

IMMIGRATION BASICS FOR EXPATS AND SECONDEES

Transferring employees of multinational companies to other countries requires thoughtful planning and analysis. There are various factors to be considered and strategic decisions to be made regarding the terms of employment as well as immigration options. Once the employee to be transferred has been identified, a determination must be made regarding the type of visa the employee should obtain. Choosing the type of visa is not a one size fits all approach. There are various visa options and the suitability of each type of visa will vary on each particular assignment and employee. Deciding which visa is the most suitable requires careful analysis of the company's business reasons for the transfer as well as the foreign employee's particular situation and long term objectives. For our purposes, we will focus on the L and E visa, but please note there is an array of work visas most notably the H-1B. Based on multinational transfers, the most common is the E and L visa.

I. Visa Overview

When a multinational company is seeking to transfer its employees to the United States the most common visas are the L-1 (Intracompany Transferees) and E-1/E-2 (Treaty Traders and Investors) visa classifications. Also common is use of the H-1B (Professional Workers) visa classification. An employee may qualify for each of these visas, however, based on the overall objective of the assignment one visa may be more appropriate and/or beneficial over the others.

A. L-1 Intracompany Transferees

The L-1 visa is reserved for multinational companies seeking to transfer its executives and managers (L-1A) and specialized knowledge workers (L-1B) to the United States. To qualify for the L-1 visa, the company must prove:

1. There is a *qualifying relationship* between the entity in the U.S. and the entity employing the foreign national abroad.
2. The employee has been employed full-time abroad for one continuous year in the last three years by a qualifying organization.
3. The employee will be transferred to the U.S. to fill a position that is *executive or managerial*, or in a position that requires *specialized knowledge*.
4. The US entity will continue to do business in the U.S. and in at least one other country abroad for the duration of the employee's assignment in the U.S. in L-1 status.

i. Qualifying Relationship

A *qualifying organization* is defined as a: "United States or foreign firm, corporation or other legal entity" that "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary." 8 C.F.R. § 214.2(l)(ii)(G). Attention to these definitions is very useful when faced with a more complex corporate structure of various owners and ownership interests. Use of these regulatory provisions is helpful to decide the type of evidence to be included to prove a qualifying relationship. Particular attention should be made to the definition of *subsidiary* and *affiliate*:

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity. 8 C.F.R. § 214.2(l)(ii)(K).

An affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member. 8 C.F.R. § 214.2(l)(ii)(L).

In cases where the corporate structure is not as straightforward or transparent, in depth analysis is required to prove that the involved entities qualify. For example, using the definition of *subsidiary* an argument can be made where there is less than majority ownership that the parent entity controls the entity. Evidence that can be included to show control includes corporate documents that prove voting percentages.

ii. Continuous Employment

In establishing the one year in the last three years of continuous employment, it is important to note that the employee does not have to be a current employee. If the employee was a prior employee, he or she may still qualify so long as the employment has taken place in the last three years.

The *continuous* requirement however can pose a problem for employees who during their employment left the company to study abroad or temporarily left the company to work for a even a short duration for an unaffiliated company. Any of these events will break the continuity of the employment. However, if the employee has spent time in the U.S.

visiting for business or pleasure or working in the U.S. for a parent, affiliate, branch or subsidiary, such time shall not interrupt the continuous period abroad. Notwithstanding, the employee must still fulfill the one year of employment. 8 C.F.R. § 214.2(l)(ii)(A). See also *Matter of Kloeti*, 18 I&N Dec. 295.

iii. Employee's Position in the U.S. : Executive, Manager or Specialized Knowledge

Whether the position qualifies for the L-1 classification (L-1A for executives and managers and L-1B for specialized knowledge employees) will be determined based on the job duties the employee will perform and not based on job title. The employee does not have to be transferred to the U.S. in the same capacity. Adjudicator's Field Manual (AFM) at 32.3(b). See also *Matter of Vaillancourt*, 13 I&N Dec. 654. In preparing the petition and corporate documentation, the duties should be drafted carefully and with sufficient specificity. The use of a generic description to describe the job duties should be avoided as USCIS will in many of these instances issue a request for additional evidence. Following are the definitions of *executive* and *manager* as established by the Immigration and Nationality Act (INA) in Section 101(a)(44):

(A) The term "managerial capacity" means an assignment within an organization in which the employee primarily- (i) manages the organization, or a department, subdivision, function, or component of the organization; (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and (iv) exercises discretion over the day- to-day operations of the activity or

function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

(B) *The term "executive capacity" means an assignment within an organization in which the employee primarily- (i) directs the management of the organization or a major component or function of the organization; (ii) establishes the goals and policies of the organization, component, or function; (iii) exercises wide latitude in discretionary decision-making; and (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.*

Where the executive role is somewhat easier to identify, managerial capacity faces some additional hurdles that have to be resolved prior to classifying the employee as a manager. First of all, first-line supervisors have been specifically excluded from this category unless the employees supervised are professional. 8 C.F.R. §2414.2(l)(1)(ii)(B). Secondly, when faced with a manager who will not be supervising any direct reports and instead will be managing an essential function careful attention to detail is required to prove the employee does in fact qualify as a manager.

This *functional manager* category has been discussed extensively and has been the source of dispute in many cases. The function itself cannot be performed by the manager. What seems to be a simple approach of explaining the manager will supervise, and not perform, the function becomes a little more convoluted when having to explain who then, if there are no direct reports, performs the function. This is particularly true when dealing with a smaller organization where the hierarchy consists of a rather small group. If the manager will in effect perform the duties of the function supervised, the employee will not

qualify and will have to seek classification under the L-1B Specialized Knowledge worker, if eligible, or another nonimmigrant category.

A larger hurdle is faced when dealing with the *specialized knowledge* category. The definition for *specialized knowledge* capacity is found in Title 8 of the Code of Federal Regulations:

Specialized knowledge means special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures. 8 C.F.R. §214.2(l)(1)(ii)(D).

Specialized knowledge professional means an individual who has specialized knowledge as defined in paragraph (l)(1)(ii)(D) of this section and is a member of the professions as defined in section 101(a)(32) of the Immigration and Nationality Act. 8 C.F.R. §214.2(l)(1)(ii)(E).

Further guidance has been provided by USCIS (formerly INS) through various published memoranda. However, exactly how much these memorandums have helped to clarify or have served to further confuse the issue is up for debate. These memorandums include the Memo from Fujie O. Ohata, HQSCOPS 70/60.1 (Dec. 20, 2002) and the Memo from James Puleo, CO 214L-P (March 9, 1994). The Ohata Memo describes specialized knowledge as knowledge that is “different from that generally found in the particular industry” and “need not be proprietary or unique.” The knowledge should be “noteworthy or uncommon.” Where the employee has “knowledge of company processes and procedures, the knowledge must be advanced.” In addition, such specialized knowledge cannot be simply stated, it must be documented with “probative evidence that the alien’s

specialized knowledge is distinguished by some unusual qualification and not generally known by practitioners in the alien's industry."

The Puleo Memo provides a list of characteristics that demonstrate specialized knowledge, and includes for example "knowledge of a product or process which cannot be easily transferred or taught to another individual." In addition, Puleo points out that the common theme in the examples provided is that the knowledge of a "process or product, would be difficult to impart to another individual without significant economic inconvenience to the United States or foreign firm." Puleo concludes by confirming the memo to be used as guidance only and there are many other instances of specialized knowledge. Despite this important caveat, USCIS adjudicators have been unrelenting in issuing Requests for Evidence to further prove, rephrase and explain the specialized knowledge possessed by the employee. Getting over this hurdle is costly and time consuming, consequently experienced practitioners will upon initial filing treat the case as if they were already be challenged to attempt to minimize unnecessary requests from USCIS.

iv. Anti Job Shopping Provisions

A brief word should be said by yet another hurdle related to *specialized knowledge* employees. The L-1 Visa Reform Act of 2004 (PL No. 108-447, Div J, Title IV; 118 Stat. 2809, 3351 (Dec. 8, 2004) created a restriction on L-1B specialized knowledge workers and codified in INA 214(c)(2)(F) making them ineligible for the classification if they are to be stationed primarily at the worksite of a third party other than the employer or an affiliate thereof, and will either be principally under the control and supervision of the unaffiliated

entity or the placement at the non-affiliated worksite is essentially labor for hire for that third party. To overcome this hurdle when the L-1B worker will be placed off-site, the U.S. entity can document that most of work will primarily occur within the L organization, the work will be controlled and supervised by the L organization, and/or the off-site activities do in fact require specialized knowledge of the Petitioner's product or services. AFM at 32.3(c).

v. Salary – Who can pay the salary? Does it matter?

Under the L-1 provisions, the employee's salary can be paid by the U.S. entity or the foreign entity. 9 FAM 41.54 N. 8.1. This provides multinational companies with flexibility to decide from which entity's payroll the salary will be paid based on lateral considerations such as continuation of pension benefits in the foreign country, tax benefits, etc. There are many reasons why a company would prefer to pay the salary from the foreign entity and in some cases a combination payroll may be used. Despite this flexibility, whether an employee's work and activities are controlled by the U.S. entity or foreign entity does matter. It is essential that the work to be performed by an employee be controlled and supervised by the U.S. entity and that the work be for the benefit of the U.S. entity. The U.S. entity has the burden to prove that an employer-employee relationship exists.

vi. New office

The L-1 provisions allow for multinational companies setting up new offices in the U.S. to benefit from the L-1A and L-1B classifications. Multinational companies can transfer their L-1A or L-1B personnel for a period of one year during which time they must prove to

the satisfaction of the USCIS that it has reached the level of doing business. Doing business is defined as “the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.” 8 C.F.R. §214.2(l)(1)(ii)(H). The entity mere’s presence and/or incorporation is not sufficient. Regulations for new office L’s can be found at 8 C.F.R. §§214.2(l)(3):

(v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

(vi) If the petition indicates that the beneficiary is coming to the United States in a specialized knowledge capacity to open or to be employed in a new office, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The business entity in the United States is or will be a qualifying organization as defined in paragraph (l)(1)(ii)(G) of this section; and

(C) The petitioner has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

A key element in new office L-1As is to be able to document and prove that within the first year, the business will support a manager or executive position. It is recognized that the manager or executive will initially be involved in some non-managerial duties while he or she hires the necessary staff to perform the non-qualifying duties.

To be eligible for an extension of the L-1A or L-1B classification, the company must document what it has accomplished during the first year to prove it is active operational. 8 C.F.R. §214.2(l)(7)(i)(A)(3).

vii. Blanket L-1

This is a great tool for large multinational companies. The Blanket L-1 allows companies with offices in the U.S. who have been doing business in the U.S. for one year to transfer employees to the U.S. so long as the entities have been included in the approved petition. The Blanket L is filed in the U.S. and once approved the employees can directly apply at the consulate for the L-1A or L-1B visa classifications without having to apply administratively in the U.S. Not all entities however can qualify for the Blanket L-1. The requirements are:

(A) The petitioner and each of those entities are engaged in commercial trade or services;

(B) The petitioner has an office in the United States that has been doing business for one year or more;

(C) The petitioner has three or more domestic and foreign branches, subsidiaries, or affiliates; and

(D) The petitioner and the other qualifying organizations have obtained approval of petitions for at least ten "L" managers, executives, or specialized knowledge professionals during the previous 12 months; or have U.S. subsidiaries or affiliates with combined annual sales of at least \$25 million; or have a United States work force of at least 1,000 employees.

8 C.F.R. §214.2(l)(4)(i)

A company seeking Blanket L-1 approval must be sure to include all of its branches, subsidiaries and affiliates that may at some point seek to transfer its employees to the U.S. Any entity not listed in the approved blanket cannot make use of the approved Blanket L-1 and will have to file through the standard L-1 process by filing in the U.S. 8 C.F.R. §214.2(l)(4)(ii)

B. E-1/E-2, Treaty Trader and Treaty Investor

The E visa is a useful tool for foreign investors, whether the investor is an individual or a multinational company that is ultimately majority owned by nationals of a treaty country. The E visa is available to foreign nationals from countries that have a friendship, commerce and navigation or bilateral investment treaty with the United States. To qualify, the individual or company must be seeking to enter the U.S. to carry on substantial trade which is international in scope principally between the U.S. and country of which he or she is a national (E-1 Treaty Trader), or to develop and direct the operations of an enterprise in which the individual or company has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise (E-2 Treaty Investor). 8 C.F.R. §214.2(e) and 9 FAM 41.51.

The foreign national seeking entry to the U.S. can be the owner or a key employee or prospective employee of the enterprise, including executives, supervisors or persons whose services are essential to the operation of the enterprise. 8 C.F.R. §214.2(e)(3).

The E visa was created to promote investment in the U.S. and is of great benefit for small and large entities. There are approximately only 80 countries eligible for the E-1 and/or E-2 visas. Therefore, when dealing with a company that holds one of these nationalities and the company is seeking to transfer an employee of the same nationality to the U.S., this category should not be overlooked. Among the biggest incentive, should the entity and employee qualify, is that the E visa can be extended for an indefinite period of time so long as the employment continues and the nationality of the company remains majority owned by nationals of the treaty country. 8 C.F.R. §214.2(e)(3), (19) and (20).

i. Nationality of Corporation

The principal requirement for the E visa is that the treaty trader or investor, whether an individual or company, possess the nationality of the treaty. This is determined the by the nationality of the individual, and in the case of a company, by the nationality of the ultimate owners. 9 FAM 41.51 N.2. To qualify, the entity must be owned at least 50% by nationals of the treaty country. The ownership in corporate structures should be traced as far up until establishing the 50% ownership. 9 FAM 41.51 N.3.1. If the corporation is sold exclusive on a stock exchange, the nationality of the company will vary on the location of the exchange. 9 FAM 41.51 N3.2. The majority ownership by qualifying national must be maintained while the E visa holder is employed. Ownership by an individual who holds U.S. lawful permanent

residence or share dual citizenship with the United States cannot be counted in the calculation. 9 FAM 41.51 N.14.1.

ii. Nationality of Employee being Transferred to the U.S.

The owner or employee who is sought to be transferred to the U.S. must possess the same treaty nationality as the corporation. 9 FAM 41.51 N.14.1.

iii. Requirements for the E-1 and E-2 Classification

After establishing that a treaty exists and that the individual being transferred and the business possess the nationality of the treaty country, additional requirements must be satisfied for each of the categories.

The E-1 Treaty Trader requirements include:

- (1) *The activities constitute trade within the meaning of INA 101(a)(15)(E) (see 9 FAM 41.51 N4);*
- (2) *Trade is substantial (see 9 FAM 41.51 N6);*
- (3) *Trade is principally between the United States and the treaty country (see 9 FAM 41.51 N6);*
- (4) *Applicant, if an employee, is destined to an executive/supervisory position or possesses skills essential to the firm's operations in the United States (see 9 FAM 41.51 N13); and*
- (5) *Applicant intends to depart the United States when the E-1 status terminates (see 9 FAM 41.51 N14).*

9 FAM 41.51 N1.1

The E-2 Treaty Investor requirements include:

- (1) *Applicant has invested or is actively in the process of investing;*
- (2) *Enterprise is a real and operating commercial enterprise;*
- (3) *Applicant's investment is substantial;*
- (4) *Investment is more than a marginal one solely for earning a living;*
- (5) *Applicant is in a position to "develop and direct" the enterprise;*

- (6) *Applicant, if an employee, is destined to an executive/supervisory position or possesses skills essential to the firm's operations in the United States; and*
- (7) *Applicant intends to depart the United States when the E-2 status terminates.*

9 FAM 41.51 N1.2

iv. Executives and Supervisors, and Essential Employees

Once all of the above criteria has been satisfied, including ensuring the existence of a treaty and that both the company and/or owner and the employee have the nationality of the treaty country of the company, analysis is required regarding the position to be filled by the employee. The E provisions allow for the transfer of the owner(s) entering to direct the enterprise, as well as employees of the company who will hold a position in an executive or supervisory capacity or is an essential employee.

In evaluating the executive and/or supervisory element, you should consider the following factors:

(1) The title of the position to which the applicant is destined, its place in the firm's organizational structure, the duties of the position, the degree to which the applicant will have ultimate control and responsibility for the firm's overall operations or a major component thereof, the number and skill levels of the employees the applicant will supervise, the level of pay, and whether the applicant possesses qualifying executive or supervisory experience;

(2) Whether the executive or supervisory element of the position is a principal and primary function and not an incidental or collateral function. For example, if the position principally requires management skills or entails key supervisory responsibility for a large portion of a firm's operations and only incidentally involves routine substantive staff work, an E classification would generally be appropriate. Conversely, if the position chiefly involves routine work and secondarily entails supervision of low-level employees, the position could not be termed executive or supervisory; and

(3) The weight to be accorded a given factor, which may vary from case to case. For example, the position title of "vice president" or "manager" might be of use in assessing the supervisory nature of a position if the applicant were coming to a major operation having numerous employees. However, if the applicant were coming to a small two-person office, such a title in and of itself would be of little significance.

9 FAM 41.51 N14.2

The requirements for the essential employee are defined at 9 FAM 41.51

N14.3, which states:

a. The regulations provide E visa classification for employees who have special qualifications that make the service to be rendered essential to the efficient operation of the enterprise. The employee must, therefore, possess specialized skills and, similarly, such skills must be needed by the enterprise. The burden of proof to establish that the applicant has special qualifications essential to the effectiveness of the firm's United States operations is on the company and the applicant

b. The determination of whether an employee is an "essential employee" in this context requires the exercise of judgment. It cannot be decided by the mechanical application of a bright-line test. By its very nature, essentiality must be assessed on the particular facts in each case.

The U.S. Department of State will determine whether the employee qualifies as an executive or supervisor or essential employee. It is important in preparing a description of the duties that the principal duties the employee will be performing comply with the regulations. It is also important that the employee fully understand the criteria of these classifications. When the employee applies for the E-1 or E-2 visa at the consulate or embassy, the employee must prove to the satisfaction of the officer that he or she qualifies for the classification. The U.S. consulates and embassies are well versed in the E-1 and E-2 regulations and each consulate and embassy has its own practices and procedures regarding the E visas.

Conclusion

The decision to transfer or hire an employee in the United States is just the start of the secondment process. This brief overview provides just the beginning of the many complex strategies to be worked out based on the particular circumstances of the transfer and the long term objectives of the company and foreign national.