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The Visa Is A Key: Foreign Workers and Their Employers Must Play By the Rules or Face Penalties

Compliance and Ethics

Employment and Labor





CHEAT SHEET

- **A long wait.** Certain intracompany transfers can be accommodated with the L-1 visa, which is for people in a managerial, executive or specialized knowledge post for at least 12 months of the previous three years. Approvals under this program slowed after the 2008 economic crisis, and delays are often long.
- **Blanket statement.** Some employers with certain sales or workforce sizes in the United States may qualify for the Blanket L program, which expedites the process. An organization's approval lasts up to three years and can be extended.
- **Trade treaties.** E-1 and E-2 visas for supervisors and essential knowledge workers depend on the citizenship of both the employer and the foreign traveling worker. This class of visa was established to fulfill treaties between the United States and other countries on investment and trade.
- **Bureaucracy.** Both the L-1 and Blanket L programs require the involvement of the US Citizenship and Immigration Services. E-1 and E-2 visas only need consular approval.

In a globalized world, the capacity to swiftly mobilize personnel when needed in other areas of the world is critical for an organization to stay competitive.

Bringing staff from overseas to the United States, specifically, presents a challenge to in-house legal counsel since several certifications from different government agencies, abroad and in the United States, are needed. The stakes are high for individuals seeking various types of US authorizations. This type of immigration law requires a high level of expertise and experience, even more so for C-suite personnel or those with high technical skills.

In-house counsel must first determine if the petitions for a foreign workforce at the organization justify hiring an in-house lawyer to handle them, or if retaining highly qualified outside counsel is the best course of action.

To achieve this, close coordination with an organization's human resources and business development units will help in-house council trace an immigration strategy. Knowing the different types of personnel that need to be relocated will help map out a legal blueprint to obtain them.

In the United States, there are different types of visas for company transfers. The L-1 visa, for example, is available to certain intra-company transfers. Specifically, transferees who have worked in a managerial, executive or specialized knowledge position for at least 12 months during the past three years may be eligible for L-1 visa classification, provided they will be working in a managerial, executive or specialized knowledge position in the United States for a US employer that has a qualifying relationship with the transferee's foreign employer.

In order to apply for an L-1 visa, most transferees must obtain approval from the United States Citizen and Immigration Services (USCIS) of the employer's L-1 petition.

There are more expeditious ways to obtain an intra-company transfer approved.

Employees of companies identified on an approved Blanket L petition are eligible to apply for L-1 visas directly at a consulate without obtaining USCIS approval. Once a company obtains a Blanket L petition, the amount of time to transfer highly skilled professionals and the associated costs should be reduced substantially.

Equally important, companies that are identified on the Blanket L petition will be in a better position to transfer skilled professionals efficiently without exposing itself to potential liability under the United States Immigration & Nationality Act for sending workers to the United States without proper employment authorization. Companies have been able to reduce the amount of time it takes to transfer employees by 60 days or more, in most cases.

Requirements to obtain a Blanket L petition

In order to obtain an approved Blanket L petition, the petitioning company must meet the following requirements:

1. The petitioner and each of the entities identified in the Blanket L petition are engaged in commercial trade or services;
2. The petitioner has an office in the United States that has been doing business for at least one year; and
3. The petitioner has three or more domestic and foreign branches, subsidiaries or affiliates.

Additionally, the petitioner and other qualifying organizations must prove one of the following:

- a. US subsidiaries or affiliates have combined annual sales of at least \$2 million;
- b. US subsidiaries or affiliates have a workforce of at least one thousand employees; or
- c. US subsidiaries or affiliates have transferred at least ten L-1 workers to the United States during the past 12 months.

To request a Blanket L petition, a US company must submit a Petition for Nonimmigrant Worker (Form I-129) to USCIS, along with evidence that it meets requirements one through three above, and that it satisfies at least one of the requirements in a, b or c. USCIS will normally review the documents within 60 days of receipt. It is possible to expedite review of Blanket L petition by paying an additional fee of \$1,225 to the USCIS premium processing unit. Under the premium processing program, USCIS must review the petition within 15 days of receipt of the expedite request and fee payment.

USCIS should approve the Blanket L petition, initially for a period of three years. After the initial three years, the petitioner may request an extension of the Blanket L petition for an indefinite period of time.

Upon approval of the Blanket L petition, transferees who have worked for one of the companies identified in the approved Blanket L petition are eligible to apply for L visas directly at the consulate without obtaining an approval notice from USCIS identifying the employee as the beneficiary.

The L visa category is limited to US transfers for individuals who have worked for a subsidiary, parent, affiliate or branch office of the US employer for a period of at least twelve consecutive months during the three year period immediately prior to admission to the United States.

Other US visa statuses

For certain transferees who do not have one year of qualifying employment, it is possible to transfer them to the United States in E-1 or E-2 status. These visas are for supervisors and essential knowledge workers.

The E-1 and E-2 visa categories were established to give effect to treaties between the United States and foreign countries that provide for reciprocal benefits to nationals of each country who invest in the other country, or who conduct trade between the two countries. The application for E status can be made directly to a US consulate and no separate or additional application must be made to USCIS.

A key issue in the context of E visa applications is the citizenship of both the foreign traveler and the employer. To apply for an E-1 or E-2 visa, an applicant must hold citizenship in a country that has entered into treaty of trade and navigation with the United States and the company must have the same citizenship. The citizenship of a company will be determined by the nationality of its owners. Determining corporate citizenship becomes especially challenging to identify when there are multiple corporate layers and the company is publicly traded.

The H1-B visa process

The H1-B visa is available for professional employees who do not qualify for any of the other potential visas listed above. To qualify for an H1B, the position must be a “professional” position, defined by USCIS as a position for which a bachelor’s degree or its equivalent is normally required for entry. Additionally, the employee must possess a Bachelor’s degree or its equivalent in a field related to the position. The company must also agree to pay the employee the prevailing wage for the position in the intended area of employment.

USCIS announced April 7, 2015, that it had reached the congressionally mandated H-1B cap of 65,000 visas for fiscal year 2016, which begins October 1, 2015. Requests for the additional 20,000 visas to be bestowed under the advanced degree exemption (which allow individuals who attended US universities to apply for visas outside the cap) were also met.

The H-1B visa, much coveted by companies across the United States, allows a foreign national to work for a specific company for three years, with an additional three-year extension.

On its website, USCIS said this year it will use a computer-generated lottery to randomly select the petitions needed to meet the caps of 65,000 visas for the general category and 20,000 for the advanced degree exemption.

USCIS will first randomly select petitions for the advanced degree exemption. All unselected advanced degree petitions will become part of the random selection process for the 65,000 general limit. The agency will reject and return filing fees for all unselected cap-subject petitions that are not duplicate filings.

Compliance is key

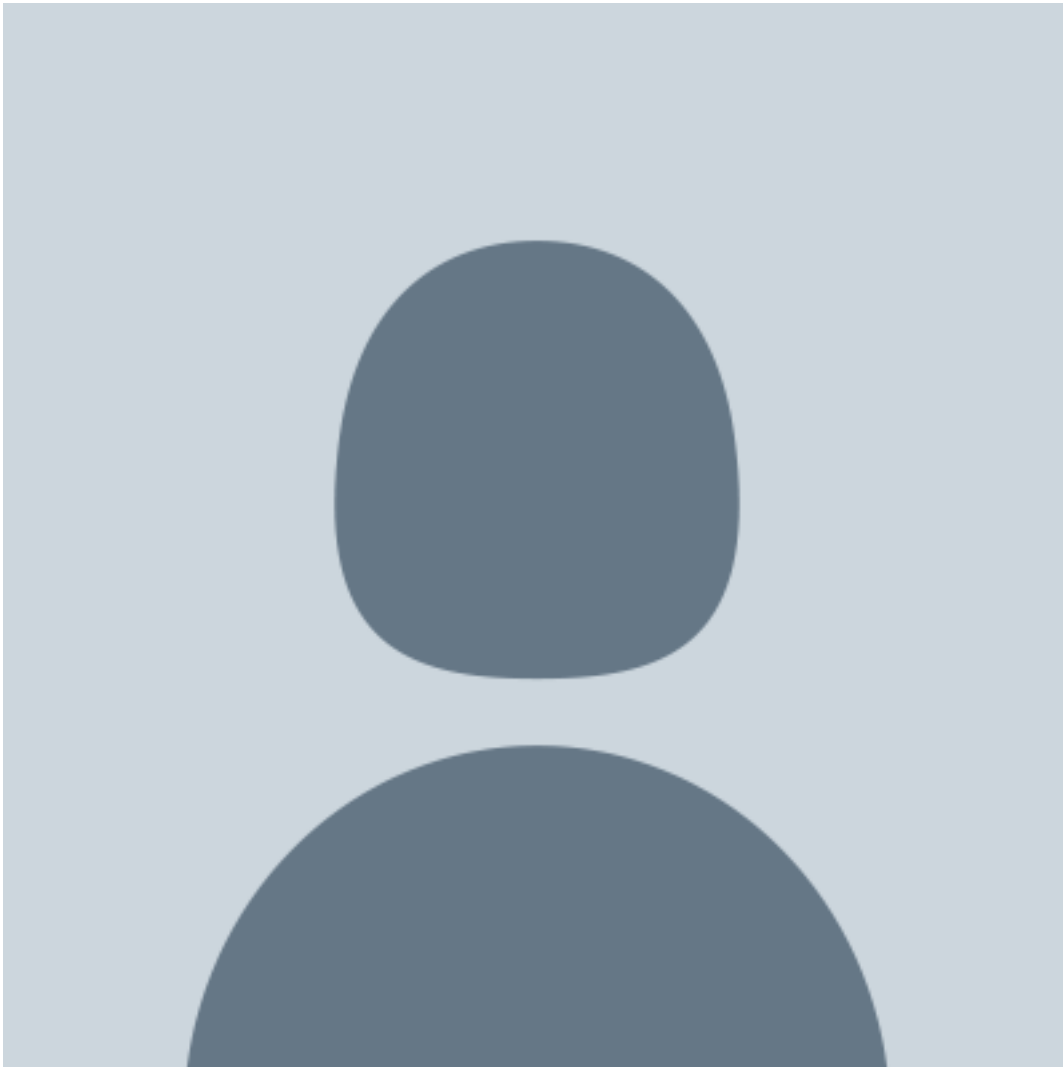
Employer violations of US immigration laws can undermine a multinational company’s ability compete in the global marketplace. The Obama administration has emphasized the importance of

compliance with regard to US immigration laws for all employers during the past six years.

When companies cross the line, the US government is ready to take all possible measures against them, including disbarment from the H-1B, L-1 and green card programs, significant monetary fines, and jail time for managers involved in the hiring of unauthorized workers.

Given the harsh penalties associated with immigration violations, employers must work with experienced immigration counsel to ensure adherence to the complex set of rules that govern the employment of foreign workers in the United States.

[Larissa Meli](#)

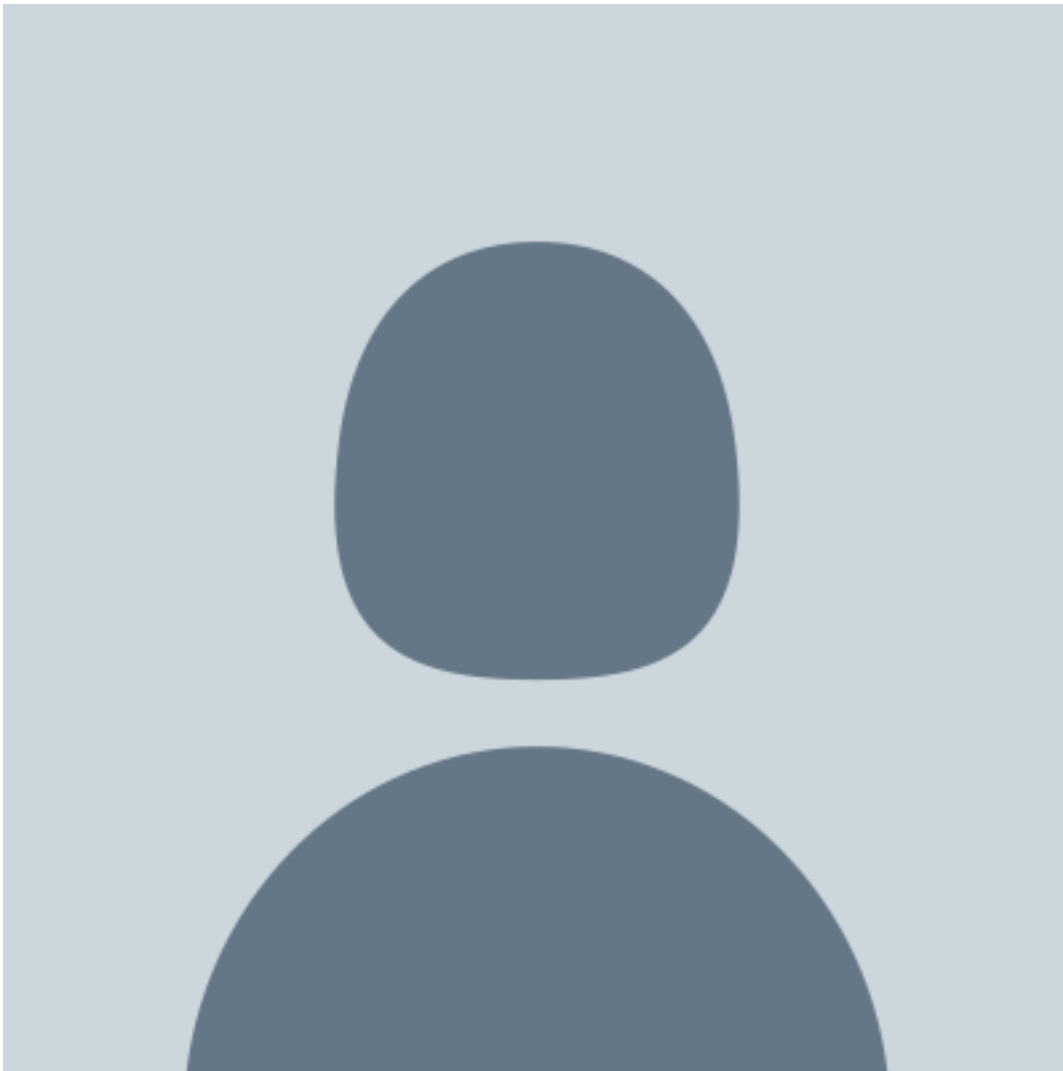


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