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Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program

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Preface

The Department of Homeland Security (DHS) Office of Inspector General (OIG) was established by the Homeland Security Act of 2002 (*Public Law 107-296*) by amendment to the Inspector General Act of 1978. This is one of a series of audit, inspection, and special reports as part of our oversight responsibilities to promote economy, effectiveness, and efficiency within the department.

This report assesses vulnerabilities and potential abuses of the L-1 intra-company transferee nonimmigrant visa program. It is based on interviews with employees and officials of relevant agencies and institutions, direct observations, and a review of applicable documents.

The recommendations herein have been developed to the best knowledge available to our office, and have been discussed in draft with those responsible for implementation. It is our hope that this report will result in more effective, efficient, and economical operations. We express our appreciation to all of those who contributed to the preparation of this report.

Richard L. Skinner
Inspector General

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Abbreviations

CA	Bureau of Consular Affairs, Department of State
DHS	Department of Homeland Security
DOS	Department of State
DS	Bureau of Diplomatic Security, Department of State
FDNS	USCIS Office of Fraud Detection and National Security
ICE	Immigration and Customs Enforcement
IT	Information Technology
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service
LCA	Labor Condition Application
OIG	Office of Inspector General
RFE	Request for Evidence
USCIS	U.S. Citizenship and Immigration Services

OIG

Department of Homeland Security
Office of Inspector General

Executive Summary

Section 415 of the Consolidated Appropriations Act of 2005, Pub. L. 108-447, requires that the Office of Inspector General (OIG) examine the vulnerabilities and potential abuses in the L-1 visa program.[1] The L-1 nonimmigrant visa is one of several temporary worker visa classifications.

We interviewed program managers in Washington, DC, and adjudicators and their supervisors at one of the four service centers that process petitions. With the assistance of the Bureau of Consular Affairs (CA) of the Department of State (DOS), we surveyed experienced consular professionals at 20 of the largest L-visa issuing posts. We also visited the Kentucky Consular Center's Fraud Prevention Office and interviewed employees there.

The L-1 program is vulnerable in several respects. First, the program allows for the transfer of managers and executives, but adjudicators often find it difficult to be confident that a firm truly intends using an imported worker in such a capacity. Second, the program allows for the transfer of workers with "specialized knowledge," but the term is so broadly defined that adjudicators believe they have little choice but to approve almost all petitions. Third, the transfer of L-1 workers requires that the petitioning firm is doing business abroad, but adjudicators in the United States have little ability to evaluate the substantiality of the foreign operation. Fourth, the program encompasses petitioners who do not yet have, but are merely are in the process of establishing, their first U.S. office, and it also permits petitioners to transfer themselves to the United States. These two provisions, separately and in combination, represent "windows of opportunity" for some of the abuse that appears to be occurring.

Our report contains three recommendations directed to the Department of Homeland Security (DHS) Bureau of Citizenship and Immigration Services (USCIS). Other vulnerabilities can only be reduced through legislative action to redefine the category.

[1] Division J, Title IV, Subtitle A of the act (sections 411-417) is also cited as "The L-1 Visa (Intracompany Transferee) Reform Act of 2004."

Background

The L classification, which originated with the 1970 amendments to the Immigration and Nationality Act (INA),[2] was designed to facilitate the temporary transfer of foreign nationals' management, executive, and specialized knowledge skills to the United States to continue employment with an office of the same employer, its parent, branch, subsidiary, or affiliate.[3] The Immigration Act of 1990 (IMMACT) made several modifications to the existing L category.[4]

- IMMACT changed the definition of "manager" in the INA to include mangers of a "department, subdivision, function, or component of the organization"[5] or those managers that manage an "essential function"[6] within the company.
- IMMACT removed L nonimmigrants from those categories being "presumed to be an immigrant."[7] L aliens are specifically excluded from the intending immigrant presumption of section 214(b) of the INA and are, furthermore, not required to have a residence abroad which they have no intention of abandoning. In addition, INA 214(h) provides that an alien who has sought permanent residence in the United States is not precluded from obtaining an L nonimmigrant visa or otherwise obtaining or maintaining that status.[8]
- IMMACT specified new limitations on the period of stay for L visa holders: seven years for executives/managers[9] and five years for specialized knowledge personnel.[10]
- IMMACT modified the definition of "affiliate" to include the international partnership agreements used by international accounting firms[11] and mandated a "blanket" petition process to accelerate the admission of individual L nonimmigrants.[12]
- IMMACT also modified the requirement that the beneficiary have been employed by the petitioner for at least one year immediately prior to the submission of the petition. The new, less restrictive requirement to qualify an L-1 employee was any one year of the prior three.[13]

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[2] See INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L), as added by Pub. L. No. 91-225, Sec.1(b), 84 Stat.116.
[3] USCIS Adjudicator's Field Manual, Chapter 32.
[4] See Pub. L. No. 101-649.
[5] See INA § 101(a)(44)(i), 8 U.S.C. § 1101(a)(44)(A)(i), as added by Pub. L. No. 101-649 Sec. 123.
[6] See INA § 101(a)(44)(ii), 8 U.S.C. § 1101(a)(44)(A)(ii), as added by Pub. L. No. 101-649 Sec. 123.
[7] See INA § 214(b), 8 U.S.C. § 1184(b), as added by Pub. L. No. 101-649 Sec. 205(b).
[8] U.S. Department of State Foreign Affairs Manual, Volume 9, section 41.54, note 4.
[9] See INA § 214(c)(2)(D)(i), 8 U.S.C. § 1184(c)(2)(D)(i), as added by Pub. L. No. 101-649 Sec. 206(b)(2).
[10] See INA § 214(c)(2)(D)(ii), 8 U.S.C. § 1184(c)(2)(D)(ii) as added by Pub. L. No. 101-649 Sec. 206(b)(2).
[11] See INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L) and 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C), as added by Pub. L. No. 101-649 Sec. 206(a).
[12] See INA § 214(c)(2)(A), 8 U.S.C. § 1184(c)(2)(A), as added by Pub. L. No. 101-649 Sec. 206(b)(2).
[13] See INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L), as added by Pub. L. No. 101-649 Sec. 206(c)).

USCIS describes intracompany transferees as belonging to one of two subcategories:[14]

- L-1A is an alien coming temporarily to perform services in a managerial or executive capacity.
- L-1B is an alien coming temporarily to perform services that entail specialized knowledge. Specialized knowledge is special knowledge of the employer's product or its application in international markets or an advanced level of knowledge of the employer's processes and procedures.

L-1 beneficiaries[15] must have worked abroad for the petitioning corporation or firm, or for a branch, subsidiary, or affiliate of the petitioning company for one continuous year within a three-year period immediately preceding the filing of the petition. These time-of-service limitations are intended to limit the L-visa to existing foreign employees, sent to the United States temporarily, and to preclude companies from hiring abroad for U.S. vacancies. Other temporary worker visa programs, such as the E, H, J, O and P, are designed to accommodate other kinds of employment: entrepreneur investors; business trainees; aliens of extraordinary ability in arts, science, education, business, or athletics; internationally recognized athletes, entertainers, and fashion models; and aliens coming temporarily to participate in an international cultural exchange program. Both the entertainment industry and professional sports employ many temporary workers, and a number of business executives playing leading roles in U.S. companies were initially transferred to the United States on temporary worker visas.

To receive an L-1 visa, a petition (Form I-129) must be filed with USCIS on behalf of the worker by a sponsoring firm. An L-1 petition, when approved, is used by a beneficiary to apply for an L-1 visa if abroad, or to change status if already in the United States. Canadian beneficiaries are reviewed for admission when they arrive at the border, because Canadians are exempt from most nonimmigrant visa requirements.

USCIS adjudicators examine many factors before approving an L-1 petition. Both the position that is going to be filled and the worker who will be hired must meet many criteria. Petitions that are complete and clearly meet the standards can be promptly approved. Other petitions require correspondence - a Request For Evidence (RFE) - between the service center and the petitioner to resolve unclear or incomplete submissions.

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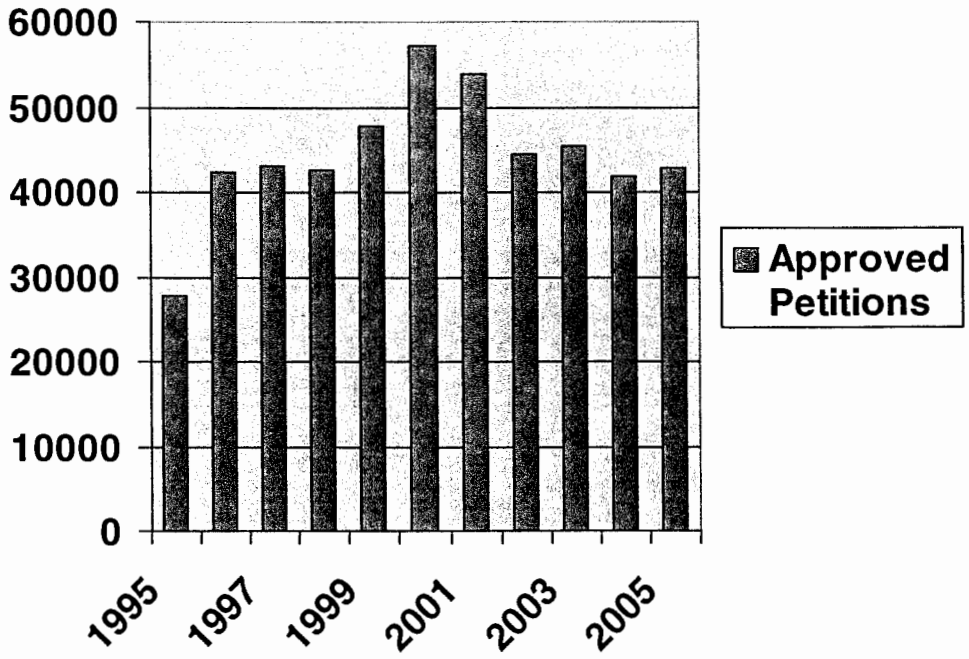
[14] While immigration law and consular procedure make no division of the L-1 category into L-1A and L-1B, USCIS does internally, and we will use their terms in our report. Petitioners select A or B when completing the "L Classification Supplement to Form I-129" depending on whether the beneficiary is A) coming to perform services in a managerial or executive capacity, or B) coming to perform services that entail specialized knowledge.

[15] Immigration petitions are submitted by a "petitioner," who requests that some particular status be accorded to a named "beneficiary." In the context of employment-based visas, the petitioner is usually the employing company, and the beneficiary is the named foreign worker. Once the beneficiary has been deemed by USCIS to be entitled to the requested classification, he or she can apply for an appropriate visa at a U.S. embassy.

Receipts and approvals of L-1 petitions increased dramatically (almost tripling) in the late 1990s. There has been a slight decline since 2001.



Source: US Citizenship and Immigration Services (January 11, 2006)

Is the L-1 "The Computer Visa"?

Though the L-1 visa program is not specifically tailored for the computer or information technology (IT) industries, the positions L-1 applicants are filling are most often related to computers and IT. From 1999 to 2004, nine of the ten firms that petitioned for the most L-1 workers were computer and IT related outsourcing service firms that specialize in labor from India.[16] And although the L-1 visa program was not intended to benefit any one country, almost 50 percent of the L-1B (specialized knowledge) petitions submitted in FY 2005 named beneficiaries who were born in India.

[16] These firms were Tata Consultancy, Cognizant Technology Solutions, Wipro Technologies, Hewlett Packard, I-Flex Solutions, IBM Global Services, Information Systems Technology, Syntel Incorporated, and Satyam Computer Services. The exception was Honda.

Top Five Approved L-1B (Specialized Knowledge) Petition Source Countries and Share of Total L-1B[17]

2002		2005	
Canada	25%	India	48%
Japan	12%	Canada	15%
India	10%	UK	5%
UK	5%	Japan	4%
Germany	5%	Germany	3%

Source: US Citizenship and Immigration Services (January 11, 2006)

There is no similar concentration among L-1A beneficiaries. The top five L-1A countries together represent only 48 percent of the FY 2005 total.

Top Five Approved L-1A (Manager) Petition Source Countries and Share of Total L-1A

2002		2005	
Canada	20%	Canada	17%
UK	7%	India	11%
Japan	6%	UK	11%
India	5%	Japan	5%
Argentina	5%	Mexico	4%

Source: US Citizenship and Immigration Services (January 11, 2006)

Results of Inspection

USCIS adjudicators we interviewed expressed a desire for more written guidance on how to adjudicate L-1 petitions. When questioned in more detail, however, it became clear that the underlying issue troubling them is their perception that the category is subject to fraud and abuse, rather than lack of guidance. Chapter 32 of the USCIS Adjudicator's Field Manual covers L requirements in considerable detail.

Many immigration benefits are based upon facts that can be verified. For example, an immigrant beneficiary either is or is not the lawful spouse of a U.S. citizen. An adjudicator can examine civil records, or interview the husband and wife, to confirm or disprove the claimed relationship. Likewise, a would-be student either has or has not been accepted by an accredited American educational institution. An adjudicator can check with the school.

Employment-based visas – and there are both nonimmigrant and immigrant visa classes that are employment-based – are perceived as more susceptible to fraud

[17] Only proportions are given and absolute numbers are omitted because country breakdown data provided by USCIS is not reconcilable with total L-1 approval data.

because they are more difficult or impossible to verify. An adjudicator cannot be certain that a beneficiary will work as a personnel manager if approved, or as just another salesperson. No document can be requested that will prove the future activities of the beneficiary. A beneficiary's entitlement to the classification is based on, among other factors, their future conduct. Additionally, adjudicators told us that employment-based petitions were usually professionally prepared by experienced attorneys, and were either too vague, or conversely too technical, for the adjudicator to make appropriate decisions. The adjudicators we interviewed felt unanimously that three vulnerabilities were the most significant they face, and these made their job extremely difficult with regard to adjudicating L-1 petitions:

- managerial status is difficult to verify,
- the definition of specialized knowledge is very broad, and
- foreign companies may be illegitimate.

DOS consular officers expressed identical concerns in their responses to our survey questions.[18]

Adjudicators Need Additional Information to Verify Managerial Status

The adjudicators we interviewed reported that one vulnerability of the L-1A program involved verification of the managerial status of the petitioned workers.[19] Though a petitioning firm may claim in their application that a worker will be performing managerial functions, once the worker arrives in the United States there is nothing to prevent the firm from employing the employee in a different capacity. Adjudicators are aware that there is sometimes a fine line between a senior worker, even a team leader, and a true manager. As an example, they discussed a busy and growing import-export firm. Typically starting as a solo activity, the one person at the one-person firm may not be a manager in the L-visa sense of the word if the work they do is selling products and filling out customs documents. When business grows and the founder hires someone else to answer the phone, but otherwise continues to do the product selection and importing, that person is still not a manager. Much later, when the growing firm has an employee who does nothing related to import-export at all, but who is responsible for personnel, "management" appears in the firm.

One complication that the adjudicators mentioned was that it is possible for a formerly successful firm to suffer commercial reverses and to shrink in size. When this happens the firm might no longer need a layer of management that was formerly useful. Shifting an L-1 manager to a non-management position for economic reasons such as this is allowed under the program.

[18] A full description of the questionnaire given to DOS is provided in Appendix D.

[19] Almost half of the L-1 petitions received and approved by USCIS are for L-1A managers and executives. For definitions of "manager" and "executive," see Appendix B.

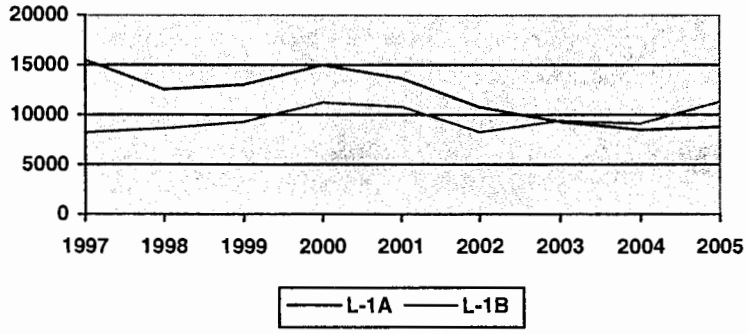
Adjudicators had varying techniques to attempt to determine whether a petitioning firm genuinely intended to employ a worker as a manager. At the request of USCIS, these fraud detection techniques will not be discussed in detail. Some adjudicators told us that they felt some of these techniques were difficult to use because they were insufficiently precise and failed to give the adjudicator a "bright-line" test. Adjudicators examine the credibility of the claims made in the petition in a variety of ways. Some adjudicators expressed hesitancy to accept at face value documentation from abroad, and pointed out that these self-serving documents could not be verified.

DOS consular officers who responded to our survey expressed similar concerns when L-1 applicants apply for visas. One southeast Asian consular section reported: "We suspect, but find it very difficult to prove, that some employees are actually doing different work than claimed in the application once they get to the United States, and that the employer-employee relationship with the U.S. subsidiary of the sending firm may not be as clear cut as the applicant claims."

Definition of the Term "Specialized Knowledge" May Not Be Sufficiently Restrictive

The number of L-1B "specialized knowledge" petitions approved by USCIS has risen steadily for several years, and in FY 2004 exceeded for the first time the number of L-1A petitions approved for managers and executives.

L-1B Overtakes L-1A



Source: US Citizenship and Immigration Services. Data as of January 12, 2006

L-1B positions are designated for workers who perform services that involve specialized knowledge.[20] The prior regulatory definition required that the beneficiary possess an advanced level of expertise and proprietary knowledge not available in the United States labor market. In 1990, Congress enacted section 214(c)(2)(B) of the Immigration and Nationality Act, as amended, 8 U.S.C.

[20] DHS USCIS I-129 Instruction Manual, page 6.

1184(c)(2)(B), which specifically provided for a less stringent definition of the term "specialized knowledge" for L-1 purposes.

Aware of the existing regulatory requirement that the alien's specialized knowledge be "proprietary" to the petitioning company, Congress, in enacting section 214(c)(2)(B) of the Act, set forth two different means for determining when an alien has specialized knowledge. Section 214(c)(2)(B) provides that: (a) the alien must have special (as opposed to proprietary) knowledge of the company product and its application in international markets or (b) the alien has an advanced level of knowledge of the processes and procedures of the company.

Following enactment of section 214(c)(2)(B), the former Immigration and Naturalization Service (INS) issued a policy memorandum on March 9, 1994, to all offices clarifying what is or is not specialized knowledge. This memorandum, entitled "Interpretation of Specialized Knowledge," is included in the Adjudicator's Field Manual as Appendix 32-1, and is still valid. In 2003, USCIS issued a second memorandum ("Interpretation of Specialized Knowledge for Chefs and Specialty Cooks Seeking L-1B Status") that, among other things, clarified certain general points made in the 1994 memorandum.

The 1994 memorandum makes clear that, in light of the enactment of section 214(c)(2)(B) of the Act, there is no longer any requirement that the alien's knowledge be unique or proprietary. The 1994 memorandum further clarifies that the beneficiary's specialized knowledge can have been gained outside of the petitioning company, and in fact, might even be knowledge that, over time, could be transferable to a worker already in the United States through training.

The 1994 memorandum contains several important caveats, however, which are reiterated in the 2003 memorandum. The mere fact that an alien's knowledge is somehow different from those of others in the industry does not, in itself, establish that the alien possesses specialized knowledge. The knowledge must be uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioners in the alien's field of endeavor.

According to the manual, adjudication requires the understanding of key terms, the meaning of which "have been defined over the years through various documents, including statutes, regulations, precedent decisions, and policy memoranda." The manual even lists which precedent decisions shape the meaning of each of several terms, including specialized knowledge.

While the current criteria for determining whether an alien is eligible for L-1B classification are not lax, given the 1990 amendment to the statute which effectively overruled INS's requirement that the alien's knowledge be proprietary, there is little room, absent new legislation, to further tighten the standards for L-1B classification. A bill to eliminate specialized knowledge as the basis for

obtaining an L visa, H.R. 4415, was introduced in the 108th Congress but did not pass.[21] That so many foreign workers seem to qualify as possessing specialized knowledge appears to have led to the displacement of American workers, and to what is sometimes called the "body shop" problem.

Displaced American Workers

There has been considerable media attention regarding the L-1 program over the past few years. Articles have focused on the increase in L-1 visa issuance in the IT sector and on the potential for the L-1 program to be used as a substitute to the H-1B program.[22] Articles also have focused on firms' abilities to use the program for labor outsourcing, and on supposed cuts to the American labor force and wages. [23]

Witnesses testifying at congressional hearings have repeated these concerns. Labor advocates felt the L-1 program was growing because of insufficient limitations, and that "the absence of these and other protections and limitations make the L-1 program far more attractive to employers than H-1B, and is a major reason for the explosive growth in this visa category."[24] Workers told of training their own replacements and implied that the L-1 program was driving down salaries and stealing American jobs; "Every H1-B and L-1 visa given to outsourcing companies like Tata is a job an American should have."[25]

DOS foreign service officers also expressed concern about substitution. One southeast Asian post we surveyed reported: "Host country software companies appear to be using the L visa to get around H quotas, and relocate individuals who may not meet the specialized knowledge requirement."

Most of the discussion of the job losses American workers have experienced as a result of L visas is focused on L-1B specialized knowledge workers, not L-1A managers and executives.[26] Simultaneously, there has been much public

[21] "The Save American Jobs Through L Visa Reform Act" was introduced by Rep. Henry Hyde.
[22] See INA § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H).
[23] New York Times, "Special Visa's Use for Tech Workers Is Challenged," May 30, 2003; Business Week, "A Mainframe-Size Visa Loophole," March 6, 2003; San Francisco Chronicle, "Visa's Use Provokes Opposition by Techies, L-1 Regarded as Threat to Workers," May 25, 2003.
[24] Testimony of Michael W. Gildea, Executive Director, Department for Professional Employees, AFL-CIO Before the Senate Committee on the Judiciary Subcommittee on Immigration and Border Security Regarding the L-1 Visa Program, July 29, 2003.
[25] Testimony by Former Siemens Technology Employee, Pat Fluno, on L-1 Visas Before the Senate Committee on the Judiciary Subcommittee on Immigration and Border Security Regarding the L-1 Visa Program, July 29, 2003.
[26] Testimony of Beth R. Verman President, Systems Staffing Group, Inc. on behalf of National Association of Computer Consultant Businesses (NACCB) Before The Senate Committee on the Judiciary Subcommittee on Immigration and Border Security Regarding the L-1 Visa Program, July 29, 2003; Testimony of Austin T. Fragomen, Managing Partner, Fragomen, Del Rey, Bernsen & Loewy, P.C., on behalf of the American Council on International Personnel (ACIP) Before The Senate Committee on the Judiciary Subcommittee on Subcommittee on Immigration and Border Security Regarding the L-1 Visa Program, July 29, 2003.

discussion of the threat to American workers posed by a similar visa, the H-1B.[27] The two temporary worker visas have much in common: the L-1B program is designed for workers with "specialized knowledge"[28] and the H-1B program is designed for workers in "specialty occupations."[29] But there are also several significant differences between the two visa categories. An American company with no overseas operations can submit an H petition, and the beneficiary need not and usually has not previously worked for the petitioner.

To manage the displacement of American workers, Congress has imposed a statutory limit on the number of H-1B petitions for workers in specialty occupations that can be approved each year.[30] There is some concern that the L-1B visa for workers with specialized knowledge, which has no such numerical limit, might serve as a way to avoid the H-1B cap for some employers.

The L-1 visa has other advantages over the H-1B, too, besides being numerically unrestricted. One is that unlike the H-1B, the L-1 has no labor certification requirement to ensure that recipients are paid the prevailing wage and that American workers are not displaced.[31] The L-1 has another advantage over the H-1B for those who might qualify for either category, such as IT workers: the permissibility of spousal employment. The accompanying spouses of L-1 recipients are given L-2 visas; the spouses of H-1B recipients are given H-4 visas. It is generally lawful for an L-2, but not an H-4, to accept gainful employment.[32]

While many of the claims that appear in the media about L-1 workers displacing American workers and testimony may have merit, they do not seem to represent a significant national trend. While L-1 visa issuance has generally increased in the decades since the category was created, issuance has abated in recent years. And while it is possible for the L-1B program to be used by some individuals who are also eligible for H-1B program, we could not establish how often this occurs. In 2004, only 1,975 applicants applied for both the L-1 and H-1B.[33] Adjudicators pointed out to us that it sometimes occurs that a foreign student about to graduate might receive multiple legitimate job offers and be the beneficiary of two or more petitions filed during the same period. Such an event does not indicate that either of the petitioners, or the beneficiary, is trying to take advantage of the system. Another possible indication that L-1s are not widely used as alternatives to the H-1B is that in fiscal year 2004 the congressional numerical limit on H-1B status

[27] Ibid, plus Testimony of Stephen Yale-Loehr Adjunct Professor of Law, Cornell Law School Before the Senate Committee on the Judiciary Subcommittee on Immigration and Border Security Regarding the L-1 Visa Program, July 29, 2003.
[28] See INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L) and INA § 214(c)(2)(B), 8 U.S.C. § 1184(c)(2)(B).
[29] See INA § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H) and INA § 214(i)(3), 8 U.S.C. § 1184(i)(3).
[30] See INA § 214(g)(1)(A), 8 U.S.C. § 1184(g)(1)(A), as added by Pub. L. No. 101-649 Sec 205(a).
[31] DHS USCIS I-129 Instruction Manual, page 3.
[32] "Immigrant Wives' Visa Status Keeps Them Out of Workplace," Washington Post, October 3, 2005, Page A01.
[33] Source: US Citizens and Immigration Services.

was significantly reduced,[34] but no increase in L receipts or approvals was observed.

On the whole, the demand for computer and IT related positions also seems to be strong. From 1999 to 2004, computer and IT related employment averaged 1.4 percent annual real wage growth, compared to 1.3 percent growth for production workers, and a 3.5 percent increase in the number of positions annually compared to 0.7 percent annually for production workers.

There may be a perception that the L-1 program is larger and more significant than it is because beneficiaries are grouped together in certain areas of the country. L-1 positions tend to be concentrated in a few states. For four of the last five years, California has received the most L visa workers.

USCIS adjudicators said the L-1B program had the potential to be easily exploited for two major reasons. First, adjudicators said that without a more restrictive and more precise definition of "specialized knowledge," their denials tended to be subjective. Subjective decisions, they said, are more easily appealed. Because of their desire to do their jobs correctly, successful appeals are seen as a kind of failure that they strive to avoid. They were therefore inclined to approve ambiguous petitions rather than denying them. Second, they reported to us that because many petitions were for employment in the rapidly evolving high technology sector, they did not have sufficient technical expertise to determine whether the beneficiary's knowledge is specialized or general. And the petitions often contain highly technical language that is not readily comprehensible to an adjudicator.

The DOS consular professionals we surveyed echoed many of the comments of the adjudicators. One Southeast Asian visa section reported "officers do not have the knowledge or the guidance necessary to determine whether such work involves specialized knowledge, except in the most clear cut cases."

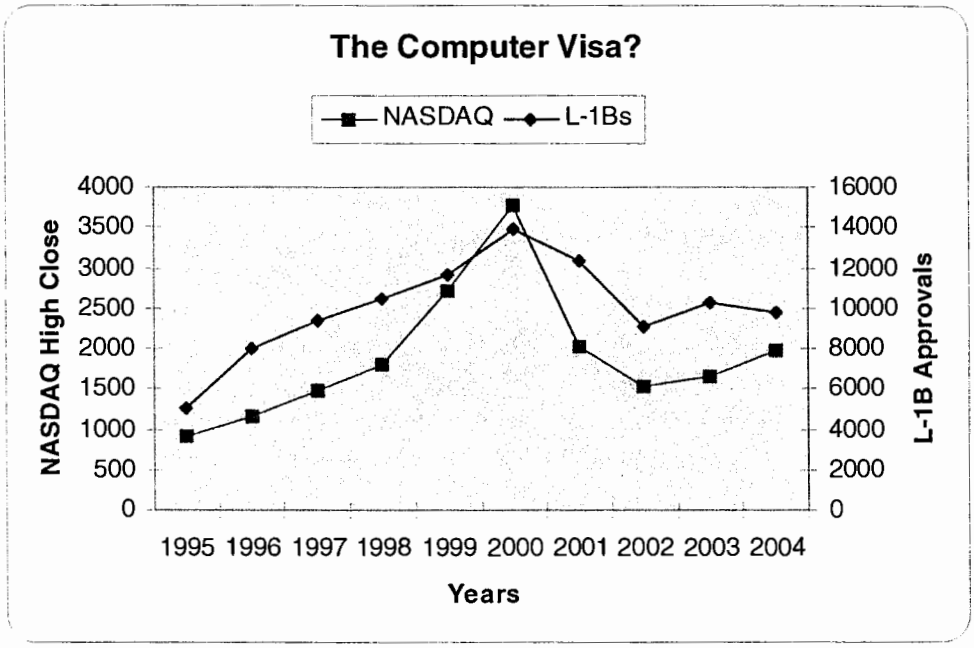
The "Body Shop" Problem

Of the many actual and potential vulnerabilities of the L-1 visa, the body shop problem has received the most attention in the press, and during congressional hearings.

Briefly, there are companies whose business involves providing the services of their own employees to other companies for a fee. Some of these companies are general purpose temporary employment agencies that provide both blue collar workers, such as laborers, and white collar staff, such as accountants. Newer on the scene are high-tech information technology (IT) service providers that

[34] See INA § 214(g)(1)(A)(vi), 8 U.S.C. § 1184(g)(1)(A)(vi), as added by Pub. L. No. 101-649 Sec 205(a).

specialize in computer operators, network managers, systems analysts, and programmers. During the boom years for the U.S. tech industry in the 1990s, there was a growing demand for these kinds of high-tech workers. Foreign IT service providers could transfer more and more of their foreign workers to the U.S. branch of the company – and place them with their U.S. clients. The ebb and flow of L-1B workers correlates closely with the general health of the U.S. high-tech industry, as the following chart illustrates.



NASDAQ levels: *The Economic Report of the President, 2005.*

L-1B data: U.S. Citizenship and Immigration Services

According to press accounts, many unemployed American IT workers saw themselves as displaced by a rising tide of foreign IT workers. The great majority of the new foreign IT employees entered the United States using the H-1B temporary worker visa, not the L-1. There is considerable room for overlapping of the two categories, but the most important distinction is that H-1B workers are petitioned for directly by U.S. companies, and are usually new hires, whereas L-1s are being transferred from a foreign company. The H-1B visa is so popular that Congress has placed explicit limits on the number of petitions that can be issued in any one year. In fiscal year 1998, that limit was 65,000 beneficiaries.[35] For 1999 and 2000, the limit was raised to 115,000. In 2001 and 2002, the limit was raised even higher, to 195,000. Since 2003, the limit has since been lowered to 65,000 again. L-1 foreign IT workers represented only a small component of a much larger wave of foreign IT workers that came to the United States on

[35] The limitation on H-1B status is actually rather complicated, with several exceptions to the limit that make counting difficult. For more information about H-1B limits, see our recent report "USCIS Approval of H-1B Petitions Exceeded 65,000 Cap in Fiscal Year 2005, OIG-05-49, released in September 2005.

temporary worker visas. The busiest year for L-1B visas, fiscal year 2000, saw more than ten H-1B workers for every one L-1B worker. In FY 2002, the ratio was twenty to one. Foreign IT workers may indeed have affected employment opportunities for American IT workers, but the L-1B visa would appear to be only a very small element of the problem.

Nevertheless, the appearance of foreign companies establishing branches in the United States and then driving American workers out of their jobs with transplanted competitors led Congress to address the body shop issue in the L-1 Visa Reform Act of 2004, signed into law December 8, 2004.[36]

> SEC. 412. NONIMMIGRANT L-1 VISA CATEGORY.
>
> (a) IN GENERAL- Section 214(c)(2) of the Immigration and Nationality Act (8 U.S.C. 1184(c)(2)) is amended by adding at the end the following:
>
> (F) An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 101(a)(15)(L) and will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 101(a)(15)(L) if—
>
> (i) the alien will be controlled and supervised principally by such unaffiliated employer; or
>
> (ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.

It is too soon for the effects of this legislative change to be determined.

Adjudicators Need Additional Information to Verify a Foreign Company's Legitimacy

The L-1 program allows qualifying workers who have been employed abroad by the petitioner continuously for one year of the last three to be transferred to the United States. In order for the petitioning company to be eligible, it must be "the same firm, corporation, or other legal entity, or parent, branch, affiliate or subsidiary thereof, for whom the beneficiary has been employed abroad."[37]

[36] See INA § 214(c)(2)(F), 8 U.S.C. § 1184(c)(2)(F), as added by Pub. L. No. 108-649, Sec 412(a).
[37] U.S. Department of State Foreign Affairs Manual, Volume 9, section 41.54, note 2.1.

There is a widespread belief that the L visa was created so that large American companies with international operations could move foreign executive talent into the pre-existing U.S. offices of those companies. The Department of State Foreign Affairs Manual contains the following background information in its guidance for consular officers adjudicating L visas:

> The L nonimmigrant classification was created to permit international companies to temporarily transfer qualified employees to the United States for the purpose of improving management effectiveness, expanding U.S. exports, and enhancing competitiveness in markets abroad. Prior to the enactment of Public Law 91-225, no nonimmigrant classification existed which fully met the needs of intracompany transferees. Those who did not qualify as E nonimmigrants were forced to apply for immigrant visas to the United States, even if there was no intent to reside permanently.[38]

Whether or not the L visa was created to serve the needs of multinational corporations, the law creating the category does not require that the petitioning company have any operations in the United States, or even operate in more than one country, at the time of the filing of the petition. It merely requires that the alien comes to the United States to continue to serve the petitioning employer, or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.[39] Any foreign company can use the L visa to send employees to the United States to open a new office. This opens a window of opportunity for the owners of a business abroad to send themselves and their families to the United States to live, work, and study. The INA permits the spouses of L beneficiaries to work in the United States, and the children may attend public school.

Once the first beneficiary has arrived in the United States, the foreign company effectively has a U.S. branch. The new U.S. office, not the parent company abroad, typically files subsequent petitions on behalf of the company. Because of this, and because many of the petitions USCIS receives are from existing U.S. companies, the "new office" petition is a small percentage of the total. Most L petitioners have both U.S. and foreign offices at the time the petition is submitted.

USCIS adjudicators must determine whether the U.S. and foreign entities truly exist, and have the required commercial interrelationship. This process is designed to prevent individuals or groups from creating shell companies in one

[38] U.S. Department of State Foreign Affairs Manual, Volume 9, section 41.54, note 1.b.
[39] See INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L) and 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C).

country or the other, or falsifying the relationship between two legitimate companies, to transfer otherwise ineligible aliens to the United States.

To make their decisions, adjudicators use evidence supplied by the petitioning company of the qualifying relationship between the U.S. and foreign entities. The adjudicator must analyze the ownership and control of the two entities. Evidence often includes an annual report, the articles of incorporation, financial statements, and copies of stock certificates. Unless the company is well known, adjudicators might find the submitted evidence insufficient to establish the facts. They will then send the petitioner an RFE. Typically, the request will ask for quarterly wage reports and state business tax returns to prove that the firm is actually conducting business in the United States. This RFE, though, slows the adjudication process. Many adjudicators we spoke with expressed a desire that quarterly wage reports and tax returns be made required documents, to be submitted with all L petitions. They felt this would reduce the need to issue so many RFEs.

It can be a very difficult task for an adjudicator to verify that a business exists abroad. Adjudicators said they did not place much confidence in documents from abroad because they are easy to counterfeit in a fashion that the adjudicator would not be able to detect. As an example, they related that their familiarity with California state employment tax documents makes it possible for them to spot forged or altered versions submitted with fraudulent petitions. This sometimes occurs, they said, when a petitioner seeks to exaggerate the number of current employees to sustain a claim that an additional manager is required. They also pointed out that any suspicions they might have about a U.S. document can likely be resolved with a telephone call to the issuing authority. With respect to firms abroad, however, they have vastly less ability to detect bogus documents, or to resolve suspicions if any arise. There is little information available publicly in the United States that would assist the adjudicator in determining whether a business abroad is legitimate.

On occasion an adjudicator will seek assistance from the U.S. embassy in the foreign country, and ask them to conduct an investigation as to the legitimacy of the claimed business. Verifying businesses for USCIS is a routine task for many consular officers in countries like India and China, but officers in those countries expressed concern in our survey about businesses located in small or far-away cities that they could not verify first-hand. USCIS petitions in which the adjudicator suspects fraud can be referred to the service center's own Fraud Detection Center. These offices not only have advanced tools for detecting petition fraud, but also serve a valuable role as a liaison to Immigration and Customs Enforcement (ICE).

DOS foreign service officers expressed parallel concerns when the beneficiaries apply for visas. One very large embassy reported, "L-1 applicants claim they are

being sent to open new offices or subsidiaries in the United States. It is impossible to verify these claims as the new company need only show to DHS that it has a leased business space and possesses company registration. When we subsequently investigate "existing" U.S. entities, we often find that the U.S. office never actually existed in the true sense, or that it is no longer doing business."

USCIS plans to establish a standard mechanism to request overseas verification of pending H and L petitions by Department of State officers in the related countries. State, for its part, plans to use its one-third share of the new $500 Fraud Prevention and Detection Fee to expand its anti-fraud staffing abroad. They would be able to verify education, experience, relationships, and other information provided in support of H and L petitions. This initiative will, if implemented, reduce successful L petition fraud.

Recommendations

We recommend that U.S. Citizenship and Immigration Services:

Recommendation 1: Establish a procedure to obtain overseas verification of pending H and L petitions by Department of State officers in the related countries.

Recommendation 2: Explore with ICE whether ICE Visa Security Officers, experienced criminal investigators assigned abroad in compliance with Section 428(e) of the Homeland Security Act, could assist in checking the bona fides of L petitions submitted by petitioners in the countries in which the officers are assigned.

Recommendation 3: In cooperation with "L Visa Interagency Task Force," which consists of representatives from the Departments of Homeland Security, Justice, and State, seek legislative clarification relative to:

a) applying the concepts of manager and executive to L-1A visas and verifying that the beneficiary will be so used;
b) the term "specialized knowledge," as altered in the Immigration Act of 1990, and according to USCIS guidance issued in March 1994; and
c) the criteria and proof required when a foreign company seeks to use an L petition to open a new office in the United States. That almost any foreign business proprietor can effectively petition himself and his family into the United States may not be in accord with congressional intent.

Management Comments and OIG Analysis

We issued our draft report on November 30, 2005, and met with USCIS officials on January 4, 2006 to discuss the report. The draft was also circulated to CA for

its comments, which are attached at Appendix F. USCIS was invited to provide us with technical comments about and corrections to the draft; these were submitted to us separately for our consideration, and have been incorporated into our final report as appropriate. We also requested, and received, up-to-date FY 2005 petition counts to improve the quality of our charts. We thank USCIS and CA for their assistance at all stages of our work.

The USCIS response to our draft has added a wealth of legal background to our analysis of the fraud and potential abuse of the L-1 Intracompany Transferee Visa program. A copy of these comments is attached at Appendix E. Below is our summary of USCIS' comments about our recommendations and our analysis of its response.

The draft version of our report that was circulated for comment contained a recommendation that USCIS expand its anti-fraud activities abroad by stationing FDNS anti-fraud immigration officers at embassies and consulates general in countries that present the highest risk of petition and benefit fraud. While several USCIS officials we interviewed during our research had commended such an approach, at this time neither USCIS managers nor the Department of State endorse this idea. USCIS states in its comments that it has thoroughly reviewed the option to station anti-fraud immigration officers in overseas locations but determined that it would be more effective and efficient to rely on the current structure and establish a standard mechanism to request overseas verifications through the Department of State (DOS). In their comments, both USCIS and CA pledge better future cooperation to combat fraud.

CA advised that its fraud prevention officers investigate L visa fraud already. We believe that the vast majority of CA's anti-fraud activities in this area (petition fraud) involve questionable petitions that have already been approved by USCIS. These efforts suggest to us that more anti-fraud work should be done before questionable petitions are approved and sent to embassies for processing. CA also states that the Fraud Prevention and Detection Fee enacted in Section 426 of the 2004 Visa Reform Act (Title IV of the Omnibus Appropriations Act, P. L. 108-447) will be used by the Department of State to increase the number of Diplomatic Security (DS) bureau officers assigned to such duty at embassies and consulates abroad. The Department of State OIG recently studied the current CA–DS anti fraud program (*Report of Management Review of Visa and Passport Fraud Prevention Programs*, Report Number ISP-CA-05-52, November 2004). The report contained 28 recommendations to improve the program and stated that "most posts ... lack the resources to address fraud effectively." CA's larger point, that with CA and DS already conducting some fraud detection efforts abroad, and with the new Visa Security Officer positions staffed abroad by DHS's bureau of Immigration and Customs Enforcement (ICE) adding to the mix, the field is getting crowded and inefficiencies and redundancies will occur. We fully agree with CA that this redundancy of functions may become wasteful in the future.

Given the position taken by both USCIS and CA to oppose any USCIS FDNS expansion abroad, however, and considering their declared intention to instead expand State's role in detecting and preventing H and L visa fraud before questionable petitions are approved, we have reconstituted our recommendation accordingly.

Recommendation 1: We recommend that USCIS establish a procedure to obtain overseas verification of pending H and L petitions by Department of State officers in the related countries.

As indicated, this recommendation has been formulated to be consistent with current USCIS initiatives. We request a report from FDNS within 90 days of actions taken by USCIS to comply.

Recommendation 1 is Resolved – Open.

Recommendation 2: We recommend that USCIS explore with ICE whether ICE Visa Security Officers, experienced criminal investigators assigned abroad in compliance with Section 428(e) of the Homeland Security Act, could assist in checking the bona fides of L petitions submitted by petitioners in the countries in which the officers are assigned.

USCIS indicates in its comments that it is pursuing this recommendation with ICE's Visa Security Unit. USCIS points out that even if such assistance can be obtained, it will only be useful in the few countries in which ICE operates VSUs. We request a report from USCIS within 90 days of their efforts to obtain ICE assistance in those countries.

Recommendation 2 is Resolved – Open.

Recommendation 3: We recommend that USCIS, in the framework of its participation in the "L Visa Interagency Task Force," which consists of representatives from the Departments of Homeland Security, Justice, and State, seek legislative clarification relative to:

a) applying the concepts of manager and executive to L-1A visas and verifying that the beneficiary will be so used;
b) the term "specialized knowledge," as altered in the Immigration Act of 1990, and according to USCIS guidance issued in March 1994; and,
c) the criteria and proof required when a foreign company seeks to use an L petition to open a new office in the United States.

USCIS responds that any legislative recommendation to Congress requires Department of Homeland Security and interagency review and clearance through the Office of Management and Budget to ensure that it is consistent with the Administration's program. There are many hurdles to the consideration and enactment of new law. These hurdles do not preclude an agency from considering legislative changes recommended by an OIG and stemming from the OIG's responsibility to review existing law and to make recommendations concerning the impact of such legislation. See Inspector General Act of 1978, 5 U.S.C.A., § 4(a)(2), (5). USCIS states that it will carefully review the matters raised by the Inspector General, but does not agree that any legislative recommendations regarding the L-1 visa program are necessary or appropriate.

Section 416 of the Visa Reform Act requires the establishment of an L Visa Interagency Task Force that consists of representatives from the Department of Homeland Security, the Department of Justice, and the Department of State. The law further requires that the Task Force report to the Committees on the Judiciary of the House of Representatives and the Senate on the efforts to implement the recommendations set forth by this report. The Task Force will note specific areas of agreement and disagreement, and make recommendations to Congress on the findings of the Task Force, including any suggestions for legislation.

It would therefore appear that our recommendation must necessarily be considered by the Task Force through the operation of the law, and specific compliance action by USCIS is unnecessary.

Recommendation 3 is Closed.

Purpose, Scope, and Methodology

The objective of this review was to determine the extent of vulnerabilities and potential abuses of the L-1 visa program. We conducted fieldwork from April 2005 to June 2005.

We interviewed USCIS officials from the Office of Service Center Operations, the Office of Fraud Detection and National Security. We also interviewed officials at the DHS Management Directorate's Office of Immigration Statistics.

We observed L-1 petition processing at the California Service Center in Laguna Niguel, California, and interviewed adjudicators and managers.

With the cooperation of the Department of State, we visited the Kentucky Consular Center in Williamsburg, Kentucky, where questionable L petitions are returned for review. The Department of State also facilitated a written survey of consular officers and foreign national fraud prevention specialists at the 20 largest L-visa processing posts (see Appendix D).

This review was conducted under the authority of the Inspector General Act of 1978, as amended, and according to the Quality Standards for Inspections issued by the President's Council on Integrity and Efficiency.

Section 101(a)(15)(L) of the Immigration and Nationality Act

(L) subject to section 214(c)(2), an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

Section 101(a)(44) of the Immigration and Nationality Act

(44)(A) The term "managerial capacity" means an assignment within an organization in which the employee primarily-

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day- to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

(B) The term "executive capacity" means an assignment within an organization in which the employee primarily- For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Section 214(c)(2)(B) of the Immigration and Nationality Act

(B) For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

USCIS Adjudicator's Field Manual, Appendix 32-1 Interpretation of Specialized Knowledge.

Editor's Note: The following is the text of a memorandum issued March 9, 1994, to all offices by the Acting Executive Associate Commissioner for Programs:

The Immigration Act of 1990 contains a definition of the term "specialized knowledge" which is different in many respects than the prior regulatory definition. The purpose of this memorandum is to provide field offices with guidance on the proper interpretation of the new statutory definition.

The prior regulatory definition required that the beneficiary possess an advanced level of expertise and proprietary knowledge not available in the United States labor market. The current definition of specialized knowledge contains two separate criteria and, obviously, involves a lesser, but still high, standard. The statute states that the alien has specialized knowledge if he/she has special knowledge of the company product and its application in international markets or has an advanced level of knowledge of the processes and procedures of the company.

Since the statutory definitions and legislative history do not provide any further guidelines or insight as to the interpretation of the terms "advanced" or "special," officers should utilize the common dictionary definitions of the two terms as provided below.

Webster's II New Riverside University Dictionary defines the term "special" as "surpassing the usual; distinct among others of a kind." Also, Webster's Third New International Dictionary defines the term "special" as "distinguished by some unusual quality; uncommon; noteworthy."

Based on the above definition, an alien would possess specialized knowledge if it was shown that the knowledge is different from that generally found in the particular industry. The knowledge need not be proprietary or unique, but it must be different or uncommon.

The following are provided as general examples of situations where an alien possesses specialized knowledge.

- The foreign company manufactures a product which no other firm manufactures. The alien is familiar with the various procedures involved in the manufacture, use, or service of the product.

- The foreign company manufactures a product which is significantly different from other products in the industry. Although there may be similarities between products, the knowledge required to sell, manufacture, or service the product is different from the other products to the extent that the United States or foreign firm would experience a significance interruption of business in order to train a new worker to assume those duties.

- The alien beneficiary has knowledge of a foreign firm's business procedures or methods of operation to the extent that the United States firm would experience a significant interruption of business in order to train a United States worker to assume those duties.

A specific example of a situation involving specialized knowledge would be if a foreign firm in the business of purchasing used automobiles for the purpose of repairing and reselling them, some for export to the United States, petitions for an alien to come to the United States as a staff officer. The beneficiary has knowledge of the firm's operational procedures, e.g., knowledge of the expenses the firm would entail in order to repair the car as well in selling the car. The beneficiary has knowledge of the firm's cost structure for various activities which serves as a basis for determining the proper price to be paid for the vehicle. The beneficiary also has knowledge of various United States customs laws and EPA regulations in order to determine what modifications must be made to import the vehicles into the United States. In this case it can be concluded that the alien has advanced knowledge of the firm's procedures because a substantial amount of time would be required for the foreign or United States employer to teach another employee the firm's procedures. Although it can be argued that a good portion of what the beneficiary knows is general knowledge, i.e. customs and EPA regulations, the combination of the procedures which the beneficiary has knowledge of renders him essential to the firm. Specifically, the firm would have a difficult time in training another employee to assume these duties because of the inter-relationship of the beneficiary's general knowledge with the firm's method of doing business. The beneficiary therefore possesses specialized knowledge.

Further, Webster's II New Riverside University Dictionary defines the term "advanced" as "highly developed or complex; at a higher level than others." Also, Webster's Third New International Dictionary defines the term "advanced" as "beyond the elementary or introductory; greatly developed beyond the initial stage."

Again, based on the above definition, the alien's knowledge need not be proprietary or unique, merely advanced. Further, the statute does not require that the advanced knowledge be narrowly held throughout the company, only that the knowledge be advanced.

The determination of whether an alien possesses specialized knowledge does not involve a test of the United States labor market. Whether or not there are United States workers available to perform the duties in the United States is not a relevant factor since the test for specialized knowledge involves only an examination of the knowledge possessed by the alien, not whether there are similarly employed United States workers. However, officers adjudicating petitions involving specialized knowledge must ensure that the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly specialized. There is no requirement in current legislation that the alien's knowledge be unique, proprietary, or not commonly found in the United States labor market.

The following are some of the possible characteristics of an alien who possesses specialized knowledge. They are not all inclusive. The alien:

- Possesses knowledge that is valuable to the employer's competitiveness in the market place;
- Is qualified to contribute to the United States employer's knowledge of foreign operating conditions as a result of special knowledge not generally found in the industry;

- Has been utilized abroad in a capacity involving significant assignments which have enhanced the employer's productivity, competitiveness, image, or financial position;

- Possesses knowledge which, normally, can be gained only through prior experience with that employer;

- Possesses knowledge of a product or process, which cannot be easily transferred or taught to another individual.

- An alien beneficiary has knowledge of a process or a product, which is of a sophisticated nature, although not unique to the foreign firm, which is not generally known in the United States.

A specific example of the above is if a firm involved in processing certain shellfish desires to petition for a beneficiary to work in the United States in order to catch and process the shellfish. The beneficiary learned the process from his employment from an unrelated firm but has been utilizing that knowledge for the foreign firm for the past year. However, the knowledge required to process the shellfish is unknown in the United States. In this instance, the beneficiary possesses specialized knowledge since his knowledge of processing the shellfish must be considered advanced.

The common theme, which runs through these examples is that the knowledge which the beneficiary possesses, whether it is knowledge of a process or a product, would be difficult to impart to another individual without significant economic inconvenience to the United States or foreign firm. The knowledge is not generally known and is of some complexity.

The above examples and scenarios are presented as general guidelines for officers involved in the adjudication of petitions involving specialized knowledge. The examples are not all inclusive and there are many other examples of aliens who possess specialized knowledge, which are not covered in this memorandum.

From a practical point of view, the mere fact that a petitioner alleges that an alien's knowledge is somehow different does not, in and of itself, establish that the alien possesses specialized knowledge. The petitioner bears the burden of establishing through the submission of probative evidence that the alien's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioners in the alien's field of endeavor. Likewise, a petitioner's assertion that the alien possesses an advanced level of knowledge of the processes and procedures of the company must be supported by evidence describing and setting apart that knowledge from the elementary or basic knowledge possessed by others. It is the weight and type of evidence, which establishes whether or not the beneficiary possesses specialized knowledge.

In closing, this memorandum is designed solely as a guide. It must be noted that specialized knowledge can apply to any industry, including service and manufacturing firms, and can involve any type of position.

The Consular Survey

With the assistance of the Department of State Bureau of Consular Affairs, a brief questionnaire was sent to twenty-four embassies and consulates general that are among those that processed the greatest number of L-1 visa applications. The posts surveyed were:

Visa-issuing Post	Number of L-1 Visa Applications Processed	
	Fiscal Year 2004	Fiscal Year 2005
Chennai, India	12,185	13,222
London, United Kingdom	5,836	5,903
New Delhi, India	2,574	5,664
Mumbai, India	3,356	4,602
Calcutta, India	2,040	3,146
Tokyo, Japan	2,774	2,991
Frankfurt, Germany	2,430	2,468
Paris, France	1,812	1,854
Sao Paulo, Brazil	1,154	1,484
Osaka Kobe, Japan	1,306	1,321
Seoul, Korea	992	1,204
Mexico City, Mexico	1,235	1,163
Manila, Philippines	690	944
Caracas, Venezuela	1,092	906
Tel Aviv, Israel	780	863
Amsterdam, the Netherlands	794	835
Dublin, Ireland	781	773
Sydney, Australia	624	730
Beijing, China	410	648
Buenos Aires, Argentina	573	646
Shanghai, China	500	635
Berlin, Germany	465	600
Kuala Lumpur, Malaysia	748	520
Johannesburg, South Africa	557	502

The survey instrument asked six questions:

1) What experience has post had with abuse of the L-visa?

2) Does the post find many L beneficiaries unqualified? What are the common reasons?

3) What abuse has the post observed by host-country petitioning companies?

4) Has the post observed false claims to derivative status? How many cases?

5) Does the post have any anti-fraud checklists, tools, or techniques that are used to screen L cases?

6) The October 2003 issue of Consular Affairs Fraud Prevention Program's "Fraud Digest" has an article on L fraud. It states in part that posts can use the Internet and field investigations to verify questionable L cases. Does post regularly do this? If so, please describe typical activities, and some of the fraud uncovered?

Half of the posts surveyed indicated in their replies that they typically saw little or even no evidence of fraud or abuse among the L-1 applications they received. They added that large, well-known local corporations had submitted almost all the petitions they saw, and that the beneficiaries – the visa applicants - were in fact managers and executives with several years experience at the petitioning firms. The other half of the posts surveyed commonly found fraud or potential abuse among their L-1 cases.

U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, D.C. 20529

U.S. Citizenship and Immigration Services

To: Robert L. Ashbaugh
Assistant Inspector General
Inspections and Special Reviews

From: Robert C. Divine Robert C. Divine
Acting Deputy Director

Date: January 10, 2006

Re: Comments on OIG Draft Report: A Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program

We appreciate the opportunity to review and comment on the subject report. The report accurately notes that adjudication of L-1 visa petitions is difficult and that this category has the potential of being exploited to fraud and abuse. Below we have provided additional information on the guidance, both within the Immigration and Nationality Act (INA), regulations and internally, that are in use in an attempt to minimize such vulnerabilities. In addition, in 2006, we plan to conduct a benefit fraud assessment to determine the nature and extent of fraud in the L-1A non-immigrant classification.

What Constitutes an L-1A Manager – Executive: The report focuses on the need for verification that the alien will in fact be engaged as a manager or executive, without devoting much time to discussing the statutory definition for these positions. Based on the statutory definition of manager and executive, USCIS adjudication officers review the documentary evidence presented in each L-1 petition, including the petitioner's description of the job duties, to determine whether the beneficiary will be employed in a qualifying manner. USCIS adjudication officers at times must rely solely on the paper evidence to make this determination, particularly if they cannot point to any specific flaw or question regarding the petition itself that would justify a request for further evidence.

The statute's definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Immigration Act, as amended (the "Act"), 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common use of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(ii)(B)((2). If a beneficiary directly supervises other employees, the beneficiary must also

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have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(ii)(B)(3).

The term "function manager" applies generally when a manager does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). The term "essential function" is not defined by statute or regulation. As with any claim of managerial duties, if a petitioner asserts that the beneficiary is managing an essential function, the petitioner must furnish a detailed description of the services to be performed. See 8 C.F.R. § 214.2(l)(3)(ii). USCIS adjudication officers review the description of the job duties to ensure that it identifies the function with specificity, articulates the "essential" nature of the function, and establishes what proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the description of the job duties must demonstrate that the beneficiary "primarily" manages the function rather than performs the duties related to the function. Section 101(a)(44)(A)(ii) of the Act.

The term "executive capacity" focuses on a person's position within an organizational hierarchy, including major components or functions of the organization, and the person's authority to direct that organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct" the management of an organization and "establish the goals and policies" of that organization. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." Id.

When considering these definitions, USCIS does not discriminate against or discount the claims made by small companies. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the "reasonable needs" of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, USCIS adjudication officers expect a petitioner to specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In this regard, it is always appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner.

Finally, both the definition of managerial and executive capacity emphasize that the beneficiary must "primarily" engage in these qualifying duties. See 8 C.F.R. § 214.2(l)(ii)(B) and (C). The petitioner must prove that the beneficiary "primarily" performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions or otherwise non-qualifying duties, such as sales or the supervision of non-professional staff. Where an individual is "primarily" performing the basic tasks necessary to produce a product or to provide a service, that individual cannot also be "primarily" performing managerial or executive duties.

As acknowledged in the report, USCIS adjudication officers can not be absolutely certain whether a beneficiary will ultimately be employed as represented in an L-1 petition. USCIS adjudication officers

must rely on documentary evidence, such as the required description of the services to be performed and organizational charts, as well as the overall credibility of the petition and underlying supporting documentation submitted with the petition. In this regard, however, this is no different than in the case of other employment-based nonimmigrant or immigrant petitions. However, if fraud is suspected the adjudicator can refer the case to FDNS for further review. FDNS will conduct additional systems checks and/or an administrative field inquiry.

Many L-1 petitioners and their attorneys are knowledgeable about the law and USCIS adjudication practices. Consequently, L-1 petitions may appear approvable on their face, but, upon closer review, fail to pass muster. The problem is that, even when a USCIS adjudication officer suspects that an employment claim is not credible, it is often difficult and time consuming for the officer to identify any particular deficiencies in a given petition and therefore provide a sufficiently specific written denial that will stand up to judicial scrutiny. For example, USCIS adjudication officers have received a number of petitions that inflate the value or importance of job duties, paraphrase statutory standards in the job description, and contain organizational charts with artificial tiers that represent simple organizations as more complex. To deduce the truth of the matter, a USCIS adjudication officer must often compare the written description of the job duties and the organizational charts with the actual employment records and evidence of business transactions to discover what the beneficiary is actually doing on a daily basis. Given the competing demands of providing timely customer service and ensuring that only those petitions which meet the statutory standards be approved, adjudicators, at the time of adjudication, may not have more to go on than mere suspicion of ineligibility, since the true facts may come to light only after the petition has been approved. As a result, some petitions that appear to meet or exceed statutory standards, when in actuality they do not, may be approved in error. In such cases, when USCIS becomes aware of the error, it may initiate proceedings to revoke the L-1 petition, or deny a subsequently filed L-1 extension.

Finally, the report discusses how a petitioning organization may grow or develop to the point that it can support a managerial or executive employee. As an example, the report discusses a "busy and growing import-export firm" and how a founder may start off as a sales person but ultimately hire someone to perform those duties. It must be emphasized that the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year "start up" period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension of L-1 status. 8 C.F.R. § 214.2(l)(14)(ii).

Standards for Classification of L-1B Specialized Knowledge Workers: The report correctly notes that, in enacting the Immigration Act of 1990 (IMMACT) and attempting to clarify the meaning of "specialized knowledge," Congress indicated its intention not to adopt legacy Immigration and Naturalization Service's (INS) then-existing bright-line test for determining whether an alien was eligible for classification as a specialized knowledge employee. Specifically, in addressing the need to reconcile "[v]arying interpretations [of the term "specialized knowledge" adopted] by INS" in the past, Congress, in providing the current statutory definition of "specialized knowledge," specifically declined to include any requirement that the alien's knowledge be propriety or exclusive to the

petitioning company. See House Committee Report, H.R. Rep. No. 101-723(I) at 69, 1990 U.S.C.C.A.N. at 6749. Citing the March 9, 1994, INS policy memorandum, CO-214L-P (entitled "Interpretation of Specialized Knowledge") the report suggests that, due to passage of IMMACT, the standard for adjudicating L-1B petitions has become more subjective and therefore more difficult to apply. The report also suggests that the definition of the term "specialized knowledge" may not be sufficiently restrictive. While we agree that there is no bright-line test for determining when a beneficiary is classifiable as a specialized knowledge worker, we wish to emphasize that there exist certain specific guidelines for adjudicating L-1B petitions.

In broadening the scope of the specialized knowledge category, Congress did not render irrelevant the requirement that the degree of knowledge possessed by the alien beneficiary must be different from that generally held by a person in the particular profession or industry, nor did it make less important the specific role and use the beneficiary's knowledge plays within the petitioning organization. In a memorandum dated September 9, 2004, "Interpretation of Specialized Knowledge for Chefs and Specialty Cooks seeking L-1B Status," the USCIS Director of Service Center Operations reaffirmed the principles stated in the March 9, 1994, policy memorandum, making clear that L-1B petitioners must demonstrate: (a) the complexity of the prospective employee's knowledge; (b) that the beneficiary's knowledge is not generally found in the industry, and, (c) that the petitioning company (or its overseas affiliate) would suffer economic disruption to its U.S. or foreign-based operations if it had to hire someone other than the particular overseas employee on whose behalf the petition was filed. In other words, a critical consideration in adjudicating an L-1B petition is the degree to which the alien's knowledge would contribute to the uninterrupted operation of the specific business for which the alien's services are sought.

In short, Congress, in enacting IMMACT, did away with a bright-line test for determining which aliens possess specialized knowledge. In enacting this law, Congress created a standard that requires the determination as to whether an alien is classifiable as an L-1B specialized knowledge worker to be made on a case-by-case basis. In doing so, however, Congress did not intend that there be no controls on the category, or that the standards for classification be purely subjective. There is no indication in the legislative history of IMMACT to indicate that Congress intended to depart from its previous position that the L-1B classification was intended for "key employees" and that the number of admissions under the L-1 classification "will not be large" or that "[t]he class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated . . . ." See *Matter of Penner*, 18 I&N Dec. 49, 51 (Comm. 1982) (citing to the 1970 House Report, H.R. No. 91-851).

Notwithstanding certain widely publicized abuses to the L-1B program, as your draft report demonstrates, and despite recent increases in the usage of the L-1B category, there continues to be a relatively low number of aliens granted L-1B classification annually. Moreover, as the report notes, there does not appear to be any significant trend toward using the L-1B classification to circumvent the normal requirements of the H-1B category. We believe that this is due, in significant part, to the fact that USCIS and legacy-INS have fashioned reasonable standards designed to ensure that only those persons that meet the statutory requirements be classified as L-1B specialized knowledge workers.

Displaced American Workers - L-1 Visa Reform Act of 2004 – Anti-Job/Body Shop Legislation: As the draft report correctly notes, certain foreign-based companies have misused the L-1

category to bring in otherwise unqualified workers. In response to widely reported "job shop" abuses, on December 8, 2004, Congress specifically addressed the issue of "outsourcing" by enacting the L-1 Visa Reform Act of 2004. While, the report notes, it is too soon to determine the impact of this anti-job shop legislation, it is worth noting that USCIS issued guidance implementing the new law shortly after it went into effect.

New section 214(c)(2)(F) of the INA explicitly renders aliens ineligible for L-1B classification if: (1) they will be stationed primarily at a worksite other than their petitioning employer and the work will be controlled and supervised by a different employer or, alternatively, (2) the off-site arrangement is essentially one to provide labor for hire to a company not affiliated with the petitioning company, rather than service related to the specialized knowledge of the petitioning employer.

On July 28, 2005, USCIS amended its Adjudicator's Field Manual to implement section 214(c)(2)(F). The guidance makes it clear that the new ground for ineligibility for L-1B classification applies to all petitions (initial, amended, or extended) filed on or after June 6, 2005. In its guidance, USCIS makes clear that, as a threshold matter, in order for the bar to apply, a majority of the alien's work-related activities must occur at a location other than that of the petitioner or its affiliates. Even if the majority of the alien's time is spent with the petitioning employer, however, the alien might still be subject to the bar, if the time spent at the site of the petitioning employer is primarily "down time," or non-work time between off-site assignments.

Assuming this threshold requirement has been met, USCIS then may apply the bar if the alien is under the day-to-day control and supervision of the non-petitioning unaffiliated entity; that is, in determining whether to apply the bar, USCIS must ask whether the alien is actually employed by the petitioning company or the unaffiliated company. In this regard, the fact that there may be some intervening third party supervision or input between the worker and the L organization would not necessarily render the worker ineligible for L-1B classification.

Alternatively, if the threshold requirement has been met, the bar to L-1B classification will apply if the placement of the alien at the unaffiliated worksite is "essentially an arrangement to provide labor for hire" rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. As explained in the July 28, 2005, guidance, what constitutes "essentially" such an arrangement is inherently a fact question. USCIS adjudication officers therefore are instructed to look at all aspects of the activity or activities in which the alien will be engaged while away from the petitioner's worksite. If the alien's specialized knowledge is only tangentially related to the performance of such off-site activities (or not related at all to them), then the bar would apply. The focus is on whether the alien's specialized knowledge is tied to the services offered by the petitioning company, and not to those of the off-site company.

Concerns Regarding L-1 Petitions Involving New Offices: The statute, section 101(a)(15)(L), does not specifically address the situation whereby an entity abroad may transfer an employee to a new office it will be opening in the U.S.. Nevertheless, Congress' intent in enacting the nonimmigrant intracompany transferee category was to encourage and facilitate the opening of viable

and legitimate business entities within the U.S., permitting the use of the L nonimmigrant classification in such instances has long been recognized as consistent with the statute.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a somewhat different treatment of managers or executives that are entering the U.S. to open a new office. In creating the "new office" accommodation, legacy INS recognized that the proposed definitions of manager and executive created an "anomaly" with respect to the opening of new offices in the U.S. since "foreign companies will be unable to transfer key personnel to start-up operations if the transferees cannot qualify under the managerial or executive definition." 52 Fed. Reg. 5738, 5740 (February 26, 1987) (available at 1987 WL 127799). Accordingly, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Nevertheless, USCIS, and legacy INS, have recognized that the new office situation is different than that involving an established U.S. company. In the case of the latter, the company has an established track record, and there exist benchmarks by which the agency can determine the bona fides of the job offer and the viability of the company. The analysis in a new office situation, on the other hand, is inherently prospective. USCIS must ask, among other things: (a) whether the new office will be viable within one year of approval; (b) whether the new office will be able to sustain the employment of the beneficiary; (c) whether the alien (especially in the case of a specialized knowledge employee) will have a company to which to return at the end of his or her assignment in the U.S.; and (d) what concrete steps, if any, the petitioner has taken with respect to creating and/or opening the U.S.-based entity. See 8 C.F.R. §§ 214.2(l)(3)(v) and (l)(14)(ii). Obviously, since there is no track record to go on, much depends on the promises and projections of the petitioner.

The report notes that "any foreign company" can use the L visa to send employees to the U.S. to open a new office. This statement is not accurate; the kinds of companies that may avail themselves of the L-1 new office option are limited by the terms of USCIS' implementing regulations. Those regulations are designed to provide safeguards against the concerns the report has raised, in particular, use of the L-1 category as a backdoor means for individuals who are not true intra-company transferees to obtain admission to the U.S.

As a preliminary matter, USCIS regulations require that the petitioning company is or will be doing business in the U.S., and that the foreign entity will remain in business during the period the L-1 employee is in the U.S.. See 8 C.F.R. § 214.2(l)(1)(ii)(G). A petitioner unable to satisfy USCIS on these points will not obtain approval of its L-1 petition.

Further, USCIS regulations require that, in the case of the transfer of a specialized knowledge L-1 employee to a new office, the petitioner must show, among other things, that it has the financial ability to remunerate the beneficiary and commence doing business in the U.S. 8 C.F.R. § 214.2(l)(3)(vi)(C). Moreover, in the case where the beneficiary is an owner or major shareholder of the transferring company, the petitioner must show that the beneficiary's services will be used for a temporary period only and that the beneficiary will be transferred back upon the completion of the temporary services in the U.S.. 8 C.F.R. § 214.2(l)(3)(vii). The reason for this requirement is to ensure that the foreign entity remains in business while the beneficiary is in the U.S.; it is specifically

designed to prevent individual aliens from using the L-1 category as a means of obtaining admission to the U.S. with an intent of closing down the business abroad. For this reason, USCIS adjudication officers will scrutinize new office petitions to ensure that the business is still ongoing in the foreign country before approving any such petition. Finally, and not insignificantly, USCIS regulations specifically allow the agency to request any other evidence it deems, in its discretion, necessary to adjudicate the petition. 8 C.F.R. § 214.2(l)(3)(viii).

The report also notes that the law creating the category does not require that the petitioning company have any "operations" in the U.S., or even operate in more than one country, at the time of the filing of the petition. While the U.S. entity may not be fully operational at the time a petition is filed (indeed, it may only become so only after the beneficiary arrives in the U.S.), the petitioner must demonstrate that a qualifying relationship exists at the time of filing the new office petition, by meeting exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary. USCIS regulations further require that the petitioner demonstrate that the U.S. entity will be viable and that, as noted, the petitioner has taken certain concrete steps to ensure this, among other things, by showing that a lease or other physical space has been secured to commence operations.

Another built-in safeguard with respect to ensuring that only legitimate multinational intracompany transferees benefit from L-1 new office-based petitions, such petitions, (unlike other L petitions, which are typically granted for periods of up to three years), are valid only for one year. Despite the new office provisions, the L-1A nonimmigrant visa is not an entrepreneurial visa classification (such as the E-2 nonimmigrant treaty investor classification) that would allow an alien a prolonged stay in the U.S. in a non-managerial or non-executive capacity to start up a new business. The regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. 8 C.F.R. § 214.2(l)(3)(v)(C). At the time of filing for an extension, the petitioner must demonstrate that it has been doing business in a regular, systematic, and continuous manner for the previous year since the approval of its new office petition. 8 C.F.R. § 214.2(l)(14)(ii)(B).

Finally, in adjudicating any extension of stay/second petition following the approval of an L-1 "new office" petition, USCIS adjudication officers have the ability to compare the business plan presented in the new office petition with the company's track record during this one-year start-up period, and require the petitioner to explain to the agency's satisfaction any deviations from the business plan presented in the original L-1 new office petition. This review process, while designed to ensure compliance with the statute, can, like all processes, be improved. USCIS is exploring ways to improve this review process and will continue to do so, including the context of the L-1 interagency group.

We have assessed the report recommendations and will take the following corrective actions as discussed below.

Recommendation 1: Station anti-fraud immigration officers, and hire local staff, at embassies and consulates general in countries that present the highest risk of petition and benefit fraud.

Response: We have thoroughly reviewed the option to station anti-fraud immigration officers and local staff in overseas locations. After careful review, it was determined that it would be more effective and efficient to rely on the current structure and establish a standard mechanism to request overseas verifications through the Department of State (DOS). USCIS will immediately pursue establishing this mechanism with DOS.

In addition, during 2006, the Office of Fraud Detection National Security (FDNS) plans to conduct a benefit fraud assessment to determine the nature and extent of fraud in the L-1A non-immigrant classification. Based on the results of the assessment, FDNS will prepare recommendations to combat fraud within this classification

Recommendation 2: Explore with ICE whether ICE Visa Security Officers could assist in checking the bonafides of L-petitions submitted by petitioners in the countries in which the officers are assigned.

Response: We are pursuing this recommendation with ICE's Visa Security Unit. However, if implemented this recommendation may not immediately yield the desired results since ICE's Visa Security Unit does not currently have offices in the top 5 countries with nationals filing for L-1 status.

Recommendation 3: In cooperation with the "L Visa Interagency Task Force," seek legislative clarification to a) applying the concepts of manager and executive to L-1A visas and verifying that the beneficiary will be so used; b) the term "specialized knowledge"; and, c) the criteria and proof required when a foreign company seeks to use an L petition to open a new office in the U.S.

Response: Any USCIS legislative recommendation to Congress requires Department of Homeland Security and interagency review and clearance through the Office of Management and Budget to ensure that it is consistent with the Administration's program. USCIS will carefully review the matters raised by the Inspector General, but is not in a position at this time to agree that any legislative recommendations regarding the L-1 visa program are necessary or appropriate.

As noted, USCIS has taken measures to clarify the adjudication and definitions of the three L-1 visa subcategories, including issuance of field guidance and the issuance of non-precedent decision by USCIS' Administrative Appeals Office.

Further, as discussed earlier, on July 28, 2005, USCIS amended its Adjudicator's Field Manual to implement section 214(c)(2)(F). The guidance makes it clear that the new ground for ineligibility for L-1B classification applies to all petitions (initial, amended, or extended) filed on or after June 6, 2005. We will provide a copy of the July 28, 2005 guidance along with copies of other cited internal guidance as well as other technical comments under separate cover.

If you have any questions please contact Kathleen Stanley, USCIS Audit Liaison, at 202-272-1982.

DEPARTMENT OF STATE
ASSISTANT SECRETARY FOR CONSULAR AFFAIRS
WASHINGTON

JAN 3 2006

Dear Mr. Ellice:

We have reviewed the DHS OIG draft report, *Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program* and found it to be a thorough and useful document that will advance the cooperative effort to combat fraud in this visa category. We have, however, an objection to Recommendation #1, which states, "USCIS station anti-fraud immigration officers, and hire local staff, at embassies and consulates general in countries that present the highest risk of petition and benefit fraud."

An increase in USCIS presence at our overseas posts for the purposes you recommend would create an inefficient overlap of duties with the State Department. Moreover, USCIS would need to obtain approval thru the NSDD 38 process to post personnel overseas for this purpose—something that might not be easily obtained given the inefficiencies of such an approach. The Omnibus Appropriations Act that created the H and L fraud fund envisioned that the Bureau of Diplomatic Security would investigate L-1 fraud overseas and provided that part of the fraud fund be used to increase the number diplomatic security personnel assigned to this duty. In addition, our Fraud Prevention Managers also investigate L visa fraud, as well as fraud associated with other petitions.

Rather than create the possibility of overlapping areas of responsibility in overseas investigations, and recognizing how important it is that State and USCIS cooperate and collaborate on such matters, we recommend the development of a standard operating procedure (SOP) for requesting investigations between the agencies; this will prevent redundancies and ensure sharing of information on fraud trends and practices. The SOP would also address the delineation of authority and the relationship between DHS' Office of Fraud Detection and National Security and the State Department, procedure for investigative requests, methodology and processes, and the reporting requirements regarding specific allegations of fraud.

Doug Ellice
Chief Inspector,
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Department of Homeland Security,
Washington, DC 20528.

If you have any further comments or need clarification, please feel free to contact me.

Sincerely,

Maura Harty

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