



GES Alert

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Immigration –
Clarifications on L-1B
adjudication by
USCIS

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Background

With a view to provide clarity on the adjudication of L-1B visas, the US Citizenship and Immigration Services (USCIS) has recently issued a Policy Memorandum¹ (memo) providing consolidated and authoritative guidance on L-1B visa adjudication thereby permitting multinational companies to transfer employees who possess “specialized knowledge” from their foreign operations to their US operations. This memo shall supersede prior L-1B memoranda to promote consistency and efficiency in L-1B adjudications by USCIS officers. The USCIS has issued the memo for public review and feedback requesting for a response by 8 May 2015, and it intends to make this effective on 31 August 2015.

Key aspects

Under the L-1B program, the petitioner must show that the beneficiary has “specialized knowledge”, the position offered involves the specialized knowledge which is held by the beneficiary, and that the beneficiary has at least 1 continuous year of employment abroad within the preceding 3 years.

Some of the key aspects outlined in the guidance are as under:

- The petitioner must establish that the employee for whom L-1 B classification is requested meets the eligibility criteria by a “preponderance of the evidence”; ie it is ‘more likely than not’ that the employee is eligible for this visa. The guidance confirms that this is a lower standard of proof than that of “clear and convincing evidence” or the “beyond a reasonable doubt” standard.
- Under the statute, a beneficiary is deemed to have specialized knowledge if he or she has “special knowledge” of the company products and its application in international markets or an “advanced” level of knowledge or expertise of the processes and procedures of the company. Applying the definitions provided in dictionaries of “special” and “advanced” to the statutory and regulatory text, the memo provides more guidance on the expected level of the employee’s knowledge with respect to the petitioning organization’s products, processes and procedures. For example, this knowledge need not be proprietary in nature or narrowly held within the petitioning organization.

¹ On 24 March 2015

- The memo provides the following illustrative list of factors which may be considered by the USCIS while determining whether a beneficiary’s knowledge is specialized is as under:
 - Specialized knowledge cannot be easily imparted to other individuals
 - Specialized knowledge need not be proprietary or unique to the petitioning organization
 - L-1B classification does not require test of the U.S. labor market
 - Specialized knowledge need not be narrowly held within the petitioning organization
 - Specialized knowledge workers need not occupy managerial or similar positions or command high salaries compared to their peers
 - Eligibility for another nonimmigrant classification is not a bar to eligibility for L-1B classification
- To enable the USCIS to evaluate claims of specialized knowledge, the memo provides guidance with respect to description of the services to be performed and documentation with respect to the employee’s prior education, training, and employment.
- The guidance also provides certain clarifications with respect to the requirement that the beneficiary must have at least 1 continuous year of employment abroad with the petitioning organization or a foreign organization.
- As per the L-1B visa (Intracompany Transferee) Reform Act of 2004 (Reform Act), in the case of offsite employment, for an employee to qualify for L-1B classification, the petitioning employer must show that:
 - The employee will not be principally controlled or supervised by such an unaffiliated employer; and
 - The work being provided by the employee is not considered to be labor for hire by such an unaffiliated employer.

The memo provides guidance regarding compliance with the requirements of the Reform Act, which is designed to prevent (among other things) the outsourcing of L-1B beneficiaries to third party entities as “labor for hire”.

Comments

The memo indicates that Congress has determined that the ability to transfer company personnel with specialized knowledge is important in fostering the growth and competitiveness of US businesses. The memo also suggests that a practical approach has been outlined in the guidance as reflected in the L-1B classification's broad statutory and regulatory definitions, and that such an approach maintains the integrity of the L-1B program and recognizes the fluid dynamics of the business world in which petitioning organizations operate. Given the ambiguity in the interpretation of "specialized knowledge", and the challenges faced due to extensive rejections of visa applications in the past, employers must review the draft memo and assess the impact on their assignee population.

Source: <http://www.uscis.gov>

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