



FRAMING A NEW OFFICE L WITH HELP FROM THE OFFICE OF INSPECTOR GENERAL

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An individual seeking to transfer to the United States as a manager or executive (specialized knowledge employees will not be addressed in this blog) comes to you for help. She may be interested in opening a new office, or may be transferred to an existing company that has been operating for more than one year. In either event, the business involved is a small one and your client may be the only employee or one of few employees.

In light of the [August 2013 report](#) from the Department of Homeland Security ("DHS"), Office of Inspector General ("OIG") (OIG-13-107), you know you face an uphill battle, but one that may be winnable. We note that the [2006 OIG report](#) on the L nonimmigrant category was mandated by law (section 415 of the Consolidated Appropriations Act of 2005, Pub. L. 108-447), but the 2013 report was issued at the request of Senator Grassley, specifically to examine the potential for fraud or abuse in the L-1 category. Senator Grassley has been a well known critic of immigration and is more likely than not to suspect fraud as he done with other categories, such as the [H-1B](#) and [B](#) visas, among others.

Despite the potentially negative driving force behind the impetus for the report, it provides valuable insights and guidance on the L category, and some very important nuggets for practitioners filing for small businesses.

One important take-away of the OIG report, that we as practitioners have doubtless noticed, is that adjudication of L petitions has been inconsistent across various fields. "We reviewed L-1 petitions ranging from the restaurant industry to the information technology field, and concluded that adjudicators reach different decisions despite similar fact patterns." It is some comfort for practitioners, who sometimes stand amazed at the different outcomes for

similar petitions, that the OIG has identified this reality and raised it as a problem.

The OIG conducted domestic and international field work, interviewing USCIS and CBP personnel, as well as consular officials, as well as managers within both the DHS and the Department of State, and found vulnerabilities in various areas, and here we focus on their critique of new office Ls and extensions. The OIG states that new office petitions (and to some extent, extensions thereof) “are inherently susceptible to abuse because much of the information in the initial petition is forward-looking and speculative.” Specific problems the OIG identified in its file reviews of new office petitions included the following:

- Lack of a realistic business plan or a plan that is so vague, the petitioner cannot present a viable path to meeting L-1 definitions at the end of the 1-year period;
- Initial staffing structures that raise questions about the future need for an L-1A manager or executive. Common examples we reviewed included gas stations or convenience stores that list several “managers,” with few workers involved in the day-to-day functions of the business;
- Managers who perform nonqualifying work as a central part of their job; and
- Inconsistencies or vagueness in how the beneficiary’s managerial or executive job is described.

The report concludes that given the integrity risks and uncertainty at issue in new office petitions, they are “sometimes” approved erroneously. As practitioners we know that such petitions are sometimes denied erroneously as well. It is unclear how often erroneous approval occurs, or how widespread the problem is. The way the OIG report frames the issue, emphasizing improper approvals without further information on actual numbers, may result in a backlash against approval of new office L-1As, even strong cases. (The fact that the approval numbers declined drastically after the 2006 OIG report was issued (57,218 in 2007 to 33,301 in 2011) does raise the possibility that companies may face more difficulty in getting new office petitions approved after this particular report sinks in.)

In light of this bias, practitioners will need to use the information in the OIG report to strengthen new office petitions, as well as extensions, especially for small businesses. Initially, we should address what makes a business a “small”

business. The [H-1B fraud indicators](#) (less than 25 employees, less than \$10 million in gross income, less than 10 years in existence) are not helpful in the L context because if they were applied, most small businesses would not be able to pass muster. The L statute and regulations are structured such that a single person may open a new office in the United States pursuant to valid L-1 status. However, as the excerpt from the OIG report above demonstrates, the smaller the company in terms of number of employees, and funding, the more suspect the application. This is because the smaller the operation, the logic goes, the less likely the individual will be performing primarily qualifying duties, and the less likely the organization can support someone in a managerial or executive position. The statutory definitions specifically indicate that size may be taken into account in “determining whether an individual is acting in a managerial or executive capacity”, however, where this is done, the government must “take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function.” INA 101(a)(44)(C).

If the company will initially have only one or a small number of employees, it is important to present clearly what the beneficiary will be doing during the start-up or initial phases, and how his or her duties may change over time as the business develops. Presenting a clear road map of development and duties will help you avoid the label of a fatally vague business plan. Demonstrate that the beneficiary may initially set up the business, rent office space, hire subordinates and/or contract for services such as accounting, payroll, even marketing and public relations, but once these decisions are made and implemented and she has assured administrative and operational support, she will focus on managerial or executive duties. Explain what her duties will be and why, support that explanation with the relevant facts and figures from a detailed business plan, and present a reasonable projection of what her future duties will be based on the type of organization, its expected needs at the one-year mark (and beyond), and the position she is slated to fill. Explain any non-qualifying duties to further distinguish the time spent on qualifying duties. In addition, if the beneficiary receives support from abroad, explain how that support ensures the development and continuing operation of the company, and how it supports the argument that the beneficiary is serving in a managerial or executive role. Finally, if during a first year some event beyond the petitioner’s or beneficiary’s control has significantly negatively impacted the

petitioner's business and therefore its business plan, such as a natural disaster like Hurricane Sandy, such an occurrence should be explained in an extension petition. Under such circumstances, where the business has been negatively impacted, the petitioner may suggest to USCIS that if it is not inclined to approve the extension for two years under the circumstances, it could approve the petition for one year and have the petitioner make a stronger showing once it has regrouped after the event, at the next extension.

In some instances, such as in cases where the beneficiary will be serving as a "functional manager," it may be arguable that hiring workers is crucial to managing the essential function. For example, where the beneficiary manages the sales function, an important part of doing so would be to ensure a sales team is in place to carry out the actual sales. Though the OIG specifically lists hiring workers as a nonqualifying duty (see page 19), practitioners may still be able to demonstrate that in fact such a duty is a part and parcel of managing a specific function, and ensuring that the manager is not engaging in the function managed. Of course, it is important, given the guidance, to ensure that the individual is not primarily hiring employees, but the fact of hiring employees need not be dismissed out of hand as nonqualifying.

In providing an overview of the qualifying duties, and in order to dispel the presumption of "nonqualifying work as a central part" of the position, it is recommended to provide an estimate of the percentage of time the beneficiary will spend on each duty. Of course, this can be a painful exercise, particularly because a beneficiary's broader duties may not be easily dissected into meaningful minute-by-minute tasks. While attempting to try to break up the duties, you may want to emphasize that these percentages are only an approximation as in the real world, especially involving a manager or executive with high level duties, it is often difficult to pinpoint the exact percentage of time devoted to each duty by the very nature of the high level position. Unlike a worker in a non-managerial clerical or factory job, where the employer assigns the duties in a precise manner, a top level manager who performs at the highest level within an organization must multi-task, and many of the duties may overlap. A successful manager or executive is also required to adapt to challenges and a changing business environment, in order to maximize growth for the organization. Given the discretionary role of a high level manager or executive, it would at times undermine that role if a strict percentage of time was assigned to each and every duty as it would prevent the manager or

executive from innovating, adapting or taking risks. Risk-taking is vital for growth, innovation and job creation, which requires the qualities of flexibility, adaptability and the ability to change in the face of new business trends.

Nevertheless, it is important to elicit and sift through the beneficiary's duties. Have them assist you in developing as specifically as possible what tasks she does and the time she tends to allocate to each. This will allow the beneficiary to present the clearest picture of the beneficiary's work and credibly demonstrate that she spends the majority of her time on qualifying duties. As an aside, it is not clear what percentage of managerial or executive duties meets the "primarily" threshold, though a general guideline, echoed in USCIS statements (specifically, R. Divine, "Comments on OIG Draft Report: A review of Vulnerabilities and Potential Abuses of the L-1 Visa Program," (Jan. 10, 2006) (included as Exhibit E to the 2006 OIG report)), is that primarily means a "majority of the time." Use this as a guide, but keep in mind that the more qualifying duties the better, and the stronger the argument that each duty is a qualifying duty, the better.

In its list of suspect cases included above, the OIG specifically singled out "gas stations or convenience stores" as examples of cases where "initial staffing structures . . . raise questions about the future need for an L-1A manager or executive." There is nothing in the law that precludes the ability of Petitioners that run gas stations, convenience stores, or similar small businesses, to obtain approval for L-1 transferees. This may not be possible for the average mom-and-pop gas station or single convenience store owner, but where the petitioner starts with one operation, such as a gas station or convenience store as an anchor investment, and demonstrates that it is expanding or intends to expand to further investments under the guidance of a function manager who is responsible for the essential function of business development, a sufficiently strong case can be made. Under INA § 101(a)(44)(A)(ii) and (iii), a function manager does not need to be supervising other managerial or professional employees in order to qualify for L-1A visa classification. Crucial in these cases is showing that the function manager is relieved from performing non-qualifying duties by subordinate staff, whether they are professional or not.

Moreover, the petition would have to demonstrate that additional investments are being planned and pursued by the beneficiary pursuant to his or her mandate of strategic management, growth and investment. Again, specifics are very important – show the steps the beneficiary is taking to pursue investments

(emails, letters of intent, etc.), the financing involved in such investments, explain why such action is properly taken by a function manager, someone with high level authority to commit the petitioner to a course of action or expenditure of funds.

A variety of types of small businesses can successfully petition for a transferring manager or executive (or specialized knowledge) employee. Successful cases may involve varying amounts of capitalization, salaries, numbers and types of employees, and various levels of interaction and support by the foreign entity, whether administrative, operational, or financial. The key appears to be the level of detail provided, the fact that such detail is borne out in a well diversified set of supporting documents illustrating each point made the petition, and that all issues, including elements of a position that may be nonqualifying, are clearly explained. Such detail can help to overcome the suspicion the OIG has with regard to smaller companies, or companies that are family owned and operated. In the case of family businesses, the petitioner should explain the family relationships involved and make clear the role each family member will play in the business, and their qualifications for such roles. The OIG has indicated that family based operations have been a vehicle for fraud, so a cautious practitioner will need to disabuse them of this presumption by hitting the issue head on and demonstrating the validity of the managerial or executive employment.

Practitioners and petitioners should also be aware that beginning in the first quarter of 2014, USCIS's Fraud Detection and National Security Directorate (FDNS) expects to conduct post-adjudication domestic L-1 compliance site visits. The OIG recommended that "USCIS make a site visit a requirement before extending 1-year new office petitions." The USCIS concurred and plans to being doing such site visits prior to granting an extension in a new office. Beneficiaries should be advised of the potential for a site visit to ensure that if an FDNS representative comes by, that everyone at the business knows who the beneficiary is and direct the FDNS officer to the person who will answer questions about the petition most accurately.

That the OIG report demonstrates that the government may view petitions filed by small businesses unfavorably is helpful to petitioners in illustrating how they need to improve petitions they file, and where they need to provide explanations and documentation to further demonstrate the credibility of a petition. Petitioners should also highlight that small businesses are a

recognized engine of a recovering economy, as borne out by reports published by organizations like the November 2009 report by the Ewing Marion Kauffman Foundation, and articles by Thomas Friedman, and other reputable writers addressing economic issues. The statutes and regulations governing the L category themselves recognize the importance of new and small businesses, despite the government suspicion of them. As discussed on numerous occasions on [this blog](#), USCIS has also recognized the importance of entrepreneurs and small business in the context of its [“Entrepreneurs in Residence”](#) initiative. In addition to presenting a strong, well-documented petition, practitioners can balance the negatives presented by the OIG against the positives presented by the USCIS in the context of its support of entrepreneurs, and include a short discussion of the significance of small businesses, even family businesses, in the context of economic recovery and growth.

The OIG reports from 2013 and 2006, along with the USCIS memoranda responding to each report, are required reading for practitioners representing petitioners filing new office Ls and extensions thereof. In addition to the regulations, these documents provide essential guidance on how to strengthen cases for new and/or small businesses.