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The L-1 Visa Reform Act of 2004 and Its Implications for Companies Utilizing Outsourced Labor at Company Sites

By Rex L. Niswander

Businesses that have been relying upon L-1 visas to procure offshore labor to staff on-site projects in the United States should be aware that a recently enacted federal law – which becomes effective in June 2005 – will impose significant new limitations and requirements on such practices.

In recent years, many businesses have augmented their U.S.-based workforces with non-U.S. personnel, provided by offshore-based service providers, who enter and work in the U.S. on L-1 visas, a visa category not subject to certain limitations and restrictions applicable to H-1 visas, the visa category generally associated with non-U.S. technical staff. Such "staff augmentation" arrangements are sometimes provided in connection with a significant sourcing relationship with a non-U.S. vendor, for example, as in a software maintenance and development agreement with an Indian-based service provider. In other cases, these arrangements may be one of several projects between a U.S. business and its offshore provider and may function simply as a cost-efficient and flexible way to procure specialized labor, on an as-needed basis. In any event, L-1 visas have become a popular, if controversial, way for businesses to supplement their labor needs and to hold down costs. This client alert reviews the L-1 Visa Reform Act of 2004 (the "Act") and its implications for U.S. companies using on-site staff provided by offshore services providers.

BACKGROUND AND PURPOSE OF THE ACT

The Act is intended to address perceived abuse of L-1 visas by non-U.S. outsourcing providers, including use of the L-1 visa to avoid H-1 visa minimum wage requirements and the H-1 visa "cap" (limited availability). The Act will prohibit the issuance of L-1 visas to aliens who will be stationed primarily at the U.S. worksite of a party other than the L-1 petitioner or its affiliates (*i.e.*, aliens stationed at U.S. businesses that have service contracts with an offshore service provider). This prohibition may have significant adverse effects for users of this type of outsourced augmentation of personnel.

A brief summary of the H-1 and L-1 visa categories may be helpful to an understanding of the Act:

The H-1 visa for "specialty occupations" and the L-1 visa for persons with "specialized knowledge" are the two U.S. visa categories most commonly used to permit U.S. employment of non-U.S. technical support staff. For H-1 visa purposes, "specialty occupation" generally means a position requiring at least a bachelor's degree. For L-1 visa purposes, "specialized knowledge" refers to special and advanced knowledge of the employer's products and services.

While both the H-1 and the L-1 permit U.S. employment, the prerequisites of the two visas are different in important respects. Among other things, the H-1 visa requires that the visa holder be paid a salary at least equal to the "prevailing wage" (essentially the average wage) for the relevant occupation in the relevant geographic area. Moreover, the number of H-1 visas available in any fiscal year is limited, with the current annual "cap" fixed at 65,000, which is well below demand. In fact, this year's H-1 visas were all taken on the first date they became available, October 1, 2004, and no new H-1 visa will be available until October 1, 2005.

In contrast, the L-1 visa does not have a minimum wage requirement, and there is no cap on L-1 visas. However, the L-1 is limited to "intracompany transferees," i.e., persons who have been employed outside the U.S. for at least one year and who are being transferred to a U.S. branch or affiliate of their foreign employer to provide their specialized knowledge.

In short, the L-1 visa offers employers substantial advantages over the H-1 visa if an employee can be brought within the definition of "intracompany transferee." As a result, in recent years a number of outsourcing providers have been obtaining L-1 visas for their employees based on a transfer from their foreign affiliates to their U.S. offices and then, based on service agreements or similar arrangements, dispatching those L-1 employees to worksites of unrelated U.S. companies, a practice sometimes referred to as "leasing" employees.

Such a practice is generally seen as an abuse of the L-1 visa because (1) the L-1 visa holder is no longer in a true employer-employee relationship with the L-1 visa petitioner, and (2) the L-1 visa holder's "specialized knowledge," if any, is being provided to an unrelated party.

PROVISIONS OF THE ACT

The Act addresses the problem by amending the Immigration and Nationality Act to provide that a person is not eligible for an L-1 visa based on specialized knowledge if the person "will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent" and 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.

Stated differently, the Act would continue to permit L-1 visas for persons assigned to the worksite of an unrelated company, but only if (1) the L-1 visa holder will be controlled and supervised by the L-1 visa petitioner, *i.e.*, the off-shore provider, AND (2) the L-1 visa holder will be using specialized knowledge specific to the L-1 visa petitioner, and not simply providing workforce augmentation for the unrelated party.

Thus, for example, under the Act, a person with specialized knowledge of a software product developed by his employer abroad, could be dispatched to the U.S. in L-1 visa status to provide on-site support for that product for

unrelated users, but only so long as the L-1 visa holder is controlled and supervised by his L-1 visa petitioner, and is using specialized knowledge specific to the L-1 visa petitioner's products and services. In other words, an off-shore provider can no longer provide generalized "body shop" services for on-site projects at U.S. companies.

The Act will go into effect on June 6, 2005, and from that date will apply to all new L-1 visa petitions and all L-1 extension applications.[1]

IMPLICATIONS OF THE ACT FOR USERS OF L-1 OUTSOURCING

The regulations implementing the Act are not yet available. Therefore, details of implementation are not yet clear, including the nature of any public reporting that may be required of outsourcing suppliers or their U.S. customers. However, based on the provisions of the Act itself, companies making significant use of L-1 visa arrangements to staff on-site projects are likely to experience some disruption in several ways:

Reduction or Elimination of Cost Savings. Many U.S. companies may find that the Act will reduce or eliminate some of the cost advantages of outsourcing arrangements where a significant basis for the arrangement is the availability of on-site, non-U.S. personnel who are not subject to H-1 requirements. That is, under the Act such companies will not be able to control or supervise L-1 technical staff from outsourcing providers, and may not use such staff as "labor for hire." While these problems might be avoided through use of the H-1 visa, the prevailing wage requirement of the H-1 may eliminate certain cost savings associated with this type of outsourcing.

Risk of Business Disruption. The Act will apply to L-1 petitions and L-1 extension applications filed after June 6, 2005. Thus, as time passes from that date, there may be a steady reduction of the number of alien workers permitted to work offsite without meeting the requirement of the Act, which could lead to business disruption for users of outsourcing services.

Reputational Risk. L-1 outsourcing has been a politically sensitive issue in recent years. The Act requires follow-up studies by Homeland Security and an "L-1 Visa Interagency Task Force" to be formed. Presumably, those studies will result in further public discussion of the issue. As a result, it is possible that heavy users of L-1 visa arrangements may be publicly identified and discussed in the context of perceived L-1 abuses, with potentially adverse impact on labor, government and public relations.

Potential Legal Liability/Involvement in Enforcement Proceedings. The potential for legal liability on the part of users of L-1 type outsourcing services seems remote except in the extreme case, for example, a case of collusion with outsourcing providers to misrepresent the facts to relevant agencies. However, if the providers were to become involved in legal proceedings based on their activities (e.g., based on misrepresentations in visa petitions), it is likely that their clients would also be involved as non-defendants with knowledge of the relevant facts.

Potential Labor Law Liability. Under the Act, qualified L-1 visa petitioner (i.e., the off-shore service provider of labor) must retain control and supervision over their L-1 visa employees who work at the premises of a U.S. company. The presence of such supervisory personnel on the premises of U.S. companies may complicate the potential for finding joint employment relationships. In potential joint employment relationships, such as that between the L-1 visa petitioner and the unaffiliated employer, many discrimination, harassment and other employment law statutes allocate liability between the employers based, in part, upon the amount of control

Editor: Lloyd W. Aubry, Jr., (415) 268-6558

San Francisco

Elizabeth P. Allor	(415) 268-6751 eallor@mofo.com
Lloyd W. Aubry, Jr.	(415) 268-6558 laubry@mofo.com
James E. Boddy, Jr.	(415) 268-7081 jboddy@mofo.com
Judith Droz Keyes	(415) 268-6638 jkeyes@mofo.com
James C. Paras	(415) 268-7087 jparas@mofo.com
Linda E. Shostak	(415) 268-7202 lshostak@mofo.com
Walter M. Stella	(415) 268-6779 wstella@mofo.com

Palo Alto

David J. Murphy	(650) 813-5945 dmurphy@mofo.com
Eric A. Tate	(650) 813-5791 etate@mofo.com
Raymond L. Wheeler	(650) 813-5656 rwheeler@mofo.com
Tom E. Wilson	(650) 813-5604 twilson@mofo.com

Los Angeles

Sarvenaz Bahar	(213) 892-5744 sbahar@mofo.com
Michael Chamberlin	(213) 892-5256 mchamberlin@mofo.com
Timothy F. Ryan	(213) 892-5388 tryan@mofo.com
Janie F. Schulman	(213) 892-5393 jschulman@mofo.com
B. Scott Silverman	(213) 892-5401 bsilverman@mofo.com
Marcus A. Torrano	(213) 892-5416 mtorrano@mofo.com

New York

Miriam H. Wugmeister	(212) 506-7213 mwugmeister@mofo.com

Century City

Ivy Kagan Bierman	(310) 203-4002 ibierman@mofo.com

Orange County

Robert A. Naeve	(949) 251-7541 rnaeve@mofo.com
Steven M. Zadravecz	(949) 251-7532 szadravecz@mofo.com

San Diego

Rick Bergstrom	(858) 720-5143 rbergstrom@mofo.com
Craig A. Schloss	(858) 720-5134 cschloss@mofo.com

Denver

Stephen S. Dunham	(303) 592-2251 sdunham@mofo.com
Steven M. Kaufmann	(303) 592-2236 skaufmann@mofo.com
Tarek F.M. Saad	(303) 592-2269 tsaad@mofo.com

London

Ann Bevitt	44-20-7896-5841 abevitt@mofo.com
Simeon Spencer	44-20-7896-5843 sspencer@mofo.com
David C. Warner	44-20-7896-5844 dwarner@mofo.com

If you have a change of address, please write to Chris Lenwell, Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105-2482, or e-mail him at *clenwell@mofo.com*.

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each employer has over an employee's day-to-day conduct. Many employee leasing agreements address this allocation of liability, but sometimes the law does not permit parties to contract away their statutory obligations.

POSSIBLE ACTION ITEMS FOR USERS OF L-1 OUTSOURCING

- Companies that make use of L-1 visa arrangements to augment project staffing should require their offshore vendors to demonstrate what steps the vendors are taking to ensure compliance with the Act. Companies should also review their contracts with such providers to determine the consequences under such contracts of vendor compliance and non-compliance with the Act.
- Affected U.S. companies may also want to consider the economic, legal, and strategic risk implications of continuing to use L-1 outsourcing services in light of the control and "specialized knowledge" issues discussed above, and the potential for involvement, directly or indirectly, in enforcement actions.
- Companies that continue to use L-1 outsourcing should include in their service agreements with providers appropriate representations, covenants and indemnities with respect to compliance with the Act. Companies may also want to consider the impact of compliance with the Act on the vendor's ability to meet applicable performance requirements, as well as the economic impact of any loss or reduction of L-1 staffing.
- To the extent a company uses L-1 visa staff from off-shore providers, it should establish procedures to ensure, and maintain records to document, that such use does not contradict the requirements of the Act with regard to control and supervision and specialized knowledge.

In general, companies using this type of labor should review any new and existing arrangements to ensure that they are in full compliance with the law. ■

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[1] Is is not yet clear whether or how the provisions of the Act might apply to individual L-1 "applications" filed under blanket L-1 "petitions" approved prior to the effective date. That point will presumable be addressed in future regulations.

Rex L. Niswander is of counsel in our New York office and can be reached at (212) 468-8140.

The following attorneys also practice immigration law and can be reached at their respective offices:
Michiko Ito Crampe, a partner in our New York office, (212) 468-8028,
Janie Schulman, a partner in our Los Angeles office, (213) 892-5393, and
Aki Shoji, Of Counsel in our Palo Alto office, (650) 813-5774.