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September 15, 2015

VIA ELECTRONIC TRANSMISSION

The Honorable León Rodríguez
Director
U.S. Citizenship and Immigration Services
Washington, D.C. 20529

Dear Director Rodríguez:

I write to express my concern about the memorandum published by United States Citizenship and Immigration Services (USCIS) on August 17, 2015, which went into effect on August 31, 2015, that purports to “reform” the L-1B nonimmigrant visa category for temporary intracompany transferees with “specialized knowledge.”¹ I commend USCIS for attempting to provide guidance to adjudicators as well as to the public on the meaning of “specialized knowledge” and other aspects of the L-1B visa program, but I have concerns relating to the intent of the memo, substance of the memo, as well as process by which the changes described in the memo are going to be implemented.

Regarding the intent of the memo, the President stated in his remarks on March 23 announcing the L-1B reforms that the goal of the new L-1B guidance was to allow corporations to temporarily move workers from a foreign office to a U.S. office “in a faster, simpler way.” He added that “this could benefit hundreds of thousands of nonimmigrant workers and their employers; that, in turn, will benefit our entire economy and spur additional investment.”²

The President’s assertion that the proposed L-1B reforms will result in *hundreds of thousands* of additional L-1B workers being admitted to the United States is troubling. The L-1B program has

¹ Policy Memorandum: L-1B Adjudications Policy, United States Citizenship and Immigration Services, PM-602-0111 (August 17, 2015), available at http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/L-1B_Memorandum_8_14_15_draft_for_FINAL_4pmAPPROVED.pdf.

² *Modernizing the Visa System to Attract and Retain Global Investment and Global Talent*, White House Blog (<https://www.whitehouse.gov/blog/2015/03/26/modernizing-visa-system-attract-and-retain-global-investment-and-global-talent>).

never been intended by Congress to be a high-volume temporary foreign worker program. In fact, the intent was to ensure that the class of persons eligible for such visas was “narrowly drawn.”³ Further, the DHS Office of the Inspector General (OIG) has correctly observed that the section of the Immigration Act of 1990 relating to the definition of specialized knowledge “appears to be an effort to clarify, not broaden, the definition of specialized knowledge.”⁴ A liberal definition of specialized knowledge, continues the OIG, “would open the category to an unlimited number of foreign workers.”⁵

Not only is the professed intent to dramatically increase the number of L-1B workers in conflict with clear Congressional intent, but it isn’t clear that the memo is addressing a real problem. It appears that much of the memo is intended to address complaints raised by immigration advocacy and business groups claiming that the L-1B denial and Request for Evidence (RFEs) rates have increased. Contrary to employer assertions, in 2013 the DHS OIG concluded that “service centers are not unduly restrictive” in L-1B adjudications.⁶

A more liberal definition of “specialized knowledge” that causes hundreds of thousands of additional L-1B workers to be admitted to the country will also accelerate the offshoring of jobs from the United States. The problem was already well known nine years ago, at which time the DHS OIG found that the term “specialized knowledge” was already “so broadly defined that adjudicators believe they have little choice but to approve almost all petitions.”⁷ The OIG concluded: “That so many foreign workers seem to qualify as possessing specialized knowledge appears to have led to the displacement of American workers....”⁸ I am also concerned, as I expressed in my 2012 letter to your predecessor, Alejandro Mayorkas, that “any weakening of the standard would create additional incentives for some employers to use the L-1B visa program in order to circumvent even the minimal wage and other protections for American workers in the H-1B visa program.”⁹

Regarding the substance of the memo, I am concerned about the section discussing how specialized knowledge “need not be narrowly held within the petitioning organization.”¹⁰ In other words, a company may have *many* L-1B workers doing identical “specialized knowledge” work. The memo’s troubling endorsement of this staffing model flies in the face of what even the lawyer for the petitioner in the well-known 2008 Administrative Appeals Office decision on L-

³ H.R. Rep. No. 91-851, 1970 U.S.C.C.A.N. at 2754 (“The class of persons eligible for [L] nonimmigrant visas is narrowly drawn and will be carefully regulated and monitored by the Immigration and Naturalization Service.”).

⁴ *Implementation of L-1 Visa Regulations*, OIG-13-107 (August 9, 2013), at 9 (emphasis added).

⁵ *Id.*

⁶ *Id.* at 8.

⁷ *Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program*, OIG-06-22 (January 2006), at 1.

⁸ *Id.* at 9.

⁹ Letter from Sen. Charles E. Grassley and Sen. Richard J. Durbin to USCIS Director Alejandro Mayorkas (March 7, 2012).

¹⁰ *Supra*, note 1, at 10.

1Bs, referred to as the “GST” decision, conceded during the oral presentation of that case: “[C]learly it is true that if everyone is specialized, then no one is specialized.”¹¹

Finally, I am troubled by the publication of this guidance as a mere policy memorandum and not as a regulation. Clearly, publication of a proposed regulation, which would include an economic impact assessment and substantial opportunity for public comment, is the preferable means for implementing binding, permanent guidance about such a critically important subject that has been the subject of such intense debate for years.¹² In the over *three years* since then-USCIS Director Mayorkas promised L-1B guidance (and that he’d do so within a month)¹³, USCIS could have drafted, published and finalized a comprehensive L-1B regulation, including long-overdue regulations implementing the 2004 L-1 Visa Reform Act. But that didn’t happen. I understand that advocacy organizations that met with DHS about the memo were told that a regulation was out of the question, not for any substantive or legal reason, but only because there was insufficient “bandwidth” to draft a regulation in light of all the other work that was being done to implement the President’s executive actions.

I fear – especially in light of the remarks made by the President in March – the effect that this L-1B memo will have on American workers, particularly in the IT sector, who are already battered by mass layoffs, job offshoring, and depressed wages. I expect, regardless what the memo may actually provide, that “the message” has already been sent to USCIS adjudicators, from no less than the President himself: the L-1B denial and RFE rates must go down.

In order to better understand the administration’s intent and ensure that implementation of the memo doesn’t adversely affect American workers, I have attached a series of questions that I would like responses to. Please provide responses no later than October 6, 2015.

Sincerely,



Charles E. Grassley
Chairman

¹¹ AAO Case # WAC 07 277 53214 (Jul, 22, 2008), at 26.

¹² In 2012 the USCIS Ombudsman “suggested USCIS engage in formal notice and comment rulemaking under the Administrative Procedure Act to address stakeholder concerns.” Teleconference Recap: The Adjudication of L-1B “Specialized Knowledge” Worker Petitions - How Is It Working for You? (June 29, 2012) – available at <http://www.dhs.gov/teleconference-recap-adjudication-l-1b-specialized-knowledge-worker-petitions-how-it-working-you>.

¹³ Remark by USCIS Director Mayorkas at meeting on L-1 Visa Adjudications at the U.S. Chamber of Commerce (January 30, 2012).

QUESTIONS

1. Is the President's statement that "hundreds of thousands" of L-1B nonimmigrants will benefit from the new L-1B guidance memo accurate?
2. What analysis has USCIS done regarding potential increases in the number of L-1B workers admitted to the U.S. as a result of the implementation of the August 17 memo?
 - If no such analysis has been done, please explain why it hasn't been done.
3. Please provide any economic impact analysis that has been done in support of the August 17 memo.
 - If no such analysis has been done, please explain why it hasn't been done.
4. What is the status of USCIS implementation of OIG recommendations ##2, 3, 6, 8, and 9 from the 2013 OIG report (OIG-13-107) on L-1B?
 - Regarding #9, in light of the provisions included in the August 17 memo, does USCIS now have no plans to ever issue regulations implementing the L-1 Visa Reform Act?
5. Are there any plans to publish precedent decisions relating to L-1B specialized knowledge? If not, what happened to the precedents that USCIS told the USCIS Ombudsman were being worked on in 2010?¹⁴
6. In its April 2012 letter to the President, the AFL-CIO suggested that we first get better data on L-1Bs before issuing any new guidance. The AFL-CIO noted that "[w]e do not know how many beneficiaries are currently working in the U.S., where they are working, what their qualifications are, and how much they are earning."¹⁵
 - What, if any, attempts has USCIS made to track the information requested by the AFL-CIO?
 - What is USCIS's estimate of the number of L-1B workers currently in the United States? If USCIS has no such estimate, please explain why the agency does not have such an estimate and what, if anything, the agency plans to do to make such an estimate.
 - Does USCIS know how many of the L-1B workers in the U.S. are beneficiaries of regular L-1B petitions and how many are beneficiaries of blanket L-1B petitions approved overseas by State Department consular officers? If not, what, if anything, is USCIS doing to obtain that information from the State Department?
7. What, if any, analysis has USCIS done to determine whether the allegedly high denial and RFE rates alleged by business groups reflect anything other than increased numbers of petitions that do not meet the L-1B eligibility requirements?

¹⁴ See USCIS Response to the Citizenship and Immigration Services Ombudsman's 2010 Annual Report to Congress (Nov. 9, 2010) at 7 ("[T]he Administrative Appeals Office (AAO) is working to publish a precedent decision or series of decisions on 'specialized knowledge.'").

¹⁵ Letter from AFL-CIO, Department for Professional Employees, to President Obama (April 3, 2012) regarding "Reform of L-1B Visa 'Specialized Knowledge' Definition," available at <http://dpeaflcio.org/wp-content/uploads/Ltr-to-POTUS-re-L-1B-visas.pdf>.

8. The legislative history of Public Law 91–225, which established the L-1 nonimmigrant classification, states that one of the goals of the L-1 program is to transfer “key personnel.”¹⁶ Does USCIS still stand by the 2006 statement of then Acting Deputy Director of USCIS Divine that “[t]here is no indication in the legislative history of [the Immigration Act of 1990] 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....’”?¹⁷
9. Does USCIS still stand by this statement: “[T]he GST decision was neither incorrect nor contrary to existing USCIS policy as set forth in the Puleo memorandum and other memoranda issued by the Agency on the subject of ‘specialized knowledge’”?¹⁸
10. One part of the August 17 memo provides that adjudicators may look at wages to determine if a person is truly a “specialized knowledge” worker.¹⁹
 - In the wake of the Electronics for Imaging case, in which a California tech company was found by the Department of Labor to be paying its L-1B workers below the State’s minimum wage, does USCIS have a mechanism in place to flag petitions in which the employer will be paying the L-1B workers less than the minimum wage?²⁰
 - The memo refers to “valid business reasons” for a possible wage discrepancy between the L-1B worker and the company’s similarly situated employees. The memo offers as an example of such “valid business reasons” the following: “A company in its early development, for example, may not yet have generated sufficient income to pay the beneficiary a greater salary.” But if there is insufficient income to pay the L-1B worker at a certain wage level, then there should be insufficient income to pay *anyone* doing the same or similar work as the L-1B at that higher wage level. I suggest that there is absolutely no valid business reason for the company to pay only L-1B workers at a lesser wage than what similarly situated workers are being paid. Such a practice is an indicator of potential exploitation and something that, as the memo implies, signifies that the L-1B worker really doesn’t have specialized knowledge. Are there any examples, aside from the inadequate example proffered in the memo, of valid business reasons for which L-1B workers may be underpaid?

¹⁶ H.R. Rep. No. 91-851 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815 (Leg. Hist.). In 1992 the Immigration and Naturalization Service (INS) Office of the General Counsel pronounced that “[r]equiring the ‘specialized knowledge’ alien to have been a key employee abroad is consistent with Congress’s overall intent....” *Interpretation of Specialized Knowledge*, Memo from [INS] Office of the General Counsel to James Puleo, Assistant Commissioner, Office of Examinations (Dec. 1, 1992), at 6 (emphasis in the original).

¹⁷ Letter from Robert C. Divine, Acting Deputy Director of USCIS, to Robert L. Ashbaugh, Assistant Inspector General, “Comments on OIG Draft Report: A Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program” (January 10, 2006), at 31.

¹⁸ USCIS Response to the Citizenship and Immigration Services Ombudsman’s 2010 Annual Report to Congress (Nov. 9, 2010) at 9.

¹⁹ *See supra*, note 1, at 10.

²⁰ *See* George Avalos, “Workers Paid \$1.21 an Hour to Install Fremont Tech Company's Computers,” San Jose Mercury News (Oct. 22, 2014), available at http://www.mercurynews.com/business/ci_26778017/tech-company-paid-employees-from-india-little-1.

- If an L-1B worker is placed at a client worksite will USCIS compare the wages paid to the L-1B worker by the worker's employer with the wages paid by the client company to similarly situated U.S. workers *employed by the client company*? If not, why not?
11. The memo implements the 2004 L-1 Visa Reform Act, which prohibits placing L-1B workers at third-party worksites where the worker is "controlled and supervised principally" by the unaffiliated employer/client company. Is the employer-employee relationship standard set forth in the March 24 memo different from the employer-employee relationship standard laid out in the 2010 USCIS memo on this subject?²¹ If so, why?
 12. Will USCIS commit to publishing (i) stakeholder comments on the March 24 draft memo submitted within the comment period and (ii) responses to such comments, as would be done under regular APA notice and comment procedures? If not, why not?
 13. Will USCIS please provide a version of the August 17 memo indicating where changes were made from the March 24 draft memo?
 14. Please provide—
 - a list of all businesses and immigration advocacy groups that USCIS officials met with in developing the policy laid out in the memo;
 - a list of U.S. workers or associations representing American workers with whom USCIS met with in developing the policy outlined in the memo.

²¹ See Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements, Memorandum to Service Center Directors from Donald Neufeld, Associate Director, Service Center Operations (Jan. 8, 2010).