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Understanding the Complexity of the L-1 Non-Immigrant Visa Category

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The L-1 visa program, first enacted into law in 1970 by Public Law 91-225, has proved to be an effective tool for businesses that seek to transfer key personnel from qualifying operations abroad to manage or provide specialized knowledge services to qualifying United States-based branch offices, subsidiaries and affiliates. In much the same way that the H-1B program has been subject to shifting political currents, to a lesser extent the L-1 visa program has undergone changes over the years as the U.S. government seeks to ensure that the program is being used solely for its intended purpose and not to circumvent limitations on the uses of other visa categories. Although any abbreviated analytical framework will invariably fail to capture all of the exceptions and nuances of the law, eligibility for L visa classification can be broadly broken down into three components: 1) organizational eligibility; 2) foreign national eligibility and qualifying employment; and 3) practical considerations for L-1 classification. This article will endeavor to provide a brief overview of the aforementioned three components.

Organizational Eligibility

The U.S. entity seeking to employ the foreign national under the L visa classification and the entity for which the foreign national has been employed abroad must have a qualifying relationship. The petitioning L-1 eligible entity must be a "United States or foreign firm, corporation, or other legal entity which..." is conducting business through the "regular, systematic, and continuous provision of goods and/or services" and be a "parent," "branch," "affiliate" or "subsidiary" to the employing entity abroad. See 8 C.F.R. § 214.2(l)(1)(ii)(H-L). The term "parent" is defined in the Federal Regulations as being a "firm, corporation, or other legal entity, which has subsidiaries." See 8 C.F.R. § 214.2(l)(1)(ii)(I). "Branch" is defined as "an operating division or office of the same organization housed in a different location." See 8 C.F.R. § 214.2(l)(1)(ii)(J). The regulations define the term "subsidiary" as being "a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity." See 8 C.F.R. § 214.2(l)(1)(ii)(K). Finally, the term "affiliate" is defined as "one of two subsidiaries both of which are owned and controlled by the same parent or individual, or one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity." See 8 C.F.R. § 214.2(l)(1)(ii)(L)(1-3). Although the criteria for a qualifying organization is well defined in the regulations, the same regulations contain one notable exception for a partnership that is "organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms." See 8 C.F.R. § 214.2(l)(1)(ii)(L)(3) The regulations state that such relationships will be considered to be "affiliate" relationships for L-1 visa purposes. *Id.*

If the qualifying relationship between the U.S. entity seeking to employ the L-1 nonimmigrant and the foreign entity from which that person is being transferred has existed for less than one year, or if the qualifying relationship has existed for more than one year but the U.S. entity has not been systematically carrying out business for one full year on the date of the filing of the L-1 petition, the period of validity of

the petition, and hence the L-1 visa will be limited to one year. See 8 C.F.R. § 214.2(l) (7)(i)(A)(3). It is noteworthy, that the Service will approve a petition for a maximum of three years notwithstanding the fact that the U.S. petitioning entity is a “new office” as long as the new U.S. office has a U.S.-based affiliate that has been doing business for more than one year. This is an important point for large commercial enterprises that may have multiple affiliates in the United States and are contemplating opening a new office in the United States as a separate legal entity.

Foreign National Eligibility and Qualifying Employment Abroad and in the United States

The L-1 visa category is broken down into two sub-categories — L-1A and L-1B. As will be discussed in greater detail below, the L-1A classification is for foreign nationals who have been employed abroad in an executive or managerial capacity and who are seeking admission to the United States to serve in a managerial or executive capacity with the qualifying U.S. entity. The L-1B classification is reserved for foreign nationals who have been employed abroad in a specialized knowledge capacity and who are seeking the admission to the United States to assume employment with the qualifying U.S. entity in a specialized knowledge capacity. Generally speaking, with respect to employment abroad, the foreign national must have been employed by a qualifying foreign entity for one full year in the last three years prior to seeking admission to the United States in L-1 nonimmigrant status. See 8 C.F.R. § 214.2(l) (1)(ii)(A). Time spent in the United States in valid nonimmigrant status will not be considered to be an interruption of the qualifying employment abroad nor will it be counted toward fulfillment of the one-year employment requirement. *Id.*

The terms “executive” and “manager” have clearly defined meanings in the Immigration and Nationality Act. “Executive” is defined as an employee who “directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” See INA § 101(a)(44)(B), 8 U.S.C. § 1101(a)(44)(B). “Managerial” is defined as an employee who “manages the organization, or a department, subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.” See INA § 101(a)(44)(A)(i-iv), 8 U.S.C. § 1101(a)(44)(A)(i-iv). The law specifically states that first-line supervisors are “not considered to be acting in a managerial capacity merely by virtue of the supervisor’s supervisory duties unless the employees supervised are professional.” INA § 101(a)(44)(A)(iv), 8 U.S.C. § 1101(a)(44)(A)(iv).

For L-1B classification purposes, “specialized knowledge” is defined as “special knowledge possessed by an individual of the petitioning organization’s product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization’s processes and procedures.” See 8 C.F.R. § 214.2(l)(1)(ii)(D). Due to the open-ended nature of this definition of “specialized knowledge,” and numerical limitations on the H-1B visa category, immigration counsel across industries have noticed that the Immigration Service has been increasingly more demanding in requiring detailed explanations and additional documentation of the exact nature of a foreign national’s specialized knowledge. Moreover, the issue of how qualifying U.S. employers utilize the services of L-1B specialized knowledge employees has not escaped the notice of Congress. L-1B classification will be denied where the specialized knowledge foreign national “will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent ...or the alien will be controlled and supervised principally by such unaffiliated employer; or the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning

employer is necessary.” *L-1 Visa and H-1B Visa Reform Act of 2004* Pub. L. 108-447, 118 Stat. 2809 (Dec. 8, 2004); INA § 214(c)(2)(F)(i-ii), 8 U.S.C. § 1184(c)(2)(F)(i-ii).

Practical Considerations

Petitions for L classification are initiated by filing an I-129 with supporting documentation with the appropriate USCIS regional Service Center. The proper filing venue for the petition can be easily ascertained from the USCIS web site. Depending on the foreign national's specific circumstances, L-1 employers may seek to change the status of a foreign national candidate to the appropriate L visa category if that person is present in the United States or else opt for a straight petition approval and have the foreign national make application for the L visa at a U.S. consular post abroad. With the exception of a new office, qualifying U.S. organizations may request an initial petition validity of three years. L-1A status holders are eligible to hold L status for up to seven years. L-1B status holders are eligible to renew status for up to five years.

A U.S. petitioner may seek a “blanket approval” wherein subsequent L applications are made directly at U.S. consular posts abroad by the foreign national candidate without the need for an additional individual petition filings with the USCIS if the qualifying U.S. entity and its qualifying foreign parent, affiliate or branch: 1) are “engaged in commercial trade or services;” 2) “has an office in the United States that has been doing business for one year or more;” 3) “has three or more domestic and foreign branches, subsidiaries, or affiliates; and the petitioner and the other qualifying organizations have obtained approval of petitions for at least ten “L” managers, executives, or specialized knowledge professionals during the previous 12 months; or have U.S. subsidiaries or affiliates with combined annual sales of at least \$25 million; or have a United States work force of at least 1,000 employees.” See 8 C.F.R. § 214.2(l)(4).

The L Visa program is fraught with nuance and complexity. As the economy tightens and the nation's immigration laws continue to be subjected to ever-increasing scrutiny, it only stands to reason that L-1 petitions and visa applications will encounter similar treatment by the USCIS and consular posts abroad.