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Article: The New L-1B

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BACKGROUND

The L-1B category is used to transfer intra-company workers with specialized knowledge of the corporation's procedures, techniques, or activities to U.S. affiliates or operations.

For years, the USCIS' standards for L-1B petitions were set out in two intra-agency memos. However, on July 22, 2008, the USCIS issued a 43-page denial of an L-1B "Specialized Knowledge Worker" petition for IBM. This decision, handed down by the Administrative Appeals Office (AAO), attacked case precedent and government agency interpretive decisions and memos in defining the terms "specialized" or "advanced" knowledge. The decision addresses the definition and interpretation of L-1B qualifying criteria including qualifying relationships, new offices, and specialized knowledge.

While the AAO decision is not a binding precedent, the USCIS has clearly adopted the rationale in the decision, and as a result has been subjecting L-1B petitions to increased scrutiny. This change in procedure by the USCIS has resulted in a significant increase in Requests for Additional Evidence (RFE) leading to the increased denial of L-1B petitions.

Does that mean all hope is lost for the potential L-1B employee? We don't believe so and, based on our approach to dealing with increased scrutiny by USCIS, our firm has filed and consistently won L-1B cases post IBM.

WHAT IS REQUIRED?

There has been a great deal of upheaval in the immigration community as a result of this new pattern by the USCIS following the IBM decision. The USCIS has responded to the push back by stating that the officers have been instructed to review the cases individually and consider all applicable statutes, regulations, and current policy memorandums pertaining to the L-1B classification. In other words, this is our new policy, learn to deal with it.

In light of the USCIS' new approach to reviewing these cases, each L-1B petition must be very carefully evaluated and prepared. The place to start, as with any petition, is with the statute. To establish initial eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act. This section requires that the beneficiary be an intra-company transfer with specialized knowledge of the company's procedures, techniques, or activities. Additionally, the beneficiary must have been continuously (true?) employed by the company overseas at least one year out of the previous three years in a specialized knowledge position. It's important to note that the definition of specialized knowledge does not apply to persons who only have a general knowledge or expertise, which enables them merely to produce a product or provide a service

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to the company. Instead, specialized knowledge can be better determined by considering the following questions in regards to the beneficiary:

- Possesses knowledge that is valuable to the employer's competiveness in the marketplace?
- Has the experience abroad and has been utilized in a capacity involving significant assignments which have enhanced the employer's productivity, competitiveness, image, or financial position?
- Qualified to contribute to the United States employer's knowledge of foreign operating conditions as a result of special knowledge not generally found in the industry?
- Possesses knowledge which normally can be gained only through prior experience with the employer?
- Possesses knowledge of a product or process which cannot be easily transferred to another individual?

By critically evaluating and thoroughly addressing each of the above questions the employer should be able to assess whether or not the beneficiary truly possesses specialized knowledge. One way to accomplish this is for the employer to provide detailed written responses to questions that relate to the specific inquiry.

Another point to consider is that the IBM decision also seemed to focus on the number of L-1B petitions filed by the petitioner. In addition, based on the new USCIS level of scrutiny, it would seem that the average software engineer or marketing manager may not qualify for an L-1B. So, if a company is filing a significant number of L-1B petitions a year, it is unlikely that USCIS will believe that each beneficiary has specialized knowledge (i.e. knowledge of a unique set of skills not common to the company or industry). The more a company abuses the L-1B category the more likely the USCIS is going to scrutinize an L-1B petition. As such, the L-1B should be reserved for beneficiaries truly qualified for the position.

THE BIG PICTURE

All things must be taken into consideration when preparing and filing an L-1B petition: the company and its employee make up, the position in the U.S. and the beneficiaries positions overseas, the beneficiaries length of employment with the company, and qualifications of other employees to fill the position. Gone are the days of submitting a basic L-1B petition. The new L-1B requires thorough preparation and thoughtful presentation. Obviously, this entails more work in preparing an L-1B, but the payoff is less RFE's and quicker approval times.

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