

# HOW TO HIT A HOME RUN WITH YOUR NIVS



Sujata Ajmera  
*Of Counsel*  
Jackson Lewis, PC  
Sujata.Ajmera@jacksonlewis.com



Jessica Mullins-Ta  
*Senior Associate*  
Berry Appleman & Leiden LLP  
JMullinsTa@balglobal.com

# L-1B VISA UPDATES

## ❖ New L-1B Guidance

announced March 24, 2015

- Effective August 31, 2015
- Supersedes and Rescinds prior L-1B memoranda
- Clarifies “specialized knowledge” standard
- Standard of Review: Preponderance of the Evidence



# L-1B VISA UPDATES, COTD...

## ❖ Must Prove One of Two Statutory Criteria

- “Special” knowledge of the company’s product and its application in international markets; OR
- An “advanced” level of knowledge or expertise of the processes and procedures of the company.
- Patents, trademarks, licenses, or contracts awarded to the organization based on the beneficiary’s work is great evidence, but NOT required.





# L-1B VISA UPDATES, COTD...

## ❖ How to Prove “specialized knowledge”

- Evidence that the beneficiary has knowledge of a process or product that is sophisticated or complex, or of a highly technical nature
- USCIS will decide based on the “totality of the circumstances” presented in the Petition
- Provide as much documentation as possible!



# L-1B VISA UPDATES, COTD...

## ❖ Clarification of Offsite L-1B

### Employment

- Who Controls and Supervises the beneficiary?
- Why is the beneficiary working offsite?
- Confirm that the placement is not “labor for hire”
- Geographic location of offsite office is not relevant





# CORPORATE RESTRUCTURING

❖ What are we looking for?

- Merger
- Acquisition
- Spin-Off
- Any change in corporate structure that changes who holds the immigration liability for employees





# HOW TO HANDLE CORPORATE RESTRUCTURING IN AN IDEAL WORLD

## ❖ PLAN!!

- Have a Pre-emptive plan in place for each visa category and each type of anticipated restructure
  - Discuss the pros and cons of plan and each visa type with company
  - Discuss costs as well!! (travel expenses, PP fees, etc.)
- Plan should be easily read (i.e. understood) by your Immigration partner at the company
- Plan should be shared with applicable members of the mergers & acquisitions or restructuring team
- Plan should be accurately explained to the employees by properly identified source (i.e. you, immigration team, or current immigration contact)



## HOW YOU'RE LIKELY TO HANDLE RESTRUCTURING IN THE REAL WORLD

- ❖ You will likely have minimal notice, if any
- ❖ Prioritize!!
  - Initial concern of you and company will always be NIV, to keep everyone working.
  - Initial concern of employee will always be Green Card, so be prepared for those questions.
- ❖ Get information ASAP on the visa types and number of employees you're looking at
- ❖ Get information ASAP on deal structure



# DEAL SHMEAL

- ❖ How is the deal going down?
  - Full-on acquisition?
  - Complete spin-off to new entity?
  - Merger?
  - Full acquisition of ownership but no other change?
  - Are we selling off the entity?
  - Are there international entities we need to consider?
    - If so, what entity purchased them?
  - WHO ENDS UP WITH THE IMMIGRATION LIABILITIES?
  - Most of the time, your Immigration contact will not know this info, so be prepared to talk to someone working on the deal itself.

# WHAT TO CONSIDER

- ❖ TIMELINE- what do you have to get done when?
  - When is deal closing?
  - When are employees transitioning?
- ❖ Is a Public Access File Statement appropriate?
- ❖ Is the corporate structure abroad still intact?
- ❖ Is an amendment to the current petition possible?
- ❖ Is traveling the fastest option?
- ❖ Are there I-9 issues to consider?



# MOST AFFECTED NIV TYPES

- ❖ Hs
  - PAF eligible?
  - Are we amending?
- ❖ E-3s
  - PAF eligible?
  - Are they traveling?
- ❖ Ls
  - Are they here as Ls?
  - Are they coming post-close as Ls?
  - Is using the Blanket an option?
- ❖ TNs
  - POE application an option?





# COMMUNICATION

- ❖ Always try to maintain constant communication with the company and employee.
- ❖ Expected timelines are essential to protect both

# DUAL INTENT

❖ Dual Intent Doctrine allows certain nonimmigrant visa holders to have both a short-term intent to leave the US *and* a long-term intent to pursue and obtain permanent residency.



# DUAL INTENT, COTD...



- ❖ Qualifying Visa Types:
  - H, L, O, P Visa categories
- ❖ Common Ineligible Visa Types:
  - E, TN, E-3, H-1B1
- ❖ Always keep in mind underlying visa type when beginning the permanent residency process!



# DUAL INTENT, COTD...

*Dual Intent considerations that must be factored in for any permanent residency process strategy:*

- Possible limitations on travel capability for non-qualifying visa holders
- Possible need to file change of status Petition or Application prior to commencement of permanent residency process
- Possible increase in legal costs to sponsoring employers



# VISA WAIVER PROGRAM & ESTA UPDATES

- ❖ Electronic System for Travel Authorization (ESTA) allows Visa Waiver Program (VWP) visitors to apply prior to traveling to the US
- ❖ B-1 Visa Stamps are still required for all non-VWP visitors and special annotation applicants for entry



# VWP & ESTA, COTD...

## ❖ ESTA Final Rule Requirements (effective July 8, 2015):

- Submit applications at least 72 hours before travel
- Valid for up to three years, but DHS and DOS have authority to make valid for less than 2 years if deemed appropriate
- Eliminates paper I-94 cards at air and sea Ports of Entry
- If email address provided on ESTA application, reminder notices will be sent in advance of travel authorization expiration date
- Authorizations valid for multiple entries
- New website went live on September 10, 2015 and has a mobile friendly design
- Website is available in 23 languages
- New design makes it easier to apply as a family





# NIV WAIVER

- ❖ Waiver of Foreign Residency Requirement
  - 8 C.F.R. § 212.7(c)
- ❖ Waiver of Entry Documents
  - INA § 212(d)(4)
- ❖ Criminal Grounds
  - INA §212(d)(3)
- ❖ Medical Grounds
  - INA §212(g)



# FOREIGN RESIDENCY REQUIREMENT

- ❖ Certain prior stays in J-1 or J-2 status trigger a 2 year foreign residency requirement that must be fulfilled before the applicant can obtain certain other nonimmigrant visas or permanent residence
- ❖ Subject based either on:
  - Skills List
  - Government sponsored
- ❖ Completion: Must be in country of residence listed on DS-2019
- ❖ Waiver Available



# FOREIGN RESIDENCY REQUIREMENT (CONT'D)

## ❖ Confirming if Subject

- Check visa and DS-2019
  - Are they marked?
  - Was applicant government sponsored?
- Check Current Skills List
  - Even if they were subject, if current Skills List removes the requirement, they're not subject

## ❖ Get Advisory Opinion

- Send request to DOS and they will confirm if subject



# FOREIGN RESIDENCY REQUIREMENT (CONT'D)

## ❖ Waiver Process

- If applicant was a Fulbright scholar, it's probably not happening, just FYI
- No Objection (Most common)
  - Country must not object (China will not issue if applicant is there)
  - Then DOS approves and forwards to USCIS
  - USCIS approves
- Persecution
  - Scared to return home
- Hardship
  - USC/LPR spouse or child will face hardship if applicant must leave
- US Federal Agency
  - There is a US agency that will issue a request to have waiver granted based on work being done with that agency by the applicant

# WAIVER OF DOCUMENTS

## ❖ 212(d)(4) Waiver of Documents: I-193

- \$585 filing fee
- Port of Entry
  - A nice port, or one that has a history of being difficult
  - Pre-Inspection?
  - Airline restrictions
    - Will they even let the person on the plane without it?
- Time
  - Standard workday, 8-4, more likely to have a supervisor with more experience
- Applicant
  - Is the applicant nice and amiable?
- Reason
  - Was passport stolen? Did applicant not understand they needed a visa?
  - Official acceptable reasons for waiver are very, very high- passport lost within 48 hours of flight

# CRIMINAL GROUNDS

## ❖ INA § 212(d)(3) Criminal Grounds

- Allows for waiver of all 212(a) grounds of inadmissibility EXCEPT for Espionage
  - To enter to overthrow the US government
  - To enter to commit a crime
  - To enter to hurt US foreign policy
  - Nazi participation
  - Genocide participation



# CRIMINAL GROUNDS (CONT'D)

- ❖ INA § 212 (d)(3)
  - Consulate
    - What is the current environment at the Consulate?
    - What is the cultural environment in that country?
  - POE
    - I-192 waiver and fee, person already has visa so DOS involvement not required
  - USCIS
  - Factors for Waiver:
    - The risk of harm to society
    - Seriousness of the applicant's criminal or immigration law violation
    - The applicant's reason for seeking entry
  - Waiver will likely have to be granted at each visa application, so all documentation should be saved and presented if requested by Consulate or CBP.

# MEDICAL GROUNDS

- ❖ INA §212(g)
- ❖ Not as common for NIV applications, but be prepared if person has a history of DUI/DWI and is applying in a different country
- ❖ Be on guard if applicant is sent for medical after appointment at Consulate