Treaty Trader/Investor—Intra-Company Visa Dilemma: Navigating the Consular and Service Center Roadblocks

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As immigration practitioners, we always analyze the best possible course of action for visa processing on behalf of our clients. When all the facts are in and clients are setting up new businesses in the United States, how do we best advise between the E and L visa classifications? There are the basic differences that immediately eliminate one or the other. We can go through the executive, managerial or specialized/essential capacity positions, but aside from the basics, what do attorneys need to know to get U.S. Citizenship and Immigration Services (USCIS) or a particular consulate to approve cases?

E-1/E-2 Visa Classification

The E treaty/trader visa classification is fairly straightforward. A national of a country with which the United States maintains a treaty of commerce and navigation who wants to go to the United States to: (1) carry on substantial trade, including trade in services or technology, principally between the United States and the treaty country; or (2) develop and direct the operations of an enterprise which the national has invested; or (3) invest a substantial amount of capital, may qualify for a nonimmigrant treaty trader or treaty investor visa.[1] Attorneys can find a list of participating countries that qualify for either the E-1, E-2, or both by visiting the Department of State's (DOS) website.[2]

[1] 9 *Foreign Affairs Manual* (FAM) 41.51.
[2] Department of State (DOS), Visas for Treaty Traders and Treaty Investors, *available at* http://travel.state.gov/visa/temp/ types/types_1273.html.

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However, over the last several years, we have noticed that consular posts increasingly scrutinize applications, causing considerable delays in processing for registration of corporate entities. In some instances, and at some posts, these delays can be upwards of six months or more, but processing times may vary without notice. There is nothing more frustrating than submitting an application seeking registration of an enterprise with the Treaty Visa Office to learn it wants additional information or documentation, or the documents do not conform to the format set forth by that particular post.

Therefore, depending on the facts or circumstances of a certain case, if the E visa is the classification chosen, then attorneys must first go to the respective U.S. consulate's website. Here, a wealth of information about how that post will consider the application appears. While this initial step may seem elementary, it provides with the most valuable information available. For example, the U.S. consulate in Toronto clearly says that the submission "must be organized in such a way that the reviewer can locate all of the relevant facts to make an adjudication within five to 10 minutes."[3] It also provides detailed instructions regarding (1) examples of the documents they want and (2) the way to present the documentation, including an exhibit index and exhibit tabs by category.[4] The key is to provide the detailed index of all documentation and tab everything according to their instructions. The U.S. consulate in Toronto

also says that it wants a concise, comprehensive narrative statement of all relevant facts you want to be considered, avoiding excessive citations to the Code of Federal Regulations and the *Foreign Affairs Manual*.[5]

[3] DOS, Consulate General of the United States, Vancouver, Treaty Trader and Investor Visas, *available at* http://vancouver.usconsulate.gov/visas/treaty-trader-and-investor-visas.html.
[4] *See* Consulate General of the United States, Toronto, Canada, Supporting Documentation for New Cases and Renewals, *available at* http://toronto.usconsulate.gov/visas/treaty-trader-visas/supporting-documentation-for-new-cases-and-renewals.html. The Consulate General in Vancouver follows the same practice, but is also engaged in a new pilot program for Mission Canada to accept E visa documentation at the time of interview. *See* Consulate General of the United States, Vancouver, Canada, Treaty Trader and Investor Visas, *available at* http://vancouver.usconsulate.gov/visas/treaty-trader-and-investor-visas.html.
[5] *See* Consulate General of the United States, Toronto, Canada, Supporting Documentation for New Cases and Renewals, *available at* http://toronto.usconsulate.gov/visas/treaty-trader-visas/supporting-documentation-for-new-cases-and-renewals.html.

In E visa processing, when making the decision between pursuing an L and E visa, attorneys should know the consulate they are dealing with, as well. Choosing between an L and an E visa at Frankfurt is quite different than at the U.S. consulate in London, where one might think twice at attempting an E visa. Considering the poor economy in the United States and abroad, there appears to be greater scrutiny of E visa applications. While missing information and documentation will always trigger a red flag, we have been seeing questions raised based on two major factors, substantiality and marginality, especially where there are implications that the economic downturn might create significantly more economic risk, hence viability.**[[Page 281]]**

E-1/E-2 Visa Registration—Is It Substantial?

Substantiality is one of the twin elements of an E visa registration, along with marginality. The showing plays out differently, depending on whether we are talking about an E-1 treaty trader visa, or an E-2 treaty investor visa.

E-1 Visa Context

To be registered as a treaty trader company, more than 50 percent of the total volume of international trade with all foreign country must be with the United States.[6] That level may be demonstrated through receipts, either on a dollar or quantity/volume basis, but the treaty trader must also demonstrate that the amount of trade is "substantial," a more amorphous and slippery standard.[7] The trade must involve transactions occurring continuously over time, even if each transaction is "relatively insignificant."[8]

[6] 9 FAM 41.51 N7.
[7] 9 FAM 41.51 N6.
[8] *Id*.

How do attorneys qualify a current or new small company as a treaty trader, demonstrating that the bi-lateral flow is substantial? Certainly sales contracts are one way to document this. The more clearly the contracts relate to a regular ongoing activity, the more likely they will suffice, *e.g.*, a requirements contract by such as company X, the foreign national treaty trader, that will supply to the U.S. purchaser, company Y, all of its needs for chemical Q from the date of the agreement to a date five years into the future, with a guaranteed minimum annual purchase of R liters at a maximum price per liter of S, scaled down over time in accordance with an attached appendix for volume discounts, and adjusted every six months for inflation. While dollar value is not in and of itself critical, the higher the dollar value of the contracts, the more likely the success. If the company is new and has only one contract, such as a requirements contract, at the outset, there ought to be a very strong business plan as to how the treaty trader intends to grow the business over the next five years, as otherwise, the officer is likely to conclude that there is no need for the visa.

In addition to contracts, the company can submit records of a history of previous import activity over time, using

whatever commercial documentation has been used during recent years, such as previous invoices, shipping documents, finance documents, bank records, among other things. The pattern of activity, again, the flow, is the critical showing. A number of small contracts can often demonstrate more than a very few larger ones. To sustain the small contracts and continue development requires a physical presence of personnel, an office, and support. The pattern of bilateral business activity with a number of small companies over time, with a regular, documented course of conduct can be very compelling, especially when coupled with the kinds of information found in a good marketing plan—identification of market, specific customers, penetration of markets over time, competition, etc.

E-2 Visa Context

In the context of the treaty investor case, substantiality is a bit of a slippery concept, but at the end of the day, the consular officer is looking for a reasonable likelihood "that **[[Page 282]]** the business invested in is not speculative, but is [likely to] be a successful enterprise."[9] Accordingly, a number of factors influence the conclusion that the investment is substantial, such as the business background and record of successful business decisions, the financial and other resources of the investor, the character of the invested funds (cash and/or assets vs. borrowed funds based on personal guarantee or recourse debt tied to personal assets, such as a second mortgage on a personal home,[10] with the ultimate conclusion that the investor is "at risk"[11] personally for the success or failure of the enterprise.

[9] 9 FAM 41.51 N10.1.
[10] 9 FAM 41.51 N8.1-2.
[11] 9 FAM 41.51 N8.1-2.

To help guide the decision process, the consuls have developed the concept of "proportionality," meaning that the amount invested and at risk is proportionately high relative to the cost of purchasing or creating the business.[12] Conceptually, there is a sliding scale, with more money required for smaller ventures.[13] While, these standards are general, investigate the level of strictness, especially for small enterprises or new enterprises, with which a specific post adheres regarding the higher levels of proportionality in the context of such businesses. When a treaty investor has a company valued or purchased at the lower end of the scale or a company requiring a lower amount of capital to start it, have more documentation to prove the viability of that enterprise.

[12] 9 FAM 41.51 N10.2.
[13] 9 FAM 41.51 N10.4.

"New Office" E Visas

These are often the most satisfying cases, as attorneys assist the client in developing their business model. With an existing business, the more successful the company's history, the less attorneys need to demonstrate.

With the new office, attorneys help build the bones of the business and flesh it out. To satisfy the standards for a new office, the first, somewhat tricky concept attorneys encounter is that of "investment" or "in the process of investing."[14] To meet either standard, there must be a showing that the funds have been irrevocably committed, thus creating the first element of "at risk."[15] This does not mean that if the company does not become registered and the visa does not issue, all of the initial funds are lost. However, it does mean that if the funds are committed to some specific end, then the funds will be distributed according to the commitment in the event the condition of company registration and visa are met. An example would be a lease, in the instance of a new company/office, or the purchase of an ongoing business where the investor is buying a business. Regarding a new business, the commitment to a lease is one significant example of satisfying the act of being "in the process of investing," but other elements must be present, recalling the substantiality showing, as well as the marginality test. **[[Page 283]]**

[14] 9 FAM 41.51 N8.1-3.
[15] 9 FAM 41.51 N8.1-3.

E-1/E-2 Visa Registration—Is It Marginal?

According to the FAM, "a marginal enterprise is an enterprise that does not have the present or future capacity to generate more than enough income to provide a minimal living for the treaty investor and his or her family. An enterprise that does not have the capacity to generate such income but that has a present or future capacity to make a significant economic contribution is not a marginal enterprise. The projected future capacity should generally be realizable within five years from the date the alien commences normal business activity of the enterprise."[16]

[16] 9 FAM 41.51 N11.

Whether in the context of an E-1 or an E-2 visa, with regard to marginality, what has long been the rule of thumb is that the investment cannot be solely to earn a living for the investor and his or her family.[17] Even the most discerning of U.S. consulates would think twice about approving an E-2 treaty investor application for an investor trying to establish a taco stand, or about approving an E-1 treaty trader visa for a trading company that is trying to establish a trading company that importing and selling miniature flags of the country from which the investment emanates. The point here is that the individual investor will have a more difficult time overcoming the marginality issue than a large corporate investor, but with the right information and documentation, the marginality issue can be successfully addressed.

[17] *Lauvik v. INS,* 910 F.2d 658, 661–62 (9th Cir. 1990).

If marginality is of concern, attorneys must develop the five-year plan. The five-year plan must detail the business's activities and for each year, building on the potential growth and business operations from the previous year. In this economy, the plan should include any and all possible sources of revenue that will help the enterprise grow exponentially. The plan should also address how the investment will address the following factors:

- Expanding job opportunities;
- Generating other sources of income (depending on the nature of the business);
- Not work within the enterprise as a skilled or unskilled worker; and
- Generating income that will be more than what would be considered as just earning a living.

While these factors are viewed in light of all the information and documentation provided, it is clear that marginality is becoming more of a reason to deny E-2 applications where there is little to disprove the sole investor is merely establishing a U.S. enterprise for the purpose of earning a living.

Working with a U.S. consulate clearly has its advantages as long as attorneys have the information needed to properly prepare the E-1/E-2 visa application. With most consulates, there is a real desire to get the application adjudicated, and for the most part, E visa officers are amenable to working with attorneys in addressing any issues raised in the review process, as long as the submission conforms to the standards noted on the respective consulate's website. **[[Page 284]]**

L-1 Visa Classification

While the U.S. consulates review E applications with stricter scrutiny, USCIS has, for the most part, made securing an L-1A visa and more importantly an L-1B much more difficult.

Overcoming Hurdles for the L-1 New Business

USCIS tends to review the new business L-1A visa with considerably less scrutiny because it will only be issued for one year, and the petitioning company must prove that it has conducted business enough to satisfy the USCIS

adjudicating officer that it deserves an extension for an additional two years. Nonetheless, the new business petition must still demonstrate its ongoing viability to warrant an approval.[18]

[18] *See* 8 Code of Federal Regulations (CFR) §214.2(*l*)(14)(ii) (enumerating the evidence required for renewal of a "new office" L-1 petition after the first year of operations).

As with any new L-1 business, one of the first documents to present is a strong business plan, recommending that the client retain a good certified public accountant (CPA). A good plan should analyze:

1. the local market for your client's business;
2. the target customer/client;
3. the competition in sales of the product or service;
4. the relative sizes of the businesses; and
5. the amount of capitalization required for comparable-sized start-up business of a similar nature, among other factors.

The business plan will also provide realistic business projections, sales and dollar volumes for the next three to five years, and a balance sheet. The business plan will also help the client establish a successful business with the necessary capital. The CPA can advise the amount necessary for the investment, first year's operation, as well as the level of staff necessary to begin operations.

The lease is another major element of a new office visa application. Having a completed lease, or a substantial deposit payment against the lease, is further evidence of an investment. The lease can contain an escrow clause making the lease irrevocable on the issuance of the required L-1 visa. Such a mechanism normally satisfies the showing required for being in the act of investing in a new office start-up. Photos of the premises and the floor plan can supplement that document.

After determining the start-up and operation costs for one year, documenting the transfer of the necessary assets and funds to the United States is the next step. The funds can be held in the bank under an escrow agreement, again conditioned on the company visa registration and issuance of the investor's visa.[19] Likewise, transfer of equipment and intellectual property (IP) can be similarly handled; document the availability of required IP licenses, where needed to operate the business. Additionally, obtain the tax ID number and the relevant local, state and federal licenses and registrations, depending on the nature and location of the business. Depending on the size and nature of the business, this **[[Page 285]]** may involve copyright, trademark, and multi-state corporate registrations. Attorneys should review the USCIS Request for Evidence (RFE) templates that are available on AILA InfoNet.[20] These templates will help attorneys understand the documents required to file a new office L visa.

[19] 9 FAM 41.51 N8.1-3.
[20] U.S. Citizenship and Immigration Services (USCIS) Draft [Request for Evidence] RFE Template for Extension of New Office L-1As, *published on* AILA InfoNet at Doc. No. 12040457 (*posted* Apr. 4, 2012).

L-1A Executive/Manager

The L-1A visa allows the admission of multinational executives and managers, as well as individuals with specialized knowledge.[21] Executives are beneficiaries who primarily: (1) direct the management of the organization or a major component or function; (2) establish goals and policies; (3) exercise wide latitude in discretionary decision-making; and (4) receive only general supervision from higher level executives, board of directors or stockholders.[22] Managers: (1) oversee the organization or a subdivision; (2) supervise the work of other supervisory, professional or managerial employees or manage an essential function within the organization or subdivision of the organization; (3) have the authority to hire and fire or recommend those, as well as perform other

personnel actions; and (4) exercise discretion over the daily operations of the activity or function for which they have authority.[23]

[21] Immigration and Nationality Act (INA) §101(a)(15)(L); 8 CFR§214.2(*l*)(1)(i).
[22] INA §101(a)(44)(B), 8 CFR§214.2(*l*)(1)(ii)(C).
[23] INA §101(a)(44)(A), 8 CFR§214.2(*l*)(1)(ii)(B).

L-1A RFEs

The feelings of frustration in dealing with USCIS have risen to the surface once again with the recent outbreak of RFEs on almost every L-1A or L-1B case to prove the aforementioned classifications, whether it is an extension or a new filing. It is not uncommon to file an L-1 petition and receive a six-page RFE requesting everything that attorneys have submitted already submitted and more.

The petitioner must prove that the beneficiary primarily performs these specified responsibilities and does not spend a majority of their time on day-to-day functions.[24]

[24] *Champion World, Inc. v. INS,* 940 F.2d 1533 (Table), 1991 W: 144470 (9th Cir. 1991).

According to recent RFEs, a petitioner's claims that the beneficiary manages a business does not necessarily establish eligibility for classification as an intra-company transferee in a managerial or executive capacity. The petition must establish that the majority of the beneficiary's duties will be primarily directing the management of the organization. To this end, USCIS has been requiring, in extreme detail, the daily activities of the beneficiary, including the percentage of time required for each activity, to whom the beneficiary reports while accomplishing that activity, and the title and position of each person that the beneficiary interacts with while accomplishing each task. For petitioners with hundreds of employees, this can be extremely burdensome, so this should be addressed in the employer's response. Additionally, provide a more detailed description of the beneficiary's duties in the United States. The duties must include the percentage of time the beneficiary will spend on each of the noted duties. Be careful **[[Page 286]]** when detailing the percentage of time spent on the duties as denials are noting that the beneficiaries are not spending enough time on managerial activities.

The agency has also requested detailed statements noting managerial hierarchy and staffing levels. Further requests require even résumés and salary information for each employee. Recent RFEs have also sought a detailed job description and education details for all employees under the beneficiary's supervision. To meet these requests, provide detailed copies of a U.S. company's line and block organization chart, including names of all executives, managers, supervisors, and number of employees within each department or subdivision. The chart should clearly define the beneficiary's position and list all employees under the beneficiary's supervision by name and job title. While USCIS considers staffing in adjudicating L-1 petitions, it is not supposed to be the only factor. Pursuant to Immigration and Nationality Act (INA) §101(a)(44)(C), staffing levels are a relevant factor in considering the managerial and/or executive position in question: "If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account 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. 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." Then, why are recent RFEs requesting extensive employee lists and organization charts? Therefore, it appears that staffing levels are the most important factor in L-1A adjudications by USCIS.

L-1B Specialized Knowledge

"Specialized knowledge" is knowledge possessed by an individual of the petitioner's product, service, research, equipment, techniques, management, or other interests and its application to international markets, or an advanced level of knowledge in the organizations' processes and procedures.[25]

[25] 8 CFR §214.2(*l*)(1)(ii)(D).

L and E Specialized Knowledge/Essential Skills Comparison

These particular visa classifications have come under severe scrutiny by USCIS in L petition adjudications and are also being reviewed closely by the consular officers in the adjudication of E visas.

As with any such sponsorship, demonstrating specialized skills and the need for the skill is critical.[26] But, unlike the L-1B visa, the consular officer, while weighing these two criteria, is guided by a broader view of both skills and needs. To this end, even a skilled worker in a job category for which, in the long run there, may be ample U.S. workers available can qualify for the short run. The employer will need to demonstrate that in a start-up situation, the employee may nonetheless be treated as essential because of "familiarity with the overseas operations."[27] The question then becomes how long can the sponsored employee remain employed through the E-2 visa, specialty worker status, as opposed to whether the employee can be essential in this context. Accordingly, it is **[[Page 287]]** necessary to determine the time for which the overseas employee will be needed. Also, an essential employee need not have previously worked for the employer overseas, but has a skill set that is essential to the employer's "business needs."[28]

[26] 9 FAM 41.51 N14.3(a).
[27] 9 FAM 41.51 N14.3-3.
[28] 9 FAM 41.51 N14.3-4.

While any foreign national from the treaty country might qualify for essential worker status, the employer still must demonstrate: (1) the prospective employee's expertise in the specialty; (2) the uniqueness of the skill set; (3) the function to be performed, the reasonableness of the salary; (4) given the level of expertise; and (5) the general and local unavailability of such skills.[29]

[29] 9 FAM 41.51 N14.3-2.

In these rough economic times, attorneys might also expect that unemployment in specific industries might influence the consular officer's decision. Therefore, attorneys can help better distinguish the characteristics of the prospective specialty worker among others in the applicant pool, as well as make sharper distinctions between long-term vs. short-term needs. A shorter period may be approvable for a skill set where the training of employees can vitiate a long-term need for overseas employees in the specialty category. However, attorneys may qualify a prospective employee for a longer stay in the United States if the person is a highly-skilled employee who is familiar with the employer's business, and can supervise technicians and participate in ongoing product development, improvement, and, maintenance.[30]

[30] The FAM sites the case of *Matter of Walsh and Pollard*, 20 I&N Dec. 60 (BIA 1988), as supporting the proposition that some personnel, because of the enduring nature of the employees' activities and the constant need to manage ongoing change in the company's operations, may require a need for the specific services for the indefinite future, based on their role and the long-term institutional learning process as they perform their services. Such situations define in part the specific employee's essential worker status, as required for the company's success.

L-1B RFEs

The enactment of the 2004 L-1 Visa Reform Act[31] contributed to the increase in the rate of L-1B RFEs and denials. The Act focused on stemming the placement of L-1B workers at a third-party worksite that are not under the supervision and control of the actual L-1 petitioner. The third-party worksite issue is seen as a way for employers to circumvent safeguards place by the Department of Labor on wage requirements with the H-1B program. The Act also rolled back the provision permitting blanket petition beneficiaries with only six months of employment abroad to qualify for L-1 classification, and included the added measure of a $500 anti-fraud fee.[32] Since that time, and with the current economic climate, the focus of third-party worksites and greater restrictions on employing foreign

nationals in the United States has spread to the H-1B context, as well.[33] A recent National Foundation for Foreign Policy brief confirmed the **[[Page 288]]** dramatic increase in denials of H-1Bs and L-1s, despite no change in the law or regulations between 2008 and 2011.[34]

[31] L-1 Visa Reform Act, Pub. L. No. 108-447, Div. J, Title IV (Dec. 8, 2004), amending INA §214(c)(2)(A).
[32] *Id.*
[33] USCIS Memorandum, D. Neufeld, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" (Jan. 8, 2010), *published on* AILA InfoNet at Doc. No. 10011363 (*posted* Jan. 13, 2010) (describing the current focus of the service centers on the employment of a foreign worker in the United States).
[34] National Foundation for Foreign Policy, "Analysis: Data Reveal High Denial Rates for L-1 and H-1B Petitions at U.S. Citizenship and Immigration Services" (February 2012), *available at* www.nfap.com/pdf/NFAP_Policy_Brief.USCIS_and_Denial_Rates_of_L1_and_H 1B_Petitions.February2012.pdf, at 1.

In evaluating applications, USCIS focuses not only on the knowledge possessed by the beneficiary, but whether that knowledge is broadly available throughout the company and whether it is easy to train someone to achieve that level of knowledge.[35] Consequently, adjudicating officers set limits to the definition of "specialized" and issue broad RFEs, or even deny L-1B petitions.[36]

[35] Legacy INS Memorandum, J. Puleo, "Interpretation of Specialized Knowledge" (Mar. 9, 1994), *published on* AILA InfoNet at Doc. No. 01052171 (*posted* May 21, 2001).
[36] *See* unpublished AAO decision in 2008. Although USCIS claims the use of unpublished AAO decisions by adjudicators isn't merited and is not binding, it still provides a peek into the mindset of adjudicators at the AAO and what we may expect in the near future when appealing an L-1B denial. AILA/USCIS Liaison Committee, Q&A (Oct. 27, 2009), *published on* AILA InfoNet at Doc. No. 09110664 (*posted* Nov. 6, 2009), at 7–8.

In light of stringent adjudications, the petitioner should prove that the L-1B beneficiary's knowledge is specialized or advanced, and different from knowledge generally available in the industry.[37] Evidence of training manuals, training sessions, and projects that provided the specialized skills can achieve this.

[37] *See* Legacy INS Memorandum, F. Ohata, "Interpretation of Specialized Knowledge" (Dec. 20, 2002), *published on* AILA InfoNet at Doc. No. 03020548 (*posted* Feb. 5, 2003).

Beneficiary's Knowledge of Company Products

Where specialized knowledge is of a company product, the knowledge must be "noteworthy or uncommon."[38] Establishing the complexity of the product itself makes it easier to show how the knowledge possessed by the beneficiary contributes to the success of the organization and warrants his or her transfer to the United States.[39] It is also helpful to note how long it would take to train a U.S. worker, who is minimally qualified for the position, but lacks the specialized knowledge. If the petitioner would need substantial resources to train a replacement for the already-trained intra-company transferee, then this would strengthen the claim that the beneficiary's knowledge is specialized. Note, however, that although USCIS is claiming that the knowledge need not be proprietary or unique, petitioners who can show that the knowledge possessed by the beneficiary is indeed, proprietary and unique, in addition to being "specialized" and "advanced," have a better chance at approval. **[[Page 289]]**

[38] *Id.*
[39] For an excellent example and breakdown of the nuts and bolts of evidence to be submitted in support of an L-1B petition, see K. Hodkinson, *et al*., "It's Always Darkest Before the Dawn: Getting a Grip on Recent Challenges to L-1 Eligibility," *Immigration & Nationality Law Handbook* 273 (AILA 2009–10 Ed.).

Beneficiary's Knowledge of Company Processes and Procedures

Where the specialized knowledge is of a company's processes and procedures, the beneficiary's knowledge must be "advanced."[40] This means that the knowledge enhances the employer's competitiveness in the marketplace.[41] Here, attorneys should prove the manner in which the beneficiary gained the knowledge and the length of time it took. Use company's literature, website, printouts, product release information, articles, among other things, to show that the knowledge is difficult to impart to a new hire. Also, explain how the beneficiary strengthened the employer's productivity, competitiveness, image, or financial position using knowledge that was gained only through extensive previous experience with that employer.

[40] *See* Legacy INS Memorandum, F. Ohata, "Interpretation of Specialized Knowledge" (Dec. 20, 2002), *published on* AILA InfoNet at Doc. No. 03020548 (*posted* Feb. 5, 2003).
[41] Legacy INS Memorandum, R. Norton, "Interpretation of Specialized Knowledge" (Oct. 27, 1998), *reprinted in* 43 *Interpreter Releases* 1170, 1194 (Nov. 7, 1988).

Beneficiary's Knowledge of Company's Position in International Markets

The beneficiary may also possess specialized knowledge if he or she is uniquely qualified to contribute to the U.S. employer's knowledge of foreign operating conditions.[42] Here, show that the beneficiary has complex knowledge that contributes to the uninterrupted operation of the business and is unavailable in the industry in general.[43]

[42] *Id.*
[43] USCIS Memorandum, F. Ohata, "Interpretation of Specialized Knowledge for Chefs and Specialty Cooks Seeking L1-B Status" (Sept. 4, 2004), *published on* AILA InfoNet at Doc. No. 04091666 (*posted* Sept. 16, 2004).

What Options Do I Have if the L-1B Petition Is Denied?

An appeal on an L-1B denial does not leave much room for an employer to consider bringing the beneficiary to the United States in a timely manner. Therefore, the employer may consider exploring alternate visa categories.

L-1 Blanket Petitions

The L-1 blanket petition[44] permits companies to secure a blanket petition if the petitioner has been doing business in the United States for one year[45] and has three or more domestic or foreign branches, subsidiaries, or affiliates that are engaged in commercial trade or services.[46] Also, the petitioner has a combined U.S. annual sales of $25 million, a the petitioner's U.S. workforce with 1,000 or more employees, or has received approvals of at least 10 L petitions in the 12 months preceding the filing of the blanket petition.[47]

[44] 8 CFR §214.2(*l*)(4).
[45] 8CFR §214.2(*l*)(4)(i)(B).
[46] 8CFR §214.2(*l*)(4)(i)(C).
[47] 8CFR §214.2(*l*)(4)(i)(D).
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Processing L Blanket Petitions at U.S. Consulates

A USCIS service center receives the Form I-129S and supporting documents. The application is initially approved for three years and may be extended indefinitely.[48] It remains valid as long as the qualifying organization continues to do business in the United States and abroad on substantially the same terms as those specified in the original petition. Once the blanket L-1 petition is approved by the USCIS service center with jurisdiction over the company's U.S. headquarters, the original approval notice and a copy of the full petition is sent to the U.S. consulate with the initial visa application. The initial consular filing is usually done at the consulate where the company's foreign parent or main foreign subsidiary is located, but this is more a matter of administrative convenience to the company than an actual DOS requirement. Duplicate original Form I-797 approval notices for the blanket petition may be requested

from USCIS by any U.S. consulate that accepts jurisdiction over a beneficiary seeking issuance of a visa or by the petitioner. Normally, consulates will accept the case of a beneficiary who has a residence within their jurisdiction.

[48] 8 CFR §214.2(*l*)(14)(iii)(A); Legacy INS Memorandum, T. Cook, "L-1 Blanket Petitions" *published on* AILA InfoNet at Doc. No. 01022003 (*posted* Feb. 20, 2001).

U.S. consulates are scrutinizing blanket cases to ensure that the activities undertaken in the United States adhere to the same strict scrutiny being undertaken by the USCIS service centers. The L-1 applicant must have a photocopy of the blanket petition approval notice to submit to the consulate, along with the individual visa petition, Form I-129S, a visa application form, fees, and supporting documentation. Blanket L-1B applicants should have a bachelor's degree or equivalent in order to proceed. Policies vary from consulate to consulate as to what will constitute the equivalent of a bachelor's degree. Some will accept education and experience equivalencies and others will not.

A recent review of cases have shown that U.S. consulates are denying L blanket petitions and requesting applicants file individual petitions with USCIS. Specifically, these types of denials are routinely occurring in India. As of December 1, 2011 the U.S. consulate general in Chennai is the sole acceptance and processing center in the country for issuance of all blanket L category visas to the United States from India. The U. S. embassy will no longer review L Blanket visas from New Delhi, Mumbai, Kolkata, and Hyderabad.

The new processing procedures will not affect the spouses and children of L-1 visa holders; they and individual L1B and L1A visa applicants may still be processed at any U.S. consular section in India.

Conclusion

The L and E visa classifications are similar in scope, but not so in the adjudication process. Therefore, when considering either of these classifications, research all relevant factors that would make your client's application a successful one. **[[Page 291]]**