

IMMIGRATION**NEW SPECIALIZED KNOWLEDGE STANDARDS COMING FOR L-1B TRANSFERS**

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Multinational companies wishing to transfer foreign national employees to the U.S. under the L-1B program will have to show the employee's "specialized knowledge" by a "preponderance of evidence" under new guidance published by the US Citizenship and Immigration Services ("USCIS"). Under a "preponderance of the evidence" standard, the petitioner must show that its claim is more likely the case than not. The changes take effect on August 31, 2015.

The new guidelines eliminate earlier, more relaxed USCIS policy memorandums, and may allow examiners to employ more restrictive standards in the L-1B adjudications process. For instance, an examiner can use needs-based criteria to deny a petition if the examiner believes that others in the U.S. organization have the same knowledge. The guidance also permits examiners to require extensive corroborating evidence, even though it states that, in some situations, a petitioner's mere statement of the specialized knowledge nature of the position is enough.

The guidance provides a non-exhaustive list of the factors the examiners may consider when determining "specialized knowledge," such as:

1. The foreign employee possesses knowledge of foreign operating conditions that is significantly valuable to the company's U.S. operations;
2. The employee's work has significantly enhanced the employer's productivity, competitiveness, image or financial position;
3. The "specialized knowledge" can be gained only through prior experience with the petitioning organization;
4. The knowledge of a product or process cannot be easily transferred or taught to another individual without significant economic costs or inconvenience (such as substantial training, work experience or education);
5. The knowledge of a process or product is either sophisticated or complex, or of a highly technical nature, although not necessarily unique to the petitioning organization; or
6. The employee possesses knowledge that is particularly beneficial to the company's competitiveness in the marketplace.

The presence of one or more of the above factors, when assessed in *a totality of the circumstances*, may be sufficient to establish by a preponderance of evidence that the foreign employee has specialized knowledge.

How To Show Specialized Knowledge

In any case, the examiner may ask the petitioner to show the nature of, and the need for, the foreign employee's specialized knowledge. *In these cases, the petitioner is required to compare the foreign employee's knowledge to that of others.* As mentioned above, the petitioner may also demonstrate the nature of the claimed specialized knowledge by indicating how and when the employee gained such knowledge or explain the difficulty of imparting such knowledge to others without significant costs or disruption to its business.

Evidence may include:

1. Documentation of training, work experience or education establishing the number of years the individual has been using or developing the claimed specialized knowledge as an employee of the petitioning organization or in the industry.
2. Evidence of the impact the individual would have on the petitioning organization's U.S. operations;
3. Evidence that the foreign national is qualified to contribute significantly to the U.S. operation's knowledge of foreign operating conditions, because the knowledge not generally found in the company's U.S. operations;
4. Contracts, statements of work or other documentation to show that the employee has knowledge that is particularly beneficial to the petitioning organization's competitiveness in the marketplace;
5. Evidence, such as correspondence or reports, showing that the employee's foreign work has significantly enhanced the company's productivity, competitiveness, image or financial position;
6. Copies of personnel or in-house training records that establish that the claimed specialized knowledge normally can be gained only through prior experience or training within the petitioning organization;
7. Evidence, such as training manuals or financial documents, that may demonstrate that the employee possesses knowledge of a product or process that cannot be transferred or taught to another individual without significant economic cost or inconvenience;
8. Evidence of patents, trademarks, licenses or contracts awarded to the company based on the employee's work, or similar evidence that the employee has knowledge of a process or a product that is sophisticated, complex, or of a highly technical nature, although not necessarily proprietary or unique to the petitioning organization; or
9. Payroll documents, federal or state wage statements, documentation or other forms of compensation, resumes, organizational charts or similar evidence documenting the positions held and the compensation provided to the employee and parallel employees in the company.

Off-Site Work By L-1B Employee

The guidance also addresses off-site L-1B employment when a foreign employee will be primarily stationed at a work site of an unofficially affiliated employer. A company must show that:

1. The employee will not be controlled or supervised principally by the unaffiliated employer; and
2. The employee will be placed in connection with the provision of a product or service for which the specialized knowledge specific to the petitioning employer is necessary.

Absent this showing, the work is not eligible for L-1B classification. "Control and supervision" means that the petitioning company may not merely supply worker and issue their paychecks in a labor-for-hire arrangement. The unaffiliated company must have a business relationship with the petitioning company that involves the provision of products or services by the petitioning organization and not simply the supply of workers alone.

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