INTRACOMPANY TRANSFERS (L-1) AND TREATY INVESTORS (E-2)
TWO OPTIONS FOR EXPANSION INTO THE UNITED STATES

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Recent advances in technology have made global business easier. The Internet has created a global marketplace, accessible to millions worldwide. E-mail, remote servers and video-conferencing enable people to meet "face-to-face" without boarding a plane or leaving their office. Deals are made, contracts are signed and money is transferred despite differences in culture, language and time zones. Notwithstanding the ease with which business can be conducted in the 21st century, however, nothing can replace personal contact. International firms of all sizes, from large multinational corporations to small, family owned businesses are continuously seeking ways to expand into the United States by opening offices, expanding businesses, bringing key personnel into the U.S. and hiring U.S. workers to staff their U.S. enterprises.

Nonimmigrant (temporary) visas are generally available to qualified individuals who wish to travel to and remain in the United States for a finite period of time for a specific purpose. U.S. immigration law provides a variety of different options for foreign nationals to establish a business presence in the United States by creating a new business or purchasing an on-going enterprise. This article explores two of the most common non-immigrant visa classifications used by foreign investors: The L-1 (Intra-Company Transfer Visa) and the E-2 (Treaty Investor Visa).

INTRA-COMPANY TRANSFER (L-1)

In 1970, the L-1 visa category was created by Congress in recognition of the need for foreign companies to transfer, on a temporary basis, employees from abroad to the United States. The L-1 visa category also allows foreign-based companies to invest in the United States economy by establishing and expanding their overseas business operations. In general, individuals who have been employed by a foreign company, organization or firm as a manager, executive, or in a specialized knowledge capacity, may

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qualify for L-1 status if, during the 3 years preceding entry into the U.S., they have worked for the employer outside the U.S. for at least one continuous year and wish to transfer to an executive, managerial or specialized knowledge position in the U.S. to work temporarily with a parent, subsidiary, branch or affiliate of their foreign employer.

Employer Requirements

In order to transfer an employee from a foreign company to a U.S. company, the petitioner must be part of a "qualifying organization." A qualifying organization for purposes of the L-1 visa category is one in which the foreign employer is related to the U.S. entity as either a parent, subsidiary, affiliate or branch office:

- A ***subsidiary*** is defined as a legal entity of which a parent owns at least 50% of the entity and controls the entity; or owns 50% of a 50-50 joint venture and has equal control and veto power over the entity; or owns less than 50% of the entity but, in fact, controls the entity.
- An ***affiliate*** is (a) one of two subsidiaries, both of which are owned and controlled by the same parent or individual; or (b) one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

It is important to fully document both the existence of the two business entities (foreign and U.S.) and the necessary qualifying relationship between the foreign and U.S. companies. Appropriate documentation can include Certificates or Articles of Incorporation, Partnership Agreements, Share Certificates, detailed Organization Charts and/or Financial Statements.

In addition to establishing a qualifying relationship between the two entities, the petitioning U.S. company must establish an employer-employee relationship with the intra-company transferee. While the employee may continue to be paid by the foreign entity, it is essential that the U.S. entity have complete control over the employee. Authority to fire the employee and authority to control the employee in the performance of his or her work is often considered substantial evidence. Placement at a third party worksite is permissible *only* where the employee remains under the control and supervision of the petitioning employer.

Finally, the regulations require that the petitioner must continue to do business in both the United States and at least one other country for the duration of the employee's temporary employment in the U.S. This element can usually be established with recent Financial Statements or Tax Returns.

<u>New Offices</u>

There are special provisions for individuals being transferred to the United States for the purpose of opening a new office. A new office is an entity that has been doing business in the United States through a parent, branch, subsidiary or affiliate for ***less than one year***. The following additional evidence must be submitted with respect to new offices:

- Evidence of office space such as a lease (it should be noted that virtual offices are not acceptable for purposes of an L-1 visa and an office cannot be operated from one's residence);
- Evidence that a bank account has been opened and funded in the name of the U.S. entity; and
- A business plan which includes financial and employment projections for the first 3-5 years.

Petitions for new offices are initially approved for only one year. To extend the stay in L-1 status beyond the first year, additional evidence will be required which demonstrates that the new office has become an established business.

Blanket L Petitions

While the Blanket L program is not an option for a new foreign investor, the program does enable a larger or more established company to be "pre-certified" to use the L-1 visa program and thus apply for L-1 visas directly at U.S. consular posts abroad without the prior approval by United States Citizenship and Immigration Services (USCIS) of an individual petition. To qualify, the petitioner (and each qualifying entity) must:

- Be engaged in commercial trade or services;
- Have an office in the U.S. that has been doing business for more than one year;
- Have three or more domestic and foreign branches, subsidiaries or affiliates; and
- Have obtained approval of petitions for at least 10 "L-1" managers, executives or specialized knowledge professionals during the previous 12 months; or have U.S. subsidiaries or affiliates with a combined annual sales of at least $25 million; or have a U.S. workforce of at least 1,000 employees.

Employee Requirements

To be eligible for an L-1 visa, an employee must have worked for the company abroad for one continuous year out of the three years prior to filing the visa petition. Until very recently, an employee entering the United States under the Blanket L program was only required to have worked for the company abroad for six (6) months out of the three preceding years. However, in December 2004, the L-1 Visa Reform Act of 2004 was enacted. Among other things, this new law removed the provision permitting the six-month work requirement for L-1 blanket petitions, thereby requiring that all L-1 beneficiaries have worked for the employer abroad for at least one year.

An employee applying for an L-1 visa must also have worked for the company abroad as either a "manager," an "executive," or a person with "specialized knowledge." Further, the employee must be offered a position in the United States as either a "manager," an "executive," or a person with "specialized knowledge." The regulations do not, however, require the employee to have held the same position abroad as the offered job in the United States. For example, a person who is in a specialized knowledge position overseas can be transferred to fill a managerial or executive position in the U.S. company, or vice versa.

A qualifying "manager:"

- Manages the organization, or a department, subdivision function or component of the organization;
- Supervises and controls the work of other supervisory, professional or managerial personnel or manages an essential function within the organization department, subdivision function or component of the organization;
- Has the authority to hire and fire or recommend those and other personnel actions or, if there is no direct personnel supervision, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- Exercises discretion over the day-to-day operations of the activity or function for which he/she has authority.

It should be noted that a first line "manager" is not eligible for L-1 status merely by virtue of the fact that he/she supervises employees unless the employees supervised are professional.

A qualifying "executive:"

- Directs the management of the organization or a major component or function of the organization;
- Establishes the goals and policies of the organization, component or function;
- Exercises wide latitude in discretionary decision-making; and
- Receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

As with managers, the "executive" category is generally limited to senior level executives.

Finally, "specialized knowledge" is defined as:

- Special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets or an advanced level of knowledge of expertise in the organization's processes and procedures.

Although the L-1 visa category does not require that the foreign national have a university degree, only specialized knowledge workers who hold a bachelor's degree may enter the United States through the Blanket L program.

Adequately establishing that the employee's proposed U.S. position and his/her foreign position both fit within one of the three designated categories is often critical to the success of an L-1 visa petition. In recent years, the USCIS has closely scrutinized both managerial/executive and specialized knowledge petitions very carefully.

With respect to managers and executives, it is important to include management organization charts for both the foreign and U.S. companies, showing where the employee fits into the managerial hierarchy of the company. If the U.S. company is newly established, proposed management charts will suffice. The USCIS acknowledges that a manager or executive in a newly created business will be more involved in the hands-on establishment of the company. However, as noted above, in order to extend the stay in L-1 status beyond the first year, additional evidence will be required which demonstrates that the employee has assumed a more traditional managerial role in the company, with the day-to-day management tasks delegated to other staff members.

With respect to employees in a specialized knowledge capacity, it is essential to provide extensive, detailed information regarding their skills, training and experience. Simply describing the employee's duties is not enough. An employee with specialized knowledge must possess advanced knowledge or experience that is different from that generally found in the industry. Some of the relevant factors involved in assessing an employee's specialized knowledge include:

- Whether the employee possess knowledge that is valuable to the company's competitiveness in the market place;
- Whether the employee has been employed in a capacity involving significant assignments which have enhanced the company's productivity, competitiveness, image or financial position;
- The number of employees within the company with the same level of training and knowledge; and
- Information regarding potential undue hardship and/or expense the company would incur if the employee cannot fill the proposed position.

It is also appropriate to include documentary materials regarding the company's proprietary or bespoke products, processes or procedures as well as any available training manuals.

An investor or employee with an L-1A (manager or executive) visa can remain in the U.S. for up to 7 years. An employee with an L-1B (specialized knowledge) visa can remain in the U.S. for a maximum of 5 years.

Examples

- Company A is one of Europe's largest full-service telecommunications operators. The company serves over 20 million customers in the United Kingdom alone and employs approximately 130,000 people worldwide. The company's global network and strong strategic partnerships enable it to serve customers in all key commercial centers of Europe, North America and Asia with a portfolio ranging from desktop and network equipment and software, transport and connectivity, IP-based e-business solutions, managed network services and systems integration to consultancy for complex global requirements. Fifty percent (50%) of its people are based outside the UK, serving large business customers worldwide, and the company employs 1,800 professionals in the U.S. through its numerous subsidiaries.

- Company B is one of the world's most successful contract research organizations, providing product development and safety testing services for the pharmaceutical, biotechnology and chemical industries, employing approximately 1,400 people worldwide. The UK company acquired a U.S. Research Center which provides bio-analytical, pharmaceutical, toxicology, safety pharmacology and pathology research services, amongst others. The U.S. subsidiary currently employs 235 people, most of whom are U.S. citizens.

- Company C creates handmade, natural food, avoiding the obscure chemicals, additives and preservatives common to so much of the 'prepared' and 'fast' food on the market today. The company opened its first branch in London and now has 119 retail outlets located throughout the UK. In order to expand the market for its innovative approach to creating a healthy, natural alternative to "fast" food, a corporate decision was made to open a branch office in the United States in November 1999, and the first retail food outlet was opened in July 2000. The U.S. branch currently has 10 retail outlets with 121 employees, most of whom are U.S. citizens.

- Company D is a small family owned business which designs and installs high quality spiral, helical and straight staircases for both domestic and commercial markets. The company works closely with architects, contractors and private clients, producing modern staircases from materials such as glass, steels, bronze, acrylic and timber. In an effort to pursue opportunities for growth in the United States, an affiliate of the company was incorporated in the United States in 2004 and one employee was transferred to the United States to act as President during the preliminary stages of the affiliate's U.S. business venture.

TREATY INVESTOR VISA (E-2)

The United States has entered into treaties of Friendship, Commerce and Navigation (FCN) with more than 70 countries to promote free trade and investment between the United States and foreign countries. For example, the "Convention to Regulate Commerce" between the U.S. and the U.K. was entered into on July 13, 1915, and permits UK nationals to enter the U.S. as either a treaty trader (E-1) or treaty investor (E-2). This article focuses on the treaty investor visa as a vehicle for foreign investors to open new offices in the United States.

E visas are complex, involving corporate, trade and taxation issues in addition to the normal immigration law issues. A well organized and well documented application, demonstrating how the applicant complies with each of the E requirements is critical. In general, a foreign investor will be eligible for an E-2 visa if his or her country of nationality has a treaty with the United States and the following requirements are established:

Nationality

The U.S. company must have the same nationality as the treaty country. At least 50% of the company must be owned and controlled by nationals of the treaty country. In most cases, the country of incorporation is irrelevant for purposes of E-2 eligibility; however where a corporation is sold exclusively on the stock exchange in the country of incorporation, there is a presumption that the nationality of the company is that of the location of the stock exchange.

Investment

Commitment of Funds: The treaty investor must invest (or be in the process of investing) a substantial amount of capital in the U.S. enterprise. The capital can be in any quantifiable form, such as cash, inventory, real property or intellectual property. The investment must also be "at risk." In other words, if the investment fails, the funds will be lost. In addition, the investor must demonstrate that he/she has control of the funds or other assets invested. Finally, the funds must be irrevocably committed to the enterprise. Intent to invest or possession of uncommitted funds in a bank account is not sufficient; however, funds held in an escrow account, conditioned only on issuance of an E-2 visa, is acceptable.

Where the investor is starting a new business, it is often difficult to establish an irrevocable commitment of the qualifying investment. In such cases, the investor must spend a sufficient percentage of the total investment to establish irrevocability. While there are no hard and fast rules, the amount of capital actually committed must be enough to demonstrate that the applicant intends to follow through with the entire investment once the visa is issued. If the investor is "in the process of investing," he/she must be close to the start of business, not simply at the stage of looking for office space or signing contracts.

Substantiality: In addition to being fully committed, the investment must be "***substantial***." While there is no set dollar amount that is considered "substantial" for purposes of an E-2 visa, generally, the investment must be proportional to the value of the business, or an amount normally needed to establish a new business. When evaluating the viability of a proposed investment, it is also important to take into account the type of business being established or purchased, the amount of funds invested and the investor's level of commitment with respect to the successful operation of the business.

Marginality: Finally, the investment must not be "***marginal***." In other words, the investment cannot be solely to earn a living for the principal investor and his family. Marginality is usually overcome by

demonstrating that the U.S. business will employ U.S. workers and will contribute to the local U.S. economy.

Company Registration

As noted above, it is important to present a well organized and well documented application, demonstrating how the applicant complies with each of the E requirements. Registration applications for smaller investments, while sometimes more difficult than large corporate investments, are approved on a regular basis. The small investment often requires thorough documentation to establish substantiality and to overcome the presumption of marginality.

Before an E visa will be issued from a Consular Office, the company must first be registered at the Consulate, regardless of whether the applicant has received E-2 status from the USCIS pursuant to a change of status. Consulates are NOT bound by the USCIS grant of E status. Applicants will be required to submit a new registration application, together with all forms, fees and supporting documentation.

With respect to new businesses in the United States, the following information/documentation should be included with all Treaty Investor applications

- Evidence of company existence
- Evidence of ownership of the new company
- Evidence of investment in the new U.S. company, such as copies of wire transfers from a bank account in the owner's name to the U.S. company bank account.
- Evidence of the use of invested funds prepared in schedule format, listing the amount expended, date of expenditure and purpose of expenditure. Copies of receipts and/or other documentation evidencing invested funds expended to establish the new company should also be included.
- Copy of lease of business premises. It should be noted that virtual offices are *not* acceptable for purposes of E-2 registration.
- Examples of promotional information, advertisements, stationery, business cards, etc.
- Proposed Business Plan, financial projections or most recent available financial statements (or management accounts).

Company registrations are generally granted for a period of 5 years and can be renewed indefinitely so long as eligibility continues and the treaty remains in force. Investors of start-up companies may receive an initial approval of only one (1) or two (2) years.

Employee Requirements

The treaty investor will be eligible for an E-2 visa if he/she is seeking to enter the U.S. to develop and direct the treaty business. The ability to develop and direct the business can be established by owning at least 50% of the treaty business or by having operational control through a managerial position. Employees of the company registered as a treaty investor must have the same nationality as their employer and must be coming to the United States to engage in duties as a manager or executive or as an employee with "essential skills" necessary for the efficient operation of the business. Some of the factors which will be considered when determining whether an employee's skills are essential include:

- The degree of proven expertise of the employee in the area of specialization;
- The uniqueness of the specific skills;
- The function of the job to be performed by the employee;

- The salary such special expertise can command; and
- The availability of U.S. workers who can perform the same skills.

E-2 visa holders are generally admitted into the U.S. for a two (2) year period and can extend their stay indefinitely in two (2) year increments, so long as they can demonstrate continued eligibility.

Examples

- Company A is the U.S. subsidiary of a UK company traded on the London Stock Exchange, which engages in the provision of operational, management and administration services to water and wastewater treatment plants, as well as the development of proprietary software and services for use in the water and gas utilities industries. Each of the United States registered companies in the Group of companies has British nationality by virtue of the fact that it is ultimately 100% owned by the UK publicly traded company. The E-2 treaty investor application was made on the basis that the UK parent company had placed more than $500 million at risk in U.S.-based subsidiaries.

- Company B was incorporated in the United States in 1988. The company provides a comprehensive range of cost, contract, project and facilities management and procurement services to the building industry and has extensive experience in engineering, construction and maintenance projects in the chemicals, food, drink, energy and pharmaceutical industries. Company B is ultimately a wholly owned subsidiary of a UK private limited company, which is one of the six largest international cost management consultancy companies in the world. The UK group of companies employs over 700 people worldwide and approximately 57 people in the U.S.

- Company C is a Pilates/Yoga studio offering body-centered movement classes and instruction at two studios located in Idaho. The company is owned by an individual British national and at the time the company registration application was filed with the U.S. Embassy, London, over $120,000 had been put at risk in the commercial enterprise. The owner/investor paid a total of $40,000 cash for the purchase of the business which consisted of one studio, contingent only upon the issuance of an E-2 visa. Additionally, in excess of $80,000 was put at risk in connection with opening a second studio and launching the U.S. business.

- Company D provides general contracting work for large and small remodelling projects and new building works to both commercial and residential properties. Pursuant to a Stock Purchase Agreement the buyer/investor purchased the on-going business of Company D for the sum of $100,000. The seller was paid an initial deposit of $10,000. The balance of $90,000 was placed in an Escrow Account. Close of the Escrow and distribution of the funds was contingent only upon the issuance of an E-2 visa. The buyer/investor is a British national. During the six months prior to filing the application, the company had generated over $200,000 in total revenues and work currently in progress totalled approximately $320,000.

CONCLUSION

The continued strength of our global economy depends upon the ability of people to interact on a business and professional level. One way to achieve this objective is to enable foreign investors to establish businesses and open offices within the United States and allow foreign nationals to enter the United States to work on a temporary basis. U.S. immigration law provides a variety of different options for foreign investors to enter the United States and manage investments they make in new or existing U.S. businesses. This article has highlighted two commonly used avenues for investors to create and staff new

business enterprises or to purchase an existing business – the L-1 (intra-company transfer visa) and the E-2 (treaty investor visa). Because the classifications have different requirements, each classification should be considered carefully, based upon the goals and objectives of the foreign investor, before the investment entity is established.