

### The Law

An L-1 nonimmigrant is "an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him." INA § 101(a)(15)(L); see also 214(c)(2).

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### Qualifying Relationship

- Petitioner can be US or foreign entity
- Employer abroad must be related to the U.S. employer in a specific way:
  - (1) Parent/Subsidiary
  - (2) Affiliates
  - (3) Company in one country with branch office in the other. (same employer, not separate entities.)

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### Managerial Duties

Definition: 8 C.F.R. § 214.2(l)(1)(ii)(B)

*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 the organization;
- (2) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (3) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (4) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

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### Executive Duties

Definition: 8 C.F.R. § 214.2(l)(1)(ii)(C)

*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.

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### Specialized Knowledge position

Definition: 8 C.F.R. § 214.2(l)(1)(ii)(D)

- *Specialized knowledge* means special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.
- Guidance consolidated in memo at [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/L-1B\\_Memorandum\\_8\\_14\\_15\\_draft\\_for\\_FINAL\\_4pmAPPROVED.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/L-1B_Memorandum_8_14_15_draft_for_FINAL_4pmAPPROVED.pdf). (AILA doc #15081801, 08/17/2015)

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### Executive vs. Manager

- USCIS expects the petitioner to designate a job as **either** executive **or** managerial.
- Best practice: ask client to assign % to each duty based on amount of time spent. See which type of duty predominates.
- The USCIS definition of executive implies a large organization--difficult for small company to prove need for executive.
- Though generally easier to prove managerial than executive, if duties mainly executive then make your best case, explaining how, and through whom, goals are accomplished and decisions carried out.

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### Types of Managers

- In the real world, managers often “pitch in” and get the work done, leading by example.
- But for L-1A purposes, managers do not have “hands on” role in making company’s products or providing its services.
- Instead, must either be:
  - managing certain types of employees or
  - managing a function.
- Duties must be “primarily” managerial; again, %s are helpful.

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### Supervisory Managers

- Show reporting relationships on org chart, including both direct and indirect reports.
- Provide job descriptions of subordinates.
- Persons supervised can be:
  - Employees in same or different location.
  - Non-employees–
- Independent contractors
- Shared office services.
- Professional service providers (accountant, lawyer, marketing/ PR firm)
- Can even include non-employees on chart.

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### Functional Managers

- Org charts are still useful here.
  - Include indirect reports, those supervised on project or occasional basis, anyone else accountable to beneficiary.
  - Show others on beneficiary’s level in hierarchy.
- Budgetary authority and \$ amount.
- Empowered to make key business decisions?
- Review/approve decisions of others?
- Authority to require actions from others?
- Role in recruitment?

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**L-1B vs. L-1A**

- Job abroad and job offered in the U.S. do not have to be in the same category.
- If beneficiary has a key role in actually providing the company's product/service, consider L-1B.
- Look to USCIS memo to see what you have to prove for L-1B. Gather detailed information from client about day-to-day duties and the knowledge required to perform them.

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**Tips for Startups**

- Detailed, professional-looking business plan
- Facilities: lease, map/layout, photos, equipment, inventory
- Staff: hired/to be hired, shared services, contractors
- "New office" if US entity or branch doing business less than 1 year
  - special requirements under 214.2(l)(3)(v),(vi)
  - 1-year approval period

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**Treaty Traders and Investors  
E-1 and E-2 Classification**

- INA § 101(a)(15)(E)
- 8 CFR § 214.2(e)
- 22 CFR § 41.51
- 9 FAM 41.51

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### Treaty Traders and Investors E-1 and E-2 Classification

- See list of treaty countries, available at <https://travel.state.gov/content/visas/en/fees/treaty.html>
- Both the employer and the employee must satisfy certain criteria
- Nationality of employer
  - Qualifies if 50% owned by persons (including individuals and business organizations) having the nationality of the treaty country
  - Where the foreign enterprise is a publicly held corporation and the actual percentage of ownership cannot be determined, the corporation's nationality is presumed to be that of the country in which its stock is principally listed and trade on a stock exchange

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### E-1 Requirements

- The individual or business possesses the citizenship of the treaty country
- Business's activities must constitute trade, meaning the international exchange of goods, services, and technology
- Business's trade is substantial, meaning that there is a sizable and continuing volume of trade
- The trade is principally between the U.S. and the treaty country
- An employee must work in the U.S. as an executive, supervisor, or essential skills employee

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### E-1 Requirements Cont'd

- What is trade?
  - (1) Must constitute an exchange;
  - (2) Must be international in scope; and
  - (3) Must involve qualifying activities.
- How is trade measured?
  - (1) Volume of trade
  - (2) Monetary value of trade
  - (3) Continuous flow

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### E-2 Requirements

- The investor, either a person, partnership or corporate entity, must have the citizenship of a treaty country
- The investment must be substantial, with investment funds or assets committed and irrevocable
- The investment must be a real operating enterprise, an active commercial or entrepreneurial undertaking
- The business must not be marginal, meaning that it must generate significantly more income than just to provide a living for the investor and his or her family
- The investor must have control of the funds, they must be from a lawful sources, and the investment must be "at risk" in the commercial sense
- The investor must be coming to the U.S. to develop and direct the enterprise. If the applicant is not the investor, he or she must be employed as an executive, supervisor, or essential skills employee

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### E-2 Requirements Cont'd

- Investing or in the Process of Investing
- Bona fide Enterprise
- "Substantial" Investment
  - "Proportionality Test"
  - "Marginality Test"
- Developing and Directing the Enterprise

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### Qualifications of the Individual Applicant

- Executive/Supervisor
  - Factors:
    - (1) Executive or supervisory duties and responsibilities in the proposed position in the United States
    - (2) Executive or supervisory control over the U.S. enterprise's overall operations, or a major component thereof
    - (3) Skill levels and number of employees supervised commensurate with the position
    - (4) Prior executive or supervisory experience which will be brought to the U.S. position
    - (5) Salary to be paid for the proposed position commensurate with the position

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**Qualifications of the Individual  
Applicant Cont'd**

- Essential Skills Employee
  - Factors:
    - (1) Degree of proven expertise in the targeted area of operations
    - (2) Uniqueness of the specific skills
    - (3) Length of the alien's experience and/or training with the treaty firm
    - (4) Period of training or other experience necessary to effectively perform the proposed duties
    - (5) Salary the special qualifications can command
    - (6) Availability of U.S. workers

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**E-1/E-2 Applications**

- Generally filed directly with the Consulate
- Subject to reciprocity, visas are generally approved for 5 years
- Authorized stay of up to two years upon entry to the U.S.
- Extensions with USCIS may be requested in two-year increments
- No limitation on total period of stay and no foreign residence requirement
- Work authorization for spouses
- Limited dual intent recognized

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**E vs. L?**

- Factors to Consider:
  - Basic eligibility factors
    - Does individual/company hold nationality of a treaty country? (E)
    - Is there a foreign entity with the appropriate relationship to the U.S. enterprise? (L)
    - Does employee have qualifying year of employment? (L)
  - Size of the company (big vs. small)
  - Start-up vs. established
  - Level of employee being transferred (managerial vs. non-managerial)
  - Consular filing vs. USCIS filing
  - Timing considerations
  - Duration of stay

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### Size of Company

	E	L
Big	<ul style="list-style-type: none"> <li>If the company is registered, E applications can usually be done relatively quickly and easily</li> <li>If registration is not available, processing time may be lengthy</li> <li>USCIS approval of limited utility</li> </ul>	<ul style="list-style-type: none"> <li>The blanket procedure greatly speeds up the application process and facilitates transfer of international personnel</li> <li>Problems with PED tracking</li> </ul>
Small *Petitions by small companies are subject to greater scrutiny across both visa classifications	<ul style="list-style-type: none"> <li>Lots of paperwork</li> <li>Source of funds issues</li> <li>More difficult to show that trade is substantial as a start-up (E-1)</li> <li>Proportionality test requires greater investment (E-2)</li> <li>Marginality test more difficult to overcome (E-2)</li> </ul>	<ul style="list-style-type: none"> <li>USCIS closely scrutinizes L-1A and L-1B petitions</li> </ul>

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### Start-Up vs. Established Company

	E	L
Start-Up	<ul style="list-style-type: none"> <li>Trade must be established (E-1)</li> <li>"Irrevocably committed" and "at risk" funds an issue (E-2)</li> <li>Proportionality test requires greater investment (E-2)</li> <li>Marginality test more difficult to overcome (E-2)</li> <li>Importance of business plan</li> </ul>	<ul style="list-style-type: none"> <li>New business concept specifically provided for by regulation</li> <li>Entrepreneurs in Residence Initiative (EIR)</li> <li>Relatively simple to get one-year approval, but difficult to extend if business struggling after one year</li> <li>Importance of business plan</li> <li>Entrepreneur must establish that he or she will be working in a managerial or executive capacity</li> <li>Foreign entity must remain operational</li> </ul>

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### Managerial vs. Non-Managerial

	E	L
Manager	<ul style="list-style-type: none"> <li>Categories: Investor (E-2); Executive (E-1/E-2); Supervisory (E-1/E-2)</li> <li>Investor must develop and direct</li> <li>Executive and Supervisory definitions similar to L, but applied more loosely</li> </ul>	<ul style="list-style-type: none"> <li>Categories: Executive; Manager (Functional/People)</li> <li>More detailed regulatory parameters (generally a looser standard at Consulate)</li> </ul>
Non-Manager	<ul style="list-style-type: none"> <li>Category: Essential Skills Employee</li> <li>No degree necessary</li> <li>No requirement of prior employment with company</li> <li>Similar to concept of specialized knowledge, but applied more loosely</li> </ul>	<ul style="list-style-type: none"> <li>Category: Specialized Knowledge Employee</li> <li>Degree necessary for blanket application</li> <li>Must have at least one year of work experience with company</li> <li>New specialized knowledge memo</li> </ul>

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### Consular vs. USCIS Filing

	E	L
Consular	<ul style="list-style-type: none"> <li>Generally filed at Consulate</li> <li>If not filed at Consulate, must present all evidence anew when applying for E visa</li> <li>Choice of consulate an important consideration (TCNs, which post within a particular country, specific requirements of each post)</li> </ul>	<ul style="list-style-type: none"> <li>Blanket process is generally easier and more streamlined</li> <li>PED issues with 5-year visas may ultimately require a USCIS filing down the line</li> <li>For L-1B professional, must possess a degree or degree equivalency</li> </ul>
USCIS	<ul style="list-style-type: none"> <li>Generally filed at Consulate</li> </ul>	<ul style="list-style-type: none"> <li>Higher threshold for L-1A and L-1B with USCIS vs. Consular blanket</li> <li>DOS generally defers to USCIS on complicated L-1 issues</li> </ul>

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### Timing Considerations

E	L
<ul style="list-style-type: none"> <li>Can be processed relatively quickly due to direct consular application</li> <li>Can also file via premium processing with USCIS, but Consulate does not have to listen. Canadians have to apply for E at post.</li> <li>Processing time depends on consulate</li> </ul>	<ul style="list-style-type: none"> <li>Premium processing available</li> <li>Blanket procedure much quicker, if eligible</li> </ul>

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### Duration of Stay

E	L
<ul style="list-style-type: none"> <li>Potentially valid indefinitely</li> <li>Visa valid for 5 years (subject to reciprocity)</li> <li>Admission for periods of 2 years</li> <li>Limited dual intent recognized - 8 CFR § 214.2(e)(5)</li> <li>No foreign residence requirement and expression of intent to return is normally enough - 9 FAM 402.9-4(C)</li> </ul>	<ul style="list-style-type: none"> <li>5- or 7-year max (counts against H)</li> <li>Visa valid for 5 years (subject to reciprocity)</li> <li>Admission through PED</li> <li>Dual intent recognized</li> <li>8 CFR § 214.2(l)(16)</li> </ul>

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### Planning for EB-1

- While position abroad can be of any type for L-1, for EB-1 MM the position abroad must have been executive or managerial.
- US NIV status not determinative.
  - If initial US role is an individual contributor, possibility of promotion to managerial role?

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### To EB-1 From L-1A

- Easiest, since the manager and executive definitions are the same.
- L-1A approval does NOT guarantee EB-1 approval.  
*See AFM ch. 22.2(i)(3)(H).*
- Would denial be “arbitrary and capricious” since the requirements are almost identical?

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### To EB-1 from L-1B

- Does the employment abroad qualify as managerial (or executive)?
- If so, 2 options:
  - File for EB-1 while beneficiary remains in L-1B status, or
  - First change status to L-1A BEFORE the foreign national reaches 4 ½ years in L-1B status (*see* 8 C.F.R. § 214.2(l)(15)(ii)),and then file for EB-1

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**To EB-1 From Other NIV Status  
such as E-1, E-2, E-3, H-1B, H-1B1**

- Key requirements:
  - Qualifying relationship between U.S. employer and prior foreign employer.
  - Qualifying employment abroad calculated from date of NIV admission to U.S.
- 8 C.F.R. § 204.5(j)(3)(i)(B)

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