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Inside USCIS' Much-Anticipated L-1B Visa Guidance

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U.S. Citizenship and Immigration Services has released a much-anticipated proposed policy memorandum on adjudication of the L-1B "specialized knowledge" nonimmigrant visa category. USCIS Director León Rodríguez said that the memo "will help companies in the United States better use the skills of talented employees in the global marketplace."

Practitioners and employers have been waiting for this guidance since USCIS promised to review consistency in L-1B adjudications in early 2012. The memo comes hot on the heels of a National Foundation for American Policy report that highlights a historic increase in denial rates for L-1B petitions filed between 2006 and 2014. Denials for L-1B petitions increased from 6 percent in 2006 to 35 percent in 2014, and petitions filed for employees from India were denied at a rate of 56 percent.

The policy memo purports to supersede and rescind previous L-1B guidance issued by USCIS over the years. Of particular note is the attempt to provide standardized definitions for "specialized knowledge" and "advanced knowledge" as well as guidance around third-party worksites. The guidance also points out that Congress intended that the group of individuals who qualify for L-1B status be narrowly drawn, but also that the process should be administered efficiently to facilitate movement of employees to the U.S. Once finalized, the memo is intended to provide guidance on determinations made by USCIS adjudicators and will become effective Aug. 31, 2015. The guidance does not specifically apply to "blanket" L-1B adjudications made by consular officers overseas or Customs and Border Protection officers, however.

Standard of Review for L-1B Adjudications

The guidance reiterates the standard of review for L-1B petitions as taking into account the "totality of the circumstances" and making determinations based on a "preponderance of the evidence." This means that any relevant, probative and credible evidence leading to a conclusion that a claim is "more likely than not" or "probably true" is sufficient. The adjudicating officer may have some doubt about a claim and yet still find a petition sufficiently demonstrates specialized knowledge. The petitioner bears the burden of showing that a claim is more likely the case than not. Practitioners and employers have argued that adjudicators have applied a different standard of review to L-1B petitions filed thus far,

which may explain the increasing denial and request for evidence (RFE) rates over the past six years.

"Specialized Knowledge"

The policy guidance around the definition of "specialized knowledge" reiterates some previous policy guidance and provides a consolidated definition as follows:

"A beneficiary seeking L-1B classification should possess

- **special knowledge**, which is knowledge of the petitioning employer's product, service, research, equipment, techniques, management, or other interests and its applications in international markets that is demonstrably ***distinct or uncommon in comparison to*** that generally found in the particular industry or within the petitioning employer; or

- **advanced knowledge**, which is knowledge or expertise in the organization's specific processes and procedures that is not commonly found in the relevant industry and is ***greatly developed or further along in progress, complexity and understanding*** than that generally found within the petitioning employer. (Emphasis in original).

The guidance refers once again to the common dictionary definitions of "special" or "advanced," and furthermore follows the statutory definition of "specialized" and "advanced." Practitioners may recognize much of the same language from the boilerplate RFEs issued by USCIS on L-1B petition filings.

The guidance further details that determining whether knowledge is special/advanced requires comparing the beneficiary's knowledge to others. While that effort does not need to include a test of the U.S. labor market, the petitioner should show that there are not "so many such workers that the knowledge is generally or commonly held in the relevant industry and thus not specialized."

Perhaps most useful in the lengthy (and often repetitive) explanation of specialized knowledge is a non-exhaustive list of factors for USCIS to use in making a determination that a beneficiary's knowledge is specialized. Although the list of factors outlined on page 8 of the memo provide some context for what employers should consider when petitioning for an L-1B worker, the guidance does not give thorough examples of the types of evidence that might serve to prove each factor.

"Advanced Knowledge"

As previous L-1B guidance has suggested, "advanced knowledge" for L-1B purposes refers to knowledge of a company's specific processes and procedures "that is not commonly found in the relevant industry and is *greatly developed or further along in progress, complexity and understanding* than that generally found within the petitioning employer." (Emphasis in original). Determination of whether a worker has advanced knowledge requires comparison of that employee's knowledge to knowledge of others within the organization. The guidance states that advanced knowledge need not be proprietary in nature or narrowly held within the employer's organization. Furthermore, an L-1B worker does not need to have BOTH advanced and specialized knowledge to qualify for the classification.

The same factors and descriptions of evidence outlined in the guidance apply to proving advanced

knowledge as they do to proving specialized knowledge. The key distinction is whether the knowledge refers to a product, service, research, equipment, techniques, management or other interests and its application to international markets or uncommon knowledge of a company's processes and procedures.

Promisingly, the proposed guidance attempts to directly counter several trends in L-1B classification decisions. The guidance makes clear that (1) proprietary knowledge is not required for L-1B status, (2) qualifying for L-1B classification does not require the employee to possess knowledge that is unique to the sponsoring employer, (3) L-1B status does not require the sponsored employee to have expertise narrowly held within the petitioning employer's business, and (4) a high salary is not required for L-1B status, either in comparison to the industry or others within the petitioning employer.

Third-Party Worksites

The L-1 Visa Reform Act of 2004 was intended to regulate "job shops," situations where an L-1B worker would be placed at the worksite of an unaffiliated employer (i.e., not the petitioner). The new L-1B policy guidance provides additional guidance for valid third-party placement situations, giving definition to the "control and supervision" prong of the L-1 Visa Reform Act. The petitioning employer must show that the third party lacks principal control and supervision of the L-1B worker by demonstrating that the petitioner retains authority to:

- Dictate the manner in which the L-1B worker performs the work;
- Reward/discipline the L-1B worker for work performance; and
- Provide the worker's salary and any normally-provided employer benefits.

To demonstrate that the arrangement is not a "work for hire" situation, the petitioning employer must demonstrate that the purpose of the offsite placement is for the benefit of the petitioning employer and that the L-1B worker's specialized knowledge is specific to the petitioning organization (and not the third-party employer).

Conclusion

Public comments on the proposed guidance will be accepted through May 8, 2015. Revisions to AFM Chapter 32.6(e) will be included when the final memo is issued. Agency training will occur over the summer, and the finalized guidance will become effective Aug. 31, 2015. The key issues will be:

- How well USCIS trains its officers to ensure proper implementation of the L-1B guidance after it becomes final;
- How consistently L-1B petitions are adjudicated moving forward; and
- Whether CBP and consular officers will choose to follow the guidance.

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