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USCIS ISSUES LONG AWAITED L-1B POLICY MEMO

The US Citizenship and Immigration Services (USCIS) issues long awaited L-1B Intracompany Transferee Visa adjudications memorandum. The USCIS posted the memo on March 24th and will allow for comments until May 5th. The memo will not become effective until August 31, 2015. The memo was part of the series of executive actions on immigration that President Obama announced in November 2014. The L-1B visa permits foreign workers with specialized knowledge to be transferred to the United States to work at a U.S. entity that is affiliated with the worker's foreign employer.

The L-1B program continues to be one of the most controversial and unpredictable work visas due to a lack of clear guidance on what constitutes "specialized knowledge" and a variety of memoranda that USCIS officers frequently ignore and disregard translating into inconsistent adjudications across the board. Nothing exemplifies this more than the Fogo de Chao case that was decided in October 2014 by the U.S. Court of Appeals for the DC Circuit. The case dealt with the definition of "specialized knowledge" as it applies to specialty chefs. The case stemmed from a 2010 denial by the USCIS Vermont Service Center of an L-1B petition filed by the Brazilian-themed Fogo de Chao chain of steakhouses for a gaucho chef. Prior to the denial of the company's L-1B petition for this worker, the USCIS had approved over 200 petitions for gaucho chefs from 1997 to 2006. In its denial, among other factors, the USCIS indicated that cultural skills, such as an individual's cultural background and experience in cooking traditional ethnic meals did not constitute specialized knowledge. The Court of Appeals rejected this severe definition of specialized knowledge and scolded the Administrative Appeals Office (the DHS appellate body) for ignoring documentation that the foreign worker had completed a company training program in Brazil.

Unfortunately the Fogo de Chao case is not an isolated case and instead demonstrates how the L-1B visa classification has suffered from the Great Recession. After 2008, as U.S. workers lost their jobs, it became increasingly difficult for U.S. companies to transfer foreign workers to the United States. A report released in March 2014 by the National Foundation for American Policy, a non-profit, non-partisan research organization cited the many misfortunes of the L-1 Program. For example, although no new rule-making or laws had been enacted, the USCIS denied 34 percent of L-1B petitions in Fiscal Year 2013, up from six percent in Fiscal Year 2006. The report also provided data on the USCIS rates for issuance of Requests for Evidence (RFE). The USCIS rate, which had been at 10 percent, rose abruptly in 2008 to almost 50 percent. This rise coincided with the collapse of the U.S. economy. Remarkably, the figure continued to climb to 63 percent in fiscal year 2011

and remained at a robust 43 percent and 46 percent for fiscal years 2012 and 2013, respectively. Certain countries and industries were more adversely affected than others, for example, petitions requesting L-1B status on behalf of Indian nationals had a denial rate of 0.9 percent in fiscal year 2007 rising to 22.5 percent in fiscal year 2009.

The purpose of the L-1B memo is to consolidate agency guidance, clarify the evidentiary standard and more clearly delineate what constitutes "specialized knowledge." First, the memo summarizes the legal framework and history of the L-1B program then clarifies that it is consistent with all previously issued agency memoranda and thereby rescinds the four major L-1B memos previously issued by the USCIS from 1994 to 2005 by James A. Puleo, Fujie Ohata and William R. Yates. Second, the memo reminds USCIS officers that the evidentiary standard is "by a preponderance of the evidence," i.e., "more likely than not" rather than "clear and convincing" or "beyond a reasonable doubt." Third, the memo provides a series of factors that presumably will assist USCIS adjudicators and employers in determining what is "specialized knowledge" and what a U.S. employer does not have to demonstrate in order to be successful in obtaining an L-1B visa These factors include knowledge that is not easily imparted on others, but does not necessarily have to be managerial or command a high salary. Fourth, the memo clarifies that the L-1B visa does not require that the knowledge be proprietary or unique to the U.S. organization, be narrowly held within the U.S. employer, require a test of the U.S. labor market or that the worker only qualify under the L-1B visa and no other nonimmigrant visa. Fifth, the memo reiterates the two part test of the L-1 Visa Reform Act for workers that will be employed off-site. Specifically, an unaffiliated employer cannot primarily control and supervise the worker and the worker must be employed "in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary." This section is an important reminder to USCIS adjudicators that the L-1B visa does not prohibit the placement of workers off-site. Lastly, the memo clarifies that when a U.S. employer is requesting an extension of L-1B status where the facts of the case remain unchanged, the USCIS should defer to the prior approval. The USCIS should only re-examine eligibility when there is a finding of material error, a substantial change since the prior approval or new material information that is adverse to the petitioner or the worker's eligibility.

It remains to be seen how USCIS adjudicators will apply the memo and whether U.S. petitioning employers will be able to secure consistent adjudications.