Intracompany Transfers: A Great U.S. Startup Status

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Historically, starting up a business in the United States presents some unique challenges; not only financial and logistical but from an immigration standpoint as well. We often have startup companies ask us when and if they need work authorization to start up their business in the United States. There isn't always a bright line defining this, as certain business activities can be done in business visitor status.

Where the business and the individual beneficiary qualify, we often recommend that travelers obtain L-1 intracompany transferee status proactively. This prevents business travelers from encountering interruptions in their business plans that could compromise their business activity, growth, or success. The requirements are fairly straightforward:

- There must be a business operating outside the United States for at least one full year, which is owned and controlled in essentially the same proportions as the U.S. business at which the traveler will be working.
- The traveler — the beneficiary of the petition by the United States or foreign company for L-1 status — must have been working continuously outside the United States for at least one full year out of the most recent three in an executive, managerial, or specialized knowledge role.

- The qualifying foreign worker must be traveling to the United States to work in an executive, managerial, or specialized knowledge role.

So long as these basic requirements are met, even startup businesses can qualify their workers to operate on both sides of the border.

To obtain L-1 intracompany transferee status, there is no need for the business in the United States to have been operating for a certain amount of time. In fact, what the regulations require for initial L-1 work authorization — in terms of the business and its operational structure in the United States — is very limited: an incorporated U.S. entity or branch office, a lease for an office or operating space, a reasonable business plan and a source of capital supporting the needs of the business. If the business meets other L-1 work authorization requirements, the qualifying employee will be given one year to get the business up and running, such that the individual beneficiary and any additional employees then qualify for additional years of employment authorization. L-1 executives and managers can qualify for up to seven consecutive years of full-time work authorization in the United States, and L-1 specialized knowledge workers can qualify for up to five consecutive years of full-time employment in the United States. However, this is a common status and a great solution for individuals who are travelling even just once a month or a few times a year, in which case they may be able to extend past the seven- and five-year limits.

L-1 intracompany transferee status is not for those who are sole proprietors outside the United States and could be difficult to obtain for businesses with only a few workers. One of the requirements for this type of work authorization is that there is a qualifying affiliated business outside the United States that will continue to operate in addition to the U.S. business — so if there is no one left at the helm of the foreign business while the L-1 work authorized businessperson is in the United States, the petition will fail. There are exceptions to this: for instance, if there are two or three employees running the business but a number of independent contractors under that management structure, then it may still be possible to obtain L-1 work authorization, even for early-stage or limited operational structure businesses.

For those who would rather wait until they have a problem at the border to apply for work authorization, taking a reactive approach to immigration does come with some significant risks. If you wait until a U.S. Customs and Border Protection officer says you need work authorization to come into the United States on behalf of your business, you may have already (inadvertently or on purpose) misrepresented the nature of your activities to a government officer. I came across this situation recently, where an artist reached out to me because he was told he was inadmissible to the United States due to having represented that he was coming into the United States for certain personal and business purposes without fully disclosing the nature of his activities. When the officer did an Internet search on the individual, he came across conflicting information showing that the nature of the work in the United States appeared to far exceed and conflict with what he had been told by the individual requesting admission, both at that instance and previously. Unfortunately, this individual relied heavily on his engagements in the United States as a significant source of income —and due to his misrepresentations, he is now cut off from that source of income and unlikely to be eligible for a waiver of inadmissibility for at least several years.

My recommendation is to err on the side of caution; if you think there is a possibility you could need work authorization because your activities could be construed to go beyond the scope of mere business visitor activities, speak with a qualified professional immigration lawyer to determine whether L-1 intracompany transferee status could work for your purposes or if one of the various other immigration work authorization options available to startup businesses would be a better fit.

If you or someone you know has questions regarding obtaining an L-1 intracompany transferee status or related immigration matters, please contact Elizabeth M. Klarin (eklarin@lippes.com) or another member of the Lippes Mathias Immigration Practice Team.

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