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The Honorable Thomas R. Nides  
Deputy Secretary of State  
Office of the Secretary  
U.S. Department of State  
Harry S. Truman Building  
2201 C Street, NW  
Room 7240  
Washington, DC 20520

Re: Dialogue with business community regarding L-1B legal and policy issues

Dear Deputy Secretary Nides:

Thank you for reaching out to the Chamber to engage in dialogue with the business community regarding L-1B visa issues. We welcome the opportunity to work with the Department to ensure uniform and fair visa processing while facilitating the legitimate movement of international personnel to meet the needs of responsible employers.

Safeguarding the accuracy and impartiality of immigration benefits adjudications is and should continue to be a key concern for the business community. We realize that businesses need to be willing to take steps to protect the integrity of our nation's immigration system. We appreciate, of course, that your Department and sister agencies are likewise keenly aware of the significance of avoiding abuse of the immigration system. The Chamber and our members also know that when companies in the U.S. are unable to fill their needs here with workers possessing the right skill sets, job creation and job retention in the U.S. is negatively impacted. The L-1B visa category is one tool that multinational companies have at their disposal to ensure that skill sets internal to the company can be deployed in the U.S. in a timely fashion. However, unless L-1B adjudications are uniform, as well as aligned with the controlling legal standards, companies cannot effectively utilize the option of an intracompany transfer of advanced or specialized staff that the law provides.

We want to underscore that our members look at visa and immigration issues holistically and the issue of problems regarding L-1B adjudications relates to adjudications at both USCIS as well as the Department's consular posts. As you know, it is USCIS regulation and USCIS guidance that by law implement Congressional intent in the L-1B visa category, while the State Department plays a critical role in identifying which L-1B

visa applicants are “clearly approvable” compatible with USCIS’s policies. Thus, both agencies are directly involved in the L-1B area. In order to ensure the consistency that the business community needs, a cooperative, interagency approach between the Department’s consular posts and USCIS is indispensable.

You shared information with us regarding visa issuance at consular posts in India for the first three quarters of FY 2012. Your view, tied to the information you shared, is that current overall approval rates for L-1B visa applications in India should be satisfactory for product companies. You did note that there was a marked difference in L-1B issuance rates for professional services firms. In response, we have endeavored to provide the Department useful feedback regarding next steps and the context of why the business community began the year asking for improvements regarding L-1B adjudications.

It should be emphasized that, while the information you provided for the limited time and location covered is useful, it tells us nothing about the denial or approval of petitions at USCIS, which of course is also an integral part of the overall legal process companies must navigate to secure, and extend, the authority to employ an L-1B worker. It also does not address visa issuance at the Department’s consular posts in countries other than India, where businesses also maintain significant design, development or other functional centers.

## FEEDBACK FROM BUSINESSES

We have been able to assemble information from 84 different businesses regarding their experiences with the L-1B visa category and have a few takeaways we’d like to share with the Department, to continue the dialogue on the important subject of how multinational companies utilize the L-1B visa category to manage their global talent internal to their company.

We assembled information from what we think is a useful cross-section of businesses that utilize the L-1B category. The company description for the 84 businesses may be summarized as follows with regard to size, industry, headquarters location, interaction with State and USCIS on L-1B requests, and research or design center locations:

<i>Company description in terms of industry</i>	Administrative Headquarters Location				
	Europe	Asia (not India or China)	U.S.	Total	Percent
Biomedical	1	0	4	5	6.0
Consumer goods	0	1	6	7	8.3
Financial	1	0	5	6	7.1
Computing technology	1	1	14	16	19.1
Equipment and heavy manufacturing	7	1	14	22	26.2
Professional services	1	0	11	12	14.3
Accommodation and food services	0	0	2	2	2.4
Information (content, including data, publishing, entertainment)	0	0	6	6	7.1
Natural resources	3	1	4	8	9.5
Total	14	4	66	84	100

<i>Company description in terms of global employment</i>		
	Frequency	Percent
100 to 499 employees worldwide	2	2.4
500 to 9,999 employees worldwide	21	25.0
10,000 to 49,999 employees worldwide	23	27.4
Over 50,000 employees worldwide	38	45.2
Total	84	100

<i>Company description in terms of administrative headquarters</i>		
	Frequency	Percent
Europe	14	16.6
Asia (other than India or China)	4	4.8
India or China	0	0
United States	66	78.6
Total	84	100

<i>Company description in terms of L-1B usage</i>					
	Administrative Headquarters Location				
	Europe	Asia (not India or China)	U.S.	Total	Percent
Blanket and individual petitions	12	3	46	61	72.6
Blanket only	2	0	13	15	17.9
Individual petitions only	0	1	7	8	9.5
Total	14	4	66	84	100

*If your company maintains design centers, research or development centers, or other functional centers critical to your organization's ability to collaborate globally within your multinational organization about your products, services, or other mission critical functions, please identify the countries where such centers are located*

	Frequency (among the 84 companies)	Percent (of the 84 companies)
India	60	71.4
China	64	76.2
Canada	41	48.8
Mexico	36	42.8
Europe	72	85.7
South America	39	46.4
Africa	25	29.7
Asia (other than India or China)	46	54.7
Australia	32	38.1
United States	73	86.9

## COMPANY EXPERIENCES IN 2011

The picture painted by the Department's L-1B visa numbers in India for the first three quarters of FY 2012 is incomplete. Understanding the business community's view includes acknowledging a dramatic increase in the likelihood of experiencing a request for additional evidence or a denial when making an L-1B request at USCIS as well as an unambiguous increase in inconsistency and denials at consular posts in India, in the period preceding 2012.

The companies shared that they have experienced a bleak period in L-1B adjudications at USCIS, which is a critical part of, if not the driving force behind, the

Chamber's push for improvement in the L-1B area. For example, a comparison of calendar year data for 2007 and 2011 shows:

<i>USCIS L-1B individual petition data (including extensions of stay)</i>		
	CY 2007	CY 2011
Denial percentage	7	27
RFE (request for evidence) percentage	17	63

Moreover, contrary to the Department's 2012 data for India, both product and professional companies experienced problems at posts in India in 2011. Some companies were able to share comparison estimates between the first three quarters in calendar year 2011 and the first three quarters in calendar year 2012 at posts in India, reflecting dramatic improvements in L-1B approvals in India for calendar year 2012 as compared to calendar year 2011:

<i>L-1B blanket denial percentages at posts in India</i>		
	Q1-Q3 CY 2011	Q1-Q3 CY 2012
Product company	31	12
Product company	22	0
Professional services company	33	20
Professional services company	59	48

Other companies provided information on problems experienced in 2011 as compared to earlier years that makes clear that denial rates were much higher in the periods noted by the companies than for the periods identified in the data you provided:

<i>Companies that said they had experienced an increase in L-1B blanket denials in India with rejection rates as high as 16%-60%</i>		
	Denial percentage for L-1B blankets in India	Time period of higher rejections
Product company	16-39%	3/1/11 – 12/1/11
Product company	16-39%	1/1/11 – 12/1/11
Product company	16-39%	1/1/10 – 12/1/11
Product company	16-39%	Time period unlisted
Product company	16-39%	1/1/11 – 2/1/12
Professional services company	16-39%	1/1/11 – 12/1/11
Product company	16-39%	1/1/09 – 1/1/11
Professional services company	16-39%	7/1/11 – 1/1/12
Product company	40-60%	12/1/10 – 3/1/12
Professional services company	40-60%	10/1/10 – 9/1/11
Professional services company	40-60%	1/1/10 – 1/1/12
Product company	40-60%	1/1/09 – 12/1/11
Professional services company	40-60%	1/1/10 – 2/1/12
Professional services company	40-60%	1/1/11 – 12/1/11
Product company	40-60%	1/1/11 – 12/1/11
Product company	40-60%	1/1/11 – 2/1/12

<i>Companies that said they had experienced an increase in L-1B blanket denials in India although their rejection rate in India was 15% or less</i>		
	Denial percentage for L-1B blankets in India	Time period of higher rejections
Product company	1-15%	1/1/11 – 12/1/11
Product company	1-15%	1/1/10 – 2/1/12
Product company	1-15%	1/1/11 – 12/1/11
Product company	1-15%	7/1/09 – 2/1/12
Product company	1-15%	10/1/08 – 3/1/12
Product company	1-15%	1/1/11 – 1/1/12
Product company	1-15%	1/1/10 – 2/1/12

Accompanying the information we collected from companies, we also accumulated illustrative cases highlighting the frustration companies were experiencing through the end of 2011. The following are examples of companies' experiences regarding L-1B adjudications (some at USCIS, some at consular posts):

- ❖ A company manufacturing equipment conducts product testing in the United States after global teams develop new equipment specifications. A team of American engineers collaborating with company staff at design centers in North America, Asia and elsewhere comes together to complete product testing before manufacturing commences. Products are manufactured principally in the US although some manufacturing is also conducted abroad. Products are principally sold outside the US and most competing manufacturers in the particular industry are foreign corporations manufacturing solely outside the U.S. Visa petitions are denied for the foreign engineers working on the design team to come to the U.S. for product testing. Product testing is delayed, new product specifications can't be finalized, manufacturing engineering process are delayed, and US-based manufacturing jobs are reduced or new hiring delayed, while foreign competition is helped.
- ❖ A company designs and manufactures precision controls. It has three design facilities in the United States, two in Europe, and one in Asia. Individuals working on product design are typically in three or more locations, working jointly on different aspects of the project. The expertise of the engineers is not narrowly held within the company; instead a large number and percentage of the engineers is expert on precision controls and the company's proprietary systems. However, the expertise is narrowly held within the industry and work on the design projects cannot be done without the engineers internal to the company. The company has regularly received denials over the last few years when it petitions for a visa to have an intra-company transfer come to the U.S. to continue working on new product designs with American staff.
- ❖ A company has a leadership program where key up and coming staff come to the US to both facilitate US-centric experience for the future management of the company and promote the cross-fertilization of ideas that is needed in a multinational company. Visa applications are regularly denied, despite the interest of the American company to ensure its staff is exposed to American business methods.

- ❖ A company wants to open a fulfillment center in the U.S. where on-line orders can be processed and sent to North American customers. Applications to bring in a handful of foreign staff well-versed in the company's internal processes are denied. While the foreign staff would have trained new American staff to be hired, the center cannot be opened without some experienced internal staff. Instead, the company considers opening a fulfillment center in Canada.

## **PROFESSIONAL SERVICES**

The Department has identified dramatically different outcomes for product companies as compared to those organizations that assign employees at third party locations to provide professional services consulting. Our members point to several curious trends in this regard.

First of all, it does not appear that consular officers have a sophisticated understanding of, or make reliable distinctions between, various types of companies whose business is primarily that of providing consulting professional services. There are significant differences between management and strategic advisory services, project-based information technology services, and staff augmentation services. Moreover, any one company may be providing each of these types of services as well as various subsets within these broad types.

Additionally, some professional services companies report results at posts in India that imply a steady trend correlating the volume of L-1B requests to the denial rate. One company reported that its L-1B blanket denial rate at posts in India was reduced by about one-third comparing two recent years when the company significantly reduced its L-1B applications in India. Another company shared that when it tracked its L-1 request numbers and denial rate on a monthly basis over a 15 month period straddling the last two years, it discovered an unsettling pattern: the fluctuation in L-1 application numbers (which varied according to the company's internal demand) corresponded to the fluctuation in L-1 denial rates. We know of no legal reason that would justify a direct relationship between the number of L-1B applications and the percentage of denials.

Notably, providing services at third party locations is not solely a function for those companies whose principal business is the provision of professional services. Approximately 14% of the companies that provided information (12 organizations) were companies whose principal business was providing either strategic, advisory, or other types of professional services (to include various types of engineering, management consulting, and information technology services). Interestingly, though, another 20% of the companies (17 organizations) complement their principal business with the provision of consulting services at third party locations. These companies, in sectors as diverse as publishing, specialized manufacturing, and consumer goods, reflect a growing trend in the economy where companies seek to expand market share by converting their industry capabilities into new opportunities to provide expertise directly to their existing customers and clients.

A thoughtful reevaluation seems to be in order regarding what, exactly, the problem is from the Department's view with respect to the use of the L-1B category by companies that provide professional services (but do in fact supervise their professional staff providing such services).

## RECOMMENDATIONS

In addition to collecting informal data from 84 responding companies, we were also able over the last few months to have detailed phone calls with some of these companies. From the data and follow-up conversations, we were able to cull together feedback. The reports from companies were interestingly consistent regarding their efforts to change their internal processes to address the new challenges in USCIS and consular post adjudications of L-1B requests. In addition, certain trends emerged in the Chamber's review of our members' reactions, comments, and data. In particular, the companies' feedback suggests the following recommendations regarding L-1B policy:

1. **Avoid a one size fits all approach at the agencies reviewing L-1B petitions and applications.** If there are standardized review questions that need to be used by officers making decisions, they must be differentiated between company types and types of L-1B requests. For example, an L-1B request by a company placing one of its staff at its own facility to use proprietary knowledge should not have the same review points as an L-1B request by a company transferring one of its staff members to its own facility to develop new product specifications.
2. **Extend and change officer training to reflect insights on current business practices.** Business models in today's global economy are not necessarily more complicated than previously, but they are different. The agencies should partner with private sector businesses that engage in best practices to participate in and supplement already existing training programs with in-person presentations.
3. **Recognize that the use of technology pervades many occupations.** The review and analysis by officers must avoid lumping together all sponsored employees who use computer analytics to perform their jobs. Failure to differentiate between the many different uses of technology in today's economy obscures an accurate assessment of advanced or specialized knowledge.
4. **Eliminate the focus on numbers of similarly situated staff.** When agencies determine if someone is a key employee with specialized or advanced knowledge, officers incorrectly are focusing on the number of employees in the global organization who "do the same type of work" without engaging in a relativistic, case-by-case analysis of the facts or business need. In some cases, if more than one person has a similar skill set, the agency states it cannot find specialized knowledge.
5. **Eliminate the focus on a standard of outstanding accomplishment.** In determining where someone's knowledge falls on the spectrum between "universally held" and "narrowly held," officers are sometimes expecting evidence of the type required to confirm outstanding accomplishment (such as O-1 visa eligibility), for instance patents

created as a result of the employee's knowledge, published material about the employee's work, or a high level of remuneration compared to others.

6. **Recognize legitimate business requirements.** Consular posts and USCIS Service Centers give little or no weight to the company's projects, products, research and development, testing, transitions after merger and acquisition, leadership or cross-fertilization programs, or professional services contracts for which the beneficiary employee's skill set is needed. Consideration of the specific, underlying business context would allow officers to validate whether the beneficiary's knowledge is advanced or specialized.
7. **Eliminate *de novo* review on extensions or revalidations.** In reviewing a petition extension or visa reissuance request for an L-1B worker, agencies give no weight to prior decisions for the same employee, working in the same job, for the same assignment, for the same employer, even where there are neither changes in circumstances, material error in the prior approval, or new evidence that impacts eligibility.

## NEXT STEPS

We welcome the opportunity to meet with you again and bring a small handful of company representatives to discuss best practices and how to ensure that multinational businesses are able to use the L-1B category to facilitate the movement and assignment of their staff.

Please let us know when and how we can continue this important dialogue. Thank you again for reaching out to the U.S. Chamber.

Sincerely,



Randel K. Johnson  
Senior Vice President  
Labor, Immigration and  
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Amy M. Nice  
Executive Director  
Immigration Policy