L VISAS AND THE H 1B CAP

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TAGS: CMGT, CVIS, CASC, AFSI
SUBJECT: L VISAS AND THE H-1B CAP.

1. DHS advises that the 65,000 cap on H-1bs will soon be reached. This has led to speculation that applicants may increasingly turn to other visa categories, particularly L- 1, as a way to evade the H-1b limitations. Also, there is growing interest by Congress and the media in this issue and in some reported abuses of L visas. This cable provides some guidance to posts on how to deal with these issues.

2. The 65,000 H-1b cap is likely to soon result in a suspension of H-1b petition processing. DHS, who keeps track of H-1b numbers through the petition process, advises that a determination that the 65,000 cap has been reached is imminent. Department will send further guidance to post once it receives official confirmation from DHS that the cap has been reached.

3. It is possible that potential H-1b applicants will increasingly turn to other visa categories. A recent article in the Economic Times of India, for example, documented this issue and suggested that Indians will turn instead to L status. This possibility (and the newspaper article) have also generated some Congressional concern over potential L visa abuse.

4. There is no legal reason why aliens eligible for H-1b status cannot legitimately seek out other types of visas, including L. On the other hand, the inability of aliens to obtain H-1b visas can lead to increased fraud and abuse of the L and other categories, and posts need to be sensitive to this possibility.

5. In FY 2003 there were 57,245 L visas issued world-wide. 18,124 were issued to Indian nationals (given the fact that Indian nationals received the highest number of H-1b and L visas, this issue is clearly of greatest significance to the Indian

Posts). The next highest nationality was United Kingdom, with 6,820. The top ten nationalities were India, UK, Japan, Germany, Mexico, France, Brazil, Australian, Venezuela and China (1,098 Chinese nationals received L visas).

6. Two areas of concern over potential L abuse relate to "job shops" and to abuse of the "specialized knowledge" criteria. In regard to "job shops", the concern is that employment companies will use the L visa to transfer low wage personnel to U.S. businesses. This issue is addressed in the FAM. L status requires that the applicant be an employee of the petitioner. The essential element in determining the existence of an "employer-employee" relationship is the right of control, that is, the right of the employer to order and control the employee in the performance of his or her work. This, rather than the source of salary, is the controlling factor in determining the existence of an employer/employee relationship. Therefore, if post has evidence that an alien paid by a foreign petitioner will be working under the full control of a U.S. employer (who is not an affiliate, branch or subsidiary of the petitioner), and that the petitioner will exercise no supervision or control other than payment of salary, Post can document this relationship and return the petition to the DHS in accordance with the instructions in 9 FAM 41.54 N3.2-3. The relevant FAM notes are reproduced below:

9 FAM 41.54 N9 Employer-Employee Relationship (TL:VISA-73; 02-05-1993)
The essential element in determining the existence of an "employer-employee" relationship is the right of control, that is, the right of the employer to order and control the employee in the performance of his or her work. Possession of the authority to engage or the authority to discharge is very strong evidence of the existence of an employer-employee relationship.
9 FAM 41.54 N9.1 Source of Remuneration and Benefits Not Controlling (TL:VISA-73; 02-05-1993)
The source of the beneficiary''s salary and benefits while in the United States (i.e., whether the beneficiary will be paid by the U.S. or foreign affiliate of the petitioning company) is not controlling in determining eligibility for L status. In addition, the employer-employee relationship encompasses a situation in which the beneficiary will not be paid directly by the petitioner, and such a beneficiary is not precluded from establishing eligibility for L classification.
9 FAM 41.54 N9.2 Employment in United States Directly by Foreign Company Not Qualifying (TL:VISA-73; 02-05-1993)
A beneficiary who will be employed in the United States directly by a foreign company and who will not be controlled in any way by (and thus, in fact, not have any employment relationship to) the foreign company''s office in the United States does not qualify as an intracompany transferee.

7. In regard to "specialized knowledge", this term is defined in DHS regulations, 8 CFR 214.2(L) (1)(ii)(E), which is reproduced in the FAM: 9 FAM 41.54 N8.1-3 "Specialized Knowledge"
(TL:VISA-73; 02-05-1993) "Specialized knowledge" means special knowledge possessed by an individual of the petitioning organization''s product, service, research, equipment, techniques, management, or other interests and its application in

international markets, or an advanced level of knowledge or expertise in the organization''s processes and procedures.

8. The focus in this regulation and Note is knowledge specific to the petitioner''s product, processes or procedures. Therefore, normally an applicant will not have specialized knowledge if the applicant has to be trained in the United States before she/he can perform the principal duties of the position. This issue also ties into the "job shop" issue. If the alien is going to be working for a company which is not associated (not a subsidiary, branch or affiliate) with the petitioner, the applicant should be performing services relating to the petitioner''s product, such as installing software designed by the petitioner. If instead the applicant will be working principally with the US company on the US company''s product or a generic product (such as commonly used software) and will not be using the petitioner''s product or skills, the applicant will generally not meet the specialized knowledge criteria.

9. Post should submit any cases where there is uncertainty as to whether the petitioner is a "job shop" or whether the applicant has "specialized knowledge" (or where there are any other questions relating to visa qualifications) to CA/VO/L/A for an advisory opinion.

10. We will advise when DHS announces that the H-1B cap has been reached so that posts can engage in appropriate public outreach. Posts that process a high volume of L-1 visas may wish to engage in public outreach on the proper use of the visa and criteria used to qualify.