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NEW L-1B VISA GUIDANCE: WILL THERE BE FEWER DENIALS OR MORE OF THE SAME?

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If there is one visa uniquely suited to advance America's competitive position in the global marketplace, it is the L-1B intra-company transferee visa for specialized knowledge employees. In an increasingly specialized economy where expertise should trump nationality, the notion of "specialized knowledge" as it affects L-1B adjudications has become increasingly contentious. For many years, the L-1B visa, created in 1970 as Congress warmed to the realization that American business had become international, sailed along in tranquil waters unburdened by controversy. In recent years, much as its companion H-1B visa has become embroiled in bitter dispute, immigration restrictionists have tended to focus on the L-1B visa as a threat to domestic employment, thus ensuring that the climate of adjudications would become rigid and restrictive. In response to the resulting criticism from business and immigrant advocates, the Administration promised a new and improved philosophy to guide L-1B adjudicators. U.S. Citizenship and Immigration Services (USCIS) issued interim policy guidance on L-1B "specialized knowledge" adjudications that supersedes and rescinds certain prior L-1B memoranda. USCIS said it is issuing this memorandum now for public review and feedback. USCIS will finalize the guidance effective August 31, 2015. It provides guidance on how L-1B petitioners may demonstrate that an employee has specialized knowledge. In the case of off-site employment, it also clarifies how to comply with the requirements of the L-1 Visa (Intracompany Transferee) Reform Act of 2004. The question is whether this new guidance will bring clarity and common sense into the morass of L-1B jurisprudence or simply result in more of the same excessive inconsistency that has so plagued it in the recent past.

When President Obama announced his executive actions on November 20, 2014, there was acknowledgment in the memo entitled "Policies Supporting U.S. High Skilled Business and Workers" that the "L-1B visa program for 'intracompany transferees' is critically important to multinational companies." It was recognized as "an essential tool for managing a global workforce as companies choose where to establish new or expanded operations, research centers, or product lines, all of which stand to benefit the U.S. economy." The memo, however, acknowledged that there was "vague guidance and inconsistent interpretation of the term "specialized knowledge" in adjudicating L-1B visa petitions created uncertainty for these companies." As the applicable L-1B regulation defining "specialized knowledge", 8 CFR 214.2(l)(1)(ii)(D), dates back to implementation of the Immigration Act of 1990, and merely parrots the statute, the lack of updated regulatory guidance in the face of constantly changing business practices has created a vacuum that the USCIS has attempted to fill with a series of memoranda promulgated without the notice and comment opportunity afforded by the Administrative Procedures Act. The law has not changed, Congress remains silent, but the legal standards applied by the USCIS evolve according to its own initiative.

Contrary to what critics may say, the L-1B visa guidance is not some new allegedly unconstitutional program that will allow hundreds of thousands to immigrate to the United States via the backdoor. The absence of an artificial numerical cap seized upon by L-1B visa critics ignores the basic yet universal reality, noted below, that all L-1B beneficiaries are existing international employees of the same corporate group or organization and it is the perceived business needs of these companies, completely divorced from immigration considerations, that explains the interest in L-1B sponsorship. When the commercial realities change, the desire to retain or attract L-1B employees also changes. What critics of the L-1B visa do not seem to realize or appreciate is that L-1 petitions are a business decision. The L-1B visa guidance only seeks to clarify the statutory definition of "specialized knowledge:

n alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company

See Immigration and Nationality Act (INA) 214(c)(2)(B).

The L-1B visa guidance starts off by reminding USCIS adjudicators the very basics, which is that a petitioner seeking L-1B classification must establish that it meets the "preponderance of the evidence" standard. This is a lower standard than the "clear and convincing evidence" or the "beyond a reasonable doubt" standard. Under the "preponderance of the evidence" standard, even if an examiner has some doubt about the claim, the petitioner would have satisfied this standard if after presenting all the evidence it leads to the conclusion that the claim is "more likely than not" or "probably" true. Ever too often examiners have had the tendency to apply the "beyond a reasonable doubt" standard, which is the standard that the prosecution has to meet in a criminal case to prove the guilt of a defendant. There is no place for such an onerous standard in an administrative law setting relating to L-1B visa petition adjudications. USCIS adjudicators do not have to be "convinced" of the specialized knowledge claim; it should be enough that a reasonable basis for this claim exists. Preponderance does not require nor should it be conditioned upon a showing of absolute truth or complete faith.

Among other things, the L-1B visa guidance notes that a beneficiary must possess either special or advanced knowledge, or both. Determining whether a beneficiary has "special knowledge" requires review of the beneficiary's knowledge of how the company manufactures, produces, or develops its products, services, research, equipment, techniques, management, or other interests. Determinations concerning "advanced knowledge," on the other hand, require review of the beneficiary's knowledge of the specific employing company's processes and procedures, the L-1B visa guidance states. While the beneficiary may have general knowledge of processes and procedures common to the industry, USCIS's focus is primarily on the processes and procedures used specifically by the beneficiary's employer. With respect to either special or advanced knowledge, the petitioner ordinarily must demonstrate that the beneficiary's knowledge is not commonly held throughout the particular industry or within the petitioning employer. As discussed in detail in the L-1B visa guidance, however, such knowledge need not be proprietary in nature or narrowly held within the employer's organization.

The L-1B visa guidance notes the following non-exhaustive list of factors USCIS may consider when determining whether a beneficiary's knowledge is specialized:

- The beneficiary is qualified to contribute to the U.S. operation's knowledge of foreign operating conditions as a result of knowledge not generally found in the industry or the petitioning organization's U.S. operations.
- The beneficiary possesses knowledge that is particularly beneficial to the employer's competitiveness in the marketplace.
- The beneficiary has been employed abroad in a capacity involving assignments that have significantly enhanced the employer's productivity, competitiveness, image, or financial position.
- The beneficiary's claimed specialized knowledge normally can be gained only through prior experience with that employer.
- The beneficiary possesses knowledge of a product or process that cannot be easily transferred or taught to another individual without significant economic cost or inconvenience (because, for example, such knowledge may require substantial training, work experience, or education).
- The beneficiary has knowledge of a process or a product that either is sophisticated or complex, or of a highly technical nature, although not necessarily unique to the firm.

The L-1B visa guidance notes that specialized knowledge cannot be easily imparted to other individuals.

The L-1B visa guidance sets broad and flexible parameters to establish specialized knowledge, and comes as a breath of fresh air a few days after the release of a study issued by the National Foundation For American Policy, which confirmed that Indian nationals face the highest refusal rates in the L-1B visa program. The L-1B visa facilitates the transfer of a specialized knowledge employee from an overseas entity to a related US entity. This visa should allow US companies to quickly transfer employees in order to remain globally competitive. Instead, the overall denial rate, according to NFAP report, was 35%. Prior to 2008, the overall denial rate was under 10%. Alarmingly, the denial rate for employees coming from India was 56% in 2014 while the denial rate for employees transferred from all other countries was only 13%. As expressed in Cyrus Mehta's blog, *The Real Reason For L-1B Visa Denial Rates Being Higher For Indian Nationals*, the NFAP report is a damming indictment of USCIS's discriminatory adjudicatory practices towards Indian national applicants. How does it advance US national interests to frustrate the controlled migration of human capital across national boundaries from an

increasingly important trading partner precisely at a time when we seek to create more enlarged and reliable channels of transmission for all other forms of capital? Presumably it does not, yet it seems equally obvious that this is not the USCIS' concern since this new guidance, like its predecessors, focuses far more on what should be allowed than what can be made possible. External opportunities are subordinated to domestic anxieties. Immigration in the L1B context is or should be aligned with our overall economic strategies as they affect our key bilateral relationships. If trade and investment between the US and India are to benefit both countries, as surely they are intended to and must do, then US immigration policies must treat Indian nationals on an equal footing and not employ a double standard animated by a climate of suspicion and a predisposition to deny.

While the L-1B visa guidance endeavors to clarify how a petitioner can establish specialized knowledge on behalf of an employee in various ways, it is hoped that it is implemented fairly. It is certainly salutary that the guidance insists that eligibility for other classifications like the H-1B visa should not preclude one from classifying for the L-1B visa. Critics have often tried to unjustifiably portray the L-1B visa as an end run around the H-1B cap, and thus falsely portray an employer's use of the L-1B visa after the H-1B cap has been met as an example of visa abuse. The L-1B visa guidance recognizes that "fficers should only consider the requirements for the classification sought in the petition, without considering eligibility requirements for other classifications." *Id.* at 11. The USCIS should look for ways to approve L-1B petitions that merit approval, not for ways to deny those whose claims are not accepted.

On the other hand, despite its positive features, there is enough ambiguity in the guidance that would allow an examiner who is in the habit of saying "No" to an L-1B request to continue to continue to say "No." For example, even the earlier 1994 Puleo memo listed as a factor that the beneficiary is qualified to contribute to the U.S, operation's knowledge of foreign operating conditions as a result of knowledge not found in the industry. However, the most recent memo goes on to add that such knowledge must also not be found in "the petitioning organization's U.S operations." Id. at 8. This may be an impossible standard to meet if there are other employees who also possess similar specialized knowledge. Indeed, in a business climate where almost all projects rely upon a pooling of talent, a cadre of expertise must be built up for meaningful work on a substantial scale to be accomplished with great planning

and significant expense. While the guidance appropriately cautions that the specialized knowledge need not be narrowly held within the petitioning organization, it provides the following ammunition to an examiner who is already predisposed to denying the L-1B visa petition:*However, in cases where there are already many employees in the U.S. organization with the same specialized knowledge as that of the beneficiary, officers generally should carefully consider the organization's need to transfer the beneficiary to the United States.*

Id. at 10.

One wonders where this standard comes from. If this is what Congress intended, USCIS' references to it in the legislative history of the L-1B seem conspicuously absent. If, as seems to be the case, Congress did not mandate or even suggest the adoption or such criteria, or even endorse its relevance, whether directly or by implication, where and why does the USCIS find justification for its inclusion? Indeed, this is all too typical of the USCIS approach to the L-1B, and other work visas as well, whereby a standard is announced and becomes justified largely because of its repeated invocation. This indeed is the heart of the matter, namely that L-1 adjudicatory standards change not when external realities or Congressional dictat require such a change but when the USCIS for its own reasons shielded from public information and discussion decides to make a change. As the L-1B becomes more distant from the economic facts that gave rise to it in the first place, the value of the visa diminishes just as the degree of difficulty in gaining an approval rises. When a work visa such as the L-1B ceases to function the way the economy functions, the underlying logic behind the visa becomes increasingly cloudy and subject to challenge.

Other language that has been introduced in this memo, which was not in the Puleo memo, is the demonstration that that the knowledge cannot be easily transferred to or taught to an individual. The Puleo memo stopped there, but the new guidance adds that such transfer of knowledge cannot be done "without significant economic cost or inconvenience (because, for exampl.e, such knowledge may require substantial training, work experience, or education)."

While on first brush, showing economic inconvenience in the transfer of knowledge may seem more onerous, the logic behind may be derived from the recent decision from the DC Circuit Court of Appeals reversing an L-1B visa

denial of a Brazilian gaucho chef. *Fogo De Chao (Holdings) Inc. v. DHS*, 769 F.3d 1127, 1142 (D.C. Cir. 2014). Noteworthy in *Fogo* was the government's dismissal of the relevance of the economic hardship the restaurant would suffer if it had to train another employee to perform the gaucho chef's proposed duties. The *Fogo* Court disagreed, emphasizing that economic inconvenience is sometimes the most concrete evidence that can be used to determine whether knowledge is specialized. According to the *Fogo* Court: "Consideration of evidence of this type provides some predictability to a comparative analysis otherwise relatively devoid of settled guideposts....That specialized knowledge may ultimately be a 'relative and empty idea which cannot have plain meaning'...is not a feature to be celebrated and certainly not a license for the government to apply a sliding scale of specialness that varies from petition to petition without explanation. Suddenly departing from policy guidance and rejecting outright the relevance of Fogo de Chao's evidence of economic inconvenience threatens just that." *Id.* at 28 (citations omitted).

It is further noted that some language on page 14 of the guidance could still snare L-1Bs working at third-party clients, and this will continue to plague Indian-heritage IT companies. While offsite employment is not prohibited, INA 214(c)(2)(F)(i) requires the petitioner to ultimately exercise control over the beneficiary's employment and this can be best demonstrated if L-1B workers at third-party sites must be implementing the specialized knowledge of the petitioner's unique products or services. But the guidance adds that specialized knowledge derived from customized products or services rendered to the client may complement but cannot substitute for specialized knowledge of the petitioner's products, services, or methodologies. Sometimes the specialized knowledge is intertwined. For example, the petitioner customized the product or application for the client, and the L-1B is being sent to the United States to upgrade it. Even though the product or application was rendered to the client, the beneficiary possesses specialized knowledge of the product that was customized for the client. This fact pattern could potentially cause problems. If the petitioner has customized a product for a third party client, the employee should still be considered to possess specialized knowledge of the petitioning company's product, especially if the business model of the petitioning company is to provide customized products or solutions for third party clients.

We do hope that the L-1B visa guidance is implemented in a spirit that is consistent in the way it was intended, which is to provide more clarity on the

definition of "specialized knowledge" pursuant to INA 214(c)(2)(B). Indeed, the guidance can be improved to reflect the view of the DC Circuit Court in *Fogo*that scolded the USCIS for applying a rather wooden interpretation of specialized knowledge. The *Fogo* Court held that there was nothing in INA section 214(c)(2)(B) which precludes culturally acquired knowledge as a form of specialized knowledge for a Brazilian goucho chef. Although *Fogo* applied to a chef of a particular ethnic cuisine, it can arguably be applied to other occupations involving specialized knowledge. Skills gained through certain cultural practices may be relevant in determining specialized knowledge in other settings, such as Japanese management techniques. Similarly, acquiring deep knowledge in a particular software application through another employer can equip the L-1B visa applicant with specialized knowledge that can stand out in comparison to others.

The L-1B visa should indeed be encouraged to make US corporations more globally competitive in the face of Congress not taking any action to increase the H-1B cap. Even if there is no requirement for the payment of a prevailing wage to an L-1B visa holder as distinct to the H-1B visa, that does not justify the unfounded criticisms against the L-1B visa as it is a completely different creature. Only employees who have been working for a related overseas entity of the US company for 1 or more years, and who possess specialized knowledge, can be admitted on the L-1B visa to enhance the employer's competitiveness. A visa system that imposes artificial limitations on H-1B visa numbers is already flying on one engine and is in distress. If we abruptly shut down the L-1B visa too, the plane will crash. This guidance ought to come as a life saver for US companies in order to remain globally competitive. Let's keep our fingers crossed!

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