BACKGROUNDER

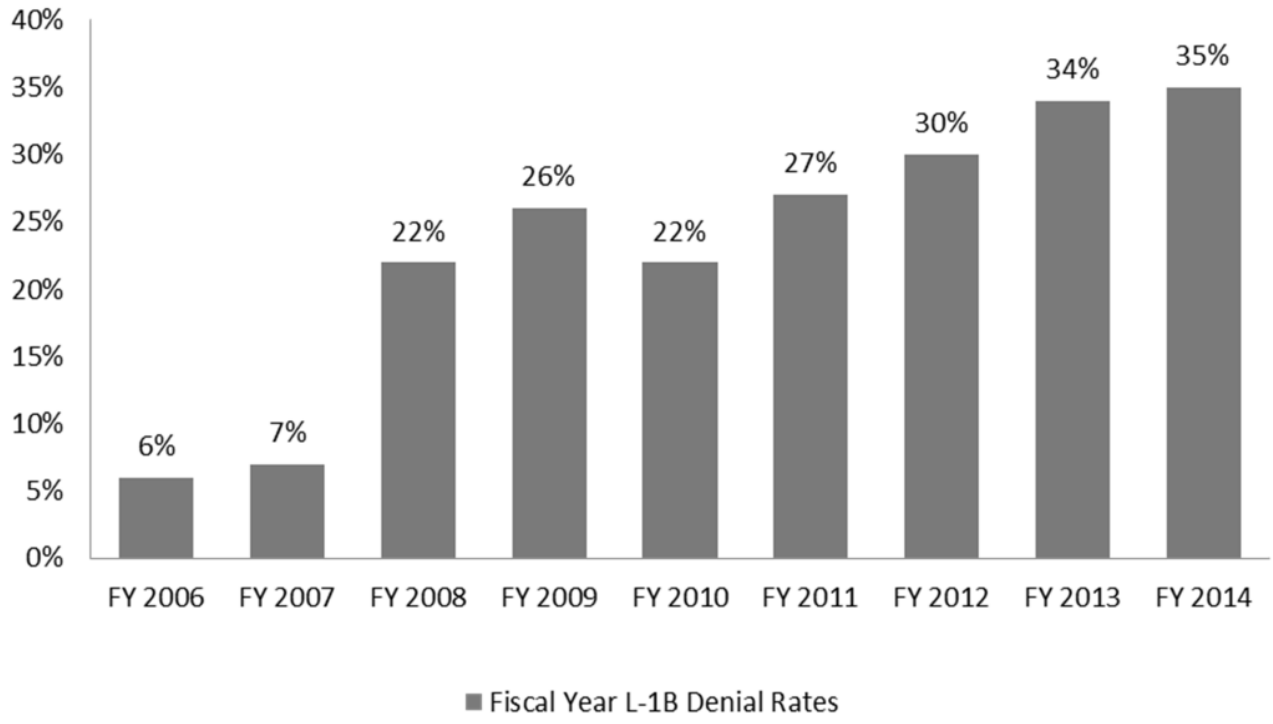
UNDERSTANDING THE LATEST USCIS L-1B POLICY

On March 24, 2015, U.S. Citizenship and Immigration Services (USCIS) issued long-awaited guidance regarding eligibility for L-1B status. The L-1B visa category permits multinational companies to transfer employees who possess “specialized knowledge” from their foreign operations to their operations in the United States. USCIS’s memorandum provides consolidated and authoritative guidance on the L-1B program and is intended to address the uncertainty that many employers face when sponsoring workers for L-1B visas.

History of Denial Rates

Between 2006 and 2014, the L-1B denial rate skyrocketed from 6 percent to 35 percent. Whether the changes in guidance succeed in reducing the L-1B denial rate will depend on how USCIS adjudicators interpret and implement the memorandum.

Table 1
L-1B Denial Rates for Employees Transferred into the U.S., FY 2006 to FY 2014



Sources: USCIS; National Foundation for American Policy

When does the guidance go into effect?
The memorandum becomes effective Aug. 31. The government is seeking feedback from the public through May 8.

Should employers change how they prepare or file L-1B petitions?
Clients should work with their BAL professional to evaluate whether, when and how they should alter their L-1B filing practices. Though the memorandum states that it merely consolidates prior guidance, it introduces new guidelines and evidentiary criteria that warrant careful review by any company that files L-1B petitions.

What is the updated standard for "specialized knowledge"?
An employer seeking L-1B status for an employee must establish, by a preponderance of the evidence (i.e., that it is "more likely than not"), that the employee possesses "special" or "advanced" knowledge:

- **Special knowledge** is "knowledge of the petitioning employer's product, service, research, equipment, techniques, management, or other interests and its applications in international markets that is demonstrably ***distinct or uncommon in comparison*** to that generally found in the particular industry or within the petitioning employer."

- **Advanced knowledge** is "knowledge or expertise in the organization's specific processes and procedures that is not commonly found in the relevant industry and is ***greatly developed or further along in progress, complexity and understanding*** than that generally found within the petitioning employer."

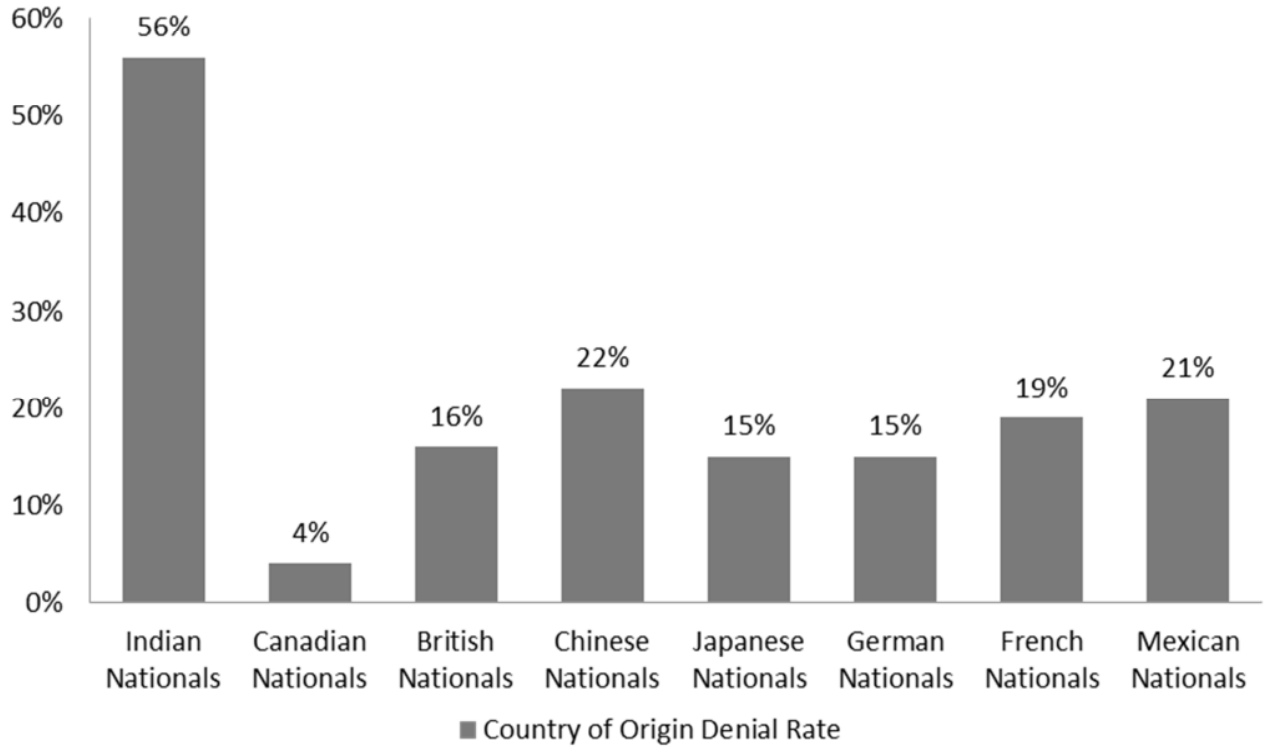
Does the memorandum restrict any grounds on which USCIS may deny an L-1B petition?
Yes. The memorandum clarifies that (1) the knowledge "need not be proprietary or unique" to the petitioning employer, (2) there is no requirement that the beneficiary be of a certain rank within the organization or that the employee be an officer or supervisor within the company, and (3) eligibility for another nonimmigrant classification (e.g., H-1B) is not a bar to eligibility for L-1B status. BAL anticipates that the clarification that adjudicators should no longer consider these criteria will improve L-1B consistency for many employers.

What factors will USCIS consider when determining whether an employee's knowledge is specialized?
The memorandum includes a non-exhaustive list of six factors that USCIS may consider when determining whether a worker has specialized knowledge. USCIS states that the presence of one or more of these (or similar) factors may be sufficient to establish eligibility:

1. The beneficiary is qualified to contribute to the U.S. operation's knowledge of foreign operating conditions as a result of knowledge not generally found in the industry or the petitioning organization's U.S. operations.
2. The beneficiary possesses knowledge that is particularly beneficial to the employer's competitiveness in the marketplace.
3. The beneficiary has been employed abroad in a capacity involving assignments that have significantly enhanced the employer's productivity, competitiveness, image, or financial position.
4. The beneficiary's claimed specialized knowledge normally can be gained only through prior experience with that employer.
5. The beneficiary possesses knowledge of a product or process that cannot be easily transferred or taught to another individual without significant economic cost or inconvenience (because, for example, such knowledge may require substantial training, work experience, or education).
6. The beneficiary has knowledge of a process or a product that either is sophisticated or complex, or of a highly technical nature, although not necessarily unique to the firm.

Of all the criteria, the memorandum gives particular attention to the question of whether specialized knowledge can be easily imparted to other individuals. If so, the L-1B petition will be denied. On the other hand, an L-1B petition is likely to be approved if the employer demonstrates through credible and relevant evidence that the knowledge would be difficult to impart "without significant economic cost or inconvenience to the petitioning organization."

Table 2
Denial Rates by Country, FY 2012-2014



Sources: USCIS; National Foundation for American Policy

In determining eligibility for L-1B status, will the government take into account the fact that the company already has many employees in the U.S. with specialized knowledge?
Yes. The memorandum states that adjudicators should consider additional criteria when there is evidence that "there are already many employees in the U.S. organization with the same specialized knowledge as that of the beneficiary." The memorandum directs adjudicators to "carefully consider" the need to transfer the employee to the U.S. and the officer should consider:

1. The need for another individual with similar specialized knowledge in the organization's U.S. operations and the difficulty in transferring or teaching the relevant knowledge to an individual other than the beneficiary.
2. How the duties to be performed by the beneficiary may or may not differ from those already employed in the organization's U.S. operations.
3. The extent to which the company would suffer economic inconvenience or disruption to its operations if it were unable to transfer the beneficiary.
4. Whether the salary paid to the beneficiary is comparable to similarly situated peers in such U.S. operations.

This section indicates that employers with many existing specialized knowledge workers will face an additional layer of review by USCIS, and the wage analysis warrants special attention. The memorandum states that:

> *"The officer should consider ... whether the salary to be paid to the beneficiary is comparable to similarly situated peers in such U.S. operations.*

> *Where many employees within the organization's U.S. operations share the beneficiary's knowledge, yet the beneficiary will be paid substantially less than those similarly situated employees, this may indicate that the beneficiary lacks the requisite specialized knowledge….*
>
> *[T]here may be valid business reasons for the wage discrepancy, but justification for the variance generally should be evaluated in light of the skills, experience, and other factors pertinent to the entire spectrum of employees in the U.S. operations who possess the requisite specialized knowledge."*

The statute and regulations contain no wage requirement for L-1B workers, and the consideration of wages in the L-1B context raises many questions: Which employees are deemed to be "similarly situated peers"? Will the government take into account individuals not employed by the petitioner who are working at the same location? How will the government evaluate pay and benefit plans between countries? What are valid business reasons for the wage variation? These and many other questions will determine the impact of the wage provision on L-1B adjudications.

Does the L-1B guidance impose any new requirements on companies that place L-1B workers at third-party worksites?
No. In 2004, Congress passed the L-1 Visa Reform Act that requires an employer to show that the L-1B worker (1) will not be "controlled and supervised principally" by the unaffiliated employer and (2) will be
placed "in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary."

Pursuant to the memorandum, a petitioning employer may establish that the third-party company lacks principal control and supervision by showing that the petitioner retains principal authority to (1) dictate the manner in which the work is to be performed, (2) reward or discipline the worker for his or her work performance, and (3) provide the worker's salary and any normal employer-provided benefits.

The memorandum emphasizes that the beneficiary stationed primarily offsite must be applying specialized knowledge of the petitioning organization's own services or products. The beneficiary's knowledge of the third party's systems may be considered in addition to – but not as a substitute for – his or her knowledge of the petitioning organization's services or products.

The guidance does not break any new ground in the area of third-party placement. Employers that place employees at third-party worksites will need to continue to document how the L-1B beneficiary's knowledge relates to the sponsoring company. Knowledge of a third-party's (e.g., client's) software or processes will not establish eligibility for L-1B status.

Does the policy guidance impose a labor market test for L-1B workers?
The memorandum emphasizes that there is no test of the U.S. labor market, and the petitioner is not required to demonstrate the lack of readily available workers in the U.S. However, the memorandum states that it is an appropriate inquiry to ask whether "there are so many workers that the knowledge is generally or commonly held in the relevant industry, and thus not specialized." This means that the availability of workers is relevant, but only for purposes of evaluating whether the knowledge is specialized. It is not clear how USCIS adjudicators will apply this new standard.

Does the policy guidance address the problem of USCIS denying extensions of status involving the same employer and employee?
Partially. The memorandum states that USCIS should give deference to a prior L-1B decision and should only reexamine a finding of eligibility where it is determined that there was either (1) a material error with regard to the previous approval for L-1B classification, (2) a substantial change in circumstances since that approval, or (3) new material information that adversely impacts the petitioner's or beneficiary's eligibility.

What is notable is that USCIS stopped short of directing its adjudicators to give deference to decisions made by consular officers or inspectors at the ports-of-entry. As a practical matter, this means that an employee seeking an extension of status

from USCIS after entering under the blanket L program will not be entitled to any presumption of eligibility at the time the extension is filed.

Furthermore, a footnote in the memorandum suggests that USCIS will deem a change in offsite employment to be a "substantial change in circumstances or new material information." This means that USCIS will not give deference to an earlier approval in situations where the L-1B employee is working at a different work location. There is also concern that USCIS could interpret the footnote to mean that a change in location is a material change that requires the filing of an amended petition at the time of the change.

What evidence should an employer submit to establish specialized knowledge?
USCIS states that it will best be able to determine eligibility for L-1B status when the petitioner explains with clarity the specific nature of the industry or field involved, the nature of the petitioning employer's products or services, the specialized knowledge required to perform the duties, and the need for the beneficiary's knowledge. The memorandum states that "merely stating that the beneficiary's knowledge is somehow different from others or greatly developed does not, in and of itself, establish that he or she possesses specialized knowledge.

USCIS provides a list of evidence that a petitioner may submit to demonstrate that an individual's knowledge is special or advanced. It includes, but is not limited to, the following:

1. Documentation of training, work experience, or education establishing the number of years the individual has been utilizing or developing the claimed specialized knowledge as an employee of the organization or in the industry.
2. Evidence of the impact, if any, that the transfer of the individual would have on the organization's U.S. operations.
3. Evidence that the alien is qualified to contribute to the U.S. operation's knowledge of foreign operating conditions as a result of knowledge not generally found in the industry or the petitioning organization's U.S. operations.
4. Contracts, statements of work, or other documentation that shows that the beneficiary possesses knowledge that is particularly beneficial to the organization's competitiveness in the marketplace.
5. Evidence, such as correspondence or reports, establishing that the beneficiary has been employed abroad in a capacity involving assignments that have significantly enhanced the organization's productivity, competitiveness, image, or financial position.
6. Personnel or in-house training records that establish that the beneficiary's claimed specialized knowledge normally can be gained only through prior experience or training with that employer.
7. Curricula and training manuals for internal training courses, financial documents, or other evidence that may demonstrate that the beneficiary possesses knowledge of a product or process that cannot be transferred or taught to another individual without significant economic cost or inconvenience.
8. Evidence of patents, trademarks, licenses, or contracts awarded to the organization based on the beneficiary's work, or similar evidence that the beneficiary has knowledge of a process or a product that either is sophisticated or complex, or of a highly technical nature, although not necessarily proprietary or unique to the petitioning organization.
9. Payroll documents, federal or state wage statements, resumes, organizational charts, or similar evidence documenting the positions held and the wages paid to the beneficiary and parallel employees in the organization.

Does the guidance apply to L-1B applications submitted at U.S. consulates overseas or at ports-of-entry?
The guidance only applies to USCIS employees, and the State Department has not issued any corresponding update to its foreign affairs manual for consular officers. Employers should nevertheless anticipate that some consular officers and Customs and Border Protection officers at the ports-of-entry will apply the new guidance.

Will the government revise the memorandum as a result of comments received during the feedback period?
Possibly. The "public review and feedback" process is not a formal process and USCIS is not required to make changes before the memorandum becomes effective. BAL Government Affairs is working with clients and trade associations to evaluate the guidance and whether to submit comments to USCIS. If your company is interested in providing indirect or direct input to the government, please email ckern@balglobal.com.