



PRACTICE ALERT: HEIGHTENED SCRUTINY OF L-1B VISAS

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by

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Practitioners Beware! L-1B Visa Program is facing heightened scrutiny. Reports are streaming in that the Service is issuing sweeping Requests for Evidence (“RFEs”) on all L-1B cases.² The RFEs appear to be boilerplate and often ask for information that has already been submitted. Rarely do the RFEs make reference to the specifics of the particular case.

As a head’s up, the following is a list of items that are routinely requested by the Service for L-1B petitions:

- Organizational charts;
- Evidence of the number of employees working abroad and in the United States;
- Evidence of the number of employees working in similar positions in the United States;
- An explanation of how the duties the alien performed abroad and those he or she will perform in the United States are different from those being performed by other individuals employed with the Petitioner;
- If employees already in the United States have these skills, an explanation of why the Petitioner needs to bring someone from abroad;
- More information about the Petitioner’s product and the beneficiary’s training in that product;
- Copies of contracts with clients and “milestone plans” showing the beginning and end dates for when the services are needed.

Don't panic if you receive these requests. If this information has already been submitted, simply inform the Service that it is already on file. For information not already provided, reiterate the L-1B standard and state (politely and tactfully if possible!) that the Service's line of questioning is not relevant. Such requests venture into a territory that is irrelevant in making an L-1B determination. Since when have organizational charts been required for an L-1B visa? Aren't they more relevant to an L-1A petition?

The Service is missing the point and not focusing on the issue at hand – whether the Beneficiary has specialized knowledge. Instead, it seems to be preoccupied with how many people within a company have that specialized knowledge. From the look of these RFEs, the Service appears to take the view that if there are multiple employees with that knowledge then the Beneficiary's knowledge will not be considered specialized.

But it is specialized! So, when responding to the RFE, inform the Service that the relevant inquiry is not whether this Beneficiary is the only one at the Foreign or American entity with the specialized knowledge. The relevant inquiry is actually whether Beneficiary has “a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company; or, an advanced level of professional or technical expertise, and proprietary knowledge of the organization's services, products, technology, strategies, or any other corporate function that is essential to the United States company's successful operation.”³

Throw the Service's own memoranda back at it. Draw their attention to a 1994 Memorandum on Interpretation of Specialized Knowledge from James E. Puleo. This clearly states that the “statute **does not require that the advanced knowledge be narrowly held throughout the company**, only that the knowledge be advanced.”⁴ This memorandum describes the characteristics of an alien with specialized knowledge. It explains that specialized knowledge exists when the alien “osesses knowledge, which, normally, can be gained only through prior experience with that employer” or “osesses knowledge of a project or process which cannot be easily transferred or taught to another individual.”⁵ As example of a specialized knowledge employee, the memorandum describes an employee who has “knowledge of the foreign firm's business procedures or methods of operation to the extent that the United States firm would experience a significant interruption of business in order to train a United

States worker to assume those duties.”⁶ Emphasize that it is better to bring a foreign employee in, rather than hire a new U.S. worker who will need to be trained upon joining the American team.

A 2002 memorandum by Fujie Ohata reiterates and clarifies these positions.⁷ Mr. Ohata states that the test for specialized knowledge centers on a product or process within the particular company: “The alien should possess a type of specialized or advanced knowledge that is different from that generally found in the particular industry. The knowledge ***need not be proprietary or unique . . . where the alien has knowledge of company processes or procedures, the knowledge must be advanced.***”⁸ Essentially, if the specialized knowledge is based on a process or procedure at the company, an L-1B can be obtained even if everyone in the company has the knowledge, so long as the Petitioner can show that the Beneficiary’s understanding of it is advanced. Ohata also confirms the long-standing USCIS rule that “there is no test of the U.S. Labor Market in determining whether an alien possesses specialized knowledge. Only an examination of the knowledge possessed by the alien is necessary.”⁹ As such, any request that requires a broad test of the market goes outside of the scope of what needs to be provided for the L-1B visa.

These are just some helpful tips in responding to these queries. The number of RFEs does not seem to be decreasing; so until this trend changes, it is best to provide the requested information with a reiteration of what the L-1B standard is.

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² As background, an L-1B Visa is available to those being transferred to a U.S.

company from a foreign parent, branch, affiliate or subsidiary. See INA 101(a)(15)(L). L-1B classification can be obtained if the Beneficiary has and will continue to work in a specialized knowledge capacity.

³ INA §214(C)(2)(B).

⁴ Memorandum on Interpretation of Special Knowledge from James A. Puleo, Acting Executive Associate Commissioner, Office of Operations, CO 214L-P (March 9, 1994) (hereinafter “Puleo Memo”) (emphasis added).

⁵ *Id.*

⁶ *Id.*

⁷ Memorandum on Interpretations of Specialized Knowledge from Fujie O. Ohata, Associate Commissioner, Service Center Operations, Immigration Services Division, HQSCOPS 70-6.1 (Dec. 20, 2002).

⁸ *Id.* (emphasis added).

⁹ *Id.* (emphasis added).