L Visa Overview

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Submitted by Guest on Feb 1st 2009

Introduction

An alien may be admitted to the United States in L1 (Intra-Company Transferee) status for the period of time required by the employer, up to a maximum initial period of stay of three years. The total period of stay may reach seven years for L1A managers and executives, and five years for L1B specialized knowledge personnel. A special one year initial period of stay applies when the alien is coming to the United States to open a new office. In this case an extension must be filed in one year, and in the extension, the company must establish that it has been doing business both in the U.S. and abroad during the year, before additional periods of stay can be approved. At present, there is no annual cap on L-1 visas. Spouses and unmarried dependent children (under the age of 21) of the L-1 holder may apply for L-2 status.

The following basic conditions must exist for the employee (alien) to obtain L-1 classification:

1) The Employee Must Have Worked Abroad for the Overseas Company for a Continuous Period of One Year in the Preceding Three Years
The employee must have completed one continuous year of employment outside of the United States with the overseas company within the preceding three years, before he or she can be transferred to the related U.S. company. The U.S. Citizenship and Immigration Services (USCIS) will look at the three years preceding the date of the petition to see whether the alien has spent the requisite continuous period of one year of employment abroad. Any time spent in the United States during that year does not bar the employee from being transferred, but that time cannot be counted toward fulfilling the one year abroad requirement. Thus, an alien who spent two months in the United States during the preceding year must have worked for the overseas company for at least fourteen months, at least twelve of which were outside of the United States. Each day in the United States during the preceding year adds one day to the total time that the alien must have been employed by the overseas company.

Part-time employment abroad: A year or more of part-time employment cannot be added up to meet the one year abroad requirement, unless the employee has worked part-time for

each of several foreign affiliates of the U.S. company, and the total employment time equals full-time hours.

Intervening employment with unrelated foreign employer: The regulations do not require that the alien's current foreign employer and the petitioner must be related entities, but rather that the alien must have worked for a qualifying related organization for one continuous year within three years preceding the application for admission to the United States.

Aggregation of employment abroad during the three year period: After passage of the 1990 Act, the USCIS had originally indicated that it would permit L1 aliens to aggregate their time abroad during the preceding three year period to reach the one year requirement. The USCIS final rules, however, require that the one year period be continuous, indicating that the agency will not permit aggregation.

Alien in the United States in H1B status at time of filing the L1 petition: When an alien is already in the United States in H1B status for the same employer that is filing the L1 petition, the USCIS will look at the three year period before the alien's admission to the United States to determine L1 eligibility, even when the alien has been present in H1B status for three years or more. However, the USCIS will only follow this procedure, if the H1B employer is related in a qualifying manner for L1 purposes to the foreign employer with which the alien was employed abroad.

2) The Company for Which the Employee Has Worked for a Year Abroad Must Be Related to the U.S. Company in a Specific Manner.

The law states that the company abroad must be "the same employer or a subsidiary or affiliate" of the U.S. company. We will provide more details on the options, as we get further along in the process.

3) The Sponsoring Company Must Be a Qualifying Organization-One That Is Doing Business in the United States and One Other Country During the Whole Period of the Transfer.

The "qualifying organization" concept arises from the USCIS concern that the L1 category will be used by owners of small businesses abroad who "transfer" themselves to the United States, in the process shutting down the foreign operation which can no longer function without their physical presence abroad. Under USCIS rules, the transferring company must continue to do business abroad during the entire period of the alien's stay in the United States as an L1 transferee. The overseas operation can be carried out in any of the acceptable corporate forms - parent, subsidiary, affiliate, or branch office.

Definition of "doing business." "Doing business" means "the regular, systematic, and continuous provision of goods and/or services." It does not include the mere presence of an agent or office abroad, if no actual business is being conducted. USCIS policy requires that the organization must have employees and be providing goods or services on a regular basis.

Business form of the U.S. employer. In the past the USCIS has required in particular cases that the company in the U.S. and abroad be incorporated entities in order for them to be eligible for a transfer. Although no explicit new rule has been issued in this regard, the USCIS now holds as a matter of policy that any legal entity, including a proprietorship or a partnership, can be the employer involved in the transfer as long as the foreign and U.S. employers are related in the prescribed manner. USCIS policy confirms that small organizations, partnerships, and sole proprietorships can be qualifying organizations.

4) The Employee to Be Transferred Must Have Been Employed Abroad in an "Executive" or "Managerial" Position or a Position Involving "Specialized Knowledge". The meaning of the terms "executive," "managerial," and "specialized knowledge" can also be quite complex. The following discussion summarizes the law.

Specialized knowledge. The question of who qualifies as an employee with "specialized knowledge" has been a complex one for the USCIS to answer. After a number of changes in its view of specialized knowledge, the USCIS issued a new policy in October 1988, which substantially liberalized the concept. The practical impact has been that many more employees of large corporations have received approval of L1 petitions based on specialized knowledge.

The 1990 Act served as an endorsement of the October 1988 policy put into place by the USCIS. By putting the policy into the statute, the 1990 Act should eliminate the policy swings of the past, when liberal definitions of specialized knowledge were suddenly supplanted by narrow interpretations of that term. The new law should also eliminate any reference to the "proprietary nature" of the knowledge as a requirement for L1 classification.

The 1990 Act states that an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has:
i) a special knowledge of the company product and its application in international markets, or
ii) an advanced level of knowledge of processes and procedures of the company.

Like the October 1988 policy, this definition should permit admission of specialized knowledge personnel who are specialists in the demands of overseas markets. Since the definition also covers people who do not just have knowledge of the company?s product but have knowledge of processes and procedures of the company, the definition should cover most of the foreign specialists that the company needs to transfer to the United States. As with the USCIS policy, the new law's requirement that the employee have an "advanced level of knowledge" of company processes or procedures probably forecloses transfers involving aliens with a bare oneyear minimum prior experience with the employer.
The changes in the 1990 law should assure that the recent history of reasonable interpretations by the USCIS of "specialized knowledge" should continue, making the L1 category as useful as possible for international employers. The USCIS final regulations implementing the statutory definition does nothing more than repeat that definition; further elaboration on the definition apparently will be made by the USCIS on a case-by-case basis.

The Service policy on specialized knowledge is particularly useful for executives or managers coming to the United States to run a new U.S. office of a foreign employer. Although the transferee might not qualify as a manager or executive because the office is so small that there are no other employees or the transferee must perform the duties required to produce the company product or service, his or her placement in the new office is clearly based on the

transferee's knowledge of the employer's product, procedures, and business operations. Therefore, the transferee meets the Service guidelines for specialized knowledge and can receive L1 classification. A number of cases of this type have been approved by the USCIS.
Restrictions on ?outsourcing? of specialized knowledge employees:

The L-1B transferee may not be placed at a worksite other than the petitioner?s location if 1) the work being performed is being controlled and supervised by an employer other than the petitioner or 2) the work being performed is not related to specialized knowledge pertaining to the petitioning employer.

Executive

Employees in an "executive" capacity are those whose primary duties are to 1) direct the management of an organization or a major component of an organization or a function in the organization, 2) establish organizational goals and policies, exercise a wide latitude of discretionary decisionmaking, and 3) receive only general supervision or direction from higher level executives, the board of directors, or shareholders of the company. An employee with a clearly executive title, such as "vice president," "controller," or the like, should generally not have a problem qualifying for this category, unless the size of the company is such that it is unlikely that the person would realistically be fulfilling executive functions. One indication of the latter situation is when the company's U.S. office is made up predominantly of persons with executive titles, and in fact the alien has only several persons below him or her on the company's personnel chart.

The USCIS will carefully scrutinize whether a transferee is an executive. Keep in mind two important criteria:

i) The executive generally must supervise the work of other persons or a function. The addition of supervision of a function in the company as a basis for executive L1 status was made by the 1990 Act; previously it was difficult for executives who manage functions and have little subordinate staff to obtain L1 status. Note also that the new law bars decisions on executive capacity to be made exclusively on the basis of the number of employees supervised; If staffing levels are considered in making a determination, they must be considered in relation to the reasonable needs of the business and its stage of development. This latter directive should aid transfers for small and startup businesses. In one case, for example, the small number of subordinates did not bar L1 classification when the alien was clearly the top manager for the U.S. Company, with a high level of discretion and a salary commensurate with an executive's position.

ii) The executive category does not include persons who are "primarily" performing the tasks necessary to produce the product or provide the service of the organization. Thus, in a service firm, a professional who performs the firm's work in addition to holding executive duties might not be classified as an executive.

Note that the definition included in the 1990 Act does not make reference to the prior regulations= requirement that the executive not be an employee who primarily performs the tasks necessary to produce the product or provide the services of the organization. This rule, requiring that executives spend a majority of their time in "executive" duties, had been a difficult rule to apply, because management studies show that most executives and managers continue to engage in the substantive work of their organizations and spend less than 50% of their time on narrowly defined management duties. The absence of this requirement in the

new law's definition might have some bearing on the USCIS interpretation of executive capacity. In its final regulations implementing the definition, the USCIS merely followed the exact language included in the new law; it will apparently make determinations on this issue on a case-by-case basis.

Manager

A person filling a "managerial" position is one whose primary duties are to 1) direct the organization, a customarily recognized department, subdivision of the organization, or a function, 2) controls the work of other professional, supervisory, or managerial employees (unless he or she manages a function), 3) has the authority to hire and fire or recommend those actions as well as other personnel actions (unless he or she manages a function), and 4) exercise discretionary authority over daytoday operations.

The big change to this definition made by the 1990 Act is the addition of management of a function, without personnel responsibilities, as a basis for being classified as an L1 manager. The new law specifically bars the number of persons supervised as the sole basis for denying managerial status to an employee; if staffing levels are taken into account, they must be considered in relation to the reasonable needs of the business and its stage of development.

Specifically excluded from this category are first-line supervisors, unless the persons being supervised are themselves managerial or professional employees (e.g., typing pool manager or mechanic foreman unlikely to qualify). Also excluded, as described above for executives as well, are persons whose primary duties are to perform the tasks necessary to produce the product or provide the service of the organization. As noted above for executives, it is unclear whether the 1990 Act's definition will change the USCIS interpretation regarding a manager's "primary duties"; the USCIS will apparently make this determination on a case-by- case basis because the final rules merely restate the statutory definition.

NOTE: A special definition of manager and executive applies when the transferee is coming to set up a new U.S. office, since it is clear that the company may have difficulty in establishing that the manager or executive is already supervising the work of others or is primarily engaged in managerial or executive duties.

5) The Employee Must Be Coming to the U.S. Company to Fill One of These Capacities (Executive, Managerial, or Specialized Knowledge)

The employee does not have to fill the same capacity in the United States that he or she filled abroad. For example, a "specialized knowledge" employee abroad may be coming to the United States to fill a managerial position.

While L-1 transferees normally come to the United States on a full-time basis, **it is permissible for them to come to the United States part-time,** e.g., to oversee a U.S. affiliate while continuing to oversee a foreign-based affiliate. The State Department has advised consular officers that an L-1 visa may be given when the alien will make brief and infrequent trips to the United States to oversee a U.S. operation. The L visa applicant must be employed by the company on a full-time basis but the alien does not have to be engaged on a full-time basis in the United States and may divide work between the United States and another country. As a result, an alien who is principally employed out of the United States and resides out of the United States may receive an L visa for the purpose of coming to work on a short-term basis.

6) The Employee Must Be Qualified for the Position by Virtue of His or Her Prior

Education and Experience
The USCIS requires that proof of the alien's qualification for the job be submitted with the L1 petition.

7) The L1 Alien Must Intend to Depart the United States upon Completion of His or Her Authorized Stay (Including Extensions), but May Also Pursue Permanent Residence at the Same Time
For most companies, a simple affirmation that the transferee temporarily will depart the United States upon completion of his or her authorized stay is sufficient. However, when the transferee is also an owner/operator of the company, the papers must be accompanied by evidence that the employee will not remain indefinitely or permanently in this country.

Based on changes made by the 1990 Act, the filing of permanent residence papers by the L1 alien is no longer considered in determining whether an L1 petition will be approved, whether an L1 visa will be issued, or whether an L1 extension will be granted. This change is particularly beneficial with regard to issuance of L1 visas, because many consulates in the past scrutinized closely the nonimmigrant intent of the L1 alien, and issuance of an L1 visa after the filing of permanent residence papers was almost impossible at those consulates.

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