AILA Issue Papers

American Immigration Lawyers Association

L-1 VISAS AND U.S. ECONOMIC GROWTH: PRESERVING AND STRENGTHENING THE INTRACOMPANY TRANSFEREE VISA CATEGORY

Issue: For almost 35 years, the L-1 visa has been a vital tool for both U.S. companies with an international presence, and international firms expanding into the U.S. Although not a heavily utilized visa, the L-1 visa has done much to foster foreign investment in the U.S. It is the principal immigration vehicle foreign companies use to build U.S. factories, open offices, and hire significant numbers of U.S. workers to staff their U.S. operations. Unless foreign companies are able to bring key personnel to their American operations, they are unlikely to establish or expand their presence in our country.

Recent proposals to restrict use of the L-1 visa would unnecessarily limit its legitimate use, thereby diminishing the economic competitiveness of U.S. companies, impeding foreign investment in the U.S., and resulting in the loss of American jobs.

Examples of How the L-1 Visa Benefits the American Economy

- Opening New U.S. Company: A global mineral exploration and mining company opened a significant mine in Washington State thanks to the L-1 visa category, which enabled the company to bring in key personnel to institute procedures, policies, and U.S. operations of this foreign-based company. The transferred personnel allowed the company to apply its management methods and training procedures for specialized equipment and mining procedures that had been developed at the head office. Without the L-1 visa category, the company would have had difficulties in setting up its operations and may have not made this investment.
- Critical Supervision for the Development of a New Vaccine: A publicly traded U.S. manufacturer of biotechnology products is a leading producer of vaccines, including those for tick-born encephalitis, Lyme disease, influenza, and hepatitis. Through the use of an L-1 visa, the company was able to bring in the engineering director of a subsidiary company located in Asia (who had the requisite knowledge of the company's research, operations, and practices) to supervise a staff of 250 engineers and scientists in all aspects of a new vaccine's development.
- Improving Products: A large U.S.-based paper company utilized the L visa to transfer cutting edge technology in the development of high brightness paper to its U.S. operations. The technology process had been perfected in the company's Scandinavian plant, and the engineers with specialized knowledge in this process brought the technology to the U.S. facilities. This process will soon replace the old industry standard in the production of paper. The ability to bring the process to the U.S. plants will save the U.S. production capacity, thereby retaining and creating American jobs.
- Transferring Knowledge: A large U.S.-based multinational medical technology company with facilities around the world relies on the L visa category to transfer key foreign personnel with specialized knowledge of the company's research, development and implementation projects for life saving medical devices. The company also uses the L visa category as part of its global strategy to rotate managers through its larger facilities.
- Expanding Market Potential: An Illinois-based manufacturer of industrial and construction equipment wanted to upgrade and tailor the design of its product line for sale in foreign markets. In order to meet this objective, a design engineer from the company's German subsidiary, who possessed critical

expertise in the engineering aspects of key machinery, was brought in using the L-1 visa for a 2-year period to guide design and engineering.

- Enhancing U.S. Products: A foreign-based software company that develops specialized software for large organizations acquired a U.S. company. To integrate the company's proprietary software with newly acquired products and intellectual property, the company needed to temporarily transfer an engineer to the U.S. who possesses knowledge of that software. Without this engineer, it would have been difficult, if not impossible, to get the software up and running in the U.S.

Background: Since its creation in 1970, the L-1 visa for intracompany transferees has been an essential vehicle for job creation and business investment in the U.S. Through the L-1 visa, large and small American-based companies have brought in qualified personnel from their operations abroad to the U.S. Foreign-based companies also have used this visa to invest in the U.S. economy by establishing and expanding business operations here.

L-1 visa holders enter the U.S. on a temporary basis either on an L-1(A) visa for executive or managerial positions or on an L-1(B) visa which requires the employee to possess specialized or advanced knowledge that generally is not found in the particular industry. (Where the specialized knowledge relates to the company's operations, products, procedures, and services, it must be noteworthy or uncommon knowledge.) In most cases, the foreign national must have worked for the multinational firm abroad for a full year before being eligible for the visa category.

According to the most recent available data from the Department of State, L visas comprised just 0.02% (112,624) of the total number of visas issued by the Department of State (DOS) during FY 2002. L visa issuance peaked in FY 2001 at 120,538, reflecting the economic boom. Usage has subsequently declined. As of May 31, 2003, the DOS had issued a total of 69,105 L visas this fiscal year. Out of this total, only slightly more than half of those visas were L-1 principal visa holders, with the rest taken by spouses and minor children of the L-1 principal.

Current Issues: Current law prohibits using an L visa to send a foreign national to the United States to work alongside the workforce of a third party, under the control of the third party, performing the same kind of work done by the third entity's employees and displacing U.S. employees.

According to current law and DOS guidance issued over seven years ago, an L-1 visa holder can visit a third party site only when the petitioning organization controls the time, place, and content of the work assignment, and, in the case of an L-1(B) visa, if the visa holder possesses specialized knowledge unique to the petitioning company. For example, if an international company has developed proprietary computer software that will improve a U.S. company's production capabilities, it is permissible for an L-1 visa holder to install the software at the third-party client site and train the client's workforce in its very specialized uses. The ability of an L-1 intracompany transferee to visit customer sites promotes business profits, lowers costs to consumers through the development of innovative products and services, and, as experience has shown, leads to the creation of jobs for American workers.

Some L visas recently were granted in which the visa holder was assigned at a third party site and was not using specialized knowledge or under the control of the petitioning employer. These visas were erroneously granted and are clearly prohibited by current law and DOS guidance. This prohibition needs to be enforced. Reportedly, the State Department already has taken steps to clarify the L visa requirements upon learning that a limited number of L-1 visas were inappropriately granted.

In the wake of these erroneously issued L-1 visas, two bills have been introduced that would substantially restrict the use of this visa. Both bills, while attempting to address the displacement issue, promote reform of such breadth that they would dramatically reduce the benefits of the L-1 visa and hurt American workers and employers. Representative John Mica (R-FL) introduced H.R. 2154, which would require all employers petitioning for an L-1 visa to file attestations with the Department of Labor (DOL) and would unnecessarily restrict legitimate uses of the L-1 visa. Representative Rosa De Lauro (D-CT) introduced H.R. 2702, which includes provisions that would effectively negate the L visa

category by requiring a lengthy DOL application process and a prevailing wage determination that does not recognize the total compensation and expatriate benefits packages offered transferred international personnel, and which would impose an inadequate cap as well as an educational degree requirement. These provisions would halt the expedient transfer of international personnel so necessary today and stifle a job-creating visa that has operated with a nearly unblemished record for over 30 years.

Both bills also would subject the L visa to DOL regulations. Experience has shown that DOL regulations often are oppressive in practice and only questionably effective. To impose such regulations on the L-1 visa would lead to excessive bureaucratic red tape that would frustrate the primary purpose of this visa category: a vehicle to expeditiously shift key personnel from international offices to U.S. affiliated operations.

AILA's Position: AILA opposes measures that would unnecessarily restrict companies' ability to use this visa category. A narrowly tailored solution is available that would address the concerns noted above. AILA supports a new statutory construct that would refine the current law by prohibiting the use of L-1 visas in simple contract labor arrangements, in which a third party (other than the petitioner) controls the beneficiary's work and essential elements of the beneficiary's employment. The petitioning company or a qualified related organization should be required to supervise the L-1 worker and to control the essential elements of the employment, including the individual's work product, time, place and content of work.

In addition, the beneficiary should possess specialized knowledge of the petitioner's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise concerning the organization's processes and procedures. Specialized knowledge is not general knowledge held commonly throughout the industry. Further, it has long been acknowledged that specialized knowledge does not require the knowledge to be narrowly held within the company, and in fact, it can be held widely within the petitioning company or its affiliates.

AILA's proposal would strengthen the law in several ways. It would preclude abuse of the L visa category in simple contract labor arrangements. It would maintain the efficiency of a visa category vital for U.S. companies' transfer of key international employees to the United States. And it would continue to permit the American economy and U.S. workers and employers to benefit from foreign companies' investment in the United States.

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