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# Business Immigration

***Summer 2004*** ***An Update***

## *The L Trap - Using the L in Lieu of an H*

**In this Issue:**



With the impending H-1B cap, clients have been interested in options to bring professional workers to the U.S. One solution is, of course, the L visa option. However, here are a few things you need to be aware of about the L visa process.

Unfortunately, despite the many opportunities for job creation that the L visa presents, some companies believe the L visa can also be an effective means of circumventing the cap placed on H-1B visas…especially when the allotment runs out as it did earlier this year. When used moderately, the L visa can prove to be an asset. However, here are a few things to be considered.

The L visa has two categories under which an existing employer or subsidiary of the employer may apply: the L-1A is for executive or managerial positions and the L-1B is for employees who possess specialized or advanced knowledge about the particular company. An L visa holder must work under the supervision of the employer or a subsidiary of the employer for at least one of the three years preceding the petition and they must be under the supervision of the employer or a subsidiary while working in the United States. The L visa holder may apply for permanent residence while in L visa status.

By contrast, the H-1B is for nonimmigrant aliens who are coming into the United States to work in a specialty occupation for which there are no or a lack of U.S. workers. The H-1B worker must be paid the prevailing wage of the industry and they are free to move to different organizations so long as that company files an H-1B petition and it is approved. In addition, a Labor Condition Application (LCA), attesting to payment of prevailing wages, employment terms, and employment conditions must be filed with and approved by the Department of Labor.

Because of the relatively few requirements for an L visa, and the lack of a cap placed on the number of L visas issued during a fiscal year, many companies turn to the L visa, especially the L-1B category, as an acceptable alternative to the H-1B. Consulates are aware of this fact and rigorously strive to eliminate any misuse.

When appearing at a Consulate for the Visa, the H-1B petition holder must demonstrate, to the satisfaction

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of the consular officer, that they have immediate work available in the U.S. for the time designated on the H-1B petition and that they have the required training for the *specialty occupation* position they were hired to fill.

The procedure for obtaining an L visa is more rigorous. The L-1A petition holder must be able to respond to questions that a multinational executive or manager would normally be expected to answer. These include detailed questions about the company's finances, their international contacts, and/or products or services. The L-1B petition holder may have to go into detail about the specialized or advanced knowledge they have about the company and its relevance to the United States entity. There are certainly questions designed to determine if the holder is merely in possession of knowledge gained through a degree-granting program or work experience or whether the knowledge comes from the alien's experience at the sponsoring company regarding the company's, products, techniques, services, etc. If the L petition holder is unable to answer the questions posed to the satisfaction of the consular officer, the request for issuance of the visa may be denied.

**"Consulates are aware of this fact and rigorously strive to eliminate any misuse."**

Denial of an L visa not only affects the alien it also affects the U.S. based entity that filed the petition, not to mention the effect it is likely to have on the domestic company. The consulate may become suspicious if they believe L visa petitions are being used in lieu of the proper H-1B. For the sponsoring organization, the suspicion may lead to denial of legitimate L visa requests in the future. The consulate also notifies the USCIS of improper use of the L visa, and denial of subsequent H-1B petitions is a possibility. The alien may also face denials in the future for other immigrant and non-immigrant petitions. In essence, the sponsoring organization and the alien will be blacklisted and subject to intense scrutiny over and above the scrutiny present in this post 9/11 world.

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In short, a company interested in sponsoring employees to come to the United States must ensure they are sponsoring them under the correct statutory framework. We urge employers to consult with our office [***info@kidambi.com***] before plunging headlong into an L visa quagmire from which they may never emerge.

## DOL Backlog Reduction Program

According to the Department of Labor, an estimated 236,000 applications were filed to meet the deadline of April 30, 2001, at a time when less than 100,000 applications were filed in an entire year. At the start of April 2003, over 280,000 permanent labor certification applications were in the SWA processing queues throughout the nation, with another 30,000 applications in the various ETA Regional Office queues. To address the backlog, the Employment and Training Administration [ETA] funded a study to identify strategic options and estimate costs. The study recommended establishing centralized processing centers to achieve the economies of scale inherent in processing large numbers of applications in one location and in consolidating the functions currently performed separately by the SWAs and the ETA Regional Offices.

Accordingly, a new National Certifying Officer (Chief, Division of Foreign Labor Certification) will be appointed. At the discretion of this NCO, SWAs and ETA Regional Offices would transfer pending labor certification applications to centralized processing centers for completion of processing. The centralized processing centers will perform the required functions of the SWAs and ETA Regional Certifying Officers, consolidating steps now performed separately by the SWAs and the ETA Regional Offices. The extent of centralized processing and the speed with which the current backlog will be reduced may vary based upon program priorities. An interim rule implementing these changes has already been issued. *See* **Federal Register** / Vol. 69, No. 139 / Wednesday, July 21, 2004. **However, it is unclear as to how the DOL will implement the actual backlog reduction program.**