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# L-1B Specialized Knowledge Visa Category Guidance Goes into Effect Today: Brave New World?

**August 31, 2015**

While the L-1B Adjudications Policy Memorandum published by United States Citizenship and Immigration Services on August 17, 2015, effective as of August 31, 2015, has many positive components, petitioners and practitioners are much concerned.

The bottom line is that nothing in the Guidance "twists the arms" of adjudicators or strongly pushes them to change their attitudes towards L-1B petitions, and without a change in attitude, officers will always find ways to issue "requests for evidence (RFE's)" and deny cases even within the revised guidelines.

**Weight of the Evidence**

It is significant that the Service recognizes in this Guidance the value of the petitioner's letter. "A petitioner's statement may be persuasive evidence if it is detailed, specific, and credible. Adjudicators may, in appropriate cases, however, request further evidence to support a petitioner's statement, **bearing in mind that there may be cases involving circumstances that may be difficult to document, other than through a petitioner's own statement**." [Emphasis added.]

This is a very important affirmation by USCIS, after a long history of disparaging the value of petitioners' statements.

Unfortunately, this is undercut somewhat by the fact that the Memorandum enumerates a whole list of examples of "other evidence" that a petitioner might submit. Although this appears to be at worst innocuous and at best helpful, historically we have seen adjudicators incorporate lists such as this in their entirety in "requests for evidence," incorrectly implying that failure to produce some or all of this documentation necessarily should lead to a denial.

The introduction to this list of documentation reads: "Other evidence that a petitioner may submit to demonstrate that an individual's knowledge is special or advanced includes, but is not limited to. . . ." The big question – will adjudicators adhere to that warning?

**The "Specialized Knowledge" Definition**

The greatest challenge to the Service was to find an effective and clear way to define "specialized knowledge" and the Service in this instance certainly made a noble effort. It conceded that specialized knowledge does not have to be narrowly held within an organization, but still warns adjudicators they should take into account whether there are others within the organization who can perform the same duties.

USCIS seeks to identify the parameters of specialized knowledge in subparagraphs entitled:

1. Specialized knowledge generally cannot be commonly held, lacking in complexity, or easily imparted to other individuals.

2. Specialized knowledge need not be proprietary or unique to the petitioning organization.

3. L-1B classification does not involve a test of the U.S. labor market.

4. Specialized knowledge need not be narrowly held within the petitioning organization.

5. Specialized knowledge workers need not occupy managerial or similar positions or command higher compensation compared to their peers.

6. Eligibility for another nonimmigrant classification is not a bar to eligibility for L-1B classification.

These address misconceptions and errors frequently seen in prior requests for evidence.

**Prior L-1B Adjudications**

Another conundrum that USCIS addresses, but does not fully resolve, is the weight to be given to prior L-1B adjudications. Nothing is more troubling to employers than to place an individual in the United States as an intracompany transferee after a petition has been approved only to be challenged three years later when an extension is requested. The Memorandum acknowledges that in "matters relating to an extension of L-1B status involving the same parties . . . and the same underlying facts, USCIS officers should give deference to the prior determination by USCIS approving L-1B classification." However, as indicated in prior memoranda, the Service officer is free to reexamine L-1B eligibility if there was a material error with regard to the previous approval, or there has been a substantial change in circumstances, or there is new material information that adversely impacts the petitioner's or beneficiary's eligibility. Again, reasons and criteria which historically have been abused by USCIS officers.

Also quite troubling is the half hearted acknowledgement the Memorandum makes as to adjudications by other government agencies, such as consular officials adjudicating L-1B blanket petitions and CBP officers adjudicating petitions at ports of entry on behalf of Canadians. "USCIS will take note of a previous determination of L-1B eligibility made by the Department of State or U.S. Customs and Border Protection, but will make a determination on the instant petition, based on the record before it, consistent with the guidance provided in this Memorandum." Well, what exactly does "take note" mean?

**Offsite L-1B Employment Pursuant to the L-1 Visa Reform Act**

The Guidance recognizes that offsite L-1B employment is permitted in appropriate circumstances. It is emphasized that as long as the petitioner retains primary authority over the way the work is performed, there remain critical indicators that the petitioner controls the employment, and the beneficiary has the requisite knowledge of the petitioner's products and services, it is still possible to consider L-1B eligibility even if the end client assigns work to the L-1B employees and there is an additional component requiring knowledge of the client's systems. This recognizes the day-to-day reality of employers who are in the business of providing customized technology solutions to their clients.

**Looking Forward**

This Memorandum goes into effect as of today, August 31, 2015, and is applicable to pending petitions and petitions to be filed in the future. There is no doubt that this Policy Memorandum is a major accomplishment of USCIS, well thought out, with the intention of trying to provide balance and clarity to L-1B adjudications. However, at the end of the day, it will only be effective if adjudicators take its principles and intent to heart and are prepared to work together with businesses and entrepreneurs to pursue the growth and expansion of business through effective transfer of personnel.

USCIS is not being asked to open the doors indiscriminately to everybody and all, but to carefully assess business needs and, within the parameters of the statute, regulations and policy, adjudicate petitions so that businesses can flourish without harming the American market.

Achieving the goals of this Memorandum will be a true challenge to USCIS, petitioners and their legal representatives.

You are encouraged to contact your Proskauer Immigration Professional to discuss the implications of this new policy on your business.