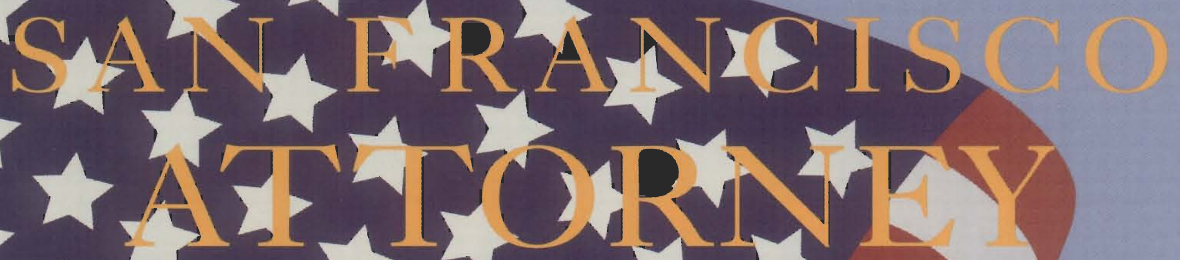

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IMMIGRATION & LAW

plus

A CONVERSATION WITH JEFF ADACHI

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Setting up Shop in the States

The immigration aspects of offshore software development

by SEAN OLENDER

The world's developed countries have suffered a shortage of skilled IT workers for at least five years, prompting the United States, Canada, Germany, Japan, England, and others to seek workers from less developed countries. In the U.S., providing access to skilled foreign workers is complex and expensive and has met with opposition from some workers' groups. While the job market for IT workers has loosened as U.S. economic growth has slowed, U.S. companies now face such problems as reduced earnings, unpredictable swings in business IT spending, and complex employment and immigration law issues.

In times of economic uncertainty, U.S. companies tend to lay off full-time workers to hire contractors, who can be easily dismissed without expensive severance and retirement packages. After *Microsoft v. Viscaino* broadened the scope of workers who are considered employees, it became more troublesome to hire contractors. Immigration law also imposes stiff penalties on companies hiring H-1B workers who lay off a U.S. worker within a certain period of time of sending the petition to the INS. Labor certification—the process whereby employers sponsor foreign workers for green cards—requires recruitment showing that no U.S. workers are available to fill the position, which is difficult in today's job market. These processes require legal and filing fees and administrative resources.

Offshore software development eliminates employment and immigration law compliance costs. It is already becoming a major industry for India, Pakistan, Russia, and Poland, and large U.S. companies have opened large development facilities in these countries. The offshore model of outsourced, distributed development has been practiced for years by most large OEM computer manufacturers, virtually none of which manufacture the components in the computers bearing their names, but merely assemble and market them. The parts are manufactured by companies around the world to specifications set by the OEM and then shipped and assembled. In a few years, offshore software development will be as common as offshore hardware development. Many analysts believe that offshore development and virtual workgroups cannot succeed in the software arena, but the largest OEM manufacturers have proven that offshore, outsourced production can not only be a viable business model, but also a key part of production.

While U.S. companies have been trying to address their shortages of qualified IT workers, many offshore software development companies have been eyeing the U.S. market. Offshore companies require U.S. offices for marketing, defining business problems, developing specifications, and directing software implementation and service, but opening a U.S. office raises many legal issues.

WHAT ARE THE IMMIGRATION OPTIONS?

Both U.S. companies seeking to import foreign workers and offshore companies seeking to open offices in the U.S. need to wade through complex immigration re-

quirements. The appropriate option depends on the nature of the worker's position and responsibilities, the category of the employer company, the type of work to be performed while in the U.S., and the length of stay.

BUSINESS VISAS

A business visa (B-1), a temporary visa valid for up to six months, supports business-related activities, but not skilled or unskilled labor. Valid B-1 activities include attending meetings and seminars, conducting business-related research, consulting with business associates, negotiating contracts, and engaging in commercial transactions not involving employment. This visa is appropriate for a foreign company sending an employee to the U.S. to investigate office leases, banking arrangements, vendor and support services, and other aspects of establishing a U.S. office. It is also appropriate for an employee traveling to the U.S. to close a deal that was begun earlier. The Foreign Affairs Manual notes that a merchant "taking orders" for his or her product is performing an appropriate B-1 activity. Working, selling, and servicing clients, however, are not appropriate. Offshore companies with a Web-based U.S. presence may use B-1 visas to close deals and sign contracts, but not to engage in general marketing campaigns. For more regular business activities in the U.S., a more durable immigration status is required.

L INTRACOMPANY TRANSFERS

Managers, executives, and employees with specialized knowledge about the company's operations, products, or processes are eligible for transfer to the U.S. to work temporarily under the L visa program. The foreign worker must have worked at the foreign company or a parent, affiliate, or subsidiary for at least one year during the three years before filing the application. The work abroad must have been in a managerial or executive capacity or one involving specialized knowledge, and the work to be performed in the U.S. must be in one of these three capacities, although not necessarily the same one. The work to be performed must be productive employment on a regular or systematic basis. Attending meetings and conferences or participating in training is not considered productive employment and will not support L-1 status. The L-1 visa is valid for up to three years. Transferees may extend the L-1 for up to seven years if they are in the U.S. in a managerial or executive capacity and for up to five years if they are working in a capacity involving specialized knowledge. To qualify, the transferee's foreign and U.S. employers must fall into one of the defined entity relationships and must be doing business in the U.S. and at least one foreign country during the entire period of the foreign worker's stay in the U.S. as an L-1.

ENTITY RELATIONSHIP

The entity relationships recognized by the INS are parent company, branch, affiliate, and subsidiary. Parent company is defined as a firm, corporation, or other legal entity with subsidiaries. Branch is defined as an operating division or office of the same organization housed in a different location. Affiliate is defined as one of two subsidiaries, both owned and controlled by the same parent, individual, or group, provided that each individual owns or controls approximately the same share or proportion of the entity. A firm, corporation, or other legal entity may qualify as a subsidiary under any of three definitions:

A firm, corporation, or other legal entity if a parent directly or indirectly owns more than fifty percent of the entity and controls it;

A joint venture company in which the parent directly or indirectly owns fifty percent and has equal control and veto power; or

A firm, corporation, or other legal entity of which a parent directly or indirectly owns less than half, but in fact controls the entity.

Doing business is defined as the regular, systematic, and continuous provision of goods or services by a qualifying organization with employees. A mere agent or office in the U.S. or abroad is insufficient.

To satisfy the managerial capacity category, the worker must supervise and control other supervisory, managerial, or professional personnel or manage an essential function. The transferee must also have the authority to make personnel choices, function at a senior level if he or she manages a function, or exercise discretion over operations or a function. Managing front line employees is not sufficient.

EXECUTIVE WORKERS

The executive capacity category is satisfied if the worker manages an organization or a major component or function of an organization. This type of worker should have the authority to establish goals or policies and enjoy wide latitude in discretionary decisionmaking. The decisionmaking should only be subject to general supervision from higher executives, the board of directors, or stockholders. However, the INS considers the reasonable needs of the business and its stage of development in determining whether the transferee's duties qualify. Foreign companies opening a first office in the U.S. can enter on a B-1 visa to close deals to start the company and then apply for an L-1 change of status, or enter on an L-1 under a special provision that allows a limited initial stay for workers enter-

ing to open the U.S. office that will create the qualifying relationship.

SPECIALIZED KNOWLEDGE WORKERS

A worker will qualify under L-1B status if he or she has specialized knowledge about a company product and its application in international markets or has advanced knowledge about the company's processes and procedures. This knowledge can also be about the employer's marketplace and should be of the kind that can only be learned through extensive experience with that employer. It is helpful to show that the worker has had assignments that improved the employer's productivity, competitiveness, image, or financial position. It is also helpful if the worker contributes to the U.S. employer's knowledge of foreign operating conditions. The INS takes approximately four to six weeks to approve L-1 petitions. Workers with approved petitions can quickly obtain visas at U.S. consulates abroad by showing their original approval notice and supporting documents.

THE L-1 BLANKET VISA

Larger employers that internationally transfer many employees may benefit from the L-1 blanket visa. This visa category allows qualifying employers to issue their own L-1 certificates of eligibility to transferring aliens. Transferees may then take these certificates to the desired port of entry and receive a determination of qualifications. This determination centers on whether the transferee satisfies one of the three requisite capacities abroad, will fill one of those three capacities in the U.S., and has been employed abroad by the same employer for one year out of the past three.

The L-1 blanket visa program can bring significant savings in legal fees and administrative confusion. Companies may qualify if the company and all of its qualifying organizations have:

At least ten L-1 approvals in the past year for managers, executives, or specialized knowledge professionals;

Annual U.S. sales of at least $25 million; or

A U.S. workforce of at least 1,000.

Additionally, all qualifying organizations that make up the petitioning company must be engaged in commercial trade or services, and the petitioner must have an office in the U.S. that has been doing business for at least one year. Finally, the petitioning company must have three or more domestic and foreign branches, subsidiaries, or affiliates.

H-1B SKILLED WORKER VISAS

The H-1B skilled worker visa has many stringent salary and compliance issues, with significant fines and penalties for employers failing to observe those rules. While the H-1B visa may be appropriate for U.S. companies seeking foreign IT workers, it is not the best choice for foreign companies seeking to do business in the U.S. unless they cannot qualify under L-1. The H-1B requires the employer to make complex wage calculations, under most circumstances not to transfer H-1B workers to additional worksites, to retain public access files containing wage and immigration information, and to voluntarily comply with any person's request to view those files. The H-1B carries a high filing fee and is probably useful only for bringing key workers to the U.S. who have not worked for the foreign entity for the minimum one year.

THE FUTURE OF SOFTWARE DEVELOPMENT

The future of software development will likely consist of larger U.S. companies creating specifications and modules and contracting out production to foreign and domestic subsidiaries and third-party producers. This shift will raise complex legal issues in corporate, trade, immigration, and employment law. Despite concerns about outsourced software development, it is likely to prove just as effective as outsourced hardware development—a practice that has worked just fine for years.

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