Whither Thy Intracompany Transferee?

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HISTORY OF GOVERNMENTAL ANTIPATHY TOWARDS THE L-1 CATEGORY

Introduced in 1970 in a political environment which sought to increase the position of the United States in the global economy by facilitating the transfer of multinational corporate key personnel, the L-1 visa was created.[1] In its original form it was straightforward requiring only the following:

> "(L) an alien who, immediately preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him."

[1] INA §101(a)(15)(L), 8 USC § 1101(a)(15)(L), as added by Pub. L. No. 91-225, Sec. 1(b).

The legislation creating L visas was in response to the Immigration Amendments of 1965, which made it more difficult for multinational corporations to transfer managers and executives to the United States. There were no limits on the amount of time a foreign national could spend in L status the United States; two digit filing fees of about ten dollars; no definition of "specialized knowledge" and all L petitions could be approved for up to three years, including "new offices." However, in practice, section 214(b) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq*.), deeming all applicants for nonimmigrant visas to be intending immigrants, unless and until the applicant persuaded the consular officer before whom a visa application was made he was a *bona fide* nonimmigrant, performed the function of limiting the stay in L status; albeit in an unpredictable and erratic fashion, usually before consular officers. The legislation creating the L visa category was clear and simple. In the ensuing four decades, the waters have been muddied by the confluence of several forces; legislators challenging the legitimacy of the category; mixed and ad hoc instructions being sent to U.S. Citizenship and Immigration Services (USCIS) adjudicators on the meaning of specialized knowledge and the definition of a "new office"; differing adjudicatory standards being applied by USCIS, U.S. Customs and Border Protection (CBP) and the U.S. Department of State (DOS) consular officer and by a few unethical immigration practitioners.

The1970s and Early 80s Were Mellow, But the Late 80s "Harshed" the L Mellow With a Lot of Rules, Man

For the next fifteen years after the creation of the L-1 visa in 1970, adjudications were generally acknowledged as fair and transparent. It was only in late 1983 that "specialized knowledge" was given a definition.[2] In the mid-1980s, increasingly restrictive interpretations of the L statute culminated in the promulgation of regulations in 1987 which narrowed the definitions of the statutory concepts of "managerial capacity", "executive capacity" and "specialized knowledge; codified the interim policy on limits on stay in L status; and modified blanket L petitions."[3] Some of the harshest provisions of the proposed regulations, such as the requirement that in order to qualify as a managerial employee, the manager must spend virtually all of the employee's time in performing managerial or executive duties, were modified after voluminous public comments were received, to require only that the L-1 duties be primarily executive or managerial in nature; that is greater than fifty (50) per cent of the duties. The regulation also recognized the concept of function managers. The legacy INS in its comments to the proposed rulemaking clearly stated that the L category was not meant for self-employed businesspersons; thereby planting the seed of bias against the transfer of small business owners under L visas.

Also created in this regulation was the "new office" concept, which has plagued businesses and their attorneys alike, for the past two decades. Prior to the promulgation of the 1987 regulations, all L petitions were eligible for three year approvals; the 1987 regulations created the new office concept and limited petition approval to one year

[2] 8 CFR §214.2(l)(1)(ii)(C) (1984); 48 Fed. Reg. 41142, 41146 (Sept. 14, 1983).
[3] 8 CFR §214.2(l)(1)(ii)(D) (1988); 52 Fed. Reg. at 5738, 5752 (Feb. 26, 1987).

blithely assuming that L-1As coming to the United States to open a new office can reach the "doing business" standard within a year, with no supporting evidence. The comments state, "The Service believes that one year is sufficient for any legitimate business to reach the "doing business"[4] standard and declined to further define the "doing business" standard. The comments state that the factors to be considered in adjudicating a "new office" petition include amount of investment, intended personnel structure, product or service to be provided, physical premises and viability of the foreign corporation. This standard has lived through the subsequent statutory amendments and revised regulations to cause attorneys and their clients to live in a state of uncertainty for the indefinite future. The 1987 regulations relating to managers, executives, and "new office" were codified at 8 CFR §214.2(l) (1) (ii) (B) and (C).

The 1987 regulations amended the definition of "specialized knowledge" from "knowledge possessed by an individual which directly relates to the product or service of an organization…not readily available in the job market" to "knowledge possessed by an individual whose advanced level of expertise and proprietary knowledge of the organization's product, service, research, equipment, techniques, management or other interests of the employer are not readily available in the U.S. labor market. This definition does not apply to persons who have general knowledge or expertise which enables them merely to produce a product or provide a service[5]".

The arguable winners in the 1987 legacy Immigration and Naturalization Service (INS) rulemaking were L-1 blanket petitioners. Among the benefits of the 1987 regulations to this group of petitioners was inclusion of specialized knowledge professionals under the blanket program; indefinite blanket petition validity after the initial three-year approval period; and intermittent Ls not subject to the five/seven-year limits.

Attorneys, employers, legacy INS and consular officers continued to struggle with the definition of "specialized knowledge" even after the 1987 regulations. On October 20, 1988, legacy INS published a policy memorandum,[6] redefining specialized knowledge as" special knowledge possessed by an employee that is different from or surpasses the ordinary or usual knowledge of an employee in the particular field." It appeared that this definition was much broader than the 1987 regulation and would result in an increase in the number of L petition approvals. Just as legacy INS adjudicators were settling into a broader reading of this troublesome term, Congress enacted another comprehensive immigration bill purporting to help all concerned determine with a bright line test what was and was not "specialized knowledge."

Legislative Clarity in IMMACT90 Rolled Back INS Overextrapolation

[4] *Id.*
[5] 8 CFR §214.2(l)(1)(ii)(D) as promulgated in 1987 and found at 52 CFR 5738-01.
[6] Legacy INS Memorandum, R. Norton, Associate Commissioner, to All Regional Commissioners and All Regional Service Center Directors (Oct. 20, 1988).

The Immigration Act of 1990 (IMMACT)[7] significantly expanded the definitions of manager and executive, overruling the legacy INS's narrow definition of these terms which were overly focused on the headcount of people managed and the number of tiers of bodies reporting to the manager in the "manager" classification and imposing, *ultra vires*, an employee test about the same as that required of L-1 managers. The 1987 Act disfavored approval of L petitions for small companies; for companies where the employee managed a function rather and people and for large overseas corporations with a small office in the United States such as public relations, marketing and lobbying operations. IMMACT 90 refocused the analysis of qualifying "managers" and "executive" from headcounts below to the functions the manager or executive has or will perform[8].

The term "function manager" was added to the lexicon of immigration lawyers and government officials. It was not foreseen that today functional managers would generate a large number of RFEs and denials of L-1A petitions because of the institutionalized predilection of USCIS adjudicators to focus on headcounts and rank of the employees counted to determine eligibility for L-1A classification. After IMMACT 90, an L-1A case could be divided into two basic types: the staff-managing manager and the function manager, clearly expanding the class of foreign nationals eligible for L-1A classification and overruling many of legacy INS adjudications under the 1987 rules.

IMMACT 90 made yet another governmental attempt to define "specialized knowledge" in redefining it as "special knowledge of the company product and its application in international markets" or "an advanced level of knowledge of processes and procedures of the company.[9] It clarified that the beneficiary's knowledge need not be proprietary to the petitioner or that the knowledge be limited in the U.S. labor market. The 1991 implementing regulations seemed to broaden the qualifying foreign nationals even further by defining "product" as services, research, equipment, techniques, management or other interests.[10] With this expansive and clear definition of "specialized knowledge", it is counterintuitive as to why the overwhelming majority of L-1B specialized knowledge cases today result in Requests for Further Evidence (RFEs) and that a significant portion are denied after the RFE response.[11]

Prior to IMMACT 90, the intracompany transferee had to demonstrate employment for the transferor for the year immediately preceding the transfer. IMMACT 90 expanded the qualifying employment abroad period to one of the preceding three years prior to the application for admission. While the statute does not indicate the employment must have

[7] Pub. L. No. 101-649, 104 Stat. 4978.
[8] Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq*.) at §101(a)(44); 8 USC § 1101(a)(44).
[9] IMMACT 90 §206(b)(2)(B).
[10] 56 Fed. Reg. at 61128.
[11] The L-1B RFE rate increased from 17 percent in FY 2007 to 63 percent in FY 2011, while the L-1B denial rate increased from 7 percent to 27 percent over that same period of time. *See* NFAP Policy Brief, "Data Reveal High Denial Rates for L-1 and H-1B Petitions at U.S. Citizenship and Immigration Services" (Feb. 2012), available at www.nfap.com/pdf/NFAP_Policy_Brief.USCIS_and_Denial_Rates_of_L1_and_H%201B_Petitions.February2012.pdf

been abroad, administrative decisions and the 1991 L-1 regulations made it clear that the employment must be abroad but periods spent in lawful status in the United States during the qualifying period to not interrupt the qualifying time; however time in the United States cannot count towards the time spent abroad.[12]

Another anomaly in the adjudication of new office petitions is that the 1970 statute requires the one year of employment to occur prior to the date of admission in L-1 status; but the USCIS L petition can be filed up to six months prior to the date of the anticipated transfer and USCIS regulations require the one year of employment to occur prior to the filing of the petition. Given the high rate of RFEs and the lengthy petition processing times at USCIS, the employee could have far in excess of one year employment abroad by the time he is qualified to seek admission at a port of entry. Moreover, in "new office" situations, most of the initial one year initially requested can be consumed with the lengthy processing times at USCIS and with visa issuance delays at consular posts. USCIS seems to be most unforgiving with the "new office" L-1A has far less than a year to get up and running to meet its "doing business" regulation to qualify for a two year extension. Given the typical processing times USCIS should promulgate a regulation which automatically extends the L-1A petition for one year after the admission of the "new office" manager or executive.

Another expansive provision in IMMACT 90 was expanding the definition of "multinational" entities thereby permitting accounting firms to use the L-1 visa for international transfers.

The sea change in IMMACT 90 was the elimination of the presumption of immigrant intent for foreign nationals applying for L-1 or L-2 status.[13] IMMACT 90 eliminated that issue for L-1 visa applicants and their L-2 dependents. This change in presumption has contributed to the dramatic rise in L-1 visas issued to Indian nationals using 33% of L-1B visas between 2002 and 2011. The Act specifically states that the fact that the foreign national has sought permanent residence should not indicate an intention to abandon a foreign residence for purposes of obtaining an L-1 visa or maintaining nonimmigrant status.[14] This is known as the doctrine of dual intent.

With IMMACT 90 and the 1991 implementing regulations, the definition of specialized knowledge was expansive, as well as practical and should have served as a bright line test for qualifying "specialized knowledge" L-1B workers. However, controversy has continued decades after its promulgation.

NAFTA's Logistical Advantages for Canadians Were Substantial

[12] 56 Fed. Reg. at 61127.
[13] INA §214(b); 8 USC §1184.
[14] INS §214(h); 8 USC §1184(h).

In 1994, the North American Free Trade Agreement of 1994 (NAFTA)[15] was signed, containing provisions for L-1 visas for Canadians which created a one step process for Canadian citizens. The L-1 petition is filed with United States Customs and Border Protection at a port of entry and is adjudicated at the port or entry and the foreign national and dependents are admitted all in one fell swoop. The procedure has provided great benefits to Canadians; however, problems have arisen with consistency in adjudications with Service Centers and consular posts and issues of fee collection. There are government officials who have recommended that the interface between CBP and USCIS be enhanced and that CBP officers be given additional training. Change in the Canadian L-1 procedures are in the air, which will likely slow processing and export the problems of USCIS adjudications to CBP. Practitioners expected that specialized knowledge issues would subside with the addition of Canada to the pool of potential L foreign nationals. That optimism has not materialized in terms of predictable adjudications and consistent applications of the rules.

Legacy INS Created Its Own Defintions and Interpretations Without Issuing Regulations

Not content with the contents of the INS *Operations Instructions* and the *Adjudicators Field Manual*, legacy INS issued yet another interoffice memorandum on March 9, 1994 (Puleo Memo),[16] which counseled adjudications officers to utilize common dictionary definitions of "advanced" and "special" knowledge. It further opined that knowledge need not be proprietary or unique, but must be different or uncommon; and need not be narrowly held throughout the company, but only that the knowledge be advanced.

Adjudications continued, presumably under the Puleo Memo until 2002, when Fujie Ohata, then director of Service Center Operations at USCIS, issued another memorandum,[17] stating that specialized or advanced knowledge must be different from that generally found in the particular industry, but need not be proprietary or unique. However, the specialized knowledge of the company product must be noteworthy or uncommon; knowledge of company processes must be advanced but need not be narrowly held. Ms. Ohata stated that no test of the labor market need be undertaken to determine whether the alien possesses specialized knowledge; rather only an examination of the knowledge possessed by the foreign national is necessary.

In 2004, Ms. Ohata issued another memorandum[18] refining which types of restaurant chefs and cooks might qualify as specialized knowledge L-1Bs, finding most would not.

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[15] North American Free Trade Agreement (NAFTA), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 296, 612 (entered into force Jan. 1, 1994).

[16] Legacy INS Memorandum, J. Puleo, "Interpretation of Special Knowledge" (Mar. 9, 1994), *published on* AILA InfoNet at Doc. No. 01052171 (*posted* May 2, 2001).

[17] USCIS Memorandum, F. Ohata, "Interpretation of Specialized Knowledge" (Dec. 20, 2002), *published on* AILA InfoNet at Doc. No. 03020548 (*posted* Feb. 5, 2003).

[18] USCIS Memorandum, F. Ohata, "Interpretation of Specialized Knowledge for Chefs and Speciality Cooks Seeking L-1B Status" (Sept. 9, 2004), *published on* AILA InfoNet at Doc. No. 04091666 (*posted* Sept. 9, 2004).

The New Millennium Brings an Indian Outsourcing Sea Change and Reactive Legislation

The state of unrest in the L-1 world climaxed in 2004, with the enactment of the "L-1 Visa and H-1B Visa Reform Act of 2004." This legislation targeted specialized knowledge workers who primarily worked offsite, enacting punitive filing fees and voluminous document requirements for third party placements. The legislation burdened the L-1B visa with fees and documents; yet, USCIS statistics indicate that from fiscal year 2002 until fiscal year 2011, 195,691 L-1A petitions were filed, while 2,612,589 L-1B petitions were filed during the same period of time. The top ten L-1 employers from FY 2002 to FY 2011 based on information provided by USCIS were:

Employer	L-1A Petitions filed	L-1B Petitions Filed	Total
Tata Consultancy	7,571	18,337	25,908
Cognizant Tech Solutions US Corp	1,521	18,198	19,719
IBM India Private Limited	446	5,276	6,722
WiPro limited	1,574	3,933	5,507
Infosys	620	3,395	4,015
Satyam Computer Services Limited	333	2,941	3,274
HCL America Inc	40	1,934	1,974
Schlumberger Technology Corp	684	795	1,479
Price Waterhouse Coopers LLP	1,196	179	1,375
Hewlett Packard Co	533	721	1,254
TOTAL SUBMISSIONS	14,518	55,709	70,227

The visa issuance statistics provide by DOS indicate the following visa issuance rates for L visas from FY 2008 through FY 2012:

Type of Visa	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
L-1	155761	124275	143952	147677	134212

The public statistical information does not break down the issuances by L-1A and L-1B. Notwithstanding the merited disenchantment with the flawed adjudicatory process of L visa petitions, U.S. consular posts in India issued 43,322 L visas, or roughly 33% of all L visas issued worldwide, in fiscal year 2012.

To further dis-incentivize third party placements, Congress enacted Public law 111-230, Congress substantially increased the filing fee for L-1 petitions to $2,250.00 for petitioners who employ 50 or more employees in the United States if more than 50 percent of the petitioner's employees are in H-1B or L status.

In addition to the burdensome provisions on L-1 employers in S. 744, the comprehensive immigration bill passed in the Senate; Senator Grassley introduced a stand alone bill on March 8, 2013 to further deter use of H-1B and L-1 visas, "H-1B and L-1 Visa Reform Act of 2013." The main L-1 provisions include a prohibition on an employer hiring an L-1B for more than one year who will be stationed primarily at the worksite of a third party, unless a waiver of the one year rule is granted by DHS; limits the beneficiary to a total of three "new office" petitions within preceding two years; permits extension of the new office petition if the new office has been doing business for six months immediately preceding the filing of the L-1 petition extension upon a showing that the failure to meet the one year requirements was due to extraordinary circumstances as determined by DHS; impose a prevailing wage rate similar to H-1B prevailing wage rates; prohibition of early termination penalties; provides for civil monetary penalties and debarment from filing L-1 petitions for specified violations; and liability for lost wages and benefits.

TRENDS IN L-1 RFE ADJUDICATION

Since 2007, L-1B RFE rates have increased from 17 percent to an astonishing 63 percent of petitions filed in 2011. Practitioners also universally report that USCIS has shifted its standard for L-1A managers, often in the case of new offices filing their first L-1A extension.

How have RFEs evolved over the last several years, and how can practitioners best prepare their first extension filings to (if not prevent RFEs) set the table for a successful RFE response? Listed below are the top five L-1 RFE developments, along with tips on managing and overcoming them.

Top Five L-1 RFE Developments

1. **RFEs are no longer signs of deficient filings.**

We attorneys usually do not like to mention the possibility of an RFE to our clients in the initial consultation stage, mostly because we are used to viewing RFE's as the result of sloppy or deficient work. This is no longer the case in the L-1 context. Multinational companies with thousands of employees seeking to transfer Vice-Presidents with twenty-years of managerial and executive experience are now getting RFE's on their L-1A petitions asking for clarification on managerial duties. It goes without saying that companies with less than a few hundred employees will get RFE's on all of their L-1A and L-1B petitions. RFEs are now the rule, not the exception.

Observers will cite a series of reasons for this upward trend – legislative scrutiny on allegedly inappropriate L-1 usage, labor market protection concerns, and plain adjudicative confusion on managerial or specialized knowledge standards among them. Regardless of the reasons, it is important for the practitioner to properly manage client expectations, without compromising their confidence in your work. Clients should be warned of the likelihood of an RFE from the outset, and practitioners should assume the RFE when considering whether they have the time, personnel and inclination to take on an L-1 case.

2. The war against functional managers.

The past three years have seen a shift from both the California and Vermont Service Centers in their approach to the functional manager, most often in the cases of small companies and new offices. DHS views new office petitions as "inherently susceptible to abuse", since the information provided in the petition is "forward-looking" and "speculative". DHS OIG Report on L-1 Visa Program (Aug. 9, 2016), published on AILA InfoNet at Doc. No. 13082748 (posted Aug. 27, 2013).

The key strategy used in new office RFE's is the attack on the functional manager, i.e., the manager who is in charge of growing the new US office, but has not yet had the time or resources to hire professional employees to do the necessary work for the company. In the typical RFE, the service center will claim that the beneficiary is not and will not be primary involved in a managerial/executive capacity, but that he or she appears to be performing the necessary tasks to provide a service or to produce a product.

A successful functional manager petition will remind USCIS that the manager is overseeing indispensable divisions, business units, or other typical function within the company, as follows:

- When outlining the manager's specific duties, practitioners should note that the manager (for example) "heads the marketing division, responsible for $10 million of the petitioner's annual business", rather than she is merely "in charge of marketing".

- Each essential function should be treated as subordinate on the organizational chart. The chart should be clear, in color, and otherwise visually appealing, and should provide a brief description of the importance of each function.

- The business plan or support letter should make clear that the goal of the company is to hire enough US employees to allow the manager to delegate all of the day-to-day work to them. Again, graphics and/or other visual summaries improve the written representations in a support letter that can easily be missed.

- If a new office is petitioning for more than one manager, then the petitioner should ideally be able to show that it projects at least a 4:1 employee to manager ratio in the near future. Note, though, that petitions for second functional managers have become increasingly difficult in recent months.

3. Specialized Knowledge: "You know it when you see it."

Perhaps the most confusing and frustrating aspect of L-1 RFE's is the specialized knowledge conundrum. In its 2013 OIG Report on L-1's, DHS themselves has recognized that adjudicators are confused about the appropriate legal standard. In fact, DHS has noted that adjudicators are now resorting to the general principle of "you know it when you see it". This troubling development confirms practitioner fears that adjudicators tend to inject their personal views when adjudicating specialized knowledge petitions, and will likely have a difficult time approving petitions with complex specialized knowledge arguments that they don't understand. With that said, here are some ways to forestall an RFE in your original submission:

- Simplify your arguments, particularly with technology-related specialized knowledge arguments. Merely asserting an advanced level of specialized knowledge in a proprietary programming language is not enough. Explain how and when the petitioner developed the language, and why no other entity is using it or anything similar to it.

- Ensure that the petition explains why specialized knowledge is required for each of the duties listed. Provide the percentage of time spent on each duty.

- Explain how the company's US operations will be impacted if the beneficiary cannot assume the role in the US.

- Distinguish the beneficiary's level of specialized knowledge from other colleagues.

- Provide a summary of the petitioner's similar positions in the US that require the specialized knowledge, to show that the specialized knowledge argument was not merely created to facilitate the beneficiary's entry into the US.

- Redouble your efforts if the beneficiary has only been employed by the petitioner abroad for a year. The Service no longer considers this amount of time sufficient to develop an advanced level of specialized knowledge, despite the regulatory basis for ruling otherwise.

4. Set the right "VIBE" from the beginning

USCIS now relies on their Validation Instrument for Business Enterprises (VIBE) tool for adjudicating the qualifying relationship criteria. If VIBE displays the qualifying relationship between the U.S. and foreign entities, USCIS will likely not RFE on this issue.

Ensure that the Dun & Bradstreet listing for your client is up to date before filing the petition, since VIBE ultimately obtains its data from there. (See www.dnb.com). New data is available to the VIBE system within 72 hours of updating Dun and Bradstreet.

5. Outdated physical premises requirements for smaller companies.

USCIS pays no mind to the fact that companies like Google, Apple, Amazon and Disney were started out of the founder's homes. Foreign national entrepreneurs must be held to a higher standard, and are required to show a physical, commercially-zoned worksite to forestall any fears of fraudulent petitions. RFEs now ask for a complete copy of the lease (complete with a floor-plan and square footage), proof that the office exists in a traditionally commercial building or area, a sub-lease if applicable (with proof that sub-leases are allowed by the master lease), and of course the ubiquitous requirement of color-photos of the office premises and workspaces. Short-term executive suite solutions are no longer viable alternatives.

The practitioner is well-advised to counsel their clients of these requirements from the outset, as many companies have not factored in the need for such extensive physical premises planning at so early a stage. The initial petition should contain all of the items listed above. If not, USCIS will be sure to RFE on this issue.

RFEs have now become virtually a guaranteed process step in the L-1 workflow. Addressing each of the above topics in the initial petition, however, will give the practitioner as good of a chance as any to avoid them.

PRACTICAL PRACTICE TIPS FOR A SUCCESSFUL L-1 PETITION

1. For a new office L-1, lease an office in commercially zone space. USCIS officers check zoning codes and can conduct Google earth surveillance of your client's new office. Do no depart from this. While not illegal, home offices are disfavored, and often not perceived as "legitimate" and can be the trigger for additional scrutiny. If you can avoid this trigger for RFE's and denials, prudence may be the better part of valor.

2. Visuals are important. For a new office L-1, submit the floor plans for the office space leased. Photos of the outside of the building, the signage internal and external and the workstations are often requested as a measure of legitimacy.

3. Provide a comprehensive, detailed and realistic business plan for the new office L-1. The USCIS can review your client's performance against the business plan on the extension petition. Overly optimistic projections on the initial filing can undercut evidence of viability on the extension.

4. Provide detailed organization charts in color for the transferor and transferee corporations, but review the scope of your presentation to make sure it is not too broad and visually undercuts your beneficiary's position with too many levels above it, or includes distracting information.

5. Provide detailed financial documents for the transferor company.

6. It is preferable to transfer more experienced personnel rather than merely qualified personnel when there are options in who can fill the U.S. position. The longer the employee has worked for the transferor, the greater the chance of success in an L-1B petition. See the recent case of *Fogo de Chao Churrascaria, LLC v. DHS, et al.* (U.S.D.C. for the District of Columbia) (Civil Action 10-1024) [AILA Infonet Doc. No. 13083046] for a history of "specialized knowledge" and a discussion of the rules for cooks and chefs to qualify for L-1B specialized knowledge. The court indicated that the beneficiary had been with the employer a short time and the record contained a discrepancy about whether he was a waiter or a cook with the transferor. The court was not impressed that the employer had been successful in over 200 prior L-1B petitions.

7. Know it when you see it. Be aware of the adjudicatory environment and discourage technically qualified but weak cases.

THE FUTURE OF L-1 VISAS

It can be expected that the L-1 visa will increasingly resemble an H-1B look-alike in terms of required wage rates, burdensome paperwork, and site visits. The DHS Office of Inspector General Report of August 2013, strongly recommended that site visits be conducted on all "new office" L-1s before petition extensions are granted. Officers have sufficient adjudicatory tools at their disposals that in most instances, site visits to the

United States entity should be limited to an "as-needed" basis. Absent organized efforts of impacted employers, the L-1B specialized knowledge category may become unusable. It is clearly a needed visa category as repeatedly recognized by Congress. It has been before Congress so many times that had Congress wanted to abolish the L-1B, it has had sufficient opportunity to do so. A small minority of members of Congress, with often flawed or incomplete information, have banded together to challenge the use of the category. We must debunk the myths and present the facts on the need for L workers and demonstrate that the overwhelming majority of employers are compliant with the rules.

APPENDIX

Real Life L-1A USCIS RFE – January 2014

For the purposes of L-1 classification:

- Ownership means the legal right to have possession of an organization.
- Control means the legal or actual ability to exercise authority or influence over an organization.

Ownership and Control of the Foreign Entity

The evidence you submitted is insufficient. USCIS acknowledges receipt of notarized statement by _____ stating that _____ and _____ own both _____ and _____. However, for L purposes, USCIS requires you to submit more than just a notarized statement. Using the list below, please submit at least two pieces evidence showing that _____ and _____ owns _____.

Evidence may include, but is not limited to, copies of:

- The most recent Securities and Exchange Commission Form 10-K, which lists all affiliates, subsidiaries, and branch offices, and shows percentage of ownership.
- The most recent annual report, which lists all affiliates, subsidiaries, and branch offices, and shows percentage of ownership.
- A detailed list of owners, which includes the foreign entity's owners' names, and what percentages they own.
- Meeting minutes, which list the stock shareholders and the number and percentage of shares owned.
- Articles of incorporation and bylaws, including all amendments.
- Stock purchase agreements.
- Stock certificates, which have been issued to the present date, clearly indicating the name of each shareholder.
- A stock ledger, which shows all stock certificates issued to the present date, including total shares of stock sold, and names of shareholders.
- Proof of stock purchase or capital contribution in exchange for ownership, such as the following:
    - Wire transfer receipts;
    - Bank statements;
    - Canceled checks;
    - Deposit receipts; or
    - Evidence of the receipt of goods and their value.
- A capitalization table.
- A term sheet, letter of intent, memorandum of understanding, or other similar document signed by the parties to the agreement specifically outlining the details of investment in your company.
- Your most recent income tax returns, which demonstrate the qualifying relationship to the foreign entity.

- The articles of organization or bylaws, with the names of members and percentage of membership interests, issued by the foreign entity.
- The partnership agreement and registration documents, with the names of partners and the limits of their liability.
- The sole proprietorship registration documents, which indicate the ownership of the foreign entity.
- Evidence that the U.S. entity is authorized to operate as a branch office in by the appropriate agency.
- The franchise purchase agreement, and documentation as evidence of the right and authority to direct the management and operation of the foreign entity.

Ownership and Control of the U.S. Entity

The evidence you submitted is insufficient. USCIS acknowledges receipt of notarized statement by _____ stating that _____ and _____ own both _____ and _____. However, for L purposes, USCIS requires you to submit more than just a notarized statement. Using the list below, please submit at least two pieces evidence showing that _____ and _____ owns _____.

Evidence may include, but is not limited to, copies of:

- The most recent Securities and Exchange Commission Form 10-K, which lists all affiliates, subsidiaries, and branch offices, and shows percentage of ownership.
- The most recent annual report, which lists all affiliates, subsidiaries, and branch offices, and shows percentage of ownership.
- Meeting minutes, which list the stock shareholders and the number and percentage of shares owned.
- Articles of Incorporation, which have been date-stamped "endorsed-filed" by the appropriate state official
- Stock purchase agreements.
- Stock certificates, which have been issued to the present date, clearly indicating the name of each shareholder.
- A stock ledger, which shows all stock certificates issued to the present date, including total shares of stock sold, and names of shareholders.
- Proof of stock purchase or capital contribution in exchange for ownership, such as the following:
    - Wire transfer receipts;
    - Bank statements;
    - Canceled checks;
    - Deposit receipts; or
    - Customs forms showing receipt of goods and their value.
- A capitalization title.
- A term sheet, letter of intent, memorandum of understanding, or other similar document signed by the parties to the agreement specifically outlining the details of investment in your company.

- Your most recent federal income tax returns, which demonstrate a qualifying relationship to the foreign entity,
- The articles of organization or bylaws, with the names of members and percentage of membership interests, issued by the entity.
- The partnership agreement and registration documents with the names of partners and the limits of their liability.
- Sale proprietorship registration documents, which indicate the ownership of the entity.
- Evidence that the foreign entity has been authorized to operate as a branch office in the state of by the appropriate state agency.
- The franchise purchase agreement, and documentation as evidence of the right and authority to direct the management and operation of the U.S. entity.

Doing Business.

You must show that you are or will be doing business as an employer in the United States and in at least one other country directly, or through a qualifying relationship, for the duration of the beneficiary's stay in the United States in the L-1 classification.

Foreign Entity is Doing Business.

You must show that the qualifying foreign entity which employed the beneficiary is doing business.

You did not submit any evidence for this requirement. Using the list below, please submit at least two pieces of evidence showing that the foreign entity is doing business.

Evidence may include, but is not limited to, copies of:

- The most recent annual report, which describes the state of the foreign entity's finances.
- Foreign tax documents.
- Audited financial statements.
- Purchase orders.
- Invoices.
- Bills of lading.
- Third party license agreements.
- U.S. customs documentation.
- Vendor, supplier, or customer contracts.

U.S. Entity is Doing Business

You did not submit any evidence for this requirement. Using the list below, please submit at least two pieces of evidence showing that the U.S. entity is doing business.

Evidence may include, but is not limited to, copies of:

- The most recent annual report which describes the state of the U.S. entity's finances.
- Securities and Exchange Commission Form 10-K.
- Federal or state income tax returns.
- Audited financial statements, including balance sheets and statements of income and expenses describing the U.S. entity's business operations.
- Major sales invoices identifying gross sales amounts reported on the income and expense's statement or on corporate income tax returns.
- Shipper's export declaration or shipper's export declaration for in-transit goods, if applicable.
- The U.S. entity's U.S. Customs and Border Protection forms. Entry Summary and Customs Bond that show business activity.
- Business bank statements that show business activity.
- Vendor, supplier, or customer contracts.
- Third party license agreements.
- Loan and credit agreements.

General Beneficiary Requirements for an L-1A Manager or Executive

To qualify a beneficiary for L-1A classification, you must show that he or she:

- Will be employed in a managerial or executive position in the United States;
- Has prior education, training, or employment that qualifies him or her to perform the intended services in the United States; and
- Has at least one continuous year of full-time employment abroad with a qualifying organization;
- Within tile three years before application for admission to the United States; and
- In a position that is managerial or executive, or involves specialized knowledge,

Beneficiary's One Year Employment Abroad.

You must show the beneficiary has at least one continuous year of full-time employment abroad with a qualifying organization. This employment must have occurred within the three years before his or her application for admission to the United States.

You did not submit any evidence for this requirement. You may still submit evidence to satisfy it.

Evidence may include, but is not limited to:

- Copies of the beneficiary's pay records showing at least one year of employment.