Maggio+Kattar

Successfully Getting an L-1B – What's knowledge got to do with it?

Immigration advocates and employees throughout the U.S. are in an uproar over USCIS' and the Administrative Appeals Office's (AAO) "new" interpretation of the L-1B, intercompany transferee, specialized knowledge category. Recently, the immigration agency and the AAO decisions have reflected a devolved interpretation of specialized knowledge where the agency now requires that a prospective transferee to the U.S. have "skills and/or knowledge beyond that" of other employees and/or the "general market". In other words, it is no longer sufficient for an employee to possess an advanced knowledge of products or services which are unique or proprietary to their employer, unless they are one of the few individuals in the entire organization who possess that knowledge.

The new standard being applied by USCIS and the AAO may be a combination of their interpretation of the 2004 L-1 Visa Reform Act which was aimed at minimizing the alleged abuse of the L-1B category by companies created to be so-called "job shops." In fact, recent AAO decisions are serving to bolster USCIS' adjudicators' more strict interpretation of the regulatory standards for this category. USCIS' requests for evidence and denials on issues that had previously been more broadly, and appropriately interpreted in light of both regulatory language and agency policy memoranda, have become more frequent across all industries from high tech, consulting and accounting, where the trend originated, to manufacturing, health care and hospitality sectors. This created a public relations rationale to restrict this category which has now been espoused by the USCIS and the AAO where specialized knowledge can only be "narrowly held within the company, possessed by key personnel, unusual duties, skills and knowledge beyond that of a skilled worker, determined by comparison with the general market and the petitioner's workforce." However, as the agency narrows the applicant pool for the L-1B visa, it also significantly undermines employers' ability to predictably transfer and retain its workers.

At present, the Department of State continues to adjudicate petitions filed by multinational organizations pursuant to a Blanket petition (where the company's qualifying relationship has previously been vetted by USCIS and the company can file directly with an overseas consulate) based on the whether the employee will perform services that require an advanced knowledge of the employer's organization and its products/services.

Overall, multinational employers need to have the opportunity to move their workers seamlessly in this global economy. Changing the adjudicatory standards and narrowing critical visa categories, such as the L-1B, make it difficult for companies to do business in the U.S. We hope that USCIS will remember that companies who cannot bring their employees to the U.S. will bring the work to their employees overseas, weakening our competitive advantage in the global workforce – not a win in a faltering economy.