Success with L-1Bs in an Era of Increased USCIS Scrutiny

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I. Introduction

The L-1B intracompany transferee visa is a versatile tool that multinational companies can use to transfer promptly their "specialized knowledge" foreign personnel to a U.S. entity. Unfortunately, over the past several years, practitioners report receiving more and more complex and burdensome Requests for Evidence (RFEs) for L-1B petitions. It has become clear that USCIS has increased its scrutiny of L-1B visa petitions. This scrutiny may be tied to skepticism by U.S. Citizenship and Immigration Services (USCIS) about the validity of L-1B petitions in an era of scarce H-1B availability, or may be the result of media reports of possible L-1B abuse by contracting companies, or even, perhaps, is based on the perception of USCIS adjudicators that the L-1 category is subject to fraud and abuse. What is certain is that approvability of L-1B petitions in the current environment now requires much more meticulous case preparation.

One of the biggest obstacles in preparing an L-1B case is the lack of clear regulatory guidance on the definition of "specialized knowledge." When ambiguous guidance is coupled with inconsistent application of applicable regulations, case law and standards set forth in agency guidance memoranda, it becomes difficult for companies to know at the outset whether a given transferee will appropriately qualify for L-1B classification. This article will review the statute, legislative history, past and current regulations and rulemaking, precedent case law, and agency policy memos that guide USCIS in its adjudication of L-1B specialized knowledge petitions

II. The L-1B Nonimmigrant Visa Category – The Basics

The L-1B visa category allows U.S. companies with foreign operations to transfer temporarily foreign nationals with "specialized knowledge" to the U.S. as "intracompany transferees."[1] The international organization must continue to conduct business in both the U.S. and in at least one other country during the entire period of time the transferee is in L-1 status.[2] The transferring entity and the U.S. entity must be related either as the same entity, or a parent, subsidiary or affiliate.[3] A parent/subsidiary relationship will be found if any of the following scenarios exist: (1) one company owns 50 percent or more of the other and controls the other company; (2) one company owns 50 percent or more of a 50/50 joint venture

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[1] Immigration and Nationality Act § 101(a)(15)(L); INA §214(c)(2)(B); 8 Code of Federal Regulations §214.2(l)(1)(i)

[2] 8 CFR §214.2(l)(1)(ii)(G)(*2*); 8 CFR §214.2(*l*)(1)(ii)(H)

[3] 8 CFR §214.2(l)(1)(ii)(G)(*1*)

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and has equal control and veto power; or (3) one company owns less than 50 percent of the other, but has actual control of it.[4] An "affiliate" relationship exists if the two entities are owned and controlled by a third-party parent company, individual or the same group of individuals (each of whom owns and controls approximately the same proportion of each entity).[5] The companies are considered the "same" if they are branch offices of each other.[6]

"Specialized knowledge" is defined by statute as:

> [S]pecial knowledge of the company product and its application in international markets or … an advanced level of knowledge of processes and procedures of the company.[7]

Current regulations do little to elucidate the statutory definition of specialized knowledge, simply stating:

> Specialized knowledge means 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.[8]

An individual in a position involving specialized knowledge may not be stationed primarily at the worksite of another employer if the individual will be controlled and supervised principally by the unaffiliated employer or the individual is placed there as part of an arrangement to provide labor for hire for the unaffiliated employer.[9]

Individuals in L-1B status may stay for up to five years in L-1B status.[10] The initial period of petition approval is up to three years, except where the beneficiary is coming to the U.S. to be employed in a "new office."[11]

III. The L-1B Visa Category – Key USCIS Interpretations

The statutory and regulatory definitions of specialized knowledge are mirror images. Consequently, ongoing efforts have been made by the USCIS and its predecessor agency, the Immigration and Naturalization Service (INS), to clarify the ambiguous definition of specialized knowledge. The formal

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[4] 8 CFR §214.2(l)(1)(ii)(I); 8 CFR §214.2(*l*)(1)(ii)(K)

[5] 8 CFR §214.2(l)(1)(ii)(L)

[6] 8 CFR §214.2(l)(1)(ii)(J)

[7] INA §214(c)(2)(B)

[8] 8 CFR §214.2(l)(1)(ii)(D)

[9] INA §214(c)(2)(F)

[10] 8 CFR §214.2(l)(12)(i)

[11] 8 CFR §214.2(l)(7)(i)(A)(*2*). L-1 petitions involving a "new office" have additional requirements which are not the focus of this article. *See,* 8 CFR §214.2(l)(3)(*v*)

interpretation of the requirements for "specialized knowledge" has changed significantly over the last three decades. An examination of the history of these changes provides an important backdrop to understanding the current L-1B environment.

Four key cases, decided early in the history of the specialized knowledge category, reflect the early judicial interpretations involve a strict set of requirements for specialized knowledge before liberalizing changes in the statute took effect in 1990.[12] The first is *Matter of Raulin*,[13] which held that an executive secretary in a multinational company possessed specialized knowledge. In *Raulin*, the beneficiary's activities as a liaison with high-level company officials as well as with executives of client companies, which allowed her to serve as an advisor to a new company vice president, were critical to the finding that she possessed specialized knowledge.

After *Raulin*, the Regional Commissioner held, in *Matter of Michelin Tire Corporation*,[14] that the specialized knowledge that the beneficiary possesses must be related to the petitioner's business and "must directly concern the expansion of commerce or it must allow an American business to be competitive in overseas markets."[15] The beneficiary's knowledge as an expert in the French educational system, while related to the job offered as a teacher for the children of transferred French executives, was found to not be related to the expansion of the company's business in the U.S.

Matter of Colley, et al.[16] synthesized the holdings in *Raulin, Michelin* and *Matter of LeBlanc*,[17] holding that technical or highly specialized positions do not inherently qualify for specialized knowledge classification. In examining whether four highly skilled employees who operated the company's complex aerial survey equipment, the Commissioner found that it is instead the application of that knowledge or skills in relation to the proprietary interests of the business that renders the beneficiary eligible for the specialized knowledge classification.

Similarly, *Matter of Penner*[18] reviewed the precedent decisions and held that a specialized knowledge employee is not merely a skilled worker. Rather, the Commissioner distinguished that a specialized knowledge employee is instead "employed primarily for his ability to carry out a key process or function which is important or essential to the business firm's operation." In *Penner*, the Commissioner also noted that the L-1B visa is not designed to address a shortage of U.S. workers.

Subsequently, in 1987, the INS promulgated regulations narrowing the definition of specialized knowledge to "knowledge possessed by an individual whose advanced level of expertise and proprietary

[12] In fact, these four decisions are still designated as precedent in the Adjudicator's Field Manual ("AFM"), Chapter 32.2(a)

[13] 13 Immigration & Naturalization Decisions 618 (R.C. 1970)

[14] 17 I&N Dec. 248 (R.C. 1978)

[15] *Ibid* at 250.

[16] 18 I&N Dec. 117 (Comm. 1981)

[17] *Matter of Leblanc*, 13 I&N Dec. 816 (R.C. 1971), held that a sales manager with experience in screening, recruiting, contracting for and training sales personnel possessed specialized knowledge.

[18] 18 I&N Dec. 49 (Comm. 1982)

knowledge of the organization's product, service, research, equipment, techniques, management or other interests of the employer are not readily available in the U.S. labor market.[19] The inclusion of the phrases "advanced level of expertise," "proprietary knowledge" and "not readily available" had the effect of greatly restricting the interpretation of specialized knowledge.

This restrictive interpretation of L-1 specialized knowledge culminated in a 1988 precedent decision, *Matter of Sandoz Crop Protection Corp.*, [20] which held that specialized knowledge requires the employee to be a "key person with materially different knowledge and expertise which are critical for performance of the job duties; which are critical to, and relate exclusively to, the [employer's] proprietary interest; and which are protected from disclosure through patent, copyright, or company policy."[21]

In a 1988 INS policy memorandum issued by Associate Commissioner Richard Norton ("the Norton Memorandum"), the INS retreated from this restrictive interpretation, acknowledging that the agency's interpretations may have been "more restrictive than Congress or the Service intended."[22] The Norton Memorandum, set forth a much broader interpretation of "specialized knowledge" by defining it merely as "special knowledge possessed by an employee that is different from or surpasses the ordinary or usual knowledge of an employee in the particular field." In addition to broadening the definition, the Norton Memorandum listed the following characteristics of an employee with specialized knowledge:

- Possessing knowledge that is valuable to the employer's competitiveness in the marketplace;
- Uniquely qualified to contribute to the U.S. employer's knowledge of foreign operating conditions;
- Utilized as a key employee abroad with significant assignments that have enhanced the employer's productivity, competitiveness, image, or financial position; and
- Possessing knowledge that can only be gained through extensive prior experience with that employer.

With the passage of the Immigration Act of 1990 ("IMMACT 90")[23], Congress significantly relaxed the specialized knowledge requirements for the L-1B subcategory by broadening the definition of the term "specialized knowledge." IMMACT 90 regulations define specialized knowledge as special knowledge of the company product and its application in international markets or an advanced level of knowledge of processes and procedures of the company. In the preamble to the proposed regulations implementing

[19] 8 CFR §214.2(l)(1)(ii)(D)(1987).

[20] *Matter of Sandoz Crop Protection Corp.*, 19 I&N Dec. 66 (Comm'r May 20, 1988).

[21] *Matter of Sandoz* is not designated as precedent decision in the Adjudicator's Field Manual.

[22] Memorandum, "Interpretation of Specialized Knowledge Under the L Classification," Richard Norton, Associate Commissioner, INS Office of Examinations, CO 214.2 L-P (October 27, 1988), reproduced in 65 Interpreter Releases 1170, 1194 (November 7, 1988).

[23] Public Law 101-649

IMMACT 90, the INS acknowledged that "the intent of [IMMACT 90] as it relates to the L classification was to broaden its utility for international companies".[24]

Over the years since IMMACT 90 was enacted, USCIS has issued several key policy memos that have attempted to further clarify the definition of specialized knowledge.

In 1994, James Puleo, Acting Executive Associate Commissioner issued a memorandum entitled "Interpretation of Special Knowledge" ("The Puleo Memo").[25] The Puleo Memo essentially summarizes and solidifies the precedent decisions discussed above and has become the foundation for USCIS' training and decision making on L-1B specialized knowledge petitions as integrated into the AFM.[26] The Puleo Memo begins by reiterating the regulatory standard that an individual with either knowledge of a company's product and its application in international markets or an advanced level of knowledge of the company's processes and procedures will qualify for specialized knowledge classification. It goes on to define the two categories. First, specialized knowledge that is based on knowledge of a company's product is defined as knowledge that is different from that which is generally found in industry. In deference to the IMMACT 90 changes, the memo confirms that such knowledge need not be proprietary or unique but must be different or uncommon. Second, specialized knowledge that is based on knowledge of the company's processes or procedures must be advanced, highly developed, or complex. Again, the memo explains that the knowledge need not be proprietary or unique and further explains that the knowledge is not required to be narrowly held throughout the company. The Puleo Memo then goes on to confirm that a finding that a beneficiary possesses specialized knowledge does not require a shortage of available U.S. workers. Finally, the Puleo Memo gives several examples of qualities or characteristics which a specialized knowledge worker may possess. These include but are not limited to the following:

- Possessing knowledge valuable to an employer's competitiveness;
- Contributing to the U.S. employer's knowledge of foreign operating conditions as a result of specialized knowledge not generally found in the industry;
- Being utilized abroad in a capacity involving significant assignments, which have enhanced productivity, competitiveness, image or financial position;
- Possessing knowledge, which can normally only be gained through prior experience with the employer; or
- Possessing knowledge of a product or process, which cannot be easily transferred or taught to another individual.

[24] 56 Fed. Reg. 31, 554 (July 11, 1991).

[25] Memorandum, "Interpretation of Special Knowledge," James A. Puleo, Acting Exec. Assoc. Comm'r for Operations (Mar. 4, 1994)

[26] AFM Appendix 32-1

The Puleo Memo ends by characterizing specialized knowledge as being difficult to impart to another individual without significant economic inconvenience to the company or a significant interruption in business.

A later 1996 Department of State (DOS) cable reiterates the 1994 Puleo Memorandum's definition of specialized knowledge and adds that specialized knowledge is "knowledge that is not general knowledge held commonly throughout the industry" although, "knowledge held widely within the company does not preclude it from being specialized."[27] This 1996 cable also clarifies the requirement of experience found in the L-1 regulations. The 1996 cable explains that the "significance of experience does not necessarily equate to length of experience" for applicants who meet the requirement of employment by the sending entity for one of the three preceding years, but otherwise have "minimal employment history with the sending entity. [28] Therefore, given that the law only requires employment by the sending entity for one of the three preceding years and the guidance provided by the 1996 State Department cable, an applicant could conceivably gain significant experience that equates to specialized knowledge in a relatively short period of time.

In 2002, Associate Commissioner for Service Center Operations Fujie Ohata issued a memo, entitled "Interpretation of Specialized Knowledge" ("Ohata Memo 1"),[29] that reminded the Service Center adjudicators to follow the Puleo Memo. The Ohata Memo 1 merely summarized the Puleo Memo and did not state any new interpretation of the definition of specialized knowledge.

The most recent USCIS interpretation of specialized knowledge came in 2004, again from Fujie Ohata, Director for Service Center Operations. The memo, entitled "Interpretation of Specialized Knowledge for Chefs and Specialty Cooks seeking L-1B Status" ("Ohata Memo 2"),[30] while focused solely on the occupations of chefs and specialty cooks, also contained an interpretation relevant to all L-1B petitions. The main purpose of the memo was to specifically state that chefs and specialty cooks are generally not considered to have specialized knowledge that will qualify them for L-1B classification. It then goes on to confirm that the Puleo Memo should still be the guiding document for adjudicators on L-1B petitions. Finally, the Ohata Memo 2 emphasizes the element of the assessment of the economic impact of having to train a U.S. worker to fulfill the duties of the foreign worker for whom the petitioner is seeking L-1B classification.

IV. The Age of the L-1B RFE

Since 2002, immigration practitioners have noticed a marked increase in the issuance of RFEs for L-1B petitions. The increased sensitivity to the L-1B classification may be due to a number of outside factors which have led to increased public scrutiny of the agency, in general, and the L-1B category, specifically.

[27] State Department cable No. 95-State-222894, reproduced in 72 Interpreter Releases No. 39 (October 6, 1995).

[28] Id.

[29] Memorandum, "Interpretation of Specialized Knowledge," Fujie Ohata, HQSCOPS 70/6.1 (Dec. 20, 2002)

[30] Memorandum, "Interpretation of Specialized Knowledge for Chefs and Specialty Cooks seeking L-1B status," Fujie Ohata, Dir. Service Center Operations, USCIS (Sept. 4, 2004)

First and foremost, the former-INS struggled under the backlash against the agency from the events of September 11, 2001. After September 11, the agency took a hard line approach and issued the now infamous March 22, 2002 "Zero Tolerance Memo,"[31] which manifested itself in a number of abrupt reversals of policy and convention, onerous and hyper-technical RFEs, and harsh denials from across the entire agency. It was in this environment that the Ohata Memo 1 was issued, possibly in response to rising complaints from the immigration bar, which was understandably concerned over the inordinate number of troubling L-1B RFEs and outright denials.

Then, in 2003, the L-1B visa category specifically came under fire in an article published in *Business Week*,[32] which publicized accusations by American information technology workers that they were being displaced by cheap foreign labor, specifically Indian IT workers brought in on L-1B visas and outsourced to U.S. firms. Labor advocates claimed that the L-1B category was a loophole that was being used to circumvent the H-1B's Labor Condition Application requirements. The article gained national attention from the press and from Congress. In response, Congress eventually passed the L-1 Visa Reform Act of 2004 as part of the 2005 Omnibus Appropriations Bill.[33] Among other changes, the Act instituted a $500 "Anti-Fraud Fee" for all initial L-1 petitions and a prohibited the placement of L-1B employees at the worksite of a third party employer where the third party employer (and not the petitioning employer) will control and supervise the worker and the worker will not be applying her specialized knowledge of the petitioning employer's product, service, processes or procedures.

The potential abuse of the L-1 visa, in general, and the L-1B category, specifically, remains a matter of priority for USCIS, as indicated by the January 2006 Department of Homeland Security Office of Inspector General report on the topic.[34] Of the three topics specifically identified as weaknesses in the program, definition of the term specialized knowledge was one of them. Interestingly, the report indicated that the definition of the term "may not be sufficiently restrictive."[35] In addition, the report examined the issue of displacement of American workers.[36] However, note that this report has been severely criticized for its research design and lack of empirical evidence, given that the Inspector General consulted only with USCIS adjudicators and did not research actual L-1 usage by U.S.-based companies.[37]

[31] Memorandum, "Zero Tolerance Policy," James W. Ziglar, Commissioner, INS (March 22, 2002).

[32] "A Mainframe-Size Visa Loophole," *Business Week*, March 6, 2003.

[33] Pub. L. No. 108-649

[34] "Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program," Office of Inspections and Special Reviews, Office of Inspector General, Department of Homeland Security, OIG-06-22.

[35] *Id.* at p. 7

[36] I*d.* at pp. 9-13

[37] *See*, Stuart Anderson, "New Research Explains L-1 Visas, Questions Recent Government Report," the National Foundation for American Policy (NFAP), an Arlington, Va.-based public policy group, accessible at: http://www.nfap.com/pressreleases/March14_2006_pr.aspx (last accessed on Jul. 25, 2008). ("The report offers no statistical or other meaningful analysis of whether there actually is abuse. Nor does it offer a single illustrative real-life instance of fraud or abuse. Instead, there is mere innuendo about 'abuse that appears to be occurring,' based on unexplored and unsubstantiated concerns from adjudicators," quoting former INS General Counsel, Bo Cooper).

Finally, the suspicion by USCIS that the L-1B visa could be improperly used as a substitute for unavailable H-1B visas may have led to increased scrutiny of L-1B petitions. In Fiscal Year 2004, the H-1B cap reverted to 65,000 visas per year. In Spring 2004, as the specter of quota depletion before the end of the fiscal year loomed large, practitioners again noticed an increase in the number of RFEs and denials, ostensibly as a result of USCIS officers who were wary of petitioners attempting to skirt the unavailability of H-1B visas. While no official pronouncements from USCIS were issued to this effect, the DOS expressly warned Consular Officers during this period to be on the lookout for potential "increased fraud and abuse" of the L-1 visa category because of unavailability of H-1B visas.[38] The increase in RFEs in L-1 petitions at the time, specifically related to the specialized knowledge issue in L-1B petitions, made it obvious that USCIS as well was on the lookout for abuse of the category.[39]

V. Common Issues in RFEs for L-1B Petitions

Knowing in advance the common issues raised in an L-1B RFE will help practitioners prepare an approvable case at the outset and avoid the delay and expense an RFE brings. Perhaps the most frequent request in an L-1B specialized knowledge RFE is for the petitioner to explain, in more detail than initially provided, both the beneficiary's proposed duties in the U.S. and her current duties with the company abroad. Avoid this RFE request by carefully drafting the petitioner's letter of support with sufficient detail about the beneficiary's duties to clearly explain how the beneficiary qualifies for one of the two specialized knowledge classifications: knowledge of a company's product and its application in international markets that is different from that which is generally found in the industry (but need not be proprietary or unique); or knowledge of the company's processes and procedures that is advanced, highly developed or complex (and, again, need not be proprietary, unique, or even narrowly held throughout the company).

A related question that often appears in specialized knowledge RFEs instructs the petitioner to indicate what percentage of time the beneficiary spends or will spend on each of the enumerated duties. While a requirement to provide such information is not specifically stated in any regulation, precedent decision, or guidance memo on the subject of specialized knowledge, it is reasonable to assume that this information would assist an adjudicator in making their decision by clarifying which are the most important duties the beneficiary will perform and helping the adjudicator to gauge more accurately whether the beneficiary will indeed be primarily performing duties that can be classified as requiring specialized knowledge. The prospective employer should consider assigning percentage of duties in the initial support letter to avoid the possibility of a later request, particularly if the duties include a few that may not evidence specialized knowledge but will be a small percentage of the overall duties.

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[38] "L Visas and the H-1B Cap," Cable, R 140343Z (February 2004); AILA InfoNet Doc. No. 04022410 (posted Feb. 24, 2004)

[39] It is interesting to note, however, that the Office of Inspector General report on the L-1 visa program found that there was no actual increase in L visa petition receipts coinciding with the reversion of the H-1B cap to 65,000 visas in FY2004. *Supra* at pp. 10-11. However, the reversion of the H-1B numbers did coincide with the enactment of the L-1 Visa Reform Act, which significantly restricted the availability of L-1B classification to IT companies who might inappropriately use the L-1B category as a substitute for unavailable H-1B visas.

Many RFEs request specific discussion of the impact on the petitioner's business if the petitioner is unable to obtain the beneficiary's services. When this question is considered in light of the Ohata 2 Memo, it appears that the effect on the U.S. business of having to train another worker to fulfill the duties that the beneficiary would be performing has become a critical factor in the specialized knowledge inquiry. Again, anticipating such questions by clearly describing how the petitioner's business will be negatively affected if the company is not able to transfer this employee to the U.S. entity will help avoid the RFE.

While many questions that commonly appear in the standard L-1B RFE ask for legitimate information, there are also some requests for information that are clearly not appropriate under the regulations and guidance memoranda and indicate a possible lack of understanding by the adjudicator of the nuances of the specialized knowledge category. For example, some recent RFEs have requested that the petitioner provide additional information to demonstrate that the beneficiary has specialized knowledge of the petitioner's product *and* that the beneficiary has advanced knowledge of the company's procedures. Clearly, satisfaction of either (not both) of these elements will qualify an individual for L-1B classification and the regulations and the guidance memos confirm this. Responses to this type of request, while still responding to the question, should also challenge the underlying premise that both the petitioner's product and an advanced level of knowledge of the petitioner's process is required under the regulations.

Another example of some adjudicators' apparent misapprehension of the applicable standards for specialized knowledge classification is exemplified by an RFE seeking an explanation of how the beneficiary "possesses an advanced level of [knowledge of] the petitioner's product or services." This request seems to indicate that confusion in the adjudication corps exists over the difference between the two regulatory standards for specialized knowledge. Again, the standard is either knowledge of the petitioner's product, which must only be different from that which is generally found in the industry, or knowledge of the petitioner's processes or procedures, which must be advanced. Advanced knowledge of the petitioner's product is required in neither the regulation nor the guidance memorandum. While nevertheless responding to the question, the response should include a correction to the misinterpretation of the standard.

Finally, some RFEs have asked, in conjunction with a question asking for more detailed explanation of the petitioner's product, whether the petitioner's technology or product is proprietary. The requirement that the knowledge that the beneficiary holds be proprietary to the company was removed from the regulations with IMMACT 90. Moreover, the Puleo Memo plainly confirms that the knowledge need not be proprietary to qualify under the specialized knowledge standard. While it could be argued that the reason the question is asked is because proprietary knowledge would definitely satisfy the "different or uncommon" standard set forth in the Puleo Memo, the question can also easily be construed to infer that proprietary knowledge is required for specialized knowledge classification. As the latter interpretation is contrary to USCIS's own stated policy on the subject, the written RFE response should challenge this type of request, while still providing an overview of the explanation of the product or services.

VI. Conclusion

Careful preparation of petitions at the outset can forestall issuance of the RFE. Notwithstanding the hurdles noted above, the L-1B visa category is still a viable option for many companies. With appropriate documentation regarding the related companies and the foreign citizen, and prior consideration of what USCIS might request in RFEs, the L-1B petition can be approved.