

ALERTS

Immigration Update: L-1 Visa Update

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Over the past three years, the L-1 Intracompany Transferee visa category has come under higher scrutiny from USCIS. Petitions for both L-1A Executive/Manager and L-1B Specialized Knowledge classifications continue to be extensively reviewed and the rate of denials for these petitions has steadily increased.

In addition USCIS has stepped up its L-1 site inspection program through which a USCIS officer or contractor visits the L-1 sponsoring employer's work location to confirm both the employer and the L-1 employee are meeting certain requirements of the L-1 visa. It is important for L-1 sponsoring employers to understand these recent trends and their potential impact.

Requests for Evidence & Denials:

A Request for Evidence (RFE) is issued by USCIS when a filed petition is lacking information required by the officer to adjudicate the petition. Recently there has been a marked increase in the number of RFEs issued on L-1A and L-1B petitions.

According to the Annual Report from the USCIS Ombudsman, nearly 50% of L-1B petitions received RFE requests in the first half of FY2014. Considering the total RFE rate in FY2013 for L-1B petitions was 46% this is a considerable increase. The L-1A RFE statistics prove similarly grim with the FY2013 rate at 40% where the first half of FY2014 is already at a 43% rate.

These onerous RFEs typically request in-depth evidence to support the petition; items such as: detailed organizational charts of both the US and overseas entity, payroll records proving the candidate has worked for the overseas entity for the required one year, and interior/exterior photos of all offices. It is also common for USCIS to request evidence supporting the essential nature of the L-1 candidate to the U.S. petitioner and a detailed explanation of how the US entity functioned up to this date without the L-1 candidate.

RFEs are being issued by the California Service Center at only slightly higher rates than the Vermont Service Center and increasingly, RFEs are followed by a denial of the L-1 petition.

Identifying the root cause of the increased denial rate is difficult. However, there are contributing factors like the imprecise regulatory guidance defining "specialized knowledge" as well as a lack of training for USCIS adjudicators on the standard of proof for L-1A and L-1B petitions.

USCIS Site Inspections

In response to the Department of Homeland Security's Office of Inspector General (OIG) August 2013 report

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titled "Implementation of L-1 Visa Regulations" USCIS has begun implementation of an L-1 site inspection program. The L-1 site inspection program is similar to the long-standing H-1B site inspection program and is being implemented in response to concerns over fraud and abuse in the L-1 visa program. In particular, potential abuses in the new L-1 office petitions and L-1 extensions. The OIG strongly recommended that USCIS make site visits a mandatory requirement before renewing L-1 new office petitions.

Utilizing either USCIS employees or outside contractors, USCIS is conducting post-adjudication approval site visits of L-1 petitioning companies who filed petitions with a USCIS Service Center. Site visits are normally conducted without advance notice, although some investigators will call first to ensure there are no security issues to accessing company facilities.

The purpose of the site inspection is two-fold: to ensure the petitioning company is a bona fide operating business entity; and that the foreign national is a legitimate employee performing the duties indicated in the petition. Some action items employers may want to consider in anticipation of a USCIS site visit:

- Designate someone at the company to interact with the investigator. This could be someone in HR, in-house counsel, or another employee who is familiar with the details of the foreign national's employment.
- Make other members of your staff (HR, Receptionist, etc.) aware of the possibility for such a visit. They should refer all questions from any government officials to the designated representative.
- Maintain a copy of petitions in an organized and readily accessible place. If the files are not routinely kept at the particular work site visited, the investigator may ask for a follow-up meeting to review the petition documents.
- Contact MVA immediately upon notification that a site visit will occur. Investigators will often work through counsel to obtain the necessary information.

It is important to remember that material changes to any L-1 petition must be noted to USCIS in an amended petition. A material change would be any information that directly affects the employee's work such as: transfer from one company to another within the same organization or changes in corporate relationships included in the approved petition.

Finally the site inspection program does not apply to L-1 employees who have processed their visa via a "Blanket Petition".

L-1 "Blanket" Petitions

An L-1 blanket petition is pre-approval from USCIS allowing certain companies to skip the L-1 petition filing process. In order to qualify for an L-1 blanket petition, the U.S. company must have:

- A U.S. office and have been doing business in the U.S. for at least one year;
- Three (3) or more domestic and foreign branches, subsidiaries or affiliates and are engaged in commercial trade or services; and
- Combined U.S. annual sales of \$25 million, U.S. workforce of 1,000, or received approval of at least 10 L-1 petitions in the last 12 months.

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Considering the current USCIS L-1 climate, it is critical for eligible companies to maintain and update their L-1 blanket approval. Having an approved L-1 blanket eliminates the need to file individual petitions with USCIS and allows the employee to apply for their L-1 visa directly at the U.S. Embassy in their home country or country of residence.