

Management Alert



USCIS Issues Policy Memorandum to Clarify the L-1B “Specialized Knowledge” Standard

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In a long-awaited and highly anticipated communication, United States Citizenship and Immigration Services (USCIS) released a draft policy memorandum to clarify the L-1B “specialized knowledge” standard. USCIS posted the draft policy memo on March 24, 2015, and it will remain open for public review and feedback until May 8, 2015. The finalized memo will take effect on August 31, 2015 and it will supersede and rescind prior L-1B memoranda.

Background

The L-1B nonimmigrant visa category allows companies to transfer individuals with more than one year of experience with a foreign affiliate to the U.S. for up to five years, provided the employer can satisfy an adjudicating officer that the individual possesses “specialized knowledge” related to the company’s business objectives and that he or she will apply that “specialized knowledge” at the U.S. worksite. Congress created the L-1B classification to enhance multinational companies’ ability to leverage an international workforce comprised of specially trained employees and meet the needs of employers operating in an increasingly global marketplace.

However, in recent years, the L-1B program has been mired by inconsistent adjudications and interpretations of the “specialized knowledge” standard by adjudicating officers at U.S. consulates and embassies abroad as well as within USCIS, the adjudicating agency in the U.S. According to a recent [report](#) released by the National Foundation for American Policy (NAFP), USCIS denied approximately 35% of all L-1B petitions filed in 2014 and USCIS issued Requests for Evidence (RFEs) in 45% of cases, figures that have been on the rise for four straight years. The uncertainty surrounding the L-1B visa category has negatively impacted companies with immediate needs to transfer highly skilled international employees with extensive internal training and company-specific expertise and complex knowledge of internal company processes, procedures, products, and services to affiliate companies in the U.S.

The L-1B Adjudications Policy: Highlights

The policy memorandum provides guidance to officers in adjudicating petitions filed by employers seeking to transfer “specialized knowledge” personnel to the U.S. It attempts to provide clarification regarding how L-1B petitioners may demonstrate that an employee possesses specialized knowledge. The policy memorandum seeks to clarify the following critical points:

1. Evidentiary Standard

- A petitioner seeking L-1B classification for an employee must establish that it meets each eligibility requirement of the classification by a “preponderance of the evidence,” which is a lower standard than “clear and convincing evidence” or “beyond a reasonable doubt.” A petitioner must convince an officer that the claim is “more likely than not” or “probably” true.

2. Definition of Specialized Knowledge

- “Special” knowledge of the petitioning employer’s product, service, research, equipment, techniques, management, or other interests and its applications in international markets must be **distinct or uncommon in comparison to** that generally found in the particular industry OR within the petitioning employer.
- “Advanced” knowledge of the organization’s specific processes and procedures must be **greatly developed or further along in progress, complexity, and understanding** than that generally found within the petitioning employer.

3. Application of the Specialized Knowledge Standard

- A beneficiary may possess either “special” or “advanced” knowledge, or both. Determining whether knowledge is “special” or “advanced” inherently requires a **comparison** of the beneficiary’s knowledge against that of others -- other workers in the industry or at the petitioning employer. The petitioner bears the burden of establishing a favorable comparison.
- Specialized knowledge does not need to be proprietary or unique to the petitioning organization. A petitioner is not required to demonstrate that it is the only company where the beneficiary could have acquired the knowledge.
- Specialized knowledge does not need to be narrowly held within the petitioning organization and L-1B classification does not require a test of the U.S. labor market. However, in cases where there are already many employees in the U.S. organization with the same specialized knowledge as that of the beneficiary, officers generally should consider the validity of organization’s need to transfer the beneficiary to the U.S.

4. Readjudication of L-1B Status

- In matters related to an extension of L-1B status involving the same sponsoring employer and foreign national and the same underlying facts, the memo directs USCIS officers to give deference to the prior approval of L-1B classification. This policy deference does not seem to apply to a request for an extension of L-1B status when the underlying status was granted based on an approved consular petition under the company’s L-1 “Blanket” approval.

Seyfarth Shaw’s Business Immigration Group is currently reviewing the draft policy memorandum in detail and will closely monitor potential developments during the public review and comment period through May 8, 2015. Once USCIS issues the final policy memorandum, Seyfarth Shaw will provide a complete analysis.

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Seyfarth Shaw LLP Management Alert | March 25, 2015

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