken not to violate U.S. law by abusing this program. Staying in the U.S. beyond 90 days for VWP beneficiaries or after the expiry of a tourist visa may seriously affect your ability to re-enter the U.S. or apply for U.S. visas in the future.

Employment law

One of your first challenges in operating in the U.S. will be to secure the talent and workforce to operationalize your business development strategy. While many foreign companies, and technology startups in particular, prefer to keep their R&D in their country of origin, business often requires local staff to sell to American clientele. A local salesforce understands American sales and marketing expectations and is best able to execute a local sales strategy, even if the bulk of operations continue to be located in company's country of origin.

As soon as you hire your first employee in the U.S., you'll be required to undergo extensive registration procedures at both the federal and state level. Employers are also responsible for enrolling their workers in a number of mandatory insurance policies, e.g. workers compensation, unemployment, and/or disability.

At the Federal level, you will have to obtain an EIN (Employer Identification Number) from the IRS (Internal Revenue Service). To achieve this, both you, as the employer, and your employees are required to fill out a number of forms at the Federal and State level.

Twelve states, including New York and California, require employers to comply with Wage Theft Prevention laws which require employers to provide information on the type(s) on compensation they offer and payment procedures for their employees.

Under the Immigration Reform and Control Act 1986 (IRCA), employers have a duty of non-discrimination and must verify that any employees hired are legally authorised to work in the U.S. This law mandates employers to request and obtain certain documents and information from their employees to fulfil this

legal obligation.

One of the first and most important decisions facing an employer hiring staff in the U.S. is determining the type of employment. Unless modified by your employment contracts, the default “at will” standard applies to U.S. employees allowing for termination at any time with or without case and with or without notice. If you intend to apply a different policy, ensure that it is clearly stated in your offer letter to employees.

Like corporate law, employment law varies from state to state. Therefore ensure that any counsel you retain is admitted to practice law in the state in which you wish to conduct your business activities. Regarding employment law in particular, if you wish to include non-disclosure obligations, non-solicitation, or non-compete clauses in your letter of engagement with employees, make sure your legal advisor is able to advise you as to the validity of those clauses under local employment laws. California courts in particular adopt a rather narrow approach to restrictive covenants in employment contracts governed by California law.

Finally, it is essential for employers in the U.S. to implement a number of internal policies in the workplace in order to document their compliance with employment laws and regulations. Some policies that all employers can expect to enact include an “At-Will Employment Policy”, an “Equal Employment Opportunity Policy”, an “Disability Accommodation Policy”, a “Religious Accommodation Policy”, an “Anti-Harassment and Anti-Retaliation Policy”, and policies regarding sick leave; family and medical leave; holidays, vacations and paid time off. Additionally, policies related to the use of social media, the internet, and e-mail at work have become standard across the U.S., and are increasingly looked upon favourably by courts around the country.

Many companies in the U.S. also publish “Codes of Conduct”, “Codes of Ethics”, and different policies related to conflicts of interest and company policies surrounding reimbursements of business expenses (“Business Expense and Reimbursement Policies”).

In short, employment law is a potential minefield for foreign businesses entering the U.S., hence the importance of retaining the services of a lawyer able to assist you in complying with applicable laws.

Intellectual property

Unlike corporate or employment law, intellectual property law is essentially a matter of Federal law in the U.S.

Without going into too much detail regarding the various rights that are protected under U.S. laws (i.e., patents, trademarks, copyrights, mask works, and trade secrets), it is vital to protect your intellectual property in the U.S. if you intend to sell products or services on U.S. territory.

Indeed, in a country as litigious as the U.S., damages awarded by courts in cases of infringement of third party intellectual property rights, may quickly reach millions of dollars. To manage that risk companies that are able to document their claim to ownership of IP associated with their technology have a definitive advantage in the event of litigation, both as a defence strategy or in support of a IP asset monetisation strategy through licensing. Courts often award higher damages to plaintiffs who can document their IP rights through registration – the potential and future benefits more than offset the initial costs of such registration. In addition, it is common in the U.S. for vendors of products and services to not only warrant ownership to the associated IP, but also indemnify and hold their clients harmless in case of a third-party claim that alleges a violation of that party's intellectual property. These practices, standard in the U.S., can be extremely dangerous for any businesses that have not secured registration of their IP.

Contract law

The purpose of this guide is not to give an exhaustive presentation of the various contract forms that are commonly used in the U.S., but to stress the importance of equipping yourself with U.S.-compliant agreements that provide you with the appropriate contractual protections for your business.

This can be achieved either by localising your foreign contract templates to U.S. law, or simply by instructing a local lawyer to create U.S. templates, website terms of use, privacy policies, etc. for your business.

Contracts in the U.S. must comply with both State and Federal law. Since American contract law is distinctive from other countries', it is essential to ensure that your contracts are drafted and structured in accordance with U.S. requirements. The assistance of local legal counsel, preferably dually qualified in the U.S. and in your country of origin (and thus aware of key differences between the two), could ensure that contracts are fully binding as intended and also become a real asset for you during negotiations with local clients.

The same applies to your website or mobile app terms of use from the moment you intend to make those accessible to a U.S.-based clientele.

Beyond the protections that derive from localising your contracts and online terms and conditions, such an approach will allow you to position yourself as a

local player and to increase the confidence your clients and local prospects have in your commitment to succeed in the American market.

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