L-1 Visa Guide: Intracompany Transfer Visas for Startups and Mature Companies

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Disclaimer: This Guide is general information, not legal advice. Make decisions only after consulting with your attorney about how the law applies to the specific facts of your case.

1. INTRODUCTION

Welcome. The purpose of this *Guide* is to provide an overview of the requirements and procedures involved in applying for an L-1 (intracompany transfer) visa, seeking admission to the U.S., and complying with the terms and conditions of the visa.

The L-1 visa is for organizations doing business both overseas and in the U.S. A visa may be granted to a foreign national who for one of the preceding three years has been employed continuously overseas for a legal entity of the organization and who will be coming to the U.S. temporarily to render services to another legal entity of the organization. These entities must be related as parent, branch, affiliate, or subsidiary. The year of overseas employment and the U.S. employment must be in a managerial, executive, or specialized knowledge capacity. There is no annual cap (quota) on L-1 visas.

The spouse and unmarried minor children of an L-1 transferee are entitled to be admitted to the U.S. in L-2 status, subject to the same period of admission. L-2 spouses are eligible for employment authorization.

This *Guide* discusses a variety of specific business scenarios, including filing an L-1 petition for a "new office" just starting U.S. operations and "blanket" petitions for mature companies that are frequent users of the L-1 visa program.

As is true with many aspects of U.S. immigration law, the L-1 visa program is impacted by shifting political winds. During the recent U.S. recession and the slow recovery, the U.S. Citizenship and Immigration Services (USCIS) and the State Department have heeded calls for protection of the American workforce by closely scrutinizing L-1 petitions for specialized knowledge workers and for workers who will be placed at third-party worksites. These agencies have also been sensitive to accusations of fraud and abuse in the L-1 visa program, especially allegedly by certain Indian, Russian, and Chinese companies. L-1 petitions buffeted by these political winds must be supported by extensive supporting evidence, and L-1 visa applicants must be well prepared for their interviews at U.S. Consulates. Even then, some cases will be subject to delays due to USCIS requests for additional evidence and agency investigations.

In short, there is no L-1 visa application that's a "sure thing." But the L-1 visa can be a useful tool in the immigration lawyer's toolbox to be deployed on behalf of companies with sound business reasons to transfer qualified employees to the U.S.

1.1 RELATED VISA CLASSIFICATIONS

While the L-1 visa is a useful tool, there are other tools in the immigration lawyer's toolbox that can help transfer foreign employees to related companies in the U.S. A few of the visa classifications to be considered are:

- EB-5 (Immigrant Investor) Visas: This immigrant visa category is for those who invest a minimum of USD 500,000 in a new enterprise in the U.S. that will directly or indirectly create jobs for ten or more U.S. workers.

- B1/B2 (visitor's for business or pleasure) visas: The B1/B2nonimmigrant visa is the most commonly issued visa for business visits of short duration to the United States. B1/B2

visas are typically issued by U.S. Consulates abroad and permit recipients to visit the United States temporarily for business purposes which do not involve gainful employment. Permissible activities include: investigating possible business opportunities, negotiating contracts, attending conferences, consulting with colleagues, and establishing initial contacts. As discussed below in Part 3.1.2, B1/B2 visas may be used to come to the U.S. to research and set up the company where a foreign national may later work with an L-1 visa.

- H-1B (professional worker) visas: The H-1B nonimmigrant visa category is frequently used to enable persons to enter the United States to be employed in professional occupations for periods of up to six years. Unlike the L-1 visa, no qualifying relationship need be established between the entity or operation abroad at which the non-U.S. national may be employed and the U.S. employer. To qualify for an H-1 B visa, the beneficiary must have a U.S. bachelor's degree, a foreign equivalent or equivalent qualifying experience in a specific area of study, and be coming to the U.S. to perform a position which requires a bachelor's degree in that area. The spouse of an H-1B receives an H-4 visa but cannot work while in such status.

- E-1 and E-2 (Treaty Trader and Investor) Visas: The E nonimmigrant visa category is often used by persons seeking to enter the U.S. to establish a new operation. The visa application process may be initiated at a U.S. Consulate abroad, in which case no preapproval from the USCIS is required. A prerequisite to applying for an E visa is that the U.S. and the foreign state of which the applicant is a national must have a trade and/or investment treaty. The U.S. and China have no such treaty.

2. Basic Requirements for L Classification

The basic requirements for L classification are that (a) the U.S. and foreign employers must have a qualifying relationship; (b) both entities must be "doing business"; (c) the transferee must have been employed abroad for one year; (d) both the foreign employment and the proposed U.S. employment must be in a managerial, executive, or specialized knowledge capacity; and (e) the U.S. employment must be temporary.

In filing an L-1 petition, the burden of proof is on the petitioner to establish eligibility for the benefit sought. This means that if the petitioner doesn't show eligibility, the USCIS should deny the petition.[1]

The standard of proof is that eligibility must be proved by the "preponderance of the evidence." This means that if the petitioner submits relevant, probative, and credible evidence that leads USCIS to believe that the petitioner is "more likely than not" eligible, the petition should be approved, even if USCIS has some lingering doubt.[2]

2.1 Qualifying Relationship Between the U.S. and Foreign Employers

[1] *See Matter of Branting*, 11 I. & N. Dec. 493 (BIA 1966); AFM ch. 11.1(c).
[2] AFM ch. 11.1(c) *citing United States v. Cardozo-Fonseca*, 480 U.S. 421 (1987).

The overseas employing entity and the U.S. entity to which the foreign national will render services must be part of the same organization. They must be the same firm or corporation[3]; or they must be related as parent, branch, affiliate or subsidiary[4]:

- "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.

- "Parent" means a firm, corporation, or other legal entity which has subsidiaries.

- "Branch" means an operating division or office of the same organization housed in a different location.

- "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) Is a partnership that is organized in the U.S. to provide accounting services internationally and meets other specific requirements.

For start-ups that have not yet formed a U.S. entity, a brief introduction to U.S. business forms is included in Part 3.1.2 below.

There is some precedent for the idea that the L-1 petition can be filed even though the foreign national's one year of work abroad was before the qualifying relationship between the U.S. and foreign companies was established.[5] If an existing business in the U.S. is purchased, it may be helpful to submit the stock purchase agreement with the L-1 petition.

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[3] *Matter of Chartier*, 16 I. &.N. Dec. 284 (BIA 1977). There is no requirement that a related company exist in a foreign country. This case involved a U.S. company that had never established a Canadian subsidiary or branch office. The employee worked from home in Canada and visited customer sites to ensure that the company's chemical products were being applied properly. The Board interpreted INA § 101(a)(15)(L), which required the beneficiary to have been employed abroad "*by a firm or corporation* or other legal entity or an affiliate or subsidiary thereof" (emphasis added). The Board reasoned, "We see no reason why a distinction should be made between United States companies with subsidiaries abroad and United States companies with employees abroad who work directly for the parent company." *Id.* at 287-288. *See also* 9 FAM 41.54 N9.3.

[4] 8 C.F.R. § 214.2(*l*)(1)(ii)(A).

[5] *See*, *e.g.*, *Matter of Joshua Yan Kee So*, unreported (Comm'r 1984), digested in 61 Int. Rel. 4, pp. 74–75, *discussed in* Austin T. Fragomen, Jr., et al., *Imm. L. & Business* § 2:70 n.5 (Mar. 2008).

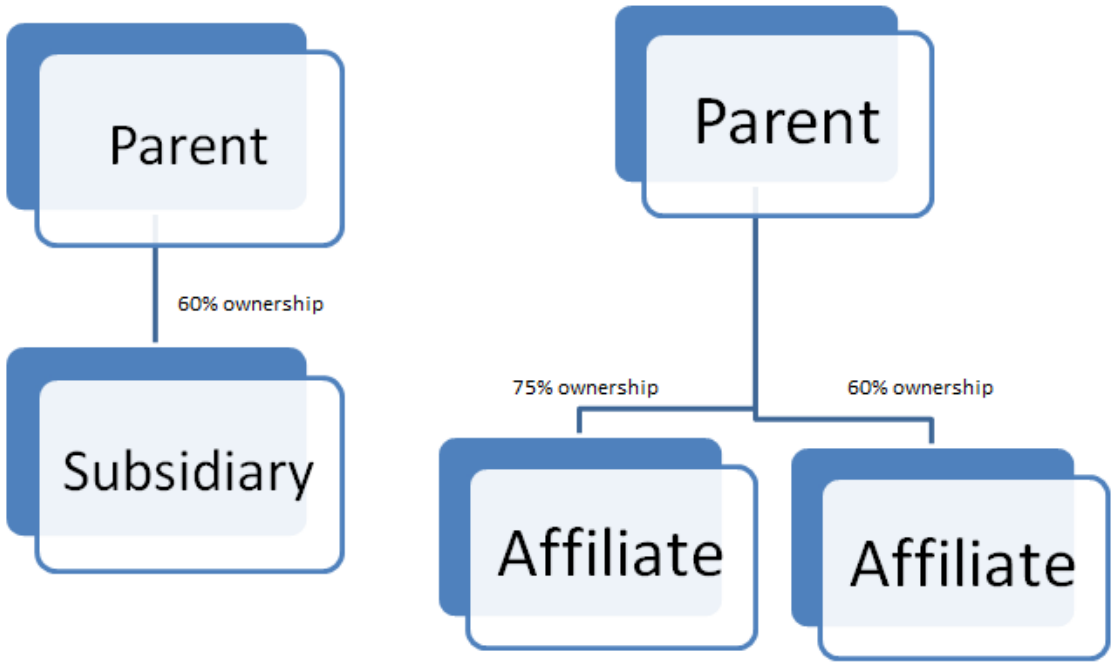

Figure 1. Sample Qualifying Relationships

2.2 The U.S. and Overseas Entities Must Be "Doing Business"

During the entire period of the foreign national's stay in the U.S. in L-1 status, the organization must be "doing business" through entities with both in the U.S. and at least one other country that have a qualifying relationship. "Doing business" means 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.[6] The "doing business" requirement may be satisfied by providing services within the qualifying organization, not just by work in the open marketplace.[7] Note that the U.S. and foreign entities do not have to be involved in the same type of business.

For large, established organizations, a copy of the most recent annual report or U.S. Securities and Exchange Commission filing, or other documentation listing the parent and subsidiaries may be sufficient to prove the U.S. and foreign entities are "doing business."

For a smaller business, more is required. In addition to an authorized official's statement, records of stock ownership, profit and loss statements or other accountant's reports, tax returns, articles of incorporation, by-laws and minutes of board meetings should be submitted.[8]

A small import-export business is likely to be subjected to extra scrutiny by USCIS. The agency will want to see multiple examples of customs forms: These include Form 7525V (Shipper's Export

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[6] 8 C.F.R. § 214.2(*l*)(1)(ii)(H).
[7] *Matter of Leacheng Int'l Inc.*, 26 I. & N. Dec. 532 (AAO 2015); *Matter of [name withheld]*, Case # WAC-[withheld] (AAO Apr. 9, 2013) (U.S. entity is "doing business" where it provides regular and consistent technical support to U.S. customers purchasing the foreign parent company's products. It's irrelevant that customers pay foreign parent company for the technical support and then parent shares revenue with U.S. entity).
[8] AFM ch. 32(d).

Declaration), Form 7501(Entry Summary), and Form 301 (Customs Bond). The forms must include the importer's identification number. USCIS will also expect to see including invoices, shipping manifests, shipping insurance policies, bills of lading, letters of credit, wire transfer advisement, inspection certifications, sales contracts and general business correspondence.[9]

For more on the "doing business" requirement for a new U.S. office, see Part 3.1.

2.3 The Foreign National Must Have Been Employed Abroad for One Year

As mentioned above, within the 3 years preceding filing the L-1 petition[10] the foreign national must have been employed abroad[11] for 1 continuous year by the foreign employer in a managerial, executive, or specialized knowledge capacity.

The employment abroad must have been full time, not part time.[12]

Periods spent in the U.S. in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the U.S. for business or pleasure are not interruptive of the one year of continuous employment abroad, but such periods do not count toward fulfillment of that requirement.

Working as an independent contractor for the foreign employer is generally insufficient for purposes of satisfying this one-year requirement. The relationship must be one of employer-employee, although it may be possible to establish this relationship even without formal payroll records.[13]

Typically, the one year of foreign employment is proved through paycheck stubs (or records of direct deposit of wages), company payroll records, tax returns that show employment, performance reviews, and/or evidence of work product.[14]

2.4 The Definitions of Managerial, Executive, and Specialized Knowledge Capacity

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[9]AFM ch. 32(b).

[10] The regulations at 8 C.F.R. § 214(*l*)(3)(iii) (requiring the 1 year to be completed before filing the "petition") are slightly more restrictive than the statute at INA § 101(a)(15)(L) (requiring the 1 year to be completed before applying for "admission" into the U.S.

[11] Employment in an outlying possession, such as American Samoa, qualifies as "abroad" for purposes of the one-year requirement. Letter from F. Ohata, Associate Commissioner for Service Center Operations, to J. Kim (Feb. 13, 2003), *posted on* AILA InfoNet as Doc. # 03030345.

[12] 8 C.F.R. § 314.2(*l*)(3)(iii); 9 FAM 41.54 N11.1. However, if an employee divides fulltime services among companies that belong to the same qualifying organization, working for each on apart-time basis, the employment is considered full-time provided that the aggregate time meets the hours of a full-time position. 9 FAM 41.54 N11.1.

[13]Letter from Yvonne LaFleur, Nonimmigrant Branch, INS Office of Adjudications, to attorney William Reich, File No. H1815-C (Dec. 18, 1995); *Matter of Tessel*, 17 I&N Dec. 631 (BIA 1981); *Mater of Pozzoli*, 14 I&N Dec. 569 (BIA 1974); 9 FAM 41.54 N9.

[14] *See* USCIS Entrepreneurs in Residence, *Understanding L-1 Requirements*, http://www.uscis.gov/eir/visa-guide/l-1-intracompany-transferee/understanding-l-1-requirements (last visited July 9, 2014).

The transferee must work abroad and in the U.S. in a managerial, executive or specialized knowledge capacity.[15] The U.S. capacity may be different from that abroad. For example, the transferee may work as a manager abroad and in a specialized knowledge capacity in the U.S.[16]

Detailed descriptions of the U.S. and overseas jobs must be provided. In many cases, the best approach is to include a detailed list of job duties and list the percentage of time that the individual devotes to each duty. Common drafting mistakes include job descriptions that just paraphrase the legal requirements or that just list vague job responsibilities or broadly-cast business objectives.[17]

MANAGERIAL CAPACITY

USCIS itself says, "Contrary to the common understanding of the word 'manager' as any person who supervises others, the statute has a much more limited definition of the term 'manager.'"[18]

The term "managerial capacity" means an assignment within an organization in which the employee "*primarily*"[19]:

- Manages the organization, or a department, subdivision, function, or component of the organization[20];
- Supervises and controls the work of other supervisory, professional, or managerial employees[21], or manages an essential function within the organization, or a department or subdivision of the organization;
- Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.[22]This means that the foreign national receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the

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[15] The AAO has held that a petition can't claim the transferee will be a "hybrid executive/manager" by "rely[ing] on partial sections of the two statutory definitions." Matter of [Name Withheld], File EAC 095 52637, at 6 (AAO June 13, 2005).
[16]AFM ch. 32.3(b); *see also Matter of Vaillancourt*, 13 I. & N. Dec. 654 (R.C. 1970).
[17]*Matter of [Name Withheld]*, File SRC 05 041 50579, at 7 (AAO Jan. 19, 2007).
[18]AFM ch. 22.2(i)(3)(E).
[19] "Primarily" means that a majority (more than 50%) of the foreign national's duties are managerial. OI §214.2*l*(5)(a)(2); 9 FAM 41.54 N8.2-1; *see IKEA v. INS*, 48 F. Supp. 2d 22 (Dist. DC 1999); *Matter of [Name Not Provided]*, File No. WAC-01-081-50986 (Jan. 19, 2011), *posted on* AILA InfoNet as Doc. # 11012430.
[20]The higher the level of authority and the broader the range of job responsibilities the better.9 FAM 41.54 N8.2-1.
[21] In determining whether the foreign national supervises others, "leased employees" and independent contractors can be considered in addition to individuals employed directly, provided that the foreign national has authority to control how these leased employees and independent contractors perform their job duties. 9 FAM 41.54 N8.2-1. Further, supervision of overseas personnel counts, according to a nonprecedent decision. *Matter of Zacros America*, Inc., WAC1310350466 (AAO Sept. 13, 2013), *discussed in* AILA-USCIS HQ Liaison Meeting (Apr. 7, 2016), AILA Doc. No. 16041141.
[22] For example, if the foreign national merely negotiates routine contracts within established corporate guidelines, this is not evidence of wide discretion. However, if the foreign national develops new business ventures and negotiates contracts worth hundreds of thousands of dollars or more, this does show wide discretion.

organization. An example would be that the transferee negotiates large, non-standard contracts.

Note that 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 professionals (i.e., hold bachelor's degrees or higher, and work in positions requiring such degrees).[23]

Also, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the reasonable needs of the organization, component, or function, in light of the overall purpose and stage of development of the organization, component, or function, shall be taken into account. An individual shall not be considered to be acting in a managerial or executive capacity merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.[24] For example, a department head could be approved as a manager at the start-up stage of development when it is too early to have hired a professional staff or tiered levels of employees.[25]

A "manager" may perform some professional duties, but still the majority of duties must be managerial. An employee who primarily performs the professional or other services necessary to produce a product or provide services is not considered to be employed in a managerial capacity.[26]

For a small company or a small department, USCIS may look at whether there are sufficient supervisees to run the day-to-day operations related to the company's product or services, allowing the manager to focus on managerial duties. Examples of managerial duties may include customer and public relations and lobbying and contracting, where these are not the very business the company is engaged in.

MANAGERIAL CAPACITY AS A "FUNCTIONAL MANAGER"

As you can see from the above discussion, if the foreign national seeks to prove "managerial capacity" not on the basis of the staff supervised but instead on the basis of being a "functional manager," the foreign national's responsibilities must be "primarily" to:

- Manage a *function* of the organization.[27] Note that *managing* a function is different than *directly performing* the function. Direct performance of a function is done by a staff officer or specialist, as opposed to a manager.[28]

- The function must be *essential*. For example, "[t] he human resources function of a large multinational corporation, with more than one thousand employees, is plainly an essential function."[29] The following factors are relevant to whether the function is essential.

    - The nature and level of sophistication of the business.

    - The broad scope of the foreign national's authority, including approval of work by

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[23] INA § 101(a)(44)(A); 8 C.F.R. §.214.2(*l*)(1)(ii)(B).
[24] INA §101(a)(44)(C).
[25]9 FAM 41.54 N.8.2.*See* C. Gordon, et al., *Imm. Law & Proc.* §39.03[4][e] (rel. Feb. 2001).
[26]*Matter of Church of Scientology Int'l*, 19 I. & N. Dec. 593, 605 (Comm'r 1988).
[27] Establishment and development of a U.S. entity can itself be the "function." *Matter of Zacros America*, Inc., WAC1310350466 (AAO Sept. 13, 2013), *discussed in* AILA-USCIS HQ Liaison Meeting (Apr. 7, 2016), AILA Doc. No. 16041141.
[28] AFM ch.32.6(d).
[29]*Matter of X*, WAC 99 150 51970 (AAU Mar. 27, 2000).

others, and how the foreign national is accountable for results.

- How large a budget the foreign national controls; and/or the value of services for which the foreign national is responsible.

- The foreign national must function at a *senior level* within the organizational hierarchy or with respect to the function managed. The following factors are relevant:

  - To the extent that the foreign national deals with parties outside of the employer's hierarchy, it is helpful that parties be at a senior level (e.g., representing the company in government and industry groups; meeting with other company presidents or with high-level government officials on behalf of the company).[30]

  - It is also helpful if the foreign national sets policies or develops strategies which other employees, including professionals and managers, will implement. Explain what those policies or strategies are, which employees will carry out those policies or strategies, and how the foreign national will go about ensuring that such employees will implement the policies or strategies properly (e.g., reviews, audits).

  - Show what duties the foreign national *doesn't* do (because they are done by subordinates, thereby leaving the foreign national free to *manage*).

  - The foreign national's salary is indirect evidence of his or her stature within the employer's hierarchy.

- The foreign national must "exercise[] discretion over the day-to-day operations of the ... function," as would any manager.

EXECUTIVE CAPACITY

"Executive capacity" means an assignment within an organization in which the employee "*primarily*":

- Directs the management of the organization or a major component or function of the organization;

- Establishes the goals and policies of the organization, component, or function;

- Exercises wide latitude in discretionary decision-making; and

- Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The foreign national's salary is indirect evidence of his or her stature within the employer's hierarchy.

As is true for manager, if staffing levels are used as a factor in determining whether an individual is acting in an executive capacity, the reasonable needs of the organization, component, or function, in light of the overall purpose and stage of development of the organization, component, or function, shall

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[30] *See Matter of Irish Dairy Board, Inc.*, A28 845 421 (AAU 11/16/89) (hiring and oversight of accountants, warehouses, customs brokers, and freight forwarders are executive duties).

be taken into account. An individual shall not be considered to be acting in a managerial or executive capacity merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed. For example, a department head could be approved as a manager at the start-up stage of development when it is too early to have hired a professional staff or tiered levels of employees.[31]

USCIS advises its officer that:

> An individual will not be deemed an executive under the statute simply because they have an executive title or because some portion of their time is spent "directing" the enterprise as the owner or sole managerial employee; the focus is on the primary duties of the individual. In this regard, there must be sufficient staff (e.g., contract employees or others) to perform the day-to-day operations of the petitioning organization in order to enable the beneficiary to be primarily employed in the executive function. As discussed in detail below, the petitioner must also establish that the U.S. entity itself is in fact conducting business at a level that would require the services of an individual primarily engaged in executive (or managerial) functions. In making this determination, you should consider, as appropriate, the nature of the business, including its size, its organizational structure, and the product or service it provides.[32]

SPECIALIZED KNOWLEDGE

"Specialized knowledge" capacity is only available to "key" staff because Congress intended for this classification to be "narrowly drawn" and carefully regulated.[33]

In the Immigration and Nationality Act, Congress defines "specialized knowledge" as:

> a 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.[34]

USCIS regulations further state that 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.[35]

At least one court noted that "specialized knowledge is a relative and empty idea which cannot have a plain meaning."[36] USCIS, the State Department, and court decisions have struggled to more specifically delineate what knowledge is specialized and what knowledge is not. Here is a list of general principles derived from those decisions:

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[31] 9 FAM 41.54 N.8.2.See C. Gordon, et al., Imm. Law & Proc. §39.03[4][e] (rel. Feb. 2001).
[32] AFM § 22.2(i)(3)(E)(2).
[33] *Matter of Penner*, 18 I. & N. Dec. 49, 51 (Comm'r 1982).
[34] INA §214(c)(2)(B).
[35] 8 CFR §214.2*(l)*(1)(ii)(D).
[36] *1756, Inc. v. Attorney General*, 745 F. Supp. 9 (DC Dist. 1990).

- The knowledge should be advanced:
    - Extensive education, training, and experience are needed to gain the knowledge.
    - Training someone new to perform the foreign national's job would cause a significant interruption to the employer's business.
    - The concepts/techniques may be difficult to master.
- The knowledge should be unusual in the industry:
    - It is held by only a few in the industry.
    - It may be held by only a few in the company, making the employee "key personnel,"[37] or one of an "elevated class of workers within a company" rather than an "ordinary or average employee."[38]
    - It may be difficult to gain access to this knowledge:
        - Only a few employers or universities provide such education, training, or experience.
        - The materials/equipment necessary for the education, training, or experience are rare.
        - It may be lacking in the U.S. labor market. (This is helpful but *not* necessary).[39]
- The knowledge should be specific to the employer's business (rather than general professional knowledge):
    - The knowledge may be "unique" or "proprietary" (i.e., protected by a company's patents, copyrights, or confidentiality agreements or policies). (This is helpful but not necessary).[40]
    - The knowledge may aid the company in competing in international markets.
    - The foreign national may train other company personnel regarding this type of knowledge.
- There should be some signs that the foreign national's specialized knowledge actually has been valuable to the company in terms of improving its productivity, competitiveness, image, or financial position:
    - The foreign national may have a track record of key assignments for the company

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[37]*Matter of Penner*, 18 I. & N. Dec. 49, 51 (Comm'r 1982).
[38]*Matter of [Name Not Provided]*, File No. SRC-04-224-51219 (Jan. 5, 2010), quoting *Matter of Penner*, 18 I. & N. Dec. 49 (Comm. 1982). *See* DOS Cable #96-State-75033, discussed in 73 Interp. Rel. 963-64 (July 22, 1996).
[39]Memo by James A. Puleo, Acting INS Exec. Assoc. Comm'r, Office of Programs, "Interpretation of Special Knowledge, File No. CO 214L-P (Mar. 9, 1994).
[40]Memo by James A. Puleo, Acting INS Exec. Assoc. Comm'r, Office of Programs, "Interpretation of Special Knowledge, File #CO 214L-P (Mar. 9, 1994); DOS Cable #95-State-222894, discussed in 72 Interp. Rel. 1378-79 (10/6/95).

applying this specialized knowledge.

- Using this specialized knowledge, the foreign national may have a track record of significant accomplishments which were original, important, and received widespread recognition.

In addition to the requirements previously stated, an individual applying for an L-1B specialty knowledge visa under a blanket L program must be a "professional" in the sense that the occupation must require at least a bachelor's degree in a particular field and the foreign national must hold such a degree.[41]

Since June 2005, the law prohibits the issuance of L-1B specialized knowledge visas when the U.S. employment is primarily at client sites if (1) the employee will be principally controlled and supervised by the client; or (2) the work does not involve the provision of a product or service that requires specialized knowledge specific to the L-1 sponsoring employer. Thus, the rules still allow L-1 employees to accomplish work at client sites when the employees remain under the L-1 employer's full control and when the employer is implementing its own specialized product or service at that client site.

2.5 The U.S. Employment Must Be "Temporary"

Employment in the U.S. in L-1 status must be "temporary." This simply means that the transferee must intend to comply with the 5-year time limit for L-1Bs or 7-year time limit for L-1As discussed in Part 5.2 below.

Significantly, the transferee may have the dual intent of immigrating to the United States while still intending to comply with his or her nonimmigrant status.[42] The fact that the transferee is the beneficiary of an immigrant petition or is otherwise seeking U.S. permanent residence is not a basis for denying L-1 status.

If the transferee is an owner or major stockholder of the company, the petition must be accompanied by evidence that the transferee's services are to be used for a temporary period and evidence that he or she will be transferred to an assignment abroad upon the completion of the temporary services in the U.S.[43]

Note that the precise issue here is whether the U.S. entity intends to employ the transferee temporarily. This is a slightly different question than (a) whether the transferee intends to remain in the U.S. temporarily, and (b) whether the position is temporary (as opposed to a permanent position being filled temporarily by the transferee).[44] In cases where the transferee is an owner or major stockholder of the company, it may be helpful to both explain that the transferee will have a new assignment abroad, and either that plans exist for the transferee's successor in the U.S. position or that the U.S. entity will exist only for a finite period.

2.6 Terms of the U.S. Employment

There are certain conditions on the terms of U.S. employment:

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[41] 8 C.F.R. §214.2(*l*)(l)(i)(E).
[42] See 8 C.F.R. §214.2(*l*)(16); 9 FAM 41.54 N4.
[43] 8 C.F.R. § 214.2(*l*)(3)(vii). *See Kurzban* at 597-98 for temporariness test.
[44] *Matter of Isovic*, 18 I. & N. Dec. 361, 363 (Comm'r 1982).

- Control over the Employee: The U.S. employer must have control over the transferee.[45] For example, authority to fire the employee is substantial evidence of a qualifying employer-employee relationship.[46]

- Third-Party Worksites: There are special requirements if the transferee will be "stationed primarily" at a third-party worksite, meaning a worksite that is not that of the petitioner or an affiliated company. Specifically, L-1 status in prohibited if either (a) the transferee will be "principally" under the "control and supervision" of the third party; or (b) the placement is "essentially an arrangement to provide labor for hire for the" third party, rather than a placement in connection with the provision of a product or service involving specialized knowledge specific to the petitioner.[47]USCIS has issued requests for evidence (RFE) regarding the business relationships between the petitioner and the end-client, with the primary purpose of determining whether a labor-for-hire arrangement exists.[48] Typical requests have been for signed agreements or statements of work from client companies regarding the terms and conditions of the transferee. While the third party "may provide input, feedback, or guidance as to its needs, goals, etc.," the third party may not "direct[ ] tasks and activities."[49]

- Part-Time Employment: Nothing in the law precludes part-time employment, but nothing explicitly permits it either. What is clear, however, is that an employee may work full-time for an employer, where part of the work is in the U.S. and part is abroad.[50]

- Wages: Wages for the U.S. employment may be paid by either the U.S. employer or by the foreign overseas employer.[51]

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[45]9 *Foreign Affairs Manual* (FAM) 41.54 N9 and N9.1; *see also Matter of Pozzoli*, 14 I&N Dec. 569 (R.C. 1974) (the power of
control over the employee's activity, not the salary, is the essential element in establishing the existence of a qualifying employment relationship that satisfies the one-year requirement).
[46]*Id.*
[47]Pub. L. No. 108-447, codified as INA § 214(c)(2)(F); William R. Yates, USCIS Assoc. Dir. of Operations, *Changes to the L Nonimmigrant Classification by the L-1 Reform Act of 2004*, July 24, 2005, *posted on* AILA Infonet as Doc. # 05080566.
[48] USCIS Questions and Answers with AILA (Oct. 27, 2009), *posted on* AILA InfoNet as Doc. # 09110664. According to a State Department cable, an L-1B employee working off site

should be performing services relating to the petitioner's product, such as installing software designed by the petitioner. If instead the applicant will be working principally with the U.S. company on the U.S. company's product or a generic product (such as commonly used software) and will not be using the petitioner's product or skills, the applicant will generally not meet the specialized knowledge criteria.

[49] USCIS Questions and Answers with AILA (Oct. 27, 2009), *posted on* AILA InfoNet as Doc. # 09110664.
[50] USCIS Adjudicators Field Manual § 32.6(f) (Nov. 2006).
[51]*Matter of Pozzoli*, 14 I. & N. Dec. 569 (1974); USCIS, *Adjudicator's Field Manual* § 32.6(f) (Nov. 2006).

3. Specific Business Scenarios

3.1 Petition for a New Office

A foreign national coming to open or be employed in a "new office" may be admitted to the U.S. for an initial period of stay not to exceed 1 year[52], after which a petition for an extension of L-1 status must be filed. This procedure allows USCIS to monitor start-up ventures.

A "new office" means an organization which has been "doing business"--i.e., providing regular, systematic, and continuous goods or services, but not just through an agent[53]-- in the United States through a parent, branch, affiliate, or subsidiary for less than one year." The term "organization," here, refers not only to the petitioning entity but to the whole organization, including other associated entities.[54]So an organization only counts as a "new office" if it has *no* entity doing business in the U.S. for one year or more.

A new-office petition must meet the normal requirements for an L-1 individual petition (discussed in Part 3.2), with the differences discussed here:

For a "new office," the "doing business" requirement is eased. The new office must only demonstrate that the U.S. operations will within a year satisfy the "doing business" requirement and can otherwise support the beneficiary.[55] This is to allow time for the new office to "ramp up."[56]

Also, the petition must meet the following requirements:

- The U.S. employer must have a federal employer identification number (FEIN).
- Evidence that sufficient physical premises to house the new office have been secured.[57] Petitions

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[52] The Form I-129 asks the petitioner to identify the start and end date for that year. The USCIS Vermont Service Center will allow the petitioner to write the start date as "date of approval" and the end date as "one year from date of approval." AILA/VSC Liaison Practice Pointer: Receiving a Full Year on a "New Office" L-1A, posted as AILA InfoNet Doc. 09102068.
[53] 8 C.F.R. § 214.2(*l*)(1)(ii)(F).
[54] *Matter of [name not provided]*, WAC 07 277 53214, 9-10 (AAO Jul. 22, 2008).
[55] AFM ch. 32(d); 8 C.F.R. § 214.2(*l*)(3)(v).
[56] *See* USCIS Entrepreneurs in Residence, *Understanding L-1 Requirements*, http://www.uscis.gov/eir/visa-guide/l-1-intracompany-transferee/understanding-l-1-requirements (last visited July 9, 2014).
[57] 8 C.F.R. §§ 214.2(*l*)(3)(v)(A), (vi)(A).

for companies planning to use "virtual offices"[58] or to operate from locations zoned for residential not commercial use have been denied.[59]

- Evidence that the U.S. employer has the financial ability to pay the transferee's salary and to commence doing business in the U.S.[60]

MANAGER OR EXECUTIVE IN A NEW OFFICE

For a manager or executive in a new office, the normal requirement that the duties be *primarily* "managerial" or "executive" is softened to allow the applicant to undertake the less glamorous duties associated with starting up the new office. Specifically, the petition must merely show that within one year of the petition's approval the operation *will* support a managerial or executive position.[61]

In addition, a new office's petition for a manager or executive must include the following evidence:

- Evidence that the foreign national's required one year of previous employment was in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation.

- A business plan for the new office will support an executive or managerial position within one year of approval of the petition

BUSINESS PLAN FOR MANAGER OR EXECUTIVE IN NEW OFFICE

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- As to the business plan, the regulations specify that it must include the proposed nature of the office, describing the scope of the entity, its organizational structure, and its financial goals. This typically involves:
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1. Business description, including operations plan and required licenses and permits:

    - Describe products or services
    - Explanation that the required permits and licenses have been obtained
    - If applicable, the manufacturing or production process, the materials required, and the supply sources
    - Any contracts executed for the supply of the materials and/or the distribution of products

2. Staffing plan and timetable:

    - Plan for organization chart at end of year one and year three (or similar timetable for hiring)
    - Summary of experience of key personnel
    - Job description for each position listed in the organization chart
    - Note that there is no specified minimum number of employees that must be hired. Instead, the underlying question is whether the beneficiary will have sufficient staff so

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[58] *Matter of [Name Withheld]*, File EAC 06 219 50151, at 5 (AAO Mar. 10, 2008) ("virtual office" was just a rented mailbox for the business).
[59] *Matter of [Name Withheld]*, File SRC 05 041 50579, at 3-4 (AAO Jan. 19, 2007).
[60] 8 C.F.R. §§ 214.2(*l*)(3)(v)(C)(2), (vi)(C).
[61] 8 C.F.R. § 214.2(*l*)(3)(v).

that he or she can primarily act as a manager or executive. Sometimes it's helpful to consider what's "normal" in the industry, such as by reference to industry surveys or guides for starting related businesses.

3. Marketing plan, including competitive analysis

    - The marketing strategy, including target market, pricing, advertising, and servicing
    - Market analysis, including competitive analysis (names of competing businesses, their relative strengths and weaknesses, their products/services and pricing structures)

4. Description of how the physical premises is adequate

5. Capitalization: Describe the sources and amounts of start-up funding, such as investments and loans. Describe any additional funding that will be provided during the first 3 years. Showing financial ability of the U.S. company to pay the beneficiary's salary and to commence "doing business" in the U.S. Note that there is no specified minimum capitalization for L-1 classification.[62] Instead, the test is whether the investment is large enough to satisfy the business' calculated startup costs to enable it to support a managerial or executive position within one year. Sometimes it's helpful to consider what's "normal" in the industry, such as by reference to industry surveys or guides for starting related businesses.

6. Budget and financial projections: This may include:

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    - Start-up costs: This may be formatted as a list (e.g., costs for first 6 months of operations, or until projected revenues are sufficient to cover ongoing costs), or in the form of a cash flow statement.
    - 1st year projected income statement (also known as profit and loss statement)
    - 3rd year projected income statement
    - Balance sheets (e.g., start-up date, end of 1st year, and end of 3rd year)
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The business plan can't be based on mere speculation. Instead, it must be based on research, sound business principles, and knowledge of the specific industry in the local market. "Most importantly, the business plan must be credible."[63]

There's another strong incentive to make the business plan one which the company can live up to. Namely, if at the end of the first year, when the company files to extend the transferee's L-1A status, if the company can show that it lived up to its business plan then USCIS would find it difficult to deny an L-1 extension on the basis that the company hasn't grown sufficiently to support a manager or executive. If the company hasn't lived up to the plan, denial is more likely.

STARTING A BUSINESS IN THE U.S.

There are numerous legal and other issues to plan for in starting and operating a business in the U.S. It is important to address these matters early on.

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[62] 9 FAM 41.54 N.7.5.

[63] *Matter of [Name Withheld],* File EAC 09 073 50069 (AAO, July 15, 2010), *citing Matter of Ho*, 22 I. & N. Dec. 206, 213 (Assoc. Comm. 1998) (analogizing the required business plan for EB-5 cases to that required for L-1 new offices).

As you address these issues, you'll need to build a team to work with you. That team includes a lawyer, an accountant, an insurance agent, a real estate agent, a banker, and maybe others.

a. **Choosing a Proper Business Form:** There are four basic legal forms for a business in the U.S.: sole proprietorship, partnership, corporation, and limited liability company (LLC). You and your lawyer should decide among the business forms by considering factors such as taxes, responsibility for debts of the business, how business decisions will be made, and the simplicity and cost of forming the business. One question to be decided is where to form the company. Most small businesses form their companies and have their principal place of business in the same state. However, that's not required. For example, some companies doing business in California may intentionally incorporate in states such as Delaware or Nevada for the perceived advantages of forming the business entity there.

b. **Registering a Fictitious Business Name:** Depending on where you do business, a fictitious business name statement (d.b.a. or "doing business as") may need to be registered with the county clerk of the county of the registrant's principal place of business if the business is any of the following: sole proprietorship doing business under a name not containing the owner's surname, such as Smith Accounting Services; partnership; or, corporation doing business under a name other than its legal name. For example, if you registered a corporation with the state as ABC Inc. but then you want to have one store called Bay City Plumbing and another called Sunny's Party Supplies, the latter names may need to be registered with the county. Registration of fictitious names gives consumers a way of identifying the owners of a company for purposes such as making complaints and filing law suits. Registration also ensures that multiple businesses don't use the same name in the same county. Registering a fictitious name requires publishing a statement in a newspaper of general circulation.

c. **Federal Employer Identification Number (FEIN); Registration with State Tax Authorities:** The employer identification number (EIN) is a unique 9-digit number assigned to corporations, partnerships, and other entities for tax filing and other purposes. As a business, an EIN is necessary before you can hire employees, pay taxes, and even open a bank account. Obtain a FEIN by filing a Form SS-4, Application for Employer Identification Number, with the Internal Revenue Service (IRS). Register with state tax authorities at the same time.

d. **Required Permits:** States and localities require a host of different permits for businesses. For example, in California, the most common permit required is a seller's permit, obtained from the California Board of Equalization (BOE). This permit allows your business to sell goods in the state and requires your business to collect sales taxes from customers to cover any sales tax owed to the state. The taxes are paid annually, quarterly, or monthly, depending on the business sales volume. This covers shops of any kind with products for sale. It also includes on-line sales located in California. On the other hand, services are not taxable in California, so businesses that only provide services are not required to obtain a seller's permit.

   States and cities may require business licenses. For example, bars and nightclubs, auto repair shops, locksmiths and waste management companies often require licenses. The federal government also requires permits for certain businesses, such as operating a trucking company, operating a radio or television station, manufacturing food, alcohol or drugs, or making or selling firearms.

   States and localities also require licenses for various professions, such as doctors, nurses, physical therapists, lawyers, engineers, architects and construction contractors.

City zoning laws dictate which activities are allowed in particular locations. If your type of business is not consistent with the zoning for the location, you will either need to get a permit known as a conditional use permit, or be granted a variance allowing you to be exempted from the zoning rules. You should contact your city or county planning department to determine whether your business complies with local zoning.

Other local permits may be required, such as building permits, fire department permits, and hazardous waste permits.

e. **Banking:** To open a business bank account, you'll still need to register to conduct business in the state. An authorized company representative should then present copies of the registration papers and the FEIN to the bank. It may be convenient to open an account at a bank that has affiliated branches in your home country.

f. Accountant: You'll need an accountant to advise you regarding taxes and to help you set up a bookkeeping system.

g. **Insurance:** When buying insurance, start by setting up some priorities that are most important for your company. First, check what coverage is required by state law and by your landlord (if you rent) and then tailor your coverage to these requirements. You also need to identify what your other business insurance needs will be. An insurance agent can provide advice. You may want or need property coverage, liability insurance (product liability insurance, comprehensive liability insurance, errors and omissions liability, vehicle insurance, and/or workers' compensation insurance), and/or disability insurance. Your business lease or other contracts may require certain minimum insurance.

h. **Real estate:** If your business will not be purchasing real estate, the terms of your lease (the contract between your company and the landlord) are important. Negotiating a lease on terms you can accept is critical to your business' success.

i. **Administering Employees:** There is a host of federal, state, and local requirements regarding administering employees that an employer must be familiar with and comply with. Our firm can help you decide whether it may be advisable to use written employment agreements covering issues such as noncompete agreements and terms to protect trade secrets and confidential business information. Our firm can also assist you in developing an employee handbook, including termination policies, for administering employees. Employee handbooks are a standard tool for clearly establishing corporate policies and protecting employers from litigation. Employee handbooks affirm in writing an employer's compliance with federal and state employment laws by clearly stating policies on anti-harassment, anti-discrimination, leave of absence and other sensitive areas. Employees are required to sign a statement confirming that the handbook has been read and understood.

j. **Website**

k. **Telephone service / Internet service**

l. **Visiting the U.S.:** It may be possible to qualify for a B1/B2 (visitor for business or pleasure) visa to visit the U.S. for purposes of planning for the new office. It may even be possible to

come to the U.S. to open or be employed by the new office if you will "become eligible" for L-1 status "upon securing proof of acquisition of physical premises."[64]

m. **Intellectual Property:** Apply for any needed patents, trademarks, and copyrights. This includes applying for trademark protection of your business name. (If the trademark is used only within one state—and thus doesn't qualify for federal registration—state registration is a good idea). Make a plan for how to protect your company's intellectual property, including trade secrets and confidential business information from not just employees but also others who may be tempted to use them to your disadvantage.

3.2 Individual L-1 Petition

An individual L-1 petition must include the following types of evidence:

- Evidence of the qualifying relationship between the U.S. and foreign employers. This may include, for example, an annual report, articles of incorporation, financial statements, or copies of stock certificates. Whether such evidence will be sufficient to meet the petitioner's burden of establishing such a qualifying relationship will depend on the quality and probative value of the evidence submitted.[65]

- Evidence that the foreign national will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the job duties performed abroad and to be performed in the U.S.

- Evidence that the foreign national has at least one continuous year of full-time employment with the foreign employer within the three years preceding the filing of the petition.

- Evidence that the foreign national's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge.

- Evidence that the foreign national's prior education, training, and employment qualifies him or her to perform the intended services in the U.S.

- As discussed in Part 2.5, if the transferee is an owner or major stockholder of the company, the petition must be accompanied by evidence that his or her services are to be used for a temporary period and evidence that he or she will be transferred to an assignment abroad upon the completion of the temporary services in the U.S."

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[64] CBP IFM ch. 15.4(b)(1)(B)(17).

[65] Form I-129 Instructions at 10 (Oct. 7, 2011). For large, established organizations, a statement by the company's president or other authorized official describing the ownership and control of each qualifying organization, with supporting evidence such as a list of the parent and subsidiaries, may be sufficient. For small and marginal operations, additional documentation may be required. AFM 32.3(d).

3.3 "Blanket" Petition for an Organization That Frequently Uses L-1 Visas

The blanket petition program is for relatively large international employers engaged in commercial trade or services. Approval of a blanket L-1 petition relieves the U.S. employer from proving its qualifying relationship to a foreign employer over and over in multiple individual L-1 petitions. Moreover, with an approved blanket L-1 petition, a foreign national can save the time involved in filing an individual L-1 petition with USCIS, if the foreign national is a manager, executive, or "professional" with specialized knowledge. Instead, the foreign national may apply directly to a consular officer for an L-1 visa.

For a U.S. employer to file an L-1 blanket petition, it must meet the following criteria:

- All of the organizations listed in the blanket petition must be engaged in commercial trade or services.
- There must be a U.S. office that has been doing business for a year or longer.
- The U.S. employer has 3 or more domestic and foreign branches, subsidiaries, or affiliates.
- The U.S. employer must have transferred 10 L-1s to the U.S. in the previous 12 months, or have U.S. subsidiaries or affiliates with combined annual sales of at least $2 million, or have a U.S. work force of at least 1000 employees.

For organizations fortunate enough to have blanket L approvals, in each case a strategic decision must be made whether to file based on the blanket approval or to file an individual L-1 petition.[66]

4. Procedures for Obtaining L-1 Status

4.1 Filing the Individual L-1 Petition with USCIS

Individual L-1 petitions are filed by mail with the USCIS Regional Service Center with jurisdiction over the area where the transferee will be employed. The petition is filed on Form I-129, Petition for Nonimmigrant Worker, with the "L" supplement.

The petitioner must be either the U.S. employer or the foreign employer.[67]

The U.S. Export Administration Regulations[68] and the International Traffic in Arms Regulations[69] require U.S. persons to seek and receive a license from the U.S. Government before releasing controlled technology or technical data to foreign persons. This includes release by an employer to an L-1 transferee. The Form I-129 requires a petitioner to certify that it has reviewed the relevant regulations and determined whether or not a license is required for the L-1 transferee.

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[66] *See generally* David Z. Izakowitz, et al, "The Intracompany Transfer Maze—The Many Detours on the Path to an L-1 Visa," in Rizwan Hassan, ed., *Immigration Practice Pointers*199-206 (AILA, 2011-2012 ed.)
[67] USCIS Adjudicators Field Manual § 32.3(d) (Nov. 2006).
[68] 15 C.F.R. Parts 770-774.
[69] 22 C.F.R. Parts 120-130.

Effective December 23, 2016, the filing fee for the I-129 petition will increase from $325 to $460.[70] In addition, there is a mandatory $500 fraud prevention fee for an "initial" petition or a petition to change employers.[71]

For certain petitioners, an additional fee of $2,250 is also now required for an initial request to grant L-1 status or for a change of an L-1 employer. (Extensions by the same petitioner are exempt). A statute, which is effective through September 30, 2014, imposes the additional fee on petitioners who have 50 or more employees in the United States, and where more than 50 percent of these employees are in H-1B or L-1status.[72]

The USCIS is supposed to adjudicate an L-1 petition within thirty days after it is filed but often takes longer. (If additional information is required from the petitioner, the 30-day processing period begins again upon receipt of the additional information.)[73]

For an additional fee of $1,250 the petitioner may request "premium processing," which adjudication within 15 business days.

The USCIS decision will be approval, denial, a request for evidence, or a notice of intend to deny:

- Approval: The approval is issued on a Form I-797, Notice of Action.
- Denial: In the event that an individual L-1 petition is denied or revoked, the petitioner shall be provided with reasons for the denial and advised of the righto appeal.[74]
- Request for Evidence (RFE): This is a common tool used by the USCIS to ask for additional evidence in order to make a decision on a petition. RFEs are often in point form requesting factual information. While many RFEs are simple, others are more complicated and tend to require legal assessment before they can be answered.
- Notice of Intent to Deny (NOID): This is a written statement from USCIS that it has determined the petition should be denied and that grants the petitioner and opportunity to overcome this determination and demonstrate eligibility.

4.2 Change of Status within the United States

To actually be classified in L-1 or L-2 status, the foreign national needs a Form I 94, Departure Record, issued by the Department of Homeland Security. The Form I-94 is the official DHS record identifying a nonimmigrant's status in the United States and the expiration date of that status.

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[70] USCIS Fee Schedule, 81 Fed. Reg. 73292 (Oct. 24, 2016) (to be codified at 8 C.F.R. § 103.7).
[71] I-129 Instructions at 6 (Oct. 7, 2011).
[72]Emergency Supplemental Appropriation for Border Security Act, Pub. L. 111-230 (Aug. 30, 2010). All persons employed by the petitioner—regardless of whether they are full– or part-time, or are paid through a U.S. or foreign payroll—will count toward the calculation of employees. *See* Implementation of Provisions of Public Law 111-230 Instituting Increased Fees for Certain H-1B and L-1 Petitions and Applications, *published on* AILA InfoNet at Doc. No. 10100771 (*posted* Jan. 28, 2011).
[73] INA § 214(c)(2)(C); 8 C.F.R. § 214.2(*l*)(7).
[74]8 C.F.R. §§214.2(*l*)(8)(i) and (10).

If the foreign national is already in the U.S. in a different nonimmigrant status at the time the L-1 petition is filed and has not violated that status, the petition may request that their status be changed to L-1 status without departing the U.S. In this case, a Form I-94, Departure Record, indicating the foreign national's classification in L-1 status will be attached to the Form I-797, Notice of Action.

An employee intending to travel abroad while a change of status request is pending should contact our law firm to discuss potential complications.

4.3 Applying at a U.S. Consulate for an L-1 Visa Based on an L-1 Individual Petition

For a foreign national not seeking change of status within the U.S. the Form I-797, Notice of Action, approving the petition can be presented to a U.S. Consulate in connection with a visa application. Before issuing a visa, the Consulate will check to ensure that the requirements for L-1 classification are met and that the transferee is not barred from the U.S. by the "grounds of inadmissibility" (e.g., certain criminals, immigration law violators, and drug addicts are barred). An inadmissible person will be denied a visa, although waivers are available in certain circumstances. And if it appears that there was fraud or misrepresentation in the petition, or it appears that the foreign national is otherwise ineligible, the Consulate may return the petition to the USCIS to consider revoking the approval.

The timing to schedule a visa appointment at the U.S. Consulate may vary, but a wait of one month is common. Moreover, certain people with education, training, or experience in high-tech fields may be subject to a security advisory opinion (SAO) delaying visa issuance for 3-4 weeks after the appointment.

The visa application fee is $160. For Chinese nationals, for no extra charge, the Embassy will issue a single-entry L-1 visa valid for entry to the U.S. over a period of three months. Or an L-1 visa valid for multiple entries to the U.S. over a period of up to 24 months is available upon payment of the additional "reciprocity fee" of $120.[75]

With the visa, the foreign national may come to a U.S. port of entry, where he or she will be screened once more upon entry, this time by the DHS Customs and Border Protection.

4.4 Obtaining L-1 Status Based on an L-1 Blanket Petition

If the employer has an approved L-1 blanket petition and the foreign national seeking L-1 status is lawfully present in the U.S., the petitioner should file Form I-129S in triplicate and supporting documents directly with USCIS.

Otherwise, the employee should apply for a visa at a U.S. Consulate abroad. This involves presenting the I-797 Blanket L-1 Approval Notice at a U.S. consulate abroad, along with a package of documents including the Form DS-160, Application for Nonimmigrant Visa, and the I-129S Blanket application in triplicate original, a letter of support confirming the assignment in the U.S. and copies of educational credentials.

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[75] Visa validity is no longer limited to the period of validity of the underlying I-797 approval notice for the L-1 petition. Still, consular officers may as a matter of discretion limit the visa validity period. 9 FAM 41.54 NN 20.1, 20.2.

4.5 WHAT U.S. GOVERNMENT ANTI-FRAUD MEASURES MEAN FOR YOU

In the 1990s, transnational criminal organizations used the L visa to facilitate the expansion of criminal activities in the U.S. and as a lucrative method to smuggle illegal immigrants into the country.[76]The typical scheme involved setting up a shell corporation, manufacturing fake documents for an L-1 petition and visa application, and selling these to applicants.[77] A U.S. State Department investigation showed that in two Chinese provinces 80 to 90% of the L visa applications were wholly fraudulent.[78]

A 2006 report by the Department of Homeland Security shows that three main vulnerabilities continued to exist in the L-1 visa program.[79] First, the program allows for transfer of managers and executives, but the government finds it difficult to be confident that a firm truly intends to use the transferee in such a capacity. Second, the program allows for the transfer of "specialized knowledge" workers, but the term specialized knowledge is not clearly defined. Third, an L-1 petition requires that the organization be "doing business" abroad, but USCIS adjudicators have little ability to evaluate whether a substantial foreign operation exists.

What does this mean for companies seeking L-1 visas?

- Honesty: It's important to be scrupulously honest in filing documents and making statements related to L-1 cases. U.S. government adjudicators and inspectors expect a certain level of fraud and are looking for it. Under U.S. law, a person who makes a statement that is fraudulent or a material misrepresentation in connection with an immigration cases is potentially barred permanently from entering the U.S. and may be deported, as well as being subject to civil sanctions and criminal prosecution.

- Strong Documentation: Cases need to be supported by thorough and persuasive evidence.

- Potential Delay: Be prepared for the possibility of delay due to a USCIS request for evidence (RFE) or a consular investigation.

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[76] Amy McCallen, *Note: Non-Immigration Visa Fraud: Proposals to End the Misuse of the L Visa by Transnational Criminal Organizations as a Method of Illegal Immigration*, 32 Vand. J. Transnatl'l L. 237 (1999), citing Visa Fraud and Immigration Benefits Application Fraud: Hearings Before the Subcomm. On Immigration and Claims of the House Judiciary Comm., 105th Cong. 10-11, 13 (1997) (statement of Paul Virtue, Acting Executive Associate Commissioner, Office of Programs, Immigration and Naturalization Service)

[77] *Id.* at 10; Hearings on Combatting Illegal Immigration Before the Subcomm. on Immigration & Claims, 105th Cong. (1997), available in 1997 WL 10570044 (testimony of George Regan, Acting Associate Commissioner, Enforcement, Immigration and Naturalization Service).

[78] Amy McCallen, *Note: Non-Immigration Visa Fraud: Proposals to End the Misuse of the L Visa by Transnational Criminal Organizations as a Method of Illegal Immigration*, 32 Vand. J. Transnatl'l L. 237, 258 (1999). An Immigration and Naturalization Service investigation that randomly investigated Chinese companies with L-1 petitions showed that

numerous companies had listed either nonexistent addresses or were flea-bag motels, mail drops, apartments, the offices of immigration consultants, or unrelated Chinese businesses that are used as fronts. In one case a man granted an L-1 visa and listed as a corporate officer was found at the listed address sitting in a barn, wearing dirty old clothes and sorting vegetables. The company was only one of four using that address. In another investigation, a two bedroom apartment served as the home address for twenty Chinese companies that had applied for visas.

Amy McCallen, *Note: Non-Immigration Visa Fraud: Proposals to End the Misuse of the L Visa by Transnational Criminal Organizations as a Method of Illegal Immigration*, 32 Vand. J. Transnatl'l L. 237, 260 (1999) (internal citations omitted).

[79] DHS Office of Inspector General, *Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program*, OIG-06-22, at 1 (Jan. 2006).

- Preparedness for the visa interview: The transferee needs to be well-prepared for the consular officer's questions during the visa interview.

5.5 USCIS Site Visits

USCIS has extended the Administrative Site Visit and Verification Program (ASVVP) to L-1 visas. The ASVVP is a site-inspection program designed to complement the Department of Homeland Security's existing anti-fraud efforts. As part of efforts to strengthen the integrity of immigration benefit processing, USCIS is expanding the ASVVP to include the worksites of L-1 intracompany transferees.

Site visits are carried out by the agency's Fraud Detection and National Security (FDNS) Division's Site Inspection Program. Such visits have been done on a random basis at H-1B temporary worker sites since 2009 in an effort to root out H-1B fraud. Expansion of the site visit program to include L-1 petitioners comes in response to a report titled "Implementation of L-1 Visa Regulations," which was released by the Department of Homeland Security's Office of Inspector General (OIG). In particular, the report recommends that USCIS officers make a site visit a mandatory requirement before renewing L-1 new office petitions.

During a site visit, the immigration officer will normally ask to speak with the manager who signed the L-1 petition and with the L-1 transferee about the details of the employment, such as job title, job duties, salary, work location, or work hours. The officer may ask to tour the work site, including the L-1 transferee's work space. The officer may ask for copies of the transferee's business card, most recent paystub, and last Form W-2. Any negative information learned by the officer could be taken into consideration by USCIS in adjudicating a pending L-1 petition or could be used as the basis to issue a notice of intent to revoke a previously approved petition.

Our law firm recommends:

- Employers should keep their legal counsel informed of any changes to L-1 employment, such as job duties, work location, or placement at a client site, to ensure that any changes are reviewed and discussed and that any necessary amendments are made to the L-1 petition.
- Site visits may be done with no prior notice, but employers should contact legal counsel immediately if prior notice is given.
- Employers should have in place policies covering topics such as: verifying the identity of the immigration officer; whether the officer will be allowed to visit and photograph non-public portions of the worksite; and whether a manager will attend the officer's interview of the L-1 transferee.

5. Terms and Conditions of L-1 and L-2 Status

It's critical for an L-1 transferee to comply with the terms and conditions of his or her status. Violation of status for even one day could have serious negative consequences for the employer or you (e.g., deportability, excludability from the U.S., ineligibility for change or extension of status).

5.1 Scope of Authorized Employment; Corporate Restructuring

An L-1 transferee is only authorized to perform the specific work described in the petition—i.e., with the same employer, in the same position, performing the same duties. Any work not specifically authorized by USICS could be considered a violation of status. Failure to perform the authorized work would also be considered a violation of status.

If in the future changes to the work described in the petition are contemplated, please consult with our firm. Changes may include but are not limited to changes in job title or significant changes in duties (e.g., from a managerial capacity to a specialized knowledge capacity), corporate restructuring that results in a change in the previously approved relationship between the U.S. and foreign employer,[80] a change in the employer's federal tax identification number, or a merger by the U.S. employer with another organization to create a third entity. Certain changes may have immigration-related ramifications (e.g., it may be necessary for the employer to file an amended petition with USICS).[81]

Maternity leave, sick leave, and vacation do not constitute failure to perform the L-1 job. USCIS has confirmed that part-time L-1 employment is permissible for an L-1 employee who had been granted a maternity leave and is returning to work on a part-time basis with the intention of gradually returning to full-time employment. USCIS noted that there are instances in which an L-1 nonimmigrant will not be able to provide services but will receive his or her full salary and remain on the company's payroll. Examples of these instances include situations in which an L-1 nonimmigrant is granted maternity or

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[80] *See generally* Elsie Hui Arias, "Requirements and Recent Adjudication Trends of L-1 Classification," in Emmie R. Smith, Ed., *Forms & Fundamentals*199, 200 (AILA, 2011).

[81] 8 C.F.R. § 214.2(*l*)(7)(C) (requiring an amended petition for a "change in capacity of employment (i.e., from a specialized knowledge position to a managerial position)," or for "any information which would affect the beneficiary's eligibility'); Memorandum by James J. Hogan, INS Exec. Assoc. Comm'r for Operations, Guidelines for the Filing of Amended H and L Petitions, File Nos. CO 214h-C, CO 214l-C (Oct. 22, 1992), *reproduced in* 69 *Interpreter Releases* 1448 (Nov. 9, 1992) (requiring that amended petition be filed for "material" changes including change of employers within the same organization).

sick leave or is on vacation. The long-standing policy of the legacy U.S. Immigration and Naturalization Service, which has been adopted by USCIS, is that such periods of leave do not violate the terms of an L-1 nonimmigrant period of stay provided the nonimmigrant remains "employed" by the company (i.e., remains on the payroll). The employer is not required to notify USCIS that the L-1 nonimmigrant has been granted leave. In addition, USCIS guidance noted that a maternity leave is authorized by federal law under the Family and Medical Leave Act of 1993. Consistent with preexisting agency policy and federal law, USCIS stated that part-time employment is permissible for an individual who was granted maternity leave and is returning to work on a part-time basis with the intention of returning to full-time employment.

5.2 Period of Stay; Extending L-1 Status

In General

An initial individual petition may be granted for up to 3 years. As mentioned in Part 3.1, a new-office petition may be approved for a maximum of 1 year.

You may spend a maximum of 7 years in the U.S. in L-1A "managerial" or "executive" capacity, or 5 years in L-1B "specialized knowledge" capacity. Only periods of **actual physical presence** in the U.S. count toward that limit.[82] Time in L-2 status does not count.[83]

To extend the maximum stay from five years to seven, a foreign national who was originally admitted in L-1B status must have served as a manager or executive for at least six months prior to requesting a change to L-1A status.[84]This means that a specialized knowledge employee must have an I-129 petition approved as an executive or manager prior to reaching four and one-half years in L-1 status in the U.S.[85]

Extension of status beyond the period initially authorized is sought by filing a new Form I-129, Petition for Nonimmigrant Worker, with "L" supplement at the appropriate USCIS Service Center. Any single extension may be granted in an increment of up to 2 years. Multiple extensions may be filed until the time limit is reached. In order to discuss an extension, please contact our firm at least 4 months before your currently authorized status expires.

These time limits do not apply to foreign nationals who do not reside continually in the U.S. and whose employment in the U.S. is seasonal, intermittent, or consists of an aggregate of 6 months or less per year.

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[82] 8 C.F.R. §214.2(*l*)(12); *see also* USCIS Memorandum, M. Aytes, "Procedures for Calculating Maximum Period of Stay
Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants" (Oct. 21, 2005) (hereinafter "Aytes Memorandum Oct. 2005"), *posted on* AILA InfoNet as Doc. # 05110363.
[83] USCIS Memorandum, M. Aytes, "Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-
2 Status" (Dec. 5, 2006), *posted on* AILA InfoNet as Doc. # 06122063.
[84] 8 C.F.R. §§.214.2(*l*)(11) and (15)(ii); *see also* USCIS Memorandum, M. Aytes, "Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants" (Oct. 21, 2005) (hereinafter "Aytes Memorandum Oct. 2005"), *published on* AILA InfoNet at Doc. No. 05110363 (*posted* Nov. 3, 2005).
[85] *Id.*

In addition, the limitations do not apply to aliens who reside abroad and regularly commute to the U.S. to engage in part-time employment.[86]

After the time limit has been reached, the foreign national may not be readmitted to the U.S. in L-1 status unless residing and being physically present outside the U.S. for the immediate prior year (except for brief visits for business or pleasure, which do not interrupt the one year abroad, but do not count towards fulfillment of that requirement).[87]

In the alternative, it may be possible to remain in the U.S. past the time limit by applying for lawful permanent resident status or a different nonimmigrant status (e.g., O-1 alien of extraordinary ability).

Approval of an L-1 extension would require that proof that the noncitizen's duties and projects reflect continued work in a managerial, executive, or specialized knowledge capacity. It is a good practice to keep documentation of the U.S. and overseas companies' continued operations, such as tax records, bank statements, payroll records, and invoices.

Extension for New Offices

There are more detailed requirements to extend L-1A manager or executive status for "new offices" in the U.S.[88] For such cases, the extension petition must include the following evidence:

- Evidence that the U.S. and foreign entities still have the required relationship.
- Evidence that the foreign entity has been doing business in the previous year.
- Evidence that the U.S. entity has been doing business in the previous year.
- The duties performed by the foreign national for the previous year
- The duties he or she will perform under the extended petition.
- The staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees. The best evidence is copies of all IRS W-2s for employees and IRS 1099s for independent contractors. Also, an updated organizational chart showing the company's employees and independent contractors can be helpful.
- Evidence of the financial status of the U.S. operation. The U.S. operation's federal tax return is particularly important. The operation's U.S. bank statements for the year are also key. A current balance sheet and year-to-date income statement can be helpful too.

The reason behind these evidentiary requirements is that during the foreign national's first year in L-1A status the requirement that the applicant be doing "managerial" or "executive" duties was softened to allow the applicant to undertake the less glamorous duties associated with starting up the new office. But

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[86] USCIS Memorandum, M. Aytes, "Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-
2 Status" (Dec. 5, 2006), *posted on* AILA InfoNet as Doc. # 06122063. Evidence may include arrival and departure records, tax returns, and records of employment abroad.
[87] 8 C.F.R. § 214.2(*l*)(12)(i).
[88] 8 C.F.R. § 214.2(*l*)(14).

for the extension of status, the petition must merely show that the operation has grown to the size that it *does* support a managerial or executive position, meaning one where the majority of the duties are "managerial" or "executive" as defined above.[89] So the USCIS hopes to see evidence of significant growth in cash flow and customers consistent with the size of an enterprise employing a "manager" or "executive." It can also be helpful to show that the company has met the goals for the first year set forth in the business plan in the initial L-1 petition and has invested the sums called for in the plan.[90] In the case of many small businesses, it is not easy to meet this requirement, so plans and backup plans need to be made starting from even before the "new office" L-1 petition is filed.

5.3 DEPENDENTS IN L-2 STATUS

Spouses and minor children of L-1 nonimmigrants may hold L-2 status.[91] The status of an L-2 dependent is subject to the same period of admission and limitations as the principal L-1. If the L-1 principal is eligible to recapture time spent abroad, the L-2 dependents should be given an extension of stay up to the new expiration date of the L-1's stay, even if the L-2 dependents never depart the United States.[92]

The statute and regulations allow L-2 status only if the dependents are *accompanying* or *following to join* the L-1 principal.[93] USCIS may limit, deny or revoke on notice any stay for an L-2 dependent that is not primarily intended for the purpose of being with the L-1 principal. For example, L-2 status may be denied if the dependent intends to live full-time in the U.S. but the L-1 transferee will only visit the U.S. for occasional work.[94]

L-2 spouses, but not L-2 children, are eligible for employment.[95] Employment authorization is not incidental to status, so the L-2 spouse is required to apply for this benefit with USCIS on Form I-765, Application for Employment Authorization, with supporting documentation.[96] To work without authorization is a violation of status.

Also note that if the L-1 violates status, dependents are automatically considered by USCIS to be in violation of status.

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[89] 8 C.F.R. § 214.2(*l*)(3)(v).
[90] If the business has not grown to support an L-1A manager or executive, one option to consider is asking that the extension instead be granted for an L-1B specialized knowledge position.
[91] 8 C.F.R. § 214.1(a)(2).
[92] 8 C.F.R. § 214.2(*l*)(3)(iii)–(iv).
[93] AFM ch. 32.6(g).
[94] *Id.*; *see also* USCIS Memorandum, M. Aytes, "Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants" (Oct. 21, 2005) (hereinafter "Aytes Memorandum Oct. 2005"), *posted on* AILA InfoNet as Doc. # 05110363.
[95] INA § 214(c)(2)(E).
[96] For more details on L-2 employment authorization, *see* INS Memorandum, W. Yates, "Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determination on the Requisite Employment Abroad for L Blanket Petitions" (Feb. 22, 2002), *published on* AILA InfoNet at Doc. No. 02022832 (*posted* Feb. 28, 2002). The current USCIS position is that an L-2 spouse needs to apply for and obtain an employment authorization document (EAD) before starting to work. AILA Verification and Documentation Liaison Committee Joint Meeting with USCIS Verification Division and ICE Homeland Security Investigations (Nov. 6, 2014), AILA InfoNet Doc. No. 14120504. *But see Matter of Do Kyung Lee* (BIA Nov. 5, 2013).

5.4 B-1 Domestic Workers

In addition, an L-1 visa holder may be able to secure B-1 status for a domestic worker. The domestic worker must be coming to the U.S. only temporarily, have a residence in a foreign country, and have no intention of abandoning that residence. The domestic worker must have one year of experience in such a capacity. If he or she has not been in the L-1 visa holder's employ for one year, then the employment relationship must have begun prior to the B-1 application and the L-1 visa holder must have employed domestic workers for several years either year-round or seasonally. The L-1 visa holder and domestic worker must have an employment contract guaranteeing to pay the prevailing wage and free room and board and stating that the L-1 visa holder will be the domestic worker's only employer.

5.6 Withdrawal of the Petition

There is no requirement to report to USCIS the termination of an L-1 visa holder. However, the petitioner has the option to withdraw the L-1 petition at any time before the worker is admitted to the U.S. or granted change of status by USCIS.[97] If the petitioner withdraws the petition, the petition approval is automatically revoked by USCIS.[98] A withdrawal may not be retracted.[99]

5.7 Revocation

USCIS may revoke a petition at any time.[100] Revocation will be automatic if the petitioner withdraws the petition. A notice of intent to revoke may be issued by USCIS to the petitioner in a number of situations, including a finding that the transferee is no longer eligible for L-1 classification, or the statement of facts contained in the petition was not true and correct.[101] The petitioner is afforded 30 days to rebut the grounds for revocation.[102]

5.8 Other Terms and Conditions of L Status

Please see "Maintaining Status and Other Post-Admission Issues for Nonimmigrants" on our website at: http://www.fwhonglaw.com/eng/areas/imm/NIV/MaintainingStatus.doc.This article covers the following topics:

- Avoiding unauthorized employment
- The scope of authorized employment
- Social Security cards
- Employment eligibility verification

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[97] 8 C.F.R. § 103.2(b)(6).
[98] 8 C.F.R. § 214.2(*l*)(9)(ii).
[99] 8 C.F.R. § 103.2(b)(6).
[100] 8 C.F.R. §214.2(*l*)(9)(i).
[101] 8 C.F.R. §214.2(*l*)(9)(iii)(A)(1)–(6).
[102] 8 C.F.R. §214.2(*l*)(9)(iii)(B).

- Carrying evidence of alien registration
- Notifying DHS within 10 days if of an address change
- Keeping a valid, unexpired passport
- Avoiding criminal activity
- Fully and truthfully disclosing all information requested by the U.S. Department of Homeland Security (DHS)
- Do not let your status expire
- Driver's license
- Health insurance
- Departing the United States

6. Seeking Permanent Resident Status

An L-1 transferee who wishes to remain in the U.S. indefinitely should consider the option to apply for lawful permanent resident ("LPR") status.

As mentioned in Part 2.5, unlike most other visas, an L-1 transferee is not required to maintain a foreign residence. As a result, as long as the L-1 transferee is willing to abide by the terms of the visa, he or she may simultaneously pursue efforts to become an LPR in the U.S.

6.1 EB-1 Multinational Executive or Manager

One LPR option for L-1 transferees is the employment-based, first preference (EB-1) multinational executive or manager category. The basic requirements for this category are similar to L-1 status but not exactly the same:

- The foreign national must have been employed overseas by a firm or corporation for one of the last three years preceding the petition.[103]
- The overseas employment must have been in a *managerial or executive capacity* (specialized knowledge capacity is not enough).
- The foreign national must seek to enter the U.S to continue service with a parent, branch, subsidiary, or affiliate of the overseas company.

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[103] If you are working for the same organization in the U.S., you can meet the requirement by showing that for one of the last 3 years before you entered in valid nonimmigrant status you worked for the related foreign company. 8 C.F.R. § 204.5(j)(3)(i)(B).

- The petitioner must be a U.S. employer that has been *doing business for at least one year*.

- The U.S. company must prove its ability to pay the wage offered. This ability to pay must be proven for the period from when the immigrant petition is filed until the time a decision is made on the green card application. Copies of annual reports, federal tax returns, or audited financial statements must be submitted.[104] And in some cases profit/loss statements, bank account records, and personnel records may be relevant. A small business that has been operating at a loss over the previous year may have difficulty in satisfying the ability to pay standard, even if the business continues to operate and meet operating expenses, including payroll. According to a USCIS policy, a company should be considered as having the ability to pay if any one of the following circumstances exists during each relevant year[105]: (1) net income (without consideration of depreciation or other expenses) exceeds the wage offered[106]; (2) net current assets exceed the wage offered; or (3) credible, verifiable evidence shows that the U.S. company is employing the foreign national and has paid or currently is paying the wage offered.[107]

For this EB-1 category, the application procedure begins with filing a Form I-140, Immigrant Petition for Alien Worker.[108] It is permissible to file the I-140 concurrently with a Form I-485, Application to Adjust Status, for the foreign national, spouse, and children, but only if the *Visa Bulletin* shows that an immigrant visa is immediately available.[109] (Sometimes there can be a long wait, even years, between when the I-140 is filed and when an immigrant visa becomes immediately available. This is one important reason to consider beginning the green card application process early).

The advantages of concurrently filing the I-140 and I-485 are:

(1) The I-485 may be approved more quickly.

(2) Employment authorization and advance parole are available within 90 days of filing the I-485.

(3) If the foreign national doesn't file the I-485 and a waiting list forms, then he or she would be prevented from filing the I-485 until an immigrant visa becomes immediately available again. On the other hand, if the foreign national does file the I-485 then it will remain pending even if a waiting list forms, allowing the foreign national to remain in the U.S. as well as renew employment authorization and advance parole.

The disadvantage of filing the I-485 concurrently with the I-140 is that if the I-140 is denied, the I-485 will also be denied automatically, so the related legal fees and filing fees will have been spent.

6.2 Other Available LPR Classifications

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[104] 8 C.F.R. § 204.5(g)(2). An exemption is created a company with 100 or more employees. It may submit a statement by a financial officer establishing the ability to pay the wage offered. *Id.*
[105] If no primary evidence for the current year is available, provide an explanation, evidence from the prior year, and secondary evidence from the current year.
[106] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18 (and sometimes 19). Both figures are also shown on the company's balance sheet.
[107] William R. Yates, Assoc. Dir. for Ops., USCIS, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* (May 04, 2008).
[108]
[109] 8 C.F.R. § 245.2(a)(2)(i).

The EB-1 multinational manager category is only one of the available methods for applying for LPR status. For example, L-1B visa holders often apply through PERM labor certification.

7. Conclusion

In sum, the L-1 visa program can be a useful option for companies with sound business reasons to transfer qualified employees to the U.S.

Our firm is available to consult with companies and individuals regarding the L-1 visa program and other U.S. immigration options.