

L-1

U.S. NONIMMIGRANT VISAS

This article is the second in a series, which will address some practical matters regarding criteria for various U.S. visa categories. The authors are Hans A. van Velzen, a consultant with Van Velzen C.S. Belgium B.V.B.A., a law firm which assists European companies with their business establishments in Europe and North America, and Rhonda J. Watson, Chief of the Visa Unit at the U.S. Embassy in Brussels, Belgium. The subject of this article will be transferring employees from Belgium to the United States and the qualifications for and advantages of Intra Company visas.

Under U.S. immigration law, nonimmigrants, unlike immigrants, enter the U.S. for a temporary period of time and are restricted to the activity consistent with their visa category. The L-1 visa category is important for companies wanting to transfer employees to the United States to work for a U.S. company that is a branch, affiliate, joint venture partner or subsidiary of a company already employing the employee abroad, e.g. Belgium.

The L-1 category is to be divided into L-1A and L-1B subcategories. The L-1A subcategory is applicable to transferring executive and managerial employees, whereas the L-1B subcategory is applicable to transferring 'key' or specialist employees. Both subcategories are subject to extensive rules and regulations. Important are the 'intra-company ties'—when there are two or more companies in Belgium and the United States to be regarded as subsidiaries, joint venture partners, branches or affiliates. Such a relationship is a precondition for L-1 visa issuance. Unlike the investor E-category—addressed in the December 1998 issue of *Business Links*, L-visa issuance requires prior INS processing. Before an L-1 visa can be issued by a U.S. Consulate General or Consular Section of a U.S. Embassy, an L-1 work permit pe-

tion needs to be adjudicated and approved by a competent INS Service Center in the United States. This article gives an example of how a fictitious company transferred its Belgian employees, a manager and specialists to their U.S. business using L-1 visas.

L-1A: A Belgian-Luxembourg company directing a business in the United States

Belclooney Corp. is a full subsidiary of Belcadeau N.V., a Belgian holding company, and of Luxhamburger S.A., a Luxembourg holding company. Both companies are directors of, share managerial control and own 50% of Belclooney Corp. Stock in Belclooney Corp. is equally held by French and Belgian stockholders, stock in Luxhamburger S.A. is held by stockholders of various nationalities. Belcadeau and Luxhamburger own a number of companies within and outside of Belgium. One of the working companies in Belgium is Belclooney B.V.B.A., a full (50/50) subsidiary of both holding companies. This company is directing day-to-day operations of working companies abroad. The company employs specialists. Belclooney Corp.'s Belgian and Luxembourg directors manage all working companies. Company management has decided that the U.S. company requires

on-site management. One of Belclooney B.V.B.A.'s Foreign Operations Managers (FOM) accepts the offer of employment for this new U.S. position. The FOM, Jean Luc LeCocq, has substantial experience in directing the group's foreign operations. He has been employed by Belclooney since 1984. It is planned that Mr. LeCocq will leave for the U.S. in the summer of 1999. He intends to stay in the United States for 5 years. It is January 10, 1999 now.

The company's lawyers are contacted to complete the filing of the necessary documentation with the Immigration and Naturalization Service in the United States.

Conclusion

Before the manager can work legally in the U.S., he needs to apply, and qualify, for a U.S. visa. Belcadeau's lawyers recommend that the company submit an L-1A visa application for the Belgian manager. The lawyers' recommendation is based on the fact that this class of visa may be issued for up to 3 years, and it can be renewed twice for up to 2 years at each renewal, a time frame which will cover the intended period of the manager's stay. The INS and Embassy processing is estimated to take 4 to 5 months, which is within the timeframe set by the company's management.

Comment U.S. Embassy, Brussels Consular Section and VVCS Belgium

In order to qualify for the L-1A visa, the manager must meet all of the following conditions:

- He or she manages the organization or a department, subdivision, function or component of the organization; and
- He or she supervises and controls the work of other supervisory, professional or managerial employees or he or she manages an essential function within the organization, department or subdivision; and
- He or she has the authority to hire and fire persons supervised or recommend those as well as other personnel actions, such as promotion and leave authorization. If no persons are supervised, he or she must be employed at a senior level within the organizational hierarchy or with respect to the function managed; and
- He or she has the authority to make decisions concerning day-to-day operations regarding the organization or department, subdivision, function or component of the organization for which the manager has authority. A first-line manager/supervisor is not considered a manager for L-1A purposes, unless the persons supervised are considered professionals.

In this respect, Mr. LeCocq qualifies as a manager.

An L-1 visa applicant must intend to leave the United States when the business is completed. Immigrant intent will lead to ineligibility for this class of visa. The manager intends to stay for a five-year period, after which he will return to Belgium. He has no immigrant intent. This general condition is met.

Before the manager can apply for an L-1 visa, the U.S. employer must file a work permit petition with the Immigration and Naturalization Service in the U.S. and this petition must be approved. Here, Belclooney Corp., files a petition with the competent INS regional Service Center in the United States demonstrating:

- That Mr. LeCocq has been employed outside the United States for at least 1 of the past 3 years as a manager; and
- That Belclooney Corp. needs the services of Mr. LeCocq to fill a position of the same or similar level as he presently holds in Belgium;
- That Belclooney Corp. is 'tied' (affiliate, branch, subsidiary or joint venture relation) to Mr. LeCocq's present employer (here: Belclooney B.V.B.A.).

Belclooney Corp. is considered affiliated to Belclooney B.V.B.A. for L-1 purposes. Both companies are equally controlled and owned by Belcadeau and Luxhamburger and may be considered subsidiaries of both holding companies, which leads to L-1 (company) eligibility.

An INS adjudicator approves the petition. INS processing took seven weeks. The INS Service Center cables the approval to the Embassy's Consular Section in Brussels, Belgium and notification is also sent to the company's lawyers.

Thereafter, Mr. LeCocq submits a visa application either in person, Monday through Friday from 9:30 to 12:00, or by mail to the U.S. Embassy Consular Section, 25 Blvd. du Regent, 1000 Brussels, along with his passport, a postal receipt evidencing payment of 1,800 BF for the visa application, the applicant's photo, a letter of explanation concerning the business enterprise, and the documentation that shows affiliation between the Belgian

and the U.S. company, and the manager's qualifications for the position. After a review of the file, which normally takes one day, an L-1A visa may be issued.

L-1B: A Belgian-Luxembourg company: Transferring specialist employees to the United States

Mr. LeCocq left for the U.S. in August 1999, as planned. First, he will attempt to restructure the organizational model of Belclooney Corp. The Belgian-Luxembourg executive management has set a number of goals. The two most important goals are increasing profitability and increasing efficiency. Field operations, however, are taking more time than previously anticipated. In addition, operations are not completely in conformity with standards set by Belclooney B.V.B.A. The company's U.S. employees are skilled, that's for sure, but something is missing.

After overseeing U.S. operations for several months, Mr. LeCocq writes an advisory opinion to headquarters suggesting that the company introduce a pilot project whereby U.S. employees will be cross-trained by Belcadeau's specialists. These specialists will apply their specialized knowledge, and supervise their U.S. colleagues' operations. Mr. LeCocq suggests that one Belcadeau specialist could train 10 U.S. employees; therefore, two specialists would be needed in the beginning. Mr. LeCocq asks for assistance on this project for one year from specialists who will remain on Belclooney Corp.'s payroll. The plan is approved.

Again, the group's lawyers are contacted to take this matter further.

Conclusion

Before the specialists can work legally in the U.S., they need to apply and qualify for a U.S. visa. Belcadeau's lawyers recommend that the company submit L-1B visa applications for the Belgian specialists. The lawyers' recommendation is based on the fact that this class of visa may be issued for up to 3 years, and it is renewable once for up to 2 years, a period which will cover the intended period of the specialists stay. The INS and Embassy processing may take up to 5 months.

Comment U.S. Embassy, Brussels Consular Section and VVCS Belgium

In order to qualify for the L-1B visa as a specialist, an employee must have the following qualifications:

- Possess knowledge that is valuable to an employer's competitiveness in the market place;
- Unique qualifications to contribute to the U.S. employer's knowledge of foreign operating conditions;
- Experience as a key employee abroad, having been given significant assignments which have enhanced the employer's productivity, competitiveness, image, or financial position;
- Possess knowledge that can be gained only through extensive prior experience with the employer;
- Possess knowledge of a product or process that can not be easily transferred or taught to another individual.

The knowledge needs to be different from that generally found in the particular industry. The knowledge need not be proprietary or unique, but it must be different or uncommon, not merely advanced.

Applying the specialized knowledge will not involve performing skilled work. Petitions for L-status may

be approved for persons with specialized knowledge, but not for persons who are merely skilled workers.

There is no U.S. labor market test. Whether or not there are U.S. workers available to perform the duties in the United States is not, of itself, a relevant factor in determining the specialized knowledge test.

Like the L-1A visa applicant, L-1B visa applicants must intend to leave the United States when the business is completed. Immigrant intent will lead to ineligibility for this class of visa.

The employer must submit a petition to a competent INS center in the United States and it must be approved prior to the time the applicant applies for a visa in the foreign company's/worker's home country. The employee needs to have worked for the employer for one out of the three preceding years and must have occupied a similar position, and the company will have to pass the affiliation test. If all conditions are met, the petition may be approved and a notification cable will be sent to the Embassy's Consular Section in Brussels, Belgium.

The specialist must submit an application, in person, Monday through Friday from 9:30 to 12:00 or by mail, to the Embassy Consular Section, 25 Blvd. du Regent, 1000 Brussels, along with his passport, a postal receipt evidencing payment of 1,800 BF for the visa application, the applicant's photo, a letter of explanation concerning the business enterprise, and the documentation that shows affiliation between the Belgian and the U.S. company, and the specialist's qualifications for the position. After a review of the file, which normally takes one day, an L-1B visa may be issued.

Summary

As the foregoing examples illustrate, the requirements for qualify-

ing for an L visa are complex, especially with regard to affiliation and control of companies.

An L-visa may be issued to aliens who, within 3 years preceding the time of the visa application, have been employed continuously for at least one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seek to enter the United States temporarily (executives and managers: maximum 7 years; specialists: maximum 5 years) in order to continue to render (his or her) services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial, executive or involves specialized knowledge.

For further information on how to structure your business enterprise to qualify for a visa, you may wish to secure the services of a competent business consultant or immigration attorney. For specific questions regarding the filing of an application at the U.S. Embassy in Brussels, you may refer to the Embassy's website at <http://www.usinfo.be>.

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