Oh, Where Are the Good Old Times? Trying to Be an L-1 Intracompany Transferee

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INTRODUCTION

According to U.S. Citizenship and Immigration Services (USCIS) data, L-1 visas are being more heavily scrutinized than ever before, with more Requests for Evidence (RFEs), denials from USCIS, and issues at the visa application stage. This advanced practice advisory will provide practical tips for preparing cases for success by looking at recent adjudication trends, common RFEs from USCIS, and adjudication trends for L-1 Individual and Blanket Visa Applicants from U.S. consular posts.

BACKGROUND

BAHA and Recent Developments Under Biden

On April 18, 2017, President Trump issued Executive Order 13788, the "Buy American and Hire American" Executive Order (BAHA),[1] which was used to issue rules and policies to protect U.S. workers and U.S wages, however, effectively, served as the basis for some of the Trump Administration's most restrictive immigration policies, such as rescission of USCIS's deference policy to prior approvals,[2] enhancement of site visits for H-1B/L-1 employers and creation of the Targeted Site Visit and Verification Program (TSVVP),[3] as well as more restrictive adjudications guidance to officers published in the FAM.

On August 9, 2017, the U.S. Department of State's (DOS's) Foreign Affairs Manual (FAM) was updated to include references to BAHA for various employment-based visa categories, such as the E visa[4] and L visa[5] categories. This new language requires officers to adjudicate cases with the spirit of BAHA in mind. The BAHA language in the FAM resulted in member reports of clients being refused visas by consular officers because "an American could do the job." Overall, the BAHA Executive Order resulted in an increase in requests for evidence (RFEs) and denials, both at USCIS and at consulates worldwide.

In a welcome reversal, on January 25, 2021, President Biden issued **Executive Order 14005** "***Ensuring the Future Is Made in All of America by All of America's Workers***"[6] which revokes several previous executive orders, including BAHA. As of the date of this article, references to BAHA have not been removed from the FAM.

In another very recent reversal of Trump Administration policy, USCIS issued guidance in the USCIS Policy Manual to address the issue of deference to prior determinations of eligibility by an officer when adjudicating a request for an extension of petition validity.[7] This new guidance effectively restores USCIS's 2004 deference policy, with updates, and is effective April 27, 2021.

While other pre-BAHA policies and memos have not been reinstated, and change is not likely to be immediate, we anticipate an improvement in immigration policy and adjudications.

CONSULAR PROCESSING OF L-1 VISAS

Under the L-1 Blanket procedure, if an employer has an approved blanket petition with USCIS, applicants can apply for the L-1 visa directly at a U.S. consulate abroad. Prior to the pandemic,

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[1] *See* Executive Order No. 13788, Buy American and Hire American (April 18, 2017), available at www.govinfo.gov/content/pkg/DCPD-201700255/pdf/DCPD-201700255.pdf

[2] See USCIS Memorandum, "Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status" (Oct. 23, 2017). For the recent reversal of this Memorandum, see also www.uscis.gov/sites/default/files/document/policy-manual-updates/20210427-Deference.pdf; USCIS Memorandum, "Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity" (April 27, 2021), AILA Doc. No. 21042733.

[3] www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security-directorate

[4] *See* 9 FAM 402.9-2: https://fam.state.gov/fam/09FAM/09FAM040209.html.

[5] *See* 9 FAM 402.12: https://fam.state.gov/fam/09FAM/09FAM040212.html.

[6] www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers/. See also 86 Fed. Reg. 7475 (Jan. 28, 2021).

[7] *See* www.uscis.gov/sites/default/files/document/policy-manual-updates/20210427-Deference.pdf; See also "Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity" (April 27, 2021), AILA Doc. No. 21042733.

this option was routinely used by qualifying companies not only for initial L-1 visas, but often for visa renewals and extensions.[8]

HEALTH-RELATED AND ECONOMIC-RELATED TRAVEL RESTRICTIONS AND LIMITED VISA PROCESSING

On March 2020, the DOS suspended routine visa services worldwide due to the COVID-19 pandemic.[9] DOS announced on July 14, 2020 that U.S. Embassies and Consulates would be able to commence a phased resumption of routine visa services as global conditions continue to evolve.[10] The announcement stated that consular posts would be able to resume routine visa services on a post-by-post basis, without a definite timeline for when each mission will resume specific types of service, or when each mission will return to processing at pre-COVID levels. On March 11, 2021, DOS announced that it has extended its policy to expand interview waiver eligibility for individuals applying for a nonimmigrant visa in the same classification until December 31, 2021. Applicants whose nonimmigrant visa expired within 48 months are eligible.

Most posts have shared updates concerning their resumption of certain visa services, so members should check post websites often as procedures change often. AILA's RDC and LACC chapters have compiled a regularly updated spreadsheet detailing consular post operations during the COVID-19 pandemic.[11]

Background on COVID-related Travel Restrictions/Proclamations

In Spring of 2020, former President Trump issued several presidential proclamations to implement restrictions on entry to the U.S. from certain countries and geographic areas (*Schengen Area,*[12] *Ireland, UK, Brazil, China, & Iran*) based on public health and economic considerations related to the COVID-19 pandemic.[13]

On January 25, 2021, President Biden issued Presidential Proclamation 10143 which extended the COVID-related travel bans for the Schengen Area, UK, Ireland, and Brazil, and also introduced a suspension of entry into the U.S. for travelers from South Africa. The proclamation will remain in effect until terminated by the president.[14]

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[8] *See* "Practice Pointer: Clarifying Changes to Blanket L Standards" (March 4, 2021), AILA Doc. No. 20090490.
[9] *See* "DOS Suspends Routine Visa Services at All U.S. Embassies and Consulates" (July 14, 2020), AILA Doc. No. 20031900.
[10] *Id.*
[11] www.aila.org/advo-media/aila-practice-pointers-and-alerts/rdc-lacc-spreadsheet-consulular-post-operations
[12] The Schengen Area comprises 26 European states: **Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.**
[13] See "Practice Alert: Presidential Proclamations Suspending Entry Due to the 2019 Novel Coronavirus" (June 19, 2020), AILA Doc. No. 20031235.
[14] See www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/proclamation-on-the-suspension-of-entry-as-immigrants-and-non-immigrants-of-certain-additional-persons-who-pose-a-risk-of-transmitting-coronavirus-disease/ (Jan. 25, 2021).

On March 31, 2021, Presidential Proclamation 10052[15] "*Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*" (or H/L/J proclamation), extended by Presidential Proclamation 10131, expired. While the H/L/J proclamation has expired, as of the date of this article, it is still too early to note any significant changes in consular processing or adjudications for visa categories which were the subject of this proclamation.

NATIONAL INTEREST EXCEPTIONS (NIEs)

The Presidential Proclamations regarding travel restrictions discussed in the section above included an exception for "any alien whose entry would be ***in the national interest*** as determined by the Secretary of State, the Secretary of Homeland Security, or their designees."

On March 2, 2021, new NIE guidance was issued by the State Department, rescinding certain categories of NIEs, while clarifying others.[16] Academics (J-1), students (F-1/M-1), and journalists (I) remain eligible for NIEs, as well as au pairs going to families whose parents are involved in direct treatment of COVID-19 patients; humanitarian cases; persons traveling to treat COVID patients or do public health research; and national security. In addition, the State Department issued new national interest determination guidance for travelers seeking to provide *vital support for critical infrastructure*. DHS's Cybersecurity & Infrastructure Security Agency (CISA) has **provided a list[17] and description of critical infrastructure sectors that is useful in preparing an NIE request to post.**

Further updated NIE guidance has come specifically from consular posts, including Paris, Frankfurt,[18] and Rome,[19] however, attorneys must check with each consular post directly as procedures vary and are changing on a daily based on country conditions and other factors.

If approved, practitioners should note and advise clients that the NIE waiver to travel is valid only for a single entry to the U.S. within 30 days of the date of visa issuance. If your client departs the U.S. and wishes to return, he/she must be reassessed for a *new* NIE. Therefore, clients should be advised to immediately check the visa stamp upon issuance and to travel to the U.S. during the 30-day NIE validity period. Clients should be reminded that being granted an NIE from the Embassy is not guaranteed admission into the United States; their admission into the United States still remains subject to a determination by U.S. Customs and Border Protection (CBP) officers at ports of entry.

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[15] www.federalregister.gov/documents/2020/06/25/2020-13888/suspension-of-entry-of-immigrants-and-nonimmigrants-who-present-a-risk-to-the-united-states-labor

[16] www.aila.org/infonet/dos-provides-information-on-national-interest; See also https://travel.state.gov/content/travel/en/News/visas-news/updates-to-national-interest-exceptions-for-regional-covid-proclamations.html (April 8, 2021 DOS guidance announcing travel of immigrants, fiancé(e) visa holders, certain exchange visitors, and pilots/aircrew traveling for training or aircraft pickup, delivery, or maintenance is in the national interest for purposes of approving exceptions under the geographic proclamations restricting travel due to COVID-19 (9984, 9992, and 10143)).

[17] www.cisa.gov/critical-infrastructure-sectors.

[18] www.aila.org/infonet/us-consulate-in-frankfurt-provides-guidance.

[19] https://it.usembassy.gov/wp-content/uploads/sites/67/210303-NIE-EN.pdf.

As of January 26, 2021, all air travelers entering the U.S., including L visa holders, must provide a negative COVID-19 test within three (3) days of travel to the U.S.[20]

Finally, AILA's DOS Liaison Committee provides a very detailed practice pointer (*AILA Doc. No. 20091704 - "Obtaining NIV Appointments and Applying for National Interest Exception Waivers for Travelers from the Schengen Area, United Kingdom, and Ireland"*) on how to obtain a national interest exception (NIE) waiver for travelers from the Schengen Area, U.K., and Ireland in light of President Biden's 1/25/21 proclamation (PP10143) and subsequent DOS revised guidance issued on 3/2/21.[21]

Practice Pointer: Issues Specific to L-1 Visa Applicants

Due to the complicated consular adjudication rules around L visas—both individual and blanket—consular posts may come to incorrect conclusions regarding L visa eligibility. Practitioners have reported that this issue tends to affect beneficiaries of blanket petitions more frequently.

Practitioners should be prepared to succinctly, patiently and carefully explain L visa eligibility to consular posts, including relevant excerpts from the FAM governing L visa adjudication (9 FAM 402.12). This will often be sufficient to resolve the issue. Due to limited consular staffing, attorneys should be prepared for delayed responses to email inquiries to post.

Practice Pointer: Reciprocity Changes

In late 2019, DOS made numerous changes to the validity length of nonimmigrant visas based on reciprocity. For example, the validity length of L visas issued to French nationals was decreased from five years to a maximum of 17 months. When considering medium- and long-term plans for L visa holders, employers and practitioners should carefully review the reciprocity tables for any changes to validity length.

In situations where someone was issued a longer visa before the general validity length was shortened due to reciprocity, there have been reports of embassies requesting that the holder apply for a new visa even though they still hold a valid visa of that type. Although this issue has not been directly linked to reciprocity changes, practitioners should nonetheless be prepared to argue the ongoing validity of their clients' visas to consular posts. There is no apparent statutory authority to retroactively apply reciprocity changes to already-issued visas.

Practice Pointer: NIE for Schengen Ban

Pursuant to Presidential Proclamation 10143, certain visa holders (including L visas) who have been in the Schengen Area, the UK, and Ireland within 14 days of their intended departure to the U.S. must first obtain a "National Interest Exception" waiver before traveling. DOS advises that visa holders should contact their local embassy to apply for a waiver, so practitioners should check to see if the embassy has published official procedures for applying.

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[20] www.cdc.gov/media/releases/2021/s0112-negative-covid-19-air-passengers.html

[21] "Practice Pointer: Obtaining NIV Appointments and Applying for National Interest Exception Waivers for Travelers from the Schengen Area, United Kingdom, and Ireland" (March 30, 2021), AILA Doc. No. 20091704.

DOS guidance states that NIE waivers can be obtained by both visa applicants and current visa holders. However, there have been reports of consular posts requesting that holders of valid visas reapply for a visa of the type they hold in order to receive NIE consideration. There is no apparent legal authority for such a request, so practitioners should be prepared to address this issue with the embassy if it arises or consider applying for an NIE with CBP.

Practice Pointer: Interview Waiver Variability By Location

Consular posts are permitted to waive the in-person interview requirement for NIV applicants, including the L visa, in order to facilitate visa issuance. Previously, only applicants whose nonimmigrant visa expired within 24 months were eligible for an interview waiver. Currently, DOS is permitting interview waivers for those who had held the same visa category and whose visa expired in the last 48 months.[22] The visa interview waiver 48-month expansion is set to expire on December 31, 2021.

Through individual correspondence with consular posts, practitioners have received varied responses indicating that each consular post is responsible for setting its own policy on the availability/applicability of interview waivers. For example, the Paris consulate has indicated that blanket L applicants are eligible for an interview waiver, while the Frankfurt consulate has indicated that blanket L applicants are not. Practitioners should investigate whether a consular post has indicated their policy and should also be prepared to ask the post directly.

Practice Pointer: Prepare your Clients for Visa Interviews Including NIE Inquiries

It is more critical than ever to applicants are thoroughly prepared for blanket L interviews. The attorney should conduct a thorough visa preparation call covering the required elements of an L-1 and any required NIE. The applicant should be able to clearly and quickly articulate how they qualify either as a manager/executive or specialized knowledge professional. Have your client practice answers to standard questions and be able to explain why they qualify in two sentences. If an NIE is required, work with your client so they can quickly and clearly explain the grounds for the NIE, including, for example, how the role provides vital support to a critical infrastructure area and why the tasks must be performed onsite (not remotely) in the United States.

USCIS PROCESSING OF L-1 VISAS

With the suspension of L-1 extensions at the U.S.-Canada border,[23] and disruptions to consular operations during the COVID-19 pandemic outlined above, more petitioners have needed to seek L-1 status through USCIS service center petitions. While anecdotally, immigration attorneys have considered USCIS service center L-1 petitions to receive greater scrutiny and require more documentation than consular or border

[22] https://travel.state.gov/content/travel/en/News/visas-news/expansion-of-interview-waiver-eligibility.html (March 11, 2021).

[23] "Practice Alert: L-1 Adjudications at Ports of Entry for Canadian Citizens" (May 14, 2019), AILA Doc. No. 19030730.

L-1 petitions, such beliefs have only strengthened during the era of "Buy American, Hire American" (BAHA) and the rescission of the USCIS deference memo.[24]

Despite the recent revocation of BAHA[25] and the very new policy reinstituting deference,[26] extensive L-1 Requests for Evidence (RFE) continue, particularly in the context of the L-1A Manager. Recent requests for evidence focus especially on "documentary evidence" seeking additional corroboration of details described in the employer's letter.

PRACTICE POINTERS: COMMON L-1 DOCUMENTATION REQUESTS AND SUCCESSFUL STRATEGIES

- ***Employment of Subordinates in the Context of an L-1A Personnel Manager.*** We note that USCIS is ideally looking for paystubs, State Quarterly Wage Reports, or W-2s to verify employment, but not every employer is willing or able to provide this information. In such instances, attorneys can look to internal Human Resources databases and records, employment verification letters, or even LinkedIn* profiles to provide further corroboration of employment.

- ***Education Level of "Professional" Direct Reports***. USCIS typically wants to see the diploma of each professional direct report, but sometimes employers are unwilling or unable to request such documentation from their subordinates. In such instances, some attorneys have found success with providing Human Resources records where the degree was reported, job descriptions showing the degree is required, or LinkedIn* profiles where the professional employee self-reports their degree.

- ***Hiring and Firing Authority, Even for Functional Managers.***[27] Typically USCIS wants to see performance reviews where the foreign national is exercising control over direct reports. Where performance reviews are not available, attorneys have been successful in providing employee payroll band documentation demonstrating that the foreign national's band holds hiring and firing authority or even a letter from the relevant Human Resources representative verifying the employee's hiring and firing authority. If the Human Resources representative is already the signatory of the employer letter, consider a sworn statement or affidavit, to add further credence to the verification.

- ***Discretion Over Day-to-Day Operations.*** USCIS does not always give examples of the type of evidence that will satisfy this request. However, attorneys have had success meeting

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[24] USCIS Will No Longer Provide Deference to Prior Adjudications for Nonimmigrant Petitions (Oct. 23, 2017), AILA Doc. No. 17102461.

[25] "Practice Alert: Biden Administration Rescinds Buy American and Hire American (BAHA) EO and 2017 Computer Programmer Memo" (March 2, 2021), AILA Doc. No. 21030230.

* Note: USCIS tends to disfavor the use of social media as evidence. If you use LinkedIn, be sure to contextualize the evidence by verifying that it was created in the ordinary course, and not specifically for the petition.

[26] *See* www.uscis.gov/sites/default/files/document/policy-manual-updates/20210427-Deference.pdf; See also "USCIS Issues Guidance on Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity" (April 27, 2021), AILA Doc. No. 21042733.

[27] 8 CFR §214.2(l)(1)(ii)(B)(3) does not require hiring and firing authority if the individual oversees a function, rather than employees. Be sure to point this out to the adjudicator in your RFE response if filing for a functional manager.

this request by providing performance reviews listing the foreign national as the manager, reports or work product by a subordinate sent to the managing foreign national, emails of the managing foreign national providing direction to subordinates, reports or other business documentation created in the ordinary course of business listing the foreign national as the manager or supervisor.

- ***Highly Unique Specialized Knowledge.*** USCIS often requests evidence that the knowledge is not widely held within the company and unique. Therefore, it is often helpful to determine who else at the company (abroad and in the United States) may have this unique knowledge. It is often helpful to focus on the task at hand to narrow the focus. It is helpful if it can be explained that the very specific knowledge needed for the position does not readily exist even within the United States even at the petitioning company, hence the need to transfer the employee. It is also often helpful in this regard to also explain that the applicant is needed in the United States to ensure company standards, policies and practices are followed consistently both abroad and in the United States.

- ***Corroborating Documentation of Specialized Knowledge.*** USCIS may also require corroborating documentation of specialized knowledge. Many companies have training logs that can be accessed electronically and provided to show a series of company specific trainings essential for the position. Documentation that the beneficiary is a subject matter expert and/or has developed key policies and procedures and trained others on those policies, practices or subject areas is also helpful.

While the above speaks specifically to L-1A manager and L-1B specialized knowledge petitions, similar trends of requiring extensive non-testimonial corroborative evidence have appeared in RFEs for L-1A executive and L-1B specialized knowledge petitions. In general, attorneys should consider the following practice pointers.

GENERAL L-1 PRACTICE POINTERS

- Reminding USCIS that the burden of proof is "preponderance of the evidence," which is considered "rock bottom at the fact-finding level..."[28]

- Explaining that the I-129 certification requires the signatory to certify under "penalty of perjury" that the petition and supporting documents are "complete, true, and correct." This means that the employer letter is in essence a sworn statement.

- Reminding USCIS that 8 CFR §214.2(l)(3)(ii) only requires, "Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed." It does not require corroboration of evidence provided, and evidence includes the testimonial evidence of the employer letter.

- Ensuring that the petitioner has additional documentary evidence to provide at the RFE stage. Attorneys should consider the strength of their initial submission, and whether there

[28] *Matter of E-M-*, 20 I&N Dec. 77, 79 (Comm'r 1989); See also *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010).

is some piece of evidence that could be held to include with an RFE response that would not prejudice the initial submission.

RFEs will always be a part of USCIS L-1 practice, and managing those RFEs will generally be more of an art than a science. Nonetheless, responding with additional documentation and strong legal arguments will give petitioners the strongest likelihood of success.

CONCLUSION

As outlined above, it has been an incredibly challenging time for L-1s due not only to Trump Administration policies and BAHA, but also due to proclamations limiting L visa issuance and the pandemic. While we see recent welcome change in the reversal of BAHA and reinstatement of deference, the pandemic continues. Change is not likely to be immediate, especially as many adjudicators have been trained by the prior Administration. While we are hopeful that the "good old times" may again return, it is all the more important in the meantime to use the tips outlined above, and to track developments and updates issued by AILA.