New L-1 Pilot Program for Canadians Seeking Employment in the United States

R. Oliver Branch JD
May 22, 2018

Our firm is filled with strong and creative US and Canadian tax practitioners who spend their days creating strategic solutions for clients who desire to invest their assets and/or work in the US. Recently implemented US tax reform (***and certain Canadian political events***) has kept our firm busy working with Canadians who seek greener pastures in the US. However, a client who desires to move to the US to become employed with a US organization cannot simply move there, there are immigration considerations they need to be aware of. As one of my colleagues often states: "***after income tax, there is nothing more byzantine than immigration law***."

That's where I come in.

I'm Oliver Branch — the newest addition to the Moodys Gartner Tax Law LLP team working out of our growing Toronto, Ontario office. I'm a senior US immigration lawyer and I'm here to make sense of immigration complexity. I'm passionate about assisting clients with their need to be in the US for business, investment, employment, or pleasure. Like wine and cheese, immigration law and tax law are a fine pair.

So, what's new in immigration law that affects Canadians? US Citizenship and Immigration Services ("**USCIS**") and US Customs and Border Protection ("**CBP**") recently announced a joint pilot program that will impact Canadian citizens seeking adjudication of L-1 intracompany transfer petitions by CBP at the Blaine, Washington port-of-entry to the US and may have a significant impact on the adjudication of L-1 and TN petitions in the future.

If USCIS and CBP deem the L-1 Pilot Program successful, both agencies have already indicated that adjudication by USCIS in advance of applications for admission at the ports-of-entry from Canada to the US by Canadian citizens will likely become mandatory for both L-1 intracompany transfer petitions and applications for TN applications under the North American Free Trade Agreement ("**NAFTA**").

What is L-1 Intracompany Nonimmigrant Status?

Created in 1970 by the US Government to facilitate the movement (***either via full-time secondment or intermittent entry***) of executives, managers, and specialized knowledge personnel employed by global business organizations, the L-1 nonimmigrant visa category is currently the most widely utilized work-authorized US nonimmigrant visa category.

To qualify for the L-1 nonimmigrant visa category, the Beneficiary must have been, at the time the petition is submitted to USCIS or CBP (***see process description below***), employed for a minimum of one year in the last three years by a parent, subsidiary, branch, or affiliated company of the US petitioning employer. This qualifying employment must be in an executive, managerial, or specialized knowledge capacity.

For immigration purposes, US immigration law defines an "***Executive***" as an individual who primarily: directs the management of an organization or a major component or function of the organization; establishes the goals and policies; exercises wide latitude in discretionary decision making; and receives only general supervision or direction from higher-level executives, board of directors, or stockholders. If the proffered US position will be in an executive capacity, the petition is considered an "L-1A" petition.

In contrast, US immigration law defines a "***Manager***" as an individual who primarily: manages the organization, department, subdivision, function, or component; supervises the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, department, or subdivision of the organization; has authority to hire and fire or recommend other personnel actions, or if no direct supervision, functions at a senior level within the hierarchy or as to the function managed; and exercises discretion over the day-to-day operations of the activity or function managed. Generally, first-line supervisors are not considered managers unless the employees managed are professionals (***positions requiring a bachelor's degree as a normal requirement***). If the proffered US position will be in a managerial capacity, the petition is also considered an "L-1A" petition.

Surprising to many is that the most difficult L-1 petition, the L-1B petition, is not for executives or managers, but for individuals who will be employed in a specialized knowledge capacity. "***Specialized Knowledge***" is defined by US immigration law as special knowledge of the company product, service, research, equipment, techniques, management or other interests and its application in international markets or has an advanced level of knowledge of processes and procedures of the company. Over the past decade, due to a perceived abuse of the L-1B program and a restrictive H-1B visa cap, both USCIS and CBP have applied an increasingly stringent level of scrutiny to L-1B petitions resulting in a much higher rate of denial than most other work-authorized nonimmigrant visa categories. In practice, specialized knowledge generally means knowledge of a company's proprietary products, services, methodologies, or processes that is both narrowly held in the world and within the Petitioner's organization.

While the general rule for Petitioners seeking work-authorized visas for personnel is that the petitioning organization must have been active for at least one (1) year, a specific exception called the "***new office***" L-1 permits US start-ups to utilize the L-1 visa program with an expanded set of qualifying criteria. For this reason, the L-1 has joined the E-2 nonimmigrant visa among the visa categories of choice for expanding international operations into the US.

How are L-1 Petitions Generally Processed for Canadian Citizens?

Prior to the new L-1 Pilot Program, Canadian citizens were able to apply for L-1 nonimmigrant status directly from CBP at any Class A port-of-entry into the US. This strategy afforded L-1 Beneficiaries the potential for immediate petition processing and admission to the US instead of waiting for adjudication by USCIS and only being able to apply for admission to the US after receiving petition approval by USCIS.

Furthermore, this traditional strategy gave Canadian citizens the ability to make their case directly to the adjudicating Officer instead of relying solely on an Officer's interpretation of the L-1 petition and supporting documentation in hard-copy.

How does the L-1 Pilot Program Work?

The new L-1 Pilot Program, running from April 30, 2018, to October 31, 2018, will currently only impact those who choose to participate in the program through the Blaine, Washington port-of-entry. Program participants must first file their I-129 or I-129S petitions with USCIS' California Service Center and

respond to any correspondence from this office, including Requests for Evidence.

After submission of the L-1 petition to USCIS, the Beneficiary does not need to wait for approval from USCIS before applying for admission to the US, but can instead apply for admission at the Blaine, Washington port-of-entry where CBP can request that USCIS remotely adjudicate the I-129 or I-129S remotely.

It important, however, that both Canadian employers and Beneficiaries keep in mind that even if USCIS has approved the L-1 petition, the ultimate decision regarding the admission of the Beneficiary to the US is in the discretion of CBP at the port-of-entry. Beneficiaries who choose not to utilize the L-1 Pilot Program may still apply for admission in L-1 status directly from CBP at any Class A port-of-entry.

How might the Pilot Program Impact Canadian Employers/Applicants after October 2018?

USCIS has stated that the purpose of the L-1 Pilot Program is to "***evaluate how long USCIS needs to adjudicate these petitions and whether USCIS can support CBP through remote adjudications***." Ultimately, the stated goal of the L-1 Pilot Program is to increase consistency in adjudication of L-1 petitions.

Although specific plans post-L-1 Pilot Program have not yet been announced, it appears that USCIS and CBP hope to expand this adjudication method to all ports-of-entry between Canada and the US and will likely expand the adjudication method to TN applications under NAFTA. While in theory, these changes could lead to more efficient and consistent adjudication, the most likely result will be higher applied scrutiny levels, longer adjudication periods, and confusion between USCIS and CBP regarding interpretation of immigration laws, regulations, and policies.

Our firm will continue to monitor developments on this issue and report on updates as they occur. In the meantime, I can't help but think about Benjamin Franklin's famous quote about wine:

> The discovery of a wine is of greater moment than the discovery of a constellation. The universe is too full of stars.

Did old Ben mean that the discovery of a new US immigration program is of a greater moment than the overall practice of immigration or tax law? Maybe!