Nonimmigrant Visa Issues for Investors and Entrepreneurs from Mexico

by Fausta M. Albi

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INTRODUCTION

In the economic environment following what many have dubbed "The Great Recession," the discussion regarding the costs and benefits of immigration continues with great passion and occasionally vitriol from both sides. In the arena of skilled professionals, the debate centers on whether an employer's ability to hire the best and the brightest, regardless of nationality, truly increases U.S. competitiveness globally. This conversation extends to whether increasing the opportunity for foreign entrepreneurs and investors furthers U.S. economic interests. Opponents of such open market hiring practices charge that the facilitation of immigration for highly-skilled individuals robs U.S. workers of jobs, depresses their wages, and makes the United States more vulnerable to security breaches caused ostensibly by the mere presence of more foreign nationals in the United States.

The Obama Administration, and in turn the immigration-related agencies of the U.S. Department of Homeland Security (DHS), purport to support immigration options for investors and entrepreneurs. Yet, there continue to be systemic obstacles to a smooth and expedient transition to the United States for many such individuals and businesses.

Due to its proximity to and long relationship with the United States, Mexico is a natural, historic, and significant trade and investment partner of the United States.[1] The facilitation of this important cross border investment and trade in goods and services requires an efficient immigration system. This is realized by consistent, timely, and reasonable adjudications by U.S. Citizenship and Immigration Service (USCIS), as well as expeditious and accurate admissions to the United States by U.S. Customs and Border Protection (CBP).

[1] In 2011, U.S. goods and services trade with Mexico totaled $500 billion. Mexico is currently the United States's third largest goods trading partner with $494 billion in goods trade during 2012, and the second largest goods export market in 2012. Trade in services with Mexico (exports and imports) totaled $39 billion in 2011. Office of the United States Trade Representative, Mexico, *available at* www.ustr.gov/countries-regions/americas/mexico (*visited* Sept. 3, 2013).

In addition to the economic motivations for Mexican investment in the United States, there is a very personal motivation for many Mexicans to come to the United States: with the rise in drug-cartel related violence[2] and kidnapping of businesspeople for ransom,[3] many Mexicans with means are seeking to begin businesses in the United States, both for the business opportunity, but also for the very important side benefit of moving their family into a safer environment.

While it is not permissible to use a nonimmigrant work visa for the sole purpose of moving to the United States, to the extent that the investor or entrepreneur is qualified and prepared to begin a legitimate business in this country, there is no legal restriction on obtaining dual benefits, both for the economic interests of the United States and the personal interests of the foreign national. In fact, some communities are already significantly benefiting from this new form of migration.[4]

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[2] As of July 16, 2013, an estimated 60,000 people were killed in drug-related violence in Mexico since late 2006. Violence was first concentrated in the northern border regions, primarily the State of Chihuahua, as well as Pacific States such as Sinaloa, Michoacan and Guerrero . . . Ciudad Juarez, a city of about one million people located in the State of Chihuahua, just across the border from El Paso, Texas had the unfortunate distinction of being the most violent city, with some 3100 people killed in 2010. Incidentally, Juarez is also home to the busiest U.S. consular post in the world; the Post warns visitors to beware of unscrupulous vendors and outright robbers. However, since 2010 the violence in Juarez has now dropped markedly, with cartel activity shifting to other areas in Mexico. "BBC News Latin America & Caribbean, Q&A: Mexico's drug-related violence," *available at* www.bbc.co.uk/news/world-latin-america-10681249 ((*posted* Jul. 16, 2013; *visited* Sept. 3, 2013).

[3] The U.S. Department of State Bureau of Diplomatic Security reports "[K]idnapping is widely underreported in Mexico, in large part due to civilian fears of police collusion with kidnappers . . . [However, as] reported in 2010 and 2011, kidnapping groups continue to target mid-level Mexican business executives and entrepreneurs. . . In some kidnapping cases, the victim is killed even after a ransom has been paid. . . . Virtual kidnapping continues to be a tool cartels will use, though it has not been as prevalent as in prior years. Extortionists call prospective victims on the telephone, posing as kidnappers, and demand payments in return for the release of an allegedly detained family member, usually a child." "Mexico 2013 Crime and Safety Report: Monterrey," The U.S. Department of State Bureau of Diplomatic Security, *available at* www.osac.gov/Pages/ContentReportDetails.aspx?cid=13553 (*posted* Feb. 5, 2013; *visited* Sept. 3, 2013).

[4] *See* "Drug war sparks exodus of affluent Mexicans," *The Washington Post* online, *available at* www.washington post.com/world/national-security/drug-war-sparks-exodus-of-affluent-mexicans/2011/08/19/gIQA6OR1 gJ_story.html (*posted* Aug. 26, 2011; *visited* Sept. 5, 2013).

"For years, national security experts have warned that Mexico's drug violence could send a wave of refugees fleeing to the United States. Now, the refugees are arriving — and they are driving BMWs and snapping up half-million-dollar homes. . .

Tens of thousands of well-off Mexicans have moved north of the border in a quiet exodus over the past few years, according to local officials, border experts and demographers. Unlike the much larger population of illegal immigrants, they are being warmly welcomed . . ..

San Antonio Mayor Julian Castro said [t]he influx "is positive, it is entrepreneurial . . . and one of the keys to a very successful growing city like San Antonio." Castro estimates that Mexicans own at least 50,000 of the approximately 500,000 homes and apartments in his city of 1.3 million, which has a vibrant Hispanic culture. . .

Affluent Mexicans have long visited the United States for business and shopping. What's different now is that they are coming to stay, fleeing cartel wars that have left more than 37,000 Mexicans dead in four years, according to U.S. and Mexican officials and analysts. The number of investment visas granted to Mexicans has risen sharply over the past five years.

The well-heeled Mexicans are arriving as illegal immigration from Mexico is on the decline, due to the weak U.S. economy, border crime and more opportunities for young Mexicans at home. Illegal immigration has plunged from an estimated half-million Mexicans a year a decade ago to 200,000 or fewer."

This advisory will focus on the nonimmigrant options for investors and entrepreneurs from Mexico, with an emphasis on problem areas, and will include suggestions for how to address them. Please note that the information below assumes basic knowledge of the eligibility criteria for the relevant visa categories and, therefore, does not address this information.

ADMINISTRATION POLICY

The Obama Administration, as represented by former DHS Secretary Janet Napolitano and former USCIS Director Alejandro Mayorkas, has formally announced a policy in support of entrepreneurial efforts and the promotion of investment in the United States. However, whether this policy is in play in reality is questionable.

During an August 2011, press conference, Secretary Napolitano and Director Mayorkas announced an objective to "continue to attract the best and brightest from around the world to invest their talents, skills and ideas to grow our economy and create American jobs."[5] In support of this position, Director Mayorkas cited a study commissioned by the National Venture Capital Association entitled "American Made – The Impact of Immigrant Entrepreneurs and Professionals on U.S. Competitiveness," which found that the current market capitalization of publically traded immigrant-founded, venture-backed companies in the U.S. exceeds $500 billion. He also cited the "significant wealth-creating abilities of immigrant entrepreneurs," acknowledging "many of the largest U.S venture-backed public companies such as Intel, Selectron, Sanmina, SCI, Sun Micro Systems, Ebay, Yahoo, Google and many others were started by immigrants." The Director also noted that "[i]mmigrant-founded U.S. publically-traded companies employ approximately 220,000 people in the U.S. and more than 400,000 people worldwide." Perhaps of most interest to practitioners, Director Mayorkas also stated, "*Our current immigration laws support foreign talent who will invest their capital, create new jobs for American workers and dedicate their exceptional talent to the growth of our nation's economy" (emphasis added).*[6]

In furtherance of the above, Director Mayorkas and Secretary Napolitano announced a series of efforts that DHS and USCIS would undertake to "ensure the potential of our existing immigration laws is fully realized."[7] Specifically, USCIS will seek to "fuel the nation's economy and stimulate investment by attracting foreign entrepreneurs with business plans that will stimulate job growth in areas of high unemployment" by:

- Clarifying that investors who can demonstrate their business endeavors will be in the interest of the United States may qualify for an Immigrant Petition in the National Interest Waiver category;

- Clarifying when a sole owner of a petitioning company can establish a valid employer-employee relationship for H-1B purposes (*In practice, most practitioners will agree that there has been no*

[5] Transcript of USCIS Press Conference, "USCIS Announces Initiatives to Promote Startup Enterprises and Spur Job Creation," (August 2, 2011), *published on* AILA InfoNet at Doc. No. 11081021 (*posted* August 10, 2011).
[6] *Id.*
[7] *Id.*

change to the definition of an employer-employee relationship as set forth in January 2010 Neufeld Memo,[8] *which is quite restrictive*);

- Implementing enhancements to the EB-5 immigrant investor program (*Most EB-5 practitioners agree that the May 2013 EB-5 Adjudications Policy Memorandum*[9] *did provide for a number of improvements in the program*); and

- Expanding premium processing to immigrant petitions in the multinational executive/ manager category. (*To date, premium processing is not available in this category*).

While the Administration's policy is laudable, the question remains whether in practice, petition and visa adjudications reflect a policy that is indeed supportive of entrepreneurs and investors. While there is only so much counsel can do to avoid *ultra vires* adjudications and encourage agency consistency in adjudications, the information below provides some practical tips and information specific to representing Mexican entrepreneurs and investors.

NONIMMIGRANT VISA PROCESSING IN MEXICO

For an overview of contact and procedural information at the U.S. consular posts in Mexico, see the December 2012, document created by the AILA Mexico City District Chapter and DOS Liaison.[10]

For details on the application process at Mission Mexico (the U.S. embassy and consulates in Mexico), see the section of the U.S. Embassy Mexico website "How to Apply," http://mexico.usembassy.gov/visas/non-immigrant-visas/how-to-apply.html.

***Practice Pointer*: Interview scheduling.** Applicants must have e-filed the DS-160 Nonimmigrant Visa Application in order to schedule an interview. Scheduling can be done by Internet or telephone. The contractor/post will make a determination on eligibility for the Interview Waiver Program during the scheduling process, and biometrics appointments will be scheduled at the Application Support Center if required. The applicant will select the DHL office for delivery of passport after visa issuance.

***Practice Pointer:* Application fees.** Fees may be paid by credit card online during the scheduling process. Alternatively, the applicant may obtain a a deposit slip for cash payment at a local Banamex or Scotiabank. Receipt for payment will be required at the interview. Application fees by category are listed below.

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[8] USCIS Memorandum to Service Center Directors, D. Neufeld, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements. Additions to Officer's Field Manual (AFM) Chapter 31.3(g)(15) (AFM Update AD 10-24)," (Jan. 8, 2010) (Neufeld Memorandum).

[9] USCIS Policy Memorandum, "EB-5 Adjudications Policy," PM-602-0083 (May 30, 2013), *published on* AILA InfoNet at Doc. No. 13053051 (*posted* May 30, 2013).

[10] Overview, AILA Mexico City District Chapter and DOS Liaison Committee (December 19, 2012), *published on* AILA InfoNet at Doc. No. 12121942 (*posted* December 19, 2012).

Visa category	Fee	Fee (MXP)
Tourist – non-petition based visas	$160	$2,160 pesos
Tourist for Mexican minors (<15)	$15	$202.50 pesos
Petition based visas	$190	$2,565 pesos
E-1/E-2 (Treaty) visas	$270	$3,645 pesos

Practice Pointer: **Visa issuance/ reciprocity fees.** In February 2010, DOS eliminated the visa reciprocity fee for Mexican nationals. However, it also eliminated the multi-year option for visa issuance. As a result, all work-authorizing (TN-2, E-1/ E-2, H-1B, L-1, O-1) nonimmigrant visas for Mexican nationals may only be issued for one year at a time, regardless of the validity period of the underlying petition or allowable period of admission to the United States.

Practice Pointer**: Automatic visa revalidation**. Given the financial burden and inconvenience of frequent visa renewals, counsel may wish to remind clients of the availability of the automatic visa revalidation provision pursuant to 22 CFR §41.112(d). This regulation allows for the extension or conversion of visa validity/ category as long as a change or extension of status has already been issued by USCIS. Specifically, admission using an expired visa is possible if the applicant possesses a valid I-94 admission document; is applying for readmission after a trip only to Mexico or Canada not exceeding thirty days; has maintained and intends to resume nonimmigrant status; is applying for readmission during the period of initial admission or authorized extension of stay; is in possession of a valid passport; does not require a waiver for admission; and has not applied for a new visa for which they are awaiting adjudication.

Although not required, if the traveler was not issued a paper I-94 document, it is highly advisable that the traveler print the electronic I-94 record via www.cbp.gov/i94, and carry the I-94 printout when seeking admission to the United States via the automatic visa revalidation provision.

THE E-1/ E-2 TREATY TRADER AND TREATY INVESTOR VISAS

For the basic eligibility criteria for E status, *see* INA §101(a)(15)(E); 8 CFR §214.2(e); 22 CFR §41.51; 9 FAM 41.51 Notes.

The E-1/ E-2 Treaty Trader and Treaty Investor visas tend to be the most utilized for investors and entrepreneurs. The main benefits of the E visa classification are that E-1/2 nonimmigrants may engage in self-employment (in furtherance of the qualifying investment); they may remain

in the U.S. for an indefinite period; E classification may provide for beneficial tax treatment, and those in E status are not required to maintain strong ties to their home country.

Further, the E visa classification is available to individuals in very diverse circumstances – from a sole proprietor/ small start-up to large multinational companies. For a sense of the types of industries most frequently represented by E visa applicants it is helpful to know the main trade goods between Mexico to the U.S., as the flow of business people seeking E status tends to track the most successful imports and exports between the two countries. The top categories of goods imported to the United States from Mexico in 2012 were electrical machinery, vehicles, machinery, mineral fuel and crude oil, and optic and medical instruments. The top agricultural products were fresh vegetables, fresh fruit, wine and beer and snack foods. The top categories of goods exported from the United States to Mexico in 2012 were machinery, electrical machinery, mineral fuel and oil, vehicles and plastic. The top agricultural products were coarse grains, red meats, soybeans, dairy products and wheat.[11]

The operative treaty of friendship, commerce and navigation, or in this case, relevant trilateral treaty, between the United States and Mexico is the North American Free Trade Agreement (NAFTA).[12] Mexico joined the United States and Canada in their preferential trading relationship when NAFTA was implemented on January 1, 1994.[13] NAFTA covers admissions of Mexican nationals in B-1, E-1, E-2, L-1 and TN-2 status.

Procedural Information for E visa issuance in Mexico

The website of the U.S. embassy in Mexico provides very detailed information on the following: Overview of E Visa Process,[14] Visa Application Requirements,[15] Requirements for Treaty Trader Visa (E-1),[16] Requirements for Treaty Investor Visa (E-2), [17] Renewal of Treaty Trader Visa (E-1),[18] Renewal of Treaty Investor Visa (E-2).[19]

Practice Pointer: **Jurisdiction.** E visas are only processed by the U.S. consular posts in Mexico City, Monterrey and Tijuana.

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[11] Source: Office of the United States Trade Representative, Mexico. Posted at www.ustr.gov/countries-regions/americas/mexico (visited 9/3/13)
[12] Pub. L. No. 105-100, tit. II, 111 Stat. 2160, 2193–201 (1997).
[13] North American Free Trade Agreement (NAFTA), supplemental agreements signed September 14, 1993, reprinted in H. Doc. 103-159, Vol. I, and 32 ILM 605 (1993).
[14] http://mexico.usembassy.gov/visas/non-immigrant-visas/visa-categories/investor-visas-e/overview-of-the-process.html
[15] http://mexico.usembassy.gov/visas/non-immigrant-visas/visa-categories/investor-visas-e/detailed-requirements.html
[16] http://mexico.usembassy.gov/visas/non-immigrant-visas/visa-categories/investor-visas-e/treaty-investor-visa.html
[17] http://mexico.usembassy.gov/visas/non-immigrant-visas/visa-categories/investor-visas-e/treaty-investor-visa.html
[18] http://mexico.usembassy.gov/visas/non-immigrant-visas/visa-categories/investor-visas-e/renewal-of-treaty-trader-visa.html
[19] http://mexico.usembassy.gov/visas/non-immigrant-visas/visa-categories/investor-visas-e/renewal-of-treaty-investor-visa.html

Practice Pointer: **Application Support Center (ASC) Location for E visas.** Mission Mexico has advised that an applicant may appear at any ASC location regardless of the DS-160 interview location. However, if an applicant selected a location on the DS-160 that no longer conducts E visa interviews, there may be problems with data transfer when changing the interview location in the system. In such circumstances, it may be necessary for the applicant to appear at a different ASC during the application process. A representative may drop off the applicant's supporting documents on the day of their appointment. The applicant must also provide a copy of the biometrics page of their passport and recent color photograph.[20]
Practice Pointer: **The E-1/ E-2 registration package** must be mailed to post 15 days before the interview if the ASC appointment is not in Mexico City, Tijuana, or Monterrey.[21] If the ASC appointment is in one of those cities, the package is hand-delivered at the appointment.

Practice Pointer: **Visa validity versus admission.** Although the E visa for Mexican nationals is now restricted now to one year per issuance, CBP may still admit E visa holders for a period of up to two years, even on the last day of visa validity.

Practice Pointer: **Presentation of E-1 visa package.** Applications should be submitted in a two or three-ringed hard-back binder with tabs dividing the sections of "Table of Contents," "Forms," "Applicant Information," "Ownership," and "Trade" clearly.

Practice Pointer: **Presentation of E-2 visa package.** Applications should be submitted in a two or three-ringed hard-back binder with tabs clearly dividing the sections of "Table of Contents," "Forms," "Applicant Information," "Ownership," "Investment," "Real and Operating," and "Marginality."

Practice Pointer: **Business plan**. It is strongly recommended that a start-up company provide a thorough business plan.

Practice Pointer: **Substantiality.** Practitioners report successful cases with investments of $100,000 and 100 percent invested, although of course the proportionality of the investment versus the cost of establishing and operating the business will be considered.

Practice Pointer: **Timing**. For a new E, an ASC appointment is generally scheduled within one week of binder delivery, with the interview being scheduled in three to four weeks. For E visa renewals, this can present a problem if the individual is not prepared to await adjudication in Mexico, as the automatic visa revalidation provision is not available when a visa application is pending.

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[20] "Meeting Minutes, AILA DOS Liaison Q&As with U.S. Consulate, Ciudad Juarez (Aug. 21, 2012)," *published on* AILA InfoNet at Doc. No. 12082447 (*posted* Sept. 18, 2012).
[21] How to Apply for an E1 or E2 Visa, http://mexico.usembassy.gov/visas/non-immigrant-visas/visa-categories/investor-visas-e/how-to-apply-for-an-e1-or-e2-visa.html

If the applicant holds an unexpired visa at the time of E visa application, they may be able to return to the United States to await the interview. However, unless the interview is waived, this likely means two trips to Mexico: one for the ASC appointment, and another for the visa interview. Counsel should discuss this with the client and visa applicant, as many employers will not cover the travel expenses twice. Further, the employer's business needs may make a prolonged stay abroad problematic.

The above timing issues have led some applicants, if eligible, to prefer the use of a blanket L or TN-2 application as these can often be obtained with a one day wait for the ASC and one day for the interview.

Practice Pointer: **Interview waivers for E renewals**. "Currently, E visa renewals submit their documents to the Embassy/Consulate ten days prior to the scheduled interview. If the consular officer determines that the interview may be waived the applicant will be so notified during the ten day timeframe. A consular officer may require an interview in any case, based on questions about any particular eligibility requirement or any other concern."[22]

Practice Pointer: **Nationality.** For taxation purposes many Mexican companies are owned by a variety of private individuals, which can impact the nationality of the company for E purposes. It is therefore important to review each owner's nationality, as well as whether they hold dual citizenship, in which case nationality is determined by the passport on which the person most recently entered the United States/ used for travel.

Note that effective March 20, 1998, Mexican law changed to allow dual citizenship to Mexicans living abroad and allow them to retain property and other rights in Mexico. As a result of this change, the issue of dual nationality in E applications has become more common in recent years. If there is a nationality problem, the company may want to consider re-structuring ownership and/or having dual nationals travel using their Mexican passport rather than the other non-qualifying passport to trigger Mexican nationality for E purposes.

THE L-1 INTRACOMPANY TRANSFEREE VISA

Another category frequently used by entrepreneurs and investors is the L-1 intracompany transferee visa, which has a provision for managers and executives who are coming to the United States to establish or be employed in a new company, which is defined as a business in operation in the United States for less than a year. [23]

Mexican nationals are among the most numerous beneficiaries of the L visa, although usage by all nationalities pales significantly in comparison the largest recipients of L visas, which are

[22] "AILA DOS Liaison Q&As with U.S. Consulate, Mexico City (4/27/12)," *published on* AILA InfoNet at Doc. No. 12050245 (*posted* December 19, 2012).
[23] 8 CFR §214.2(l)(3)(v).

Indian nationals. In 2011, of 33,301 L-1s approved, Indian nationals received 26,919 (80 percent). The United Kingdom, Japan, Canada and Mexico have the next highest numbers.[24]

For the basic eligibility criteria for L status, *see* INA §101(a)(15)(L); 8 CFR §214.2(l); 22 CFR §41.54; 9 FAM 41.54 Notes.

As the L-1 category requires either an individual petition approval by USCIS, or blanket pre-approval of the corporate relationship by USCIS, the procedures for visa issuance do not differ significantly by post. On the other hand, with L status, the challenge is for the practitioner to be intimately familiar not only with the relevant statutes, regulations, and policy memoranda, but also with the adjudication trends and policies at both USCIS and the consular posts. Again, despite a claim to be supportive of new business, the L-1 adjudication trends reflect otherwise.

Standard of Adjudication

Despite a policy of promoting business, the rate of issuance of Requests for Evidence (RFE) indicates that USCIS is, in fact, erring on the side of more conservative adjudications, challenging and scrutinizing L-1 filings. At the June 2013, AILA Annual Conference, the RFE rates for L-1 petitions were announced as follows:

California Service Center: L-1A 35%; L-1B 50%

Vermont Service Center: L-1A 28%; L-1B 40%

In the opinion of this author, the L-1 RFE and denial rates, and the boilerplate nine-page RFE frequently issued in response to L-1B filings, reflects not only additional scrutiny in this category, but in many cases an *ultra vires* adjudication standard which in some cases rises to that of the extraordinary ability classification. Engineering positions are especially problematic, and while statistics specific to premium processing filings are not available, anecdotally it certainly appears that the addition of a premium processing request increases the likelihood of RFE issuance.

2013 Report of the Office of the Inspector General

The above adjudication trends mirror concerns expressed by some that the L-1 category is being both overused and inappropriately granted. The DHS Office of the Inspector General issued a report on the Implementation of L Visa Regulations[25] which echoes these concerns, and is likely to further increase L-1 RFE rates and reduce L-1 approval rates. The report was a result of congressional pressure, primarily from Senator Charles Grassley (R - Iowa), to review the L-1

[24] "Implementation of L-1 Visa Regulations," Department of Homeland Security, Office of Inspector General, OIG-13-107, (Aug. 9, 2013), *published on* AILA InfoNet at Doc. No. 13082748 (*posted* Aug. 27, 2013).
[25] *Id.*

program due to fraud concerns; specifically, that the program is overused and/or is being used to get around the highly-regulated H-1B category, which includes a prevailing wage requirement.

Report indicates L-1 adjudications will become even more restrictive. With respect to L-1Bs, the Report states that the Immigration Act of 1990 (IMMACT 90),[26] which created the first statutory definition of specialized knowledge, was not meant to broaden specialized knowledge but only clarify the term. In support of this premise, the report cites congressional intent from the 1970 legislation which created the L-1B category, which indicated that the classification should be narrowly drawn so that the total number of L-1B beneficiaries would not be large.

The above conclusion is interesting, as IMMACT 90 clarified that the beneficiary's knowledge need not be proprietary to the petitioner or limited in the U.S. labor market. The plain language of these clarifications certainly appears to broaden rather than restrict eligibility in the L-1B category. Further, Congress noted that nonimmigrant visas, such as the L-1 and H-1B, had enhanced trade and accommodated the useful movement of people and products.[27] These facts indicate that Congress did not intend to further narrow the definition of specialized knowledge for L-1B purposes.

Although the report finds that the data provided no evidence that the L-1 program is being used to avoid H-1B restrictions and wage requirements, it also concluded that the "*low number of successful appeals and the detailed explanation by the AAO [USCIS Administrative Appeals Office] of the deficiencies in the underlying petitions indicate that service centers are not unduly restrictive"* (emphasis added). In the opinion of this author, the foregoing statement reflects a tremendous amount of deference to an appellate body that tends to "rubber stamp" USCIS decisions, even when the record reflects either a misapplication of the law and/or ignores evidence presented.

As a result of the report, the three government agencies which are involved in L-1 adjudications[28] agreed to the following:

- **USCIS will publish new guidance to clarify its interpretation of "specialized knowledge."** A draft policy memorandum is in review for official agency clearance. *(Based on the Report, which cites back to Congressional intent in 1970 and does not substantively address all subsequent policy changes, states that the L-1 category was to be used sparingly. Therefore, it is likely that the new guidance will formalize the more stringent adjudication standards we have been seeing with L-1 adjudications for some time.)*

[26] Immigration Act of 1990, 8 USC Section 1184(c)(2)(B).
[27] 1990 USCCAN 6746.
[28] USCIS (U.S. Citizenship and Immigration Service), which adjudicates L-1 petitions in the U.S.;
CBP (U.S. Customs and Border Protection), which adjudicates Canadian border L-1 applications; and
DOS (U.S. Department of State), which adjudicates blanket L adjudications and issues L-1 visas at U.S. consular posts worldwide.

- **USCIS will screen L-1 beneficiaries against a list of persons previously denied visas by DOS consular officers**. This is expected to occur in 2015, due to the difficulty of integrating DOS databases with USCIS databases. (*This is likely to mean that previous erroneous denials will be extremely difficult to overturn.)*

- **USCIS to work with the DOS to establish regular meetings with Visa Office.** *(While this may result in more consistent adjudications at post and at USCIS, if the objective is to further scrutinize L-1 petitions, this may very well mean that consular adjudications of blanket petitions, which have historically gone more smoothly, at least at posts outside of India, will start to mirror USCIS adjudications, which have been very problematic.)*

- **USCIS Fraud Detection and National Security Directorate (FDNSD) expects to begin conducting post-adjudication domestic L-1 compliance site visits in the First Quarter of FY2014.** (*It appears the* ***site visits will initially be limited to 1-year new office L-1 petitions.*** *The site visits may reduce fraud, but will have the unfortunate result of delaying adjudication of L extensions for legitimate new businesses. It may also result in the cancellation of the premium processing option for these cases.)*

- **USCIS will provide CBP with access to VIBE to assist in L-1 petition processing of Canadian L-1 applicants** at the northern border ports of entry and preclearance locations. Roll out is to occur between October 31, 2013 and December 31, 2013. (*The VIBE [Validation Instrument for Business Enterprises] database uses only Dun & Bradstreet as its resource for verifying information, which leaves out a significant number of legitimate employers. As a result, VIBE may result in an finding that the business does not exist, in turn resulting in delays and erroneous denials.)*

- **CBP to provide additional training to its officers on L-1 adjudications, as DHS believes Canadian Ls receive much less scrutiny, resulting in inappropriate approvals.** (*Expect higher denial rates for Canadian L-1 applicants, even for legitimate cases.)*

- **CBP and USCIS must establish guidelines and an audit trail for fraud fee collection at the Canadian ports of entry.** (*This is a good thing, as there has been tremendous inconsistency in the collection of the $500 fraud fee. In fact, some petitioners have paid the fraud fee multiple times for the same beneficiary, simply to avoid argument with the CBP officer.)*

- **USCIS to promulgate a regulation or at least provide additional guidance on compliance with the 2004 L-1 Visa Reform Act anti-"job-shop" provisions** (*The Visa Reform Act addressed concerns about third party placements: primarily IT consulting companies which use the L-1B to transfer employees to unaffiliated U.S. employers. These third party placements are really the heart of the L-1 fraud concerns, as they reflect the majority of L visas issued. Unfortunately, this means that direct employers*

seeking to transfer true key employees suffer from increased scrutiny in the L category as a whole.)

L-1 Visas for New Companies

While the regulations permit L-1 issuance for a new company in operation in the United States for less than one year, in reality these petitions face significantly more scrutiny than an L-1 for an established company. This is largely because of a concern that the company may be a shell operation that was established on paper only to circumvent U.S. immigration laws. However, while the fraud concern is legitimate, the extensive and sometimes inappropriate scrutiny of these petitions stands to interfere with real entrepreneurial and investor activities.

Practice Pointer: **Percentage of time spent on managerial duties.** A common RFE issue for small company L-1A petitions relates to the suspicion that due to the size of the company, the executive or manager may in fact be performing non-managerial duties, resulting in USCIS questioning whether the position is truly managerial in nature. This is an interesting concept, as the regulation itself indicates the manager or executive has a year to build the company into a fully operational enterprise: "The intended United States operation, *within one year of the approval of the petition, will support an executive or managerial position*. . ." (*emphasis added*).[29] Also, it is useful to cite the AAO Decision which held that whether the duties of the position are primarily managerial is determined by a preponderance of the duties. Specifically, "The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his or her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties."[30]

Practice Pointer: **L petitions ostensibly filed for the primary purpose of moving the beneficiary's family out of Mexico.** As noted above, given the risks for many individuals who may be the target of violence in Mexico, there is an understandable pattern of individuals who seek L status for the reason, primary or secondary, of moving their families to the U.S. for their safety. This is not an issue as long as the U.S. company is legitimate and there is in fact a position in the United States for the principal beneficiary. However, a problem arises where the spouse and children are living and going to school in the United States, while the L-1 holder is in fact working full-time in Mexico.

The August 9, 2013, Office of the Inspector General (OIG) report clearly indicates concern about this fact pattern, recommending additional scrutiny of "criteria and proof required when a foreign company seeks to use an L petition to open a new office in the United States. *That almost any foreign business proprietor can effectively petition himself and his family into the United States may not be in accord with congressional intent" (emphasis added).*[31] Again, while there are

[29] 8 CFR §214/2(;)(3)(v).
[30] AAO Decision, "AAO Approves L-1A Petition on Certification from CSC," (Jan. 19, 2011), *published on* AILA InfoNet Doc. No. 11012430 (*posted* Jan. 24, 2011).
[31] "Implementation of L-1 Visa Regulations," Department of Homeland Security, Office of Inspector General, OIG-13-107, (August 9, 2013), *published on* AILA InfoNet at Doc. No. 13082748 (*posted* August 27, 2013).

circumstances in which this pattern creates a legitimate concern, the foregoing statement indicates a suspicion of all new businesses, which is likely to result in a higher denial rate for many legitimate entrepreneurs and investors seeking to enter the United States in L status.

The OIG report also reflects concern regarding closure of the foreign qualifying entity, which would invalidate the L-1: "Another ploy involves a foreign sole proprietor who opens a new office in the United States, petitions for family members, and then closes the foreign business altogether."[32]

Practice Pointer: **Site visits for new company L extensions**. As noted above, one of the recommendations in the OIG Report which USCIS has agreed to implement is that a site visit by USCIS's Fraud Division will be required before an extension of L-1 status will be granted for a new company. Practitioners should advise their clients of the likelihood of such a visit to ensure they do not take actions which could result in a negative finding, such as moving business locations without advising USCIS in the extension filing.

Practice Pointer: **Owner/ Sole proprietor– lack of employer/ employee relationship.** While a thorough analysis of this issue is beyond the scope of this article, it is important that the practitioner be aware of potential challenges which may arise in the sole proprietor scenario.

The dilemma of the sole proprietor when the law requires an employer- employee relationship has largely been addressed in the H-1B context. However, it also arises in the L-1 context.

As part of its efforts to "fuel the nation's economy and stimulate investment by attracting foreign entrepreneurs with business plans that will stimulate job growth in areas of high unemployment,"[33] USCIS through the Neufeld Memorandum[34] and subsequent FAQs, clarified how an H-1B beneficiary who is the sole owner of a company that is petitioning for an H-1B worker may establish a valid employer/employee relationship. This analysis focused largely on the common law definition of the master-servant relationship. The Neufeld Memorandum stated that "the petitioner must be able to establish that is has the right to control when, where, and how the beneficiary performs the job." [35] In making that determination, USCIS will consider a variety of factors including whether the sole proprietor beneficiary is supervised, whether another party has the right to control his or her work, whether another party hires, pays and has the ability to fire the beneficiary, etc.

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[32] *Id.* at 22.
[33] Transcript of USCIS Press Conference, "USCIS Announces Initiatives to Promote Startup Enterprises and Spur Job Creation," (Aug. 2, 2011), at 3–4, *published on* AILA InfoNet at Doc. No. 11081021 (*posted* Aug. 10, 2011).
[34] USCIS Memorandum to Service Center Directors, D. Neufeld, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements. Additions to Officer's Field Manual (AFM) Chapter 31.3(g)(15) (AFM Update AD 10-24)," (Jan. 8, 2010) (Neufeld Memorandum).
[35] Transcript of USCIS Press Conference, "USCIS Announces Initiatives to Promote Startup Enterprises and Spur Job Creation," (Aug. 2, 2011), at 3–4, *published on* AILA InfoNet at Doc. No. 11081021 (*posted* Aug. 10, 2011).

Although not feasible for many new businesses, the best way for a sole proprietor beneficiary to demonstrate the petitioner (his or her own company) has the right to control may be to establish a board of directors. When asked by AILA Liaison whether USCIS could provide an example of when a beneficiary, who is the sole owner of the petitioning company or organization, may be able to establish a valid employer-employee relationship, USCIS responded:

> Yes. In footnotes 9 and 10 of the memorandum,[36] USCIS indicates that while a corporation may be a separate legal entity from its stockholders or sole owner, it may be difficult for that corporation to establish the requisite employer-employee relationship for purposes of an H-1B petition. However, if the facts show that the petitioner has the right to control the beneficiary's employment, then a valid employer-employee relationship may be established. For example, if the petitioner provides evidence that there is a separate Board of Directors which has the ability to hire, fire, pay, supervise or otherwise control the beneficiary's employment, the petitioner may be able to establish an employer-employee relationship with the beneficiary.

In addition, AILA's USCIS HQ Liaison Committee sent an excellent letter of concern to the USCIS Chief Counsel regarding what it described as the "erroneou[s] conclusion that an individual who has a controlling or substantial interest in a petitioning U.S. company or that company's foreign parent company (hereinafter a "working-owner") cannot – in most cases – be a beneficiary of a nonimmigrant (*e.g.*, L-1, H-1 and O-1) or immigrant employment-based petition," expressing particular concern that the Neufeld Memorandum "*may have the effect of frustrating clear congressional intent to attract foreign talent and investment and to liberalize our procedures for doing so* [37] (*emphasis added*). While USCIS has since expressed an intention to entertain the petitions of sole proprietors in the interest of economic development, the adjudication trends have not differed significantly as a result of the supposed policy shift. As the AILA Liaison Committee letter thoroughly reviews the issue and provides valuable citations, it is an excellent resource to review when submitting an H-1B or L-1 for an owner or sole proprietor.

CONCLUSION

Despite the challenges and risks inherent in promoting the admission of foreign investors and entrepreneurs, the data still reflects such immigrants result in a net benefit to economic growth in the United States. As San Antonio Mayor Julian Castro said of the influx of thousands of well-off Mexicans into his city, "[It] is positive, it is entrepreneurial . . . and one of the keys to a very successful growing city like San Antonio." Immigration laws that facilitate and, in fact, embrace

[36] USCIS Memorandum to Service Center Directors, D. Neufeld, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements. Additions to Officer's Field Manual (AFM) Chapter 31.3(g)(15) (AFM Update AD 10-24)," (Jan. 8, 2010) (Neufeld Memorandum).

[37] AILA-USCIS HQ Liaison Committee letter to USCIS Chief Counsel Roxana Bacon (Jan. 26, 2010), *published at* AILA InfoNet Doc 10012760 (*posted* Jan. 27, 2010).

the entry of such individuals to the United States could go a long way to putting The Great Recession well behind us.