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Basic Requirements of L-1 Visa

- Qualifying Relationship - Foreign company must be related to U.S. company in a "qualifying relationship." Qualifying relationship consists of parent/subsidiary, affiliate, 50/50 joint venture or branch office.
- Continuing Foreign Operations - Foreign company must continue to conduct business outside the U.S.
- Foreign Employment Capacity - Employee must have held executive, managerial or specialized knowledge position with foreign company for 1 year within 3 years preceding application date.
- U.S. Employment Functions - Employee must perform executive, managerial or specialized knowledge function at U.S. location.
- Temporary Transfer to the U.S. - U.S. transfer to be temporary, although permanent immigrant intent does not preclude obtaining L visa status.
- U.S. Physical Premises - U.S. Employer must have U.S. physical premises.

Types of Affiliation between Foreign and U.S. Entity Defined

Parent or Subsidiary. A parent company is a corporation, partnership, sole proprietorship, or other legal business entity that has subsidiaries. U.S. Immigration frowns upon granting L-1 status to sole proprietors and their employees. However, U.S. Immigration recognizes four distinct business structures as subsidiaries:

- Any legal entity of which a parent company owns, directly or indirectly, more than 50% and which the parent controls;
- A business 50% owned by a parent company which also controls the entity;
- A 50-50 joint venture directly or indirectly owned by the parent company and equally controlled by the parent company;
- Any entity of which, directly or indirectly, a parent company owns less than 50% but over which the parent company exercises actual control.

The common element in all four cases is control by the parent company of both the alien employee's present foreign employer and future U.S. employer. Ownership of voting shares almost always represents this control.

Affiliate. An affiliate is defined as one of two entities owned and controlled by an individual or a common group of individuals each owning and controlling approximately the same percentage of each entity. For example, the FN may own 100% of the foreign company and 100% of the U.S. company. The entities may also qualify as affiliates where the FN owns at least 51% of both entities.

50-50 Joint Venture. A joint venture is an entity owned only 50% by each company rather than by 51% or more. U.S. Immigration has agreed that 50/50 joint ventures do qualify for L-1 purposes provided no venture partner has veto power. The 50/50 joint venture relationship is an excellent strategy for two separate and distinct foreign companies who want to share the opportunities and risks involved in starting a business in the U.S.

Branch. Any office or division of the same organization located in another country is considered to be a branch. If a company has, for example, only a sales department in the United States, with all other functions located outside the U.S., the sales department is considered to be a branch and employees can be transferred there with L-1 status.

Continuing Foreign Operations. The L-1 requires that the foreign company continue to conduct business in a location outside the United States. A qualifying organization must continue its foreign business for the entire time the employee is in L-1 status. In the case of small business owners and entrepreneurs following L-1 strategy to obtain U.S. permanent resident status, once the business owner is granted Green Card status, the foreign company might be liquidated and closed, if desired.

Foreign Employment Capacity. The transferring employee must have been in an executive, managerial or specialized knowledge capacity on a full time basis with the foreign entity for at least one out of the prior three years before transferring to the U.S. entity.

Executive Capacity. Means an assignment within an organization in which the employee primarily: (1) Directs the management of the organization or a major component or function of the organization; (2) Establishes the goals and policies of the organization, component, or function; (3) Exercises wide latitude in discretionary decision-making; and (4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Managerial Capacity. Means an assignment within an organization in which the employee primarily: (1) Manages the organization, or a department, subdivision, function, or component of it; (2a) Supervises and controls work of other supervisory, professional, or managerial employees, (2b) Alternatively, manages an essential function within the organization, or a department or subdivision of it; (3a) If other employees are supervised, has authority to hire and fire, or recommend those or other personnel actions like promotions and leave, (3b) If no other employees are supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and (4) Exercises discretion over day-to-day operations for the function for which the employee has authority. A first-line supervisor is not considered a manager merely by virtue of supervisory duties unless the employees supervised are professional.

Specialized Knowledge. Special knowledge exists where the employee must demonstrate an advanced level of knowledge of the employer's processes and procedures, or its application in international markets. Specialized knowledge requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation. U.S. Immigration has identified the following characteristics of an employee with specialized knowledge, all of which should be present to ensure success. The employee must:

- Have knowledge that is valuable to the employer's competitiveness in the marketplace;
- Be especially qualified to contribute to the U.S. employer's knowledge of foreign operation conditions;
- Have been a key employee somewhere other than in the United States, with significant assignments that have enhanced the employer's productivity, competitiveness, image, or financial position;
- Have special knowledge that can usually be gained through extensive prior experience with the employer.

Full Time Basis. The L-1 employee must have worked on a full-time basis for the foreign entity. However, being paid is not a requirement. Therefore, directors, board members, and non-paid executives can qualify for the L-1 visa provided full time work can be proven.

One Out of Prior Three Years. The L-1 employee must have worked for the foreign entity a total of one year out of the three years prior to entry to the U.S. in a nonimmigrant capacity. Therefore, the transferring employee could have worked two years ago for over one year total, then went to work for another, unrelated company, and still qualify for the L-1 provided evidence of the employment during the specified time is demonstrated.

U.S. Employment Functions. The L-1 employee must perform executive, managerial, or specialized knowledge functions at U.S. location, as those terms are defined above under "Foreign Employment Capacity." The employee's U.S. position does not have to be identical to the one held previously, however, that person must be transferring into a position that is executive, managerial, or requires specialized knowledge. The employee must be shown to be qualified to fill that position by having the appropriate education, training, and employment experience.

Temporary Transfer to the U.S. United States Immigration regulations make clear that L-1 status must be temporary in nature. To establish the nonimmigrant intent of the Foreign National, the petitioner normally makes a statement in the support letter to that effect. L-1 holders, however, are not required to maintain a residence outside the United States to demonstrate temporary intent. In fact, L-1A (Executives and Managers) holders are allowed to demonstrate intent to live and work permanently in the U.S. This is called the concept of "Dual Intent" allowing L-1A (and H-1B) visa holders to simultaneously have temporary (nonimmigrant) intent and permanent (immigrant, or Green Card) intent to live and work in the United States.

U.S. Physical Premises. The L-1 petitioner must demonstrate physical premises for the place of employment in the U.S. The "physical premises" test can be met by showing a purchase contract or lease agreement for the U.S. office space or commercial building. The test is also met by showing that the L-1's home is also being used as an office, or that the L-1 will be working in an "executive office suite" renting shared office space. Again, a lease, deed, or purchase contact is required to show physical premises.

Michael Serotte is the founding partner of Serotte Immigration Law Firm. He has been practicing Immigration Law since 1992 and has developed a reputation for creative solutions to difficult corporate and business immigration matters. Serotte Immigration Law Firm is located at 170 Franking Street, Suite 702, Buffalo, New York, with affiliated offices in Toronto and Washington, D.C. For more information, please see www.serottelaw.com or call 888-875-8110. You can also email Mr. Serotte at mserotte@serottelaw.com.