

SLIDE 1

Challenging Adjudication Standards for L Intracompany Transferees

ILW.com

July 9, 2009

SLIDE 2

Presenters

- Rodney Malpert, Moderator, Fragomen, Del Rey, Bernsen & Loewy, LLP,
rmalpert@fragomen.com
- Richard A. Gump, Law Offices of Richard A. Gump, Jr., rick@rickgump.com,
www.rickgump.com
- Romulo Guevara, Fragomen, Del Rey, Bernsen & Loewy, LLP,
rguevara@fragomen.com

SLIDE 3

How old is the L visa and why was it created in the first place?

- In 1970, Congress created the L visa to allow U.S. companies with international offices and operations as well as foreign-based companies with offices and operations in the U.S. to temporarily transfer senior executives, managers and employees with specialized knowledge.
- L-1 category has been used at some point by most of the top corporations.
- Many top tier executives and managers of the largest international corporations have been in the U.S. in L-1 status.

SLIDE 4

Roller coaster of interpretation and enforcement

- Modified several times since its creation to reflect evolving business practices, including more explicit definitions of qualifying capacities, specialized knowledge, etc.
- Discrepancies between Service Centers in reviewing cases and evidence.
- Prove your case and avoid fraud and RFEs by submitting the right evidence the first time!

SLIDE 5

L-1A Issues

- Functional Managers
- New Offices and Extensions
- Blanket Petitions
- RFEs
- Small vs. Large Businesses
- Changing from L-1B to L-1A

SLIDE 6

Functional Managers

- Successful L-1A petitions for functional managers will include:
 - Definition of the function in the context of the overall business.
 - Explanation why the function is essential.
 - Articulate and document managerial decisions made by the beneficiary.
 - Provide facts and evidence about the sponsoring employer's business.

SLIDE 7

Why was my L-1A Functional Manager case denied?

- No evidence of managerial decisions or activities.
- USCIS regulations are the only item in the employer support letter.
- The essential function is never defined or explained.
- Manager appears as an expert providing specialized knowledge.
- The essential function is a “one person show.”
- Beneficiary is described as performing primarily hands-on work related to the function with no or small subordinate staff.

SLIDE 8

New Offices and Extensions

An organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year is considered a “New Office.”

SLIDE 9

Blanket – is it easier to get an L approval by going to the consulate?

- Managers and executives, as well as specialized knowledge workers regarded as professionals who hold a bachelor's degree, may enter the US through a company's blanket petition.
- Are the consulates overseas being less restrictive than USCIS in reviewing Ls and issuing visas?

SLIDE 10

RFEs

- Must the qualifying L-1 employment be obtained prior to filing the I-129 or prior to admission in L status?
- USCIS frequently discovers “imposter petitions” where individuals claim to be associated with an existing company without the knowledge of that company and submit publicly available documents as evidence.

Small Businesses vs. Large Companies

- A higher level of scrutiny for small offices and businesses has emerged.
- Small businesses must show additional information such as evidence of sufficient resources to support the full time employees.
- It is helpful to include foreign and US payroll records, corporate certificates, financial statements, business plan, letters from the chamber of commerce, letters from foreign trade and tourist organizations; the volume of documentation is important.

Switching from L-1B to L-1A

- An L-1B may change to L-1A to receive the benefits of the seven year limit of stay if the petitioner has an approved I-129 petition for an executive or managerial position for at least six months.
- An L-1B must have the petition filed and approved prior to his four and a half year period of stay.

Current L-1B Adjudications

- Employment abroad in a qualifying organization during 1 year in the last 3 years prior to application
- Specialized Knowledge of what?
 - Company's products & services, etc
 - Its application in international markets
 - Or have an advanced level of knowledge of the processes & procedures of the company
- Straight petition = generally filed at USCIS Service Center
 - Exception: NAFTA Canadians apply at POE

Current L-1B Adjudications : IBM Case

- Unpublished AAO Case (July 2008) -IBM
 - Focused on legislative history from 1970 for proper "specialized knowledge" standard
 - Specialized knowledge not elaborated on in the Imm Act of 1970
 - House Report refers to executives, managers and "key employees"
 - House Report discusses L admissions "will not be large"
 - Class of persons in L visa will be narrow

Current L-1B Adjudications: IBM case (cont'd)

- AAO analyzed subsequent specialized knowledge interpretations including regulations, case law, and policy memos
- AAO also cites the L-1 Visa Reform Act of 2004, which focused on 3rd party sites
- States policy memos are NOT binding, unless they analyze a precedent decision
- Specialized knowledge eligibles are “narrowly drawn (i.e., “key employees”)
- IMMACT 1990 did not intend to liberalize L-1B, but intended determinations to be case-by-case, rather than a bright-line rule

Current L-1B Adjudications: IBM Case (cont'd)

- Citing Matter of Penner, 18 I &N Dec 49 (Comm. 1988), specialized knowledge must mean more than experienced or skilled to limit the pool of eligible FNs
- H-1B was designed for occupations that were in shortage, not so on the L-1 side
- “preponderance” is still the burden of proof

Current L-1B Adjudications: USCIS

- In light of the IBM case, what is USCIS looking for these days?
 - What types of workers are performing the same duties in the U.S.?
 - Does the FN have more specialized knowledge? How different is it from U.S. workers (1) in the company and (2) in the industry?
 - What are the wages of other individuals in the proffered position in the company?
 - Is FN getting paid more? If yes, USCIS leans toward a finding of specialized knowledge
 - NOTE: This is not a regulatory requirement

Corporate reorganization

- Changes in ownership can sever the connection between companies, the U.S. company and the foreign company.
- CIS requires evidence of any such change in relationships. See 8 CFR 214.2(l)(7)(i)(C).
- If the foreign company is no longer associated with the U.S. company due to a reorganization, the L employment will end.

Effect of Corporate Restructuring

- Primary Objective = maintain qualifying relationship between foreign entity and U.S. entity
- Also watch for changes in qualifying employment (manager/executive/specialized knowledge)

Types of Corporate Restructure

- Stock Acquisition
 - Purchaser buys outstanding share of stock from target multinational company through stock, cash or combination & new ownership results
 - Impact on Ls: If purchased entity functions as a subsidiary of purchaser, no breach in L-1
 - L amendment will depend on change in approved relationship

Types of Corporate Restructure (cont'd)

- Mergers
 - Typically involve acquisition of stock & ownership of assets and liabilities of target company
 - At transaction close, either the purchaser or target company ceases to exist or becomes part of the surviving company
 - L impact will depend on which entity survives
- Asset Purchases
 - Purchaser acquires part or substantially all target company's assets
 - Some or substantially all liabilities may also be acquired by purchaser
 - Both entities may survive the transaction
 - L impact on managers may be negative, if successor in interest fails

Types of Corporate Restructure (cont'd)

- Spin-Offs
 - Corporation divests itself of a division
 - Creates a subsidiary
 - Can retain it as subsidiary or get rid of it
 - Impact on Ls is centered on who controls the spun off entity
- Spin-Off Possibilities
 - New Subsidiary prior to close
 - Joint Venture
 - Affiliate Relationship
 - New Company with NO ties to Parent Company

Types of Corporate Restructure (cont'd)

- Other Restructure issues (spin-off +):
 - Matter of Chartier
 - Distinction with EB-1 Multinational Managers
 - Successor-in-interest
 - AC21

Issues Arising from Business Downturn

Layoffs

- Absent AC21 portability, work authorization options are more limited than for H-1Bs. Change of status to H-1B is quota subject and must be approved before employment begins.
- No qualification for multinational manager at next employer.
- There is no requirement to notify USCIS but some employers send a letter.

Hours Reductions

- Whether part-time employment for Ls is allowed is unclear in the written law, but practice has been to allow it if not too extreme.
- Whether amendment petition is needed is not well defined in the law, presumably a reduction of say 20 percent in hours and salary would not require an amendment.

Issues Arising from Business Downturn, Cont'd

Change in Managerial Duties

- Change from Personnel Manager to Functional Manager – if supervised employees are laid off and L-1A becomes a functional manager, an amended petition is not necessarily needed (INS memo by J. Hogan (10/22/92)).
- But if managerial duties are significantly diluted or unclear, seeking approval by an amendment petition is advisable.

Potential Legislation: Durbin-Grassley (S. 887)

- Imposes wage obligation for Ls employed for a “cumulative” period of more than one year. Must pay higher of prevailing wage, median wage in the area, or median wage for OES skill level 2.
- Imposes benefits obligation (unclear whether one year prerequisite). Must offer L employee same benefits (insurance, retirement plans, bonuses, non-cash compensation, stock options, etc.) as U.S. workers.
- Strict requirements for new offices.

Durbin-Grassley Highlights, Cont'd

Outplacement Restrictions

- May not employ an L-1B for cumulative period greater than one year if the employee is stationed primarily at a worksite of an employer other than the petitioner and its related entities (even if the petitioner will “control” the employee).

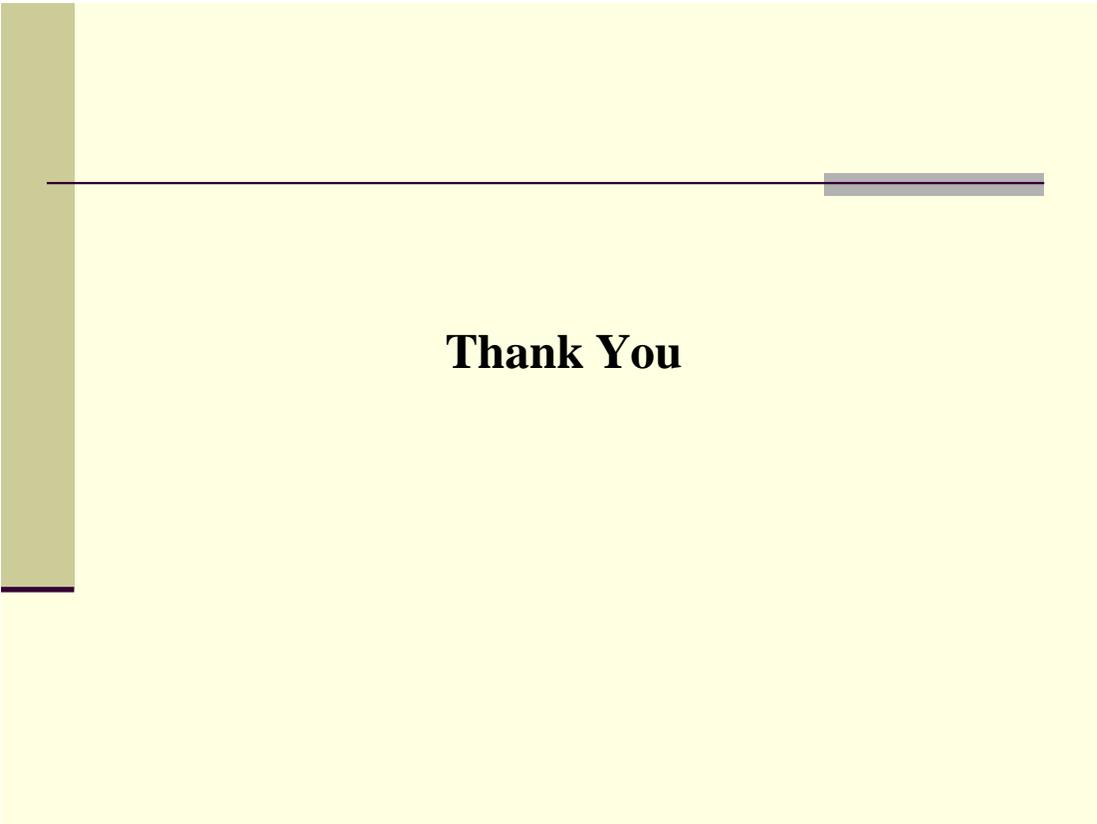
Unless Obtain a Waiver

- DHS may grant a waiver if:
 - No displacement of U.S. worker +/- 180 days from placement
 - Employee will not be controlled by the employer where the employee will be placed; and
 - The placement is in connection with the specialized knowledge and not just an arrangement to provide general labor.

Durbin Grassley Highlights, Cont'd

Increased Enforcement

- DHS would have authority to initiate investigations on its own.
- DHS required to conduct annual audit of at least 1 percent of L employers and all employers with more than 100 employees and 15 percent of whom are L employees.
- Monetary penalties for non-willful violations of up to \$2,000 and one year debarment from L use, and \$10,000/two years for willful violations.



Thank You