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FILED VIA ELECTRONIC MAIL ope.feedback@uscis.dhs.gov

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
Office of the Chief Counsel
20 Massachusetts Avenue, NW
Washington, DC 20529

Re: Feedback on proposed L-1B Adjudications Policy
PM-602-0111

Dear Sir or Madam:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation. The Chamber represents the interests of more than three million businesses and organizations of every size, sector, and region, as well as state and local chambers and industry associations, and is dedicated to promoting, protecting, and defending America's free enterprise system.

We are writing to provide feedback concerning the proposed Policy Memorandum on adjudication policy for the L-1B visa classification, the category reserved for intracompany transfer visas granted individuals with specialized knowledge who are being transferred to a U.S. assignment within a corporate family from an operation outside the U.S. The proposal was issued March 24, 2015 with a statement that feedback would be accepted through May 8, 2015 and that the new finalized Policy Memorandum would go into effect August 31, 2015. The Chamber has a significant interest in the L-1B Adjudications Policy because many of our members – small, medium, and large – are multinational enterprises that use the L-1B visa classification. In particular, many American employers with name recognition as leading innovators and a long record of corporate compliance are members of the Chamber and are global companies that rely on the flexibility of the L-1B classification to manage their own internal human resources, just as Congress intended in creating the L-1B classification in 1970. Many of these companies have provided reaction and comment to the Chamber in order to formulate this feedback.

IMPORTANCE OF IMPROVING THE GUIDANCE GOVERNING THE ADJUDICATION OF L-1B CLASSIFICATION

Safeguarding the integrity of immigration benefits adjudications is, and should continue to be, a key concern, not only for the business community but for the nation. We appreciate that many aspects of the clarity and assurances that petitioning employers seek must be conditioned upon first and foremost ensuring accurate and reliable decision-making. No intracompany transfer visa should be approved without eligibility under the controlling statute and regulations. Likewise, when visas for key staff already employed within an organization are inexplicably delayed or denied, it appears that agency resources are being spent inappropriately. Such delays or denials do not enhance compliance or enforcement and do nothing except disrupt carefully-laid business plans and create significant costs to the company and the American economy.

Notably, it has become increasingly difficult for companies to procure visas to transfer their existing employees to the United States to continue work on products, services, and projects. In a report published by the Business Roundtable (BRT) in March ("State of Immigration: How the United States Stacks Up in the Global Talent Competition," March 2015), the U.S. was ranked at the *bottom* of the 10 top industrialized economies with regard to the ability to transfer high-skilled employees across borders (see p. 30 of the BRT report). USCIS data reveal that denial rates for L-1B petitions have dramatically increased from a range of between 6% to 10% between FY2003 to FY2007 to a range of 22% to 35% for the period FY2008 to FY2014 (see reports by the National Foundation for American Policy (NFAP), "Data Reveal High Denial Rates" (NFAP February 2012) and "L-1 Denial Rates Increase Again for High Skill Foreign Nationals" (NFAP March 2015)). More disturbingly, the rate at which USCIS issues "Requests For Evidence" (RFEs) on L-1B petitions has skyrocketed even more dramatically than denials, from a range of 2% to 17% for FY2003 to FY2007 to a range of 35% to 63% during FY2008 to FY2014 (see USCIS Ombudsman Annual Reports, but note that the Ombudsman presents slightly lower rates because it calculates RFE rates based on a percentage of receipts instead of a percentage of approvals). The RFE rates over the last seven years are particularly troubling because any government agency that so *consistently is unable to communicate to the regulated community what its standards are* – such that year after year on average half of all filings are subject to requests for more or different information – *does not have in place appropriate guidance governing adjudications*.

On January 30, 2012, the U.S. Chamber hosted an L-1B legal and policy discussion. The impetus for the meeting at the Chamber was that despite best efforts to respond to the new agency approaches in L-1B adjudications, companies had not been able to manage their intracompany transfers of specialized knowledge staff with any predictability. There were over 325 people participating in the L-1B event at the Chamber, either in person or listening in by phone, representing a wide range of careful and responsible employers who use the L-1B category. The companies shared that they had each experienced a stark shift in L-1B adjudications, both at USCIS and at American consular posts abroad.

In particular, the companies' remarks attributed the increased delays, denials, and inconsistency in the L-1B category to new agency views on four critical points:

1. **Improper focus on numbers of similarly situated staff**. When agencies determine if someone is a key employee with specialized or advanced knowledge, adjudicators incorrectly are focusing on the number of employees in the global organization who "do the same type of work" without engaging in a relativistic, case-by-case analysis of the facts or business need. In some cases, if more than one person has a similar skill set, the agency states it cannot find specialized knowledge.
2. **Improper focus on O-1 standard of accomplishment**. In determining where someone's knowledge falls on the spectrum between "universally held" and "narrowly held," examiners are improperly asking for evidence of the type required to confirm O-1 eligibility, such as patents created as a result of the employee's knowledge and published material about the employee's work. Officers also regularly inquire about the level of the employee's remuneration as compared with others, which is likewise an improper focus in the adjudication of L-1B classification.
3. **Failure to recognize legitimate business requirements**. The current approach by consular posts and USCIS Service Centers gives no weight to the company's projects, products, research and development, testing, transitions after merger and acquisition, leadership or cross-fertilization programs, or professional services contracts for which the beneficiary employee's skill set is needed, even though such context would allow adjudicators to validate whether the beneficiary's knowledge is advanced or specialized.
4. **Improper *de novo* review on extensions**. In reviewing an extension or reissuance request for an L-1B worker, agencies give no weight to prior decisions for the same employee, working in the same job, for the same assignment, for the same employer, even where there are neither changes in circumstances, material error in the prior approval, or new evidence that impacts eligibility.

The takeaway from the legal and policy forum from the Chamber's perspective was that these four agency misconceptions had led to an unfounded narrowing of the definition of specialized knowledge and wildly inconsistent adjudications. Correcting these four misconceptions through updated and modernized L-1B guidance is the Chamber's top priority with regard to the L-1B classification.

So that you can see the widespread impact of such inconsistency and narrowing in the L-1B classification and understand the basis upon which the Chamber is providing this feedback, we are sharing the following information verifying the breadth of companies with the concerns we explain below about the proposed guidance (the concerns about the guidance are grouped as (i) flaws that must be corrected, (ii) critical revisions, and (iii) requests).

An informal survey was conducted, collecting data from businesses that utilize the L-1 category that were willing to provide detailed information. We believe the 84 businesses are a representative cross-section of Chamber member companies that use the L-1B classification:

Company description in terms of industry					
	Administrative Headquarters Location				
	Europe	Asia (not India or China*)	U.S.	Total	Percent
Biomedical	1	0	4	5	6.0
Consumer goods	0	1	6	7	8.3
Financial	1	0	5	6	7.1
Computing technology	1	1	14	16	19.1
Equipment and heavy manufacturing	7	1	14	22	26.2
Professional services	1	0	11	12	14.3
Accommodation and food services	0	0	2	2	2.4
Information Content (data, publishing, entertainment)	0	0	6	6	7.1
Natural resources	3	1	4	8	9.5
Total	14	4	66	84	100

* None of the 84 companies that provided data happened to be companies headquartered in India or China.

Company description in terms of administrative headquarters		
	Frequency	Percent
Europe	14	16.6
Asia (*other than India or China)	4	4.8
India or China	0	0
United States	66	78.6
Total	84	100

Company description in terms of L-1 usage					
	Administrative Headquarters Location				
	Europe	Asia (not India or China*)	U.S.	Total	Percent
Blanket and individual petitions	12	3	46	61	72.6
Blanket only	2	0	13	15	17.9
Individual petitions only	0	1	7	8	9.5
Total	14	4	66	84	100

Countries where companies maintain design centers, research or development centers, or other functional centers (besides administrative headquarters) critical to internal global collaboration to facilitate a company's development or provision of products, services, or other mission critical functions		
	Frequency (among the 84 companies)	Percent (of the 84 companies)
India	60	71.4
China	64	76.2
Canada	41	48.8
Mexico	36	42.8
Europe	72	85.7
South America	39	46.4
Africa	25	29.7
Asia (other than India or China)	46	54.7
Australia	32	38.1
United States	73	86.9

Company description in terms of global employment		
	Frequency	Percent
100 to 499 employees worldwide	2	2.4
500 to 9,999 employees worldwide	21	25.0
10,000 to 49,999 employees worldwide	23	27.4
Over 50,000 employees worldwide	38	45.2
Total	84	100

The above tables offer a company description for the 84 businesses that provided information. The tables summarize size, industry, headquarter location, interaction with Department of State (blanket petitions) and USCIS (individual petitions), and research or design center location.

The data shows that few global companies deal solely with USCIS in L-1B adjudications, with over 70% using both blanket (USCIS approved blanket petition followed by State Department adjudication) and individual petitions (USCIS adjudication only). Most of the companies that provided feedback have their administrative headquarters in the U.S. – over 78% of the firms – with the remainder having headquarters in Europe – over 16% – or in Asia other than India or China – about 5%. The data is not tilted toward India-centric concerns, because it happens that no companies based in India (or China) responded to the survey. However, a large majority (over 70%) of the responding companies maintain significant operations in each India and China, making it likely they will be transferring in staff from those countries.

The companies providing information operate in 9 different, unrelated sectors with the largest group being manufacturing (26%), providing different views from the standpoint of industry dynamics. There were no start-ups that responded to the survey, and relatively few small or medium companies that provided information. There were two companies with less than 500 employees that provided their perspective (the Small Business Administration often says that companies with less than 500 employees are small businesses), about one-quarter of the responding companies were medium sized enterprises with a workforce of 500-10,000, with another quarter being large companies maintaining a global employee base of 10,000 to 50,000, and a little less than half of the responding companies being leading global corporations with over 50,0000 staff worldwide.

The 84 responding companies have varying perspectives, some driven by their industry needs others driven by the specific legitimate business needs of the individual company, and use the L-1B category in different ways. Some of the companies primarily or solely use the L-1B for shorter term assignments of 1-3-6-9-12 months duration, some have a significant portion of their L-1B population coming to the U.S. on an intermittent basis spending less than half their time in the U.S. in any given year, others split L-1B usage between short term use of 6 months or less and longer term assignments of 24-36 months, and still others have other usage patterns. Each of the responding companies is united in the position that a cornerstone of business operations for those that do business both in the United States and abroad is the ability to transfer managers, executives and specialized knowledge personnel, through the L-1A and L-1B classifications, across national boundaries into the U.S. in order to harmonize operations, expand markets, service customers, and share knowledge. Therefore, because of its importance, we applaud the efforts by the Department of Homeland Security to update the L-1B Adjudications Policy.

INTRODUCTION TO FEEDBACK ON PROPOSED GUIDANCE

In announcing the proposed changes to the L-1B guidance, President Obama explained that the idea was to "allow corporations to temporarily move workers from a foreign office in a faster, simpler way" (see remarks of President Obama at a SelectUSA Summit, March 23, 2015 https://www.whitehouse.gov/the-press-office/2015/03/23/remarks-president-selectusa-investment-summit). While the President made reference to the possibility of benefiting "hundreds of thousands of nonimmigrant workers and their employers" that was not with regard to adding hundreds of thousands of new nonimmigrant workers but instead providing predictability for hundreds of thousands for a process that has been subject to utterly unpredictable adjudications. As President Obama reiterated, providing improved guidance over L-1B adjudications could, "in turn, benefit our entire economy and spur additional investment."

We support the approach of the Department of Homeland Security to synthesize in one place policy guidance regarding the L-1B classification. Thus, we welcome the provisions in the proposed guidance that establish the new guidance will rescind and supersede four different prior guidance memos.

On its face, the Policy Memorandum attempts to do many good things that would address the Chamber's top four priorities (page 3 above). We are particularly pleased that the proposed L-1B Adjudications Policy restates that:

- the preponderance of the evidence standard controls,
- specialized knowledge need not be proprietary or unique to the petitioner,
- L-1B classification does not require a test of the U.S. labor market,
- specialized knowledge need not be narrowly held within the petitioning organization,
- specialized knowledge workers need not occupy managerial or similar positions or command high salaries compared to their peers, and
- readjudication of L-1B eligibility should only occur when there is material error, a substantial change in circumstances, or no material information.

Indeed, if all items in this six bullet list would be implemented as listed then corporations could indeed move workers from foreign offices to the U.S. "in a faster, simpler way," as the President suggested is the purpose of the new guidance. Unfortunately, the explanatory text in the proposed Policy Memorandum includes some inconsistencies with the above bulleted points and also includes statements that dilute the impact of the above bulleted list of points.

While we appreciate the proposed guidance as an effort to provide clarity to adjudicators and petitioning employers, we believe there are two flaws that must be corrected in order for the guidance to improve consistency and also have identified two critical revisions that should be considered. We also have two requests regarding the finalization of the guidance.

TWO FLAWS IN THE PROPOSED L-1B ADJUDICATIONS POLICY THAT MUST BE CORRECTED IN ORDER FOR THE GUIDANCE TO PROVIDE ANY IMPROVED CONSISTENCY

A. Two Flaws – Summary

We commend the agency's interest and over three years of work in drafting the new L-1B Adjudications Policy to provide more certainty and predictability to the adjudication of L-1B classification, but the proposed guidance is fatally defective in two ways:

1. **Evidence**. The guidance on how to evaluate claims of specialized knowledge (p. 8, Part V Subsection B and p. 11-12, Part V Subsection C) gives no weight to the "detailed description of the services to be performed" that is required by regulation for the petitioning employer to provide under penalty of perjury and does not give weight to the business context of the proposed intracompany transfer. On pp. 8 and 11, references to the employer's sworn statement should be added. On p. 11 the reference to the employer's sworn statement needs to precede the "other evidence" bulleted list. On p. 12, references should be removed (last two bullets) relating to O-1 type evidence of patents, trademarks, licenses, or contracts awarded based on the beneficiary's work and payroll documents which will contain much Personally Identifiable Information (PII) that the employer is required to protect. There certainly will be employers that will able to assemble patent or other O-1 type evidence or payroll evidence without PII and are willing to share such evidence because it helps in particular cases but listing it in the guidance will create an expectation among adjudicators that they can expect it or request it.

2. **Deference**. The guidance to avoid unnecessary readjudication (p. 14, Part VII) does not require the government to speak with one voice on "the adjudication of L-1B classification," as stated in the first sentence of the Policy Memorandum, and instead only applies to "prior determinations by USCIS" and, contrary to the regulations, suggests that a change in location "may" be a material change for an L-1B worker. The text establishing which decisions are entitled to deference must refer to the prior approval of L-1B classification regardless of whether such approval was a result of an adjudication by USCIS, the State Department, or Customs and Border Protection. Furthermore, footnote 16 should be deleted.

B. Discussion – Understanding Why The Two Fundamental Flaws Must Be Fixed

Evidence. We understand the tension between USCIS's preference for receiving third-party, independent, objective evidence confirming a statement by the business and, on the other hand, the business reality that many of the business needs requisite to explaining the specialized knowledge in play as well as the facts and circumstances of the alien beneficiary's L-1B eligibility cannot be proved by third-party, independent, objective evidence. Surely there is a legitimate interest by USCIS to prefer corroborating evidence so that it can more reliably and

accurately determine if it is "more likely than not" that the petitioning employer claims are in fact the case. Equally clearly though, it is not reasonable, or a reliable way of assessing the facts, to ask a business to manufacture evidence disconnected from the normal course of business or to attempt to prove independently what can only logically be proven by giving careful consideration to the business's own sworn statements.

For reasons not understood by the Chamber, USCIS's proposed guidance appears to provide that the sworn petitioner's statement can never be sufficient and that no adjudicator has the authority to approve eligibility for L-1B classification based on a sufficiently detailed petitioner's statement. The guidance, therefore, disregards the fact that the required petitioner's statement that must accompany Form I-129 when seeking L-1B classification is itself a sworn statement. The Form I-129 instructions, which pursuant to 8 CFR §103.2(a)(1) have the force and effect of regulation, specifically provide that by signing the Form I-129 the petitioner employer also attests to the truthfulness of the petitioner's statement (and other filed documents). The form instructions, at p. 19, provide "By signing this form, you have stated under penalty perjury (28 USC §1746) that all information and documentation submitted with this form is true and correct." Furthermore, the general prohibition against knowingly and willingly signing any government form with false information also applies, and criminal penalties attach, pursuant to 18 USC §1001. In the case of L-1B nonimmigrant visa petitions, the signature by the petitioning employer on the government form signifies an attestation to the other statements submitted with the form – so §1001 is best understood to apply to the petitioner's statement as well.

Such sworn statements are entitled to some weight and, at a minimum, adjudicators must have clear guidance that they *may* rely on such statements in those circumstances where the statements are detailed and thorough, especially when provided by well-established and reputable employers. L-1B guidance that simply confirms that the petitioner's sworn statements in the visa petitioning forms and signed letter(s) of support may be persuasive evidence of the petitioner's need for the beneficiary and beneficiary's eligibility for the L-1B classification does not establish that a petitioner may satisfy the regulations by merely stating that the beneficiary has specialized knowledge, or otherwise making generalized statements.

In other words, it is not correct that a petitioner's statement is per se insufficient and has no evidentiary value, as the proposed guidance can be read to say. Similarly, it is equally incorrect that sweeping statements without sufficient, itemized particularity that show the basis for such statements can be considered competent evidence. The L-1B guidance must establish that where the petitioner's sworn statements are detailed, specific, and credible, and adequately place the beneficiary's knowledge within the context of the employer's specific and well-explained business need, adjudicators should not issue requests for further evidence or deny petitions merely because the petitioner has not provided additional third-party evidence, unless the petitioner's attestations are mere conclusory statements or unless the record contains evidence that weighs against eligibility.

Deference. The government must speak with one voice when it accords an immigration benefit. In the case of L-1B classification, USCIS is involved in every decision according L-1B

classification. Some visa petitions are before USCIS directly, filed at Service Centers. In other cases, USCIS adjudicates a blanket petition qualifying the employer under the statute and regulations governing qualifying corporate relationships and then by regulation consular officers of the Department of State issue visas where the individual L-1B worker's credentials are "clearly approvable." In still other cases, Customs and Border Protection (CBP) officers adjudicate L-1B petitions at the border for citizens of Mexico and Canada, after which the petitions are mailed to USCIS Service Centers for after-adjudication processing. In all three scenarios, whether the last adjudication is by USCIS, State Department, or CBP officers, USCIS regulations and guidance control the adjudication and are the only binding authority upon which any government officer can base an adjudication of L-1B classification.

It is imperative that the guidance on "readjudication" (p. 14, Part VII) speak to "the adjudication of L-1B classification," as noted in the first sentence of the Policy Memorandum, and not simply and solely "prior determinations by USCIS." Specifically, the final guidance must establish that officers give deference to a prior grant of L-1B classification, whether that determination was made by USCIS, CBP, or the State Department. The "no readjudication" policy should apply to any extension of stay, regardless of whether the immediately prior adjudication of L-1B classification was completed by USCIS, CBP, or the State Department.

Significantly, and without any apparent authority, the proposed guidance states that in some L-1B cases a change in location of the L-1B worker's job site may be "a substantial change in circumstances or new material information requiring re-adjudication by USCIS to ensure compliance with the L-1 Visa Reform Act" (p. 14, Part VII, footnote 16). The agency has regulations for the L-1B classification that already establish when changes are material thus requiring an amended petition by the petitioning employer, at 8 CFR §214.2(l)(5)(ii)(G) and §214.2(l)(7)(i)(C). These regulations do not suggest or imply, much less state, that a change in employment location "may" be considered a material change requiring the filing of an amended petition. USCIS may establish that an adjudicator has authority to find that a change in L-1B employment location is, standing alone, a substantial change if the agency issues a Notice of Proposed Rulemaking, proposing an amendment to the existing regulations which already speak to this issue.

Interestingly, the proposed L-1B guidance cites to an April 23, 2004 Policy Memorandum for the proposition that a change in offsite employment might constitute a substantial change and readjudication to ensure compliance under the L-1 Visa Reform Act. The cited memo does not speak one iota to this suggestion. The plain words of the April 2004 policy memo on deference discusses the requirements of the *regulations* referred to in the preceding paragraph, which do not contemplate change in work location standing alone as a substantial change in the L-1B classification. Of course, the reason the cited memo does not speak to possible implications for compliance with the L-1 Visa Reform Act is that it was published about seven months before the legislation was enacted (the L-1 Visa Reform Act was not signed into law until December 8, 2004). The Chamber believes the reference to an L-1B change of job site as being a material change must be deleted from the final Policy Memorandum and requests that footnote 16 be removed in its entirety.

In conjunction with a new binding deference policy, the agency should give consideration to publishing a revised Form I-129 requiring the petitioning employer to attest under penalty of perjury whether or not there has not been any substantial change in an extension filing. Given that once the petitioner signs the Form I-129, all documents filed with the form are considered filed under penalty perjury (see discussion above, at p. 8), the final guidance could also simply require the petitioning employer to specifically include a statement verifying no substantial change as a predicate to enjoying the protection of the no readjudication policy.

The agency's ability to identify material error regarding a previous case or to discover new material information could be driven by USCIS's ongoing site visits in the Administrative Site Visit and Verification Program (ASVVP) or other existing investigatory tools. Perhaps other alternatives could be considered to more easily implement the policy of not readjudicating extensions of L-1B status. USCIS officers could be given access to the State Department's Consular Consolidated Database (CCD) in order to easily review the prior petition and confirm that no substantial changes have occurred. Petitioners wanting to take advantage of the policy of not readjudicating L-1B classification could also be asked in the final guidance to provide copies of the forms and petitioning statement(s) filed in the earlier case as part of the record in the extension filing.

By not providing deference to the prior adjudication of L-1B classification, the agency is imposing significant additional costs for employers. The costs include both out-of-pocket fees to lawyers for legal services, the internal costs to cover the number of hours and staff positions responsible for such extension petitions and seemingly unnecessary Requests For Evidence, and the cost of uncertainty about retaining the services of a key employee coupled with the periodic receipt of an unexpected extension denial. Based on data from our members able to provide such information, we estimate that about 39 percent of L-1 visa petitions (both L-1A and L-1B combined) filed annually are extensions for L-1 staff currently working in valid L-1 status for the same petitioning employer. Nearly 97 percent of L-1 extensions are for the same employer, same employee, and the same job duties as the beneficiary worker's current terms and conditions of status. For these largely "no-change" petitions for extension, Requests For Evidence were nevertheless issued in 18 percent of L-1A extension petition filings and 32 percent of L-1B extension petition filings. A Chamber analysis regarding the failure to provide agency deference generally, most of which relates to H-1B extension filings, shows this to be a process costing employers over $58 million annually (see U.S. Chamber comments filed January 29, 2015 in response to Request for Information on Visa Modernization, which also lays out the number of H-1B, L-1A, and L-1B case examples relied upon for the conclusions and analysis https://www.uschamber.com/sites/default/files/uscc_rfi_response_1-29-2015.pdf).

TWO CRITICAL REVISIONS TO THE PROPOSED L-1B ADJUDICATIONS POLICY

A. Two Revisions Beyond The Fundamental Flaws – Summary

There are two other issues in the proposed L-1B Adjudications Policy that warrant special attention:

1. **Wages**. Neither the statute or the regulations create any agency authority to require a prevailing wage determination or compliance with a prevailing wage level. Indeed, as the proposed L-1B Adjudications Policy acknowledges, in creating the L-1B classification Congress focused on the beneficiary L-1B worker's knowledge, not his or her pay scale (see p. 10, Part V, Subsection (B)(5)). The references to wage levels paid should be eliminated as far as being a separate bullet point in evidentiary guidance (p. 12, Part V, Subsection C) and should either be removed or clarified with regard to when and how adjudicators consider wages (p. 10, Part V, Subsection B(4)).

2. **Examples**. The use of examples would seem vital, as a practical matter, in ensuring the guidance is effective. This is especially true because there are several internal inconsistencies in the messaging of the guidance. An addendum should be added to the Policy Memorandum with fact patterns exemplifying when specialized knowledge exists and when it does not.

B. Discussion – Understanding Why Two Revisions Needed

Wages. Outlier wage levels have *always* been a relevant touchstone for adjudicators in considering L-1B qualifications – when a beneficiary will be paid either very high or very low wages this is a relevant review point in either affirming eligibility or raising questions about eligibility. This is quite different than issuing an invitation to adjudicators to inquire about and receive independent objective evidence of the wages paid "to the entire spectrum of employees in the U.S. operations who possess the requisite specialized knowledge" (see p. 10, Part V, Subsection B(4)), which the proposed guidance incorrectly does.

In addition to the fact that there is no clear legal authority to focus adjudicators' attention on wages, in practice wages are largely irrelevant to the determination of whether a beneficiary possesses specialized knowledge. An increased focus on wages would not improve either the quality or consistency in L-1B decision-making. This fact is underscored by four recent decisions received by a large, name-recognized American company noted for its contributions to the high-tech sector:

- Denial. Employee maintaining valid L-1B status was denied an L-1B extension. On the U.S. payroll receiving a salary of $147,000. Over 18 years of professional experience, 11 years of industry experience before joining the company, 7 years

of experience with the company including work with a company acquired by the petitioning employer.

- Denial. Employee earning the equivalent of $25,000 annually (not including housing, transportation and other expat benefits when on assignment in the U.S.). Over 5 years with the company and played a key role in developing the company's "application development framework."
- Approval. Employee earning the equivalent of $10,000 annually (not including housing, transportation and other expat benefits when on assignment in the U.S.). A little over one (1) year of experience with the company. Expert in formulating and leading strategy and process. Focused on large and complex scenarios that required creative and complex solutions applying the company's methods and techniques.
- Approval. Employee on the U.S. payroll earning $52,000 annually. A little over one (1) year of experience with the company. Received in-house training on proprietary methods. Authored several white papers. Specialized in French language and multi-lingual technical sales.

As these examples highlight, wages are not the driving factor in agency decision-making and may not even be "a" factor in most cases. For this reason, and because we are not aware of the legal authority to conduct the type of wages inquiry suggested in the proposed version of the L-1B Adjudications Policy, the Chamber suggests that the references to wages be dropped.

At a minimum, though, corrective language on wages is needed – should the references to wages be retained. The proposed guidance fail to take into account that salary standing alone is *not* the sole compensation an L-1B worker may receive, creating huge problems for the many legitimate employers that do not place L-1B workers on the U.S. payroll, especially for short or intermittent assignments. While varying company practices are in place, for a variety of legitimate business reasons, it appears that many companies do not place L-1B workers on the U.S. payroll if the assignment is expected to be one year or less or if the U.S. presence of the L-1B worker will only be sporadic (although it may cover an indefinite period of time – ie, periodic work in the U.S. is expected for the individual for the foreseeable futures).

Many Chamber companies retain individuals on their home country payroll at their home country salary level while in the United States on temporary assignment and have specific policies in place governing compensation for such assignments. It is not unusual for the home country salary level to be lower than the salary paid a U.S. worker, based on cost of living and other local factors. However, in addition to wages the company typically provides the following for the L-1B worker: payment of all housing costs while in the U.S., transportation to and from the U.S., and a per diem reimbursement for daily costs of living. Other benefits are also sometimes afforded L-1B workers; for example, one company, in addition to housing, transportation, and per diem, pays all U.S. income taxes, pays for U.S. tax services, provides a car and insurance at no cost to the L-1B worker, pays fully for health and dental insurance, while also paying for benefits in the home country to ensure the worker's family is covered if the family chooses to stay behind.

Because the current proposed guidance mentions wages without mentioning other compensation, there would be *no way for any company to comply* with the current text on comparison wages (at p. 10, Part V, Subsection B(4) in the second full paragraph) when the company retains individuals on the foreign, home country payroll and, as is common, the wages on home country payroll are lower than a U.S. salary although the total compensation while on U.S. assignment is not lower. Should the wages language be retained, a fundamental problem that must be addressed is that it focuses solely on wages and does not direct the adjudicator's attention to understanding the full compensation package offered the L-1B worker.

One company's situation might be instructive. The company is an American, name-recognized business that is one of the world's largest and highest-valued. As a very large global organization it regularly uses the L-1B classification to best manage its own internal human resources and best utilize the expertise of its staff. In a typical year, about 39% of its L-1Bs are in the U.S. for periods of 30 days or less, about 41% have one year assignments, and about 8% are regular full-time hires on the U.S. payroll for assignments of longer than one year often for up to three to five years. Of the remaining L-1B workers in the U.S. in a given year, usually about 2% are here for 60 days, 3% for 90 days, 3% for more than 90 but less than 180 days, and about 4% for more than 6 months but less than a year. In all cases, all L-1B workers remain on home country payroll except for those that are considered regular full time hires in the U.S. In any given year, circumstances can arise where individual L-1B workers need to extend their stay or a special project could necessitate a cohort to remain in the U.S. for longer than a one year assignment.

For this company, each year there are numerous U.S. workers being transferred outside the U.S. and numerous foreign-based workers being transferred among foreign subsidiaries as well as in to the United States. As a matter of company policy, continuing the salary level of the home country – both for U.S. workers sent abroad and vice versa – is essential to ensure continuity in pension, retirement, social security programs and any other differed compensation program the employee may be entitled to or subscribing to in the home country. The company policy does not allow split payroll or special payroll and benefit set-ups, in order to protect the company from unnecessary tax liabilities and to avoid the impossible morass of trying to account for the myriad of differences between countries on salary scales and benefits.

Nevertheless, to quote the proposed L-1B guidance, there are "many" of this company's employees in the United States that possess the "requisite" specialized knowledge that most L-1B workers possess – typically the point is that the company needs, at any given moment, additional workers with a particular set of specialized expertise to complete or provide crucial services for a necessary project. When this company transfers L-1Bs into the U.S., all such individuals except those few (usually about 8%) placed on the U.S. payroll as regular full-time hires are paid at their home country salary level with their home country benefits plus U.S. support. The U.S. support for all L-1Bs on a foreign payroll includes immigration support costs, enroute travel, return travel, house hunting costs, dependent visit travel if not relocating to the U.S., housing (either furnished or non-furnished), goods and services differential, international

medical and dental coverage, tax equalization, tax preparation as well as an education allowance should an L-1B have school-age children in the U.S. that are attending private school,

The Chamber believes that the references to a wage comparison should be removed from the L-1B Adjudications Policy (at p. 10, Part V, Subsection B(4) in the second full paragraph and at p. 12, Part V, Subsection C at the last bullet) since only outlier wages are relevant (unusually high or low) in which case the petitioning employer would choose (without any prompting from the guidance memo) to address compensation in order to meet its burden of proof. Should the wage comparison language nevertheless be retained, the text must be clear that any wage assessment must also include a review of the full compensation being received by the L-1B worker.

Examples. The use of examples is prevalent in legacy INS and USCIS policy guidance and has been an effective tool. In addition to enhancing the understanding among both the regulated community and adjudicators, examples go a long way to ameliorate what are otherwise internal inconsistencies in the attempt to explain complicated concepts in writing. The Policy Memorandum on L-1B Adjudications Policy contains several serious inconsistencies that leave the L-1B guidance precariously unclear. Among other inconsistencies, the following are noted:

- The proposed guidance correctly states that the petitioning employer "is not required to demonstrate the lack of available workers to perform the relevant duties in the United States" but also says that "if there are numerous workers in the United States who possess knowledge that is generally similar to the beneficiary's it is the petitioner's burden to establish that the beneficiary's knowledge is truly specialized."
- The proposed guidance correctly states that "the mere existence of other employees with similar knowledge should not, in and of itself, be a ground for denial" but also says that "in cases where there are already many employees in the U.S. organization with the same specialized knowledge as that of the beneficiary, officers generally should carefully consider the organization's need to transfer the beneficiary to the United States."
- The proposed guidance correctly states that "in creating the L-1B classification, Congress focused on the beneficiary's "knowledge," not his or her position on a company's organizational chart or pay scale" but also says that where "the beneficiary will be paid substantially less than similarly situated employees, this may indicate that the beneficiary lacks the requisite specialized knowledge."

We anticipate that even extensive wordsmithing to explain and clarify these internal inconsistencies will not replace the value of a few solid examples. The use of examples would provide a reference point for adjudicators as well as employers in preparing L-1B visa petitions. We suggest that the examples in the Puleo memo be reiterated and several updated and modernized examples also be provided in an "examples addendum" be added to the finalized Policy Memorandum.

TWO REQUESTS REGARDING THE PROPOSED L-1B ADJUDICATIONS POLICY

We request as an initial matter that the effective date of the new Policy Memorandum on L-1B Adjudications Policy be pushed back as many months as needed should the agency be unable to revise the final guidance as suggested above while also allowing sufficient time for training on the revised terms of the final guidance. Should the agency be unable to correct the two defective flaws in the proposal (see discussion p. 7-10 above), the agency should consider not finalizing the guidance as we cannot envision the L-1B Adjudications Policy working without these changes.

We also request that the agency consider adding a sentence in the final guidance that officially confirms that it has always been U.S. government policy to avoid discriminatory adjudication practices. Many Chamber companies report that it appears, anecdotally, cases are reviewed differently based on the country of citizenship of the named beneficiary, with more rigorous review attaching when the beneficiary is a citizen of India. For example, several Chamber companies have reported this fact pattern: An American corporation, with name recognition as a long-ago established American-owned business, has a corporate restructuring where one business unit doing business in the U.S. is spun-off as a separate, new corporate subsidiary corporation. The business unit has 15-20 L-1B workers and an amended petition must be filed for each L-1B to document the new qualifying corporate relationship for the new employer of the L-1Bs. No changes in the work assignment, location, or any aspect of the L-1B's terms and conditions of employment accompanies the corporate restructuring; the sole issue is whether the newly spun-off subsidiary company has a relationship qualifying for L-1B classification. If none of the 15-20 L-1B status holders are citizens of India then no Requests For Evidence (RFEs) are issued; if 2 are citizens of India then 2 RFEs are issued and all the remaining L-1B amended petitions are approved without RFE; if the majority are citizens of India then all those from India are issued RFEs and the few from China or the Czech Republic or countries other than India are approved without RFE. These results suggest to the employer that L-1B visa petitions are reviewed differently based on the country of citizenship of the beneficiary. The *appearance* of such an impropriety, regardless of whether it exists, should be of sufficient concern to warrant review of whether adding an affirmative statement of non-discrimination is appropriate in the final L-1B Adjudications Policy.

CONCLUSION

The Policy Memorandum on L-1B Adjudications Policy attempts to suitably address the Chamber's top four priorities (page 3 above) in improving guidance for the L-1B classification. However, as described in the Chamber's feedback, it is our view that the L-1B Adjudications Policy as proposed fails to deliver and will not improve decision-making, in practice, absent further changes.

This failure is irrational in a world where not all intellectual capital is housed in the United States, and where one of the keys to maintaining a multinational company's competitive

position is the organization's ability to deploy specific people or specific internal skill sets for assignments in the U.S. Such deployment is integral to a global company being able to expand U.S. operations and create and retain jobs in America.

We respectfully request that the agency further revise the L-1B Adjudications Policy in accordance with our above recommendations before finalizing it.

We thank you for your consideration of these views.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration and
Employee Benefits

Amy M. Nice
Executive Director
Immigration Policy