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USCIS Clarifies the L-1 One-Year Foreign Employment Requirement

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On November 29, 2018, U.S. Immigration and Citizenship Services (USCIS) announced the publication of a policy memorandum dated November 15, 2018 that clarified the L-1 one-year foreign employment requirement. The memorandum confirms an L-1 qualifying organization must have employed the L-1 beneficiary abroad for one continuous year out of the three years before the filing of the L-1 petition, and not the later proposed L-1 entry date listed in the petition. The memo also carves out certain exceptions for those who entered the U.S. to work for the L-1 qualifying entity, as well as explains the tolling of the one continuous year of employment for trips to the U.S.

In its release, USCIS said that the clarification is part of its review of all employment-based visa programs "to eliminate fraud and ensure consistent adjudications," following the President's "Buy American and Hire American" executive order last year. In fact, this memorandum narrowly interprets the relevant statutes and regulations, and thus limits eligibility of individuals to qualify for the L-1 category.

Central Policy Points in the Memorandum

USCIS, in this memorandum, states the following:

- The one-year foreign employment requirement can only be satisfied by time an L-1 beneficiary is physically outside the United States working for a qualifying entity. Any time spent in the U.S., even if at the request of the qualifying foreign organization or U.S. L-1 petitioner, and even if the foreign organization continued to pay and employ the beneficiary abroad during the trip(s) does not count toward the one-year requirement.
- Brief trips to the U.S., for business or pleasure, toll the one-year clock but do not interrupt the continuous one-year of employment abroad. This means that any time spent in the U.S. will not be counted towards the one-year of qualifying employment abroad. The memo provides the following example: "if the qualifying foreign entity began to employ the beneficiary on January 1, 2016, and the beneficiary made brief trips to the United States that year for a total of 60 days, the

beneficiary would need to accrue at least an additional 60 days of qualifying employment abroad after January 1, 2017, in order to meet the one-year foreign employment requirement."

- In a footnote, USCIS imposes a serious stringency –applying these interpretations retroactively! The memo indicates that when a petitioner requests an extension of L-1 status, including a change from L-1B to L-1A, the service will look to the original L-1 petition to see if all of the L-1 requirements were satisfied at that time. This means that subsequent L-1 extensions may be denied based on this stricter interpretation of qualifying employment abroad even though previous petitions filed by the same petitioner for the same beneficiary were approved in the past.
- When a foreign national enters the U.S. primarily to work "for" a qualifying L employer in the U.S., in any employment-based visa category, the time spent in the U.S. will not count towards qualifying employment but it will result in an "adjustment of the three-year period." USCIS explains this "adjustment" with another example in the memo: "if a beneficiary worked in the United States in valid H-1B status for a qualifying organization from January 2, 2017, through January 2, 2018, and the petitioner filed for L-1 nonimmigrant status for the employee on January 2, 2018, the pertinent three-year period will be from January 1, 2014, to January 1, 2017." Thus, if one enters the U.S. for the primary reason of working "for" a qualifying entity, USCIS will look to the date the foreign national was initially admitted to work for the qualifying organization rather than the date of the L-1 petition filing to determine eligibility.
- If one enters the U.S. for any purpose other than to work "for" a qualifying entity, the memo confirms that period of time in U.S. will not count towards the one-year requirement, nor will it allow any "adjustment" of the three-year period. Thus, the individual must have had the qualifying foreign employment within three years of the initial L petition filing. The memo confirms this is even the case in instances when going to school under the auspices of a qualifying organization, or entering in a dependent status and then working for the petitioner in the U.S.
- The memo makes clear that any time a beneficiary is unemployed or employed in an unrelated situation, it is considered to be interruptive of the one year continuous employment period abroad necessary to qualify for the L-1, thereby barring an officer from adjusting the three-year period when determining whether the beneficiary satisfies the one-year foreign employment requirement. The officer must look to confirm whether the beneficiary had the qualifying foreign employment within three years of the L petition filing.

As a result of the restrictive approach taken in this memorandum, companies will need to encourage their foreign workforce to carefully keep track of visits to U.S. to ensure they meet the foreign employment requirement prior to the filing of any L-1 petition. More importantly perhaps, for L-1 beneficiaries already in the United States, the L-1 employer should review their employment history to ensure they met the minimum one-year continuous employment period abroad at the time their initial L-1 petition was filed, and be prepared to document this in an extension filing, or be prepared for a Request for Evidence (RFE) regarding this issue. Employers may have to deal with increased RFEs and possibly even denials of L-1 petitions for beneficiaries who may have been previously approved with the same petitioner based on the same circumstances.

Please contact Proskauer if you have any questions or concerns.