

# 2012 Annual Symposium

YOUR BRIDGE TO TALENT MOBILITY

## A “Bundle” of Current Immigration Issues Affecting the Consulting Industry and their Corporate Clients

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American Council on International Personnel

Advancing Global Mobility



# Presenters

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# Global Business Models

## Types of Services

- Consulting Services
- IT and Business Processing Outsourcing
- Staff Augmentation Services
- Other Vendor Relationships

## Interested Parties

- Corporate Customer
- Service Providers
- Master Providers and Subs



# Governmental Scrutiny of Global Business Models

- **U.S. Congress**
  - **Grassley & Durbin vs. Schumer & Lofgren – divergent visions**
  - **Jan 2012 DHS OIG report about possible undue influence within the executive branch to expedite adjudications of temporary visas:**  
[http://www.oig.dhs.gov/assets/Mgmt/OIG\\_12-24\\_Jan11.pdf](http://www.oig.dhs.gov/assets/Mgmt/OIG_12-24_Jan11.pdf)
  - **Feb 15, 2012 House Immigration Subcommittee hearing on visa adjudications and OIG report**
  - **50/ 50 Rule: Supplemental Border Fees under Public Law 111-230**



# Governmental Scrutiny of Global Business Models

- **White House**

- Insourcing American Jobs Forum
- Jan. 19, 2012 “Executive Order -- Establishing Visa and Foreign Visitor Processing Goals and the Task Force on Travel and Competitiveness,” : <http://1.usa.gov/yqh8TP>.
- Obama Administration Immigration Initiatives to Spur Jobs.
  - Links in NY Law Journal article, “No More Waiting on Legal Immigration,” by Angelo Paparelli  
<http://bit.ly/M7U9Si>





# Governmental Scrutiny of Global Business Models

- **Department of Homeland Security**
  - USCIS Entrepreneur in Residence Program
  - USCIS FDNS Site Visits
  - USCIS National Teleconference: L-1B Listening Session  
<http://1.usa.gov/LgJLFv>
  - National Foundation for American Policy (“NFAP”), Feb 2012,  
*“Analysis: Data Reveal High Denial Rates for L-1 and H-1B Petitions at USCIS”*  
<http://bit.ly/xJgRFP>



# Governmental Scrutiny of Global Business Models

- **Department of Homeland Security**
  - **2008 USCIS Administrative Appeals Office Non-Precedent “GST” Case.**  
<http://bit.ly/qAgMD3>
  - **CBP: Continued challenges and uncertainty at U.S. ports-of-entry**
  - 
  - **L-1 and H-1B concerns predominate**



# Governmental Scrutiny of Global Business Models

- **Department of State**
  - **NAFP Nov 2011 policy brief: “L-1 Visa Approvals Declines Significantly at U.S. Posts in India in 2011”** <http://bit.ly/v6848T>
  - **January, 2011 State Department's Visa Office cable (relying on the same AAO GST case):**  
<http://1.usa.gov/eA1G8u>  
**“If everyone is specialized, no one is specialized”**





# Governmental Scrutiny of Global Business Models

- **Department of State**

- 1994 State Department Cable to Angelo Paparelli (confirming Puleo Memo on interpretation of specialized knowledge): <http://bit.ly/LLHL71>

**“[The Visa Office] notes [that specialized knowledge] should not be construed to mean that an individual's expertise must be narrowly held within the company. The fact that the knowledge is held widely within the sending entity does not preclude it from being specialized.”**  
(Emphasis added.)



# DHS/USCIS Policy Developments

- **Need for creative governmental agency actions, as legislative solutions will not be feasible in the near-term and intermediate future...**
- **...but agency solutions are not taking-off, e.g.,**
  - **Bundling L-1 project-based petitions for specialized-knowledge beneficiaries and their managers <http://1.usa.gov/zVOaZr>**
    - **Attempt to streamline the process to manage “high volume” situations**



# DHS/USCIS Policy Developments

- **USCIS internal L-1 training Fall 2011**
  - No “closely held knowledge” requirement within the organization; specialized knowledge is to be outward focused
  - No “key employee” requirement
- **Promised but not delivered:**
  - RFE templates
  - L-1B guidance
  - Adequate clarification of Neufeld Memo on H-1B Employer-Employee Relationship
    - Instead, Neufeld Memo now bleeding into L-1 and EB-5 adjudications



# Tip: Clean Your House

## Internal Corporate Audits – Preferably by External Auditors:

- I-9 and E-Verify
- H-1B LCA, including required wage levels, worksite changes, and document retention requirements
- L-1B, including whether role continues to be specialized knowledge and placements at third parties
- PERM compliance
- Sponsorship of Other Employment-Based Categories



# Tip: Clean Your House

## Establish/Refine:

- **Minimum criteria for company-sponsored immigration benefits**
- **Strategy for each benefit class**
- **Templates and submissions presentation to governmental agencies**
- **Confer with internal stakeholders to update policy, plan/adapt, build consensus**





# Tip: Show Your Model Home

## Build Support/Network/Advocate

- **Join NGOs and associations as venue to confer with peers and governmental officials, and to gain behind-the-scenes intelligence and opportunity for advocacy**
  - **E.g., U.S. Chamber of Commerce, AILA, ACIP, ITI, ABIL**
- **Consider direct outreach to government officials & media**
  - **Executive Offices and Administrative Agencies**
  - **Congress**
  - **State Officials**
  - **Consular Visits**
  - **Media (Traditional and Social)**



# Venues to Interact with Governmental Agencies

## Other occasions to interact with governmental stakeholders:

1. Submissions for immigration benefits, e.g., I-129; responses to 221g or inquiries, RFEs, NOIDs, NOIRs
2. Business Executive Program (“BEP”) or similar program at U.S. consulate(s) abroad
3. NGO working meetings and events
4. Industry PR campaigns
5. Media, e.g., blogs, letters to the editor, op/ed letters, press conferences, congressional testimony
6. APA rule-making proceedings



# Messaging – Tactical Decisions

- **Plan by gathering internal contributors/ stakeholders to plan communications**
- **Coordinate message within the organizations and externally with peers and NGOs.**
- **Larger organizations:**
  - **Business leadership**
  - **Corporate communications**
  - **Legal/ external advisors**
  - **Government relations/ external advisor**
  - **HR**
- **Smaller organizations:**
  - **Business leadership**
  - **External advisors for Legal, Governmental Relations, and/ or Corporate Communications/ PR**



# L-1 Challenges @ USCIS

- **Varying interpretations of work-visa eligibility at Regional Service Centers for citizens of India, China, Brazil and other developing and developed countries**
- **Some at USCIS want to issue new standards/guidelines that could dramatically restrict L-1 visa eligibility for many consulting industry employers**
- **Director Mayorkas:**
  - **Training has been provided to adjudicators that the 1994 Puleo Memo on L-1Bs says specialized knowledge need not be “narrowly held” within the company**
  - **USCIS needs “modernized” draft L-1B guidelines**



# L-1 Challenges @ U.S. Consulates in India

- **DHS/ DOS is under pressure, from all sides, to reduce access to the L-1B visa category, with an emphasis in India, which originates most visa stampings globally**
- **While L-1 visa issuance in India has declined, L-1 visa issuance around the world continues to increase:**
  - **Minimum number of subordinates for L-1A “supervisory manager” eligibility; highly restrictive reading of “functional manager”**
  - **Highly restrictive reading of “specialized knowledge”**
  - **Requirements for field of degree and qualifications of post-secondary school that granted the degree**





# L-1 Challenges @ U.S. Consulates in India

- **DHS/ DOS is under pressure, from all sides, to reduce access to the L-1B visa category, with an emphasis in India, which originates most visa stampings globally**
- **While L-1 visa issuance in India has declined, L-1 visa issuance around the world continues to increase:**
  - **Expectation of higher pay**
  - **Consideration of the size of employee populations with similar qualifications**
  - **Inconsistent adjudication; dismissive of evidence presented at personal appearance interview and in submission**
  - **Business Executive Program**



# L-1 Process @ U.S. Consulates in Canada

- Interpretation of “specialized knowledge” concords closely with regulatory requirements
- Not as restrictive about degree held by L-1B applicant
- No minimum number of subordinates for eligibility for “supervisory manager”; “functional manager” is considered on a case-by-case basis
- More consistent decision-making
- Sensitive to increases in filing volumes
- Third country nationals from India may qualify for visa-stamping in Canada not possible in India



# L-1 Eligibility @ U.S. Consulates in Brazil

- **Rise in Demand and Issuance**
  - **Visa issuance in 2011 – Brazil up 42% and China up 34%**
  - **First half of FY 2012 – 555,000 visas issued in Brazil (59% increase), 453,000 visas issued in China (46% increase)**
- **Goal to adjudicate over 1.8 million in Brazil and 2.2 million in China by 2013**



# L-1 Eligibility as per U.S. Consulates in China

- **Beginning to adopt India-like evidentiary standards**
- **Increasing inconsistency in decision-making**
- **Goal to adjudicate over 1.8 million in Brazil and 2.2 million in China by 2013**



# L-1 & H-1B Challenges @ USCIS & Consulates

- **Consular officers refer petitions for USCIS review upon little legal or factual basis**
- **At USCIS, consular referrals at the lowest priority**
- **USCIS may issue a NOIR after 6 months**
- **Following a NOIR response, USCIS infrequently issues an I-797 to inform of outcome**
- **PIMS updated inconsistently**





# H-1B Employer-Employee Relationship & Right of Control

- **Transformed into a “totality of evidence” standard**
  - **Requires the accumulation of as much evidence as possible**
- **Increasing calls for client letters to corroborate evidence required by Neufeld memo**
  - **Increased USCIS expectation of seeing client letters with initial submissions, and especially with RFE responses**
  - **Consulates are more insistent on client letters than USCIS**
  - **Consulates sometimes reach directly to clients**



# Tips: H-1B/LCA Posting Requirements

- **Hard-copy posting**
  - Safest practice, as requirements in regulation are more explicit
  - Posting a notice with required information vs. posting the LCA itself
- **Electronic posting**
  - Useful for large organizations and/ or those with multiple and/ or remote worksites/ locations
  - Internal email vs. internal bulletin boards vs. external website



# Tips: H-1B/LCA Displacement Attestation

- **What is a displacement?**
- **What is an “essentially equivalent job”?**
- **What is an affected worksite?**
- **Precautionary review**
- **Good faith attempts to recruit U.S. workers**
  - **Differs from PERM recruitment**



# Tips: Vendor Agreements

- **Consider the inclusion of Reps & Warranties in vendor/consulting agreements:**
  - **Vendor/consultant's compliance with immigration requirements, including IRCA and particular visa programs**
  - **Audit provisions with 3<sup>rd</sup> party certification**



# Tips: Vendor Agreements

- Consider the inclusion of Reps & Warranties in vendor/consulting agreements:
  - Indemnity and “clawback” clauses in case of governmental inquiries/ enforcement actions
  - Customer obligation to post & provide letters and contracts to USCIS, Consulates and CBP
  - Reporting relationship to avoid deemed employment





# Questions



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# Thank You!

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