Testimony by ACIP on L-1 Visas

Statement by Austin T. Fragomen, Managing Partner, Fragomen, Del Rey, Bernsen & Loewy, P.C., on behalf of the American Council on International Personnel (ACIP), at a hearing on the L-1 Visa and American Interests in the 21st Century Global Economy before the Senate Judiciary Subcommittee on Immigration

Good afternoon Chairman Chambliss, Senator Kennedy, and distinguished Members of the Committee. On behalf of the American Council on International Personnel (ACIP), it is a privilege to have the opportunity to testify before this committee today. For over 30 years, the L visa category for Intracompany Transferees has been essential to international investment and economic expansion in the United States. The L visa is a tool that allows U.S. multinational companies to fully participate in the Twenty-first century global economy, and it has become a model for other countries seeking to capture a greater share of the global marketplace by facilitating the international transfer of knowledge, skills and talent. ACIP shares the Committee's concern about possible fraud and abuse in the L visa program. Appropriate sanctions should be imposed upon those who misuse our immigration system. However, because the L visa is critical to the continued participation of U.S. companies in the Twenty-first century global economy, we urge that Congress move forward deliberately and with caution, should it consider making amendments to the L visa category.

Today, ACIP will put forward three recommendations. First, that the allegations of abuse in this program – that is to say that U.S. workers have been laid-off and replaced with cheaper foreign workers – extend to a limited group of L-1B specialized knowledge workers and companies. Therefore any corrections should be targeted at this problem and not at the L visa category as a whole. The most effective approach to meet this objective would be to clearly delineate what does and does not constitute "specialized knowledge." Second, the detection of fraudulent credentials, questionable business entities, and inappropriate uses of the program can be enhanced through the expansion of precertification programs such as the blanket L visa. Limited resources demand that we increase information sharing and cooperation between the government and U.S. employers, and the L blanket has been a model program in this regard for many years. And, finally, ACIP believes that the issues spurring many of the concerns expressed today derive from changes in the global economy and not deficiencies in the L visa category or regulations. Congress has a duty to consider the impact of new business models such as offshoring on opportunities for U.S. workers. It is imperative, however, to consider the whole picture. The need to reduce costs to maintain profitability, tax laws, education policy and workforce preparedness, intellectual property rights and many other factors are driving companies to locate work abroad. The L visa is but a small piece of this puzzle. A study to determine how to retain America's edge in this changing economy would be appropriate. Each of these recommendations is addressed in more detail later in this statement.

ACIP is a not-for-profit association of over 300 corporate and institutional members with an interest in the movement of personnel across international borders. Each of our members employs at least 500 employees worldwide; and, in total, our members employ millions of U.S. citizens and foreign nationals in all industries throughout the world. ACIP sponsors seminars and produces publications aimed at educating in-house legal and human resource professionals on compliance with immigration laws, and works with Congress and the Executive Branch to facilitate the movement of international personnel. ACIP members have extensive experience with the L visa program and have been instrumental in developing the laws and regulations facilitating the transfer of intracompany transfers so vital in a global economy.

I have practiced various aspects of immigration law for the past 35 years, and was privileged to serve as Staff Counsel for the Immigration Subcommittee in the U.S. House of Representatives when the L visa category was enacted in 1970. Currently, I chair ACIP's Board of Directors, and serve as Managing Partner of Fragomen, Del Rey, Bernsen & Loewy, PC, the world's largest firm practicing exclusively in the field of global immigration and nationality law.

Global Mobility and L-1 Visa Usage by International Companies

To understand the L visa, it is important to understand the scope of international personnel transfers, commonly referred to as "global mobility." A recent survey of just 181 small, mid-size, and large companies with offices in 130 countries revealed that they have a combined expatriate population of more than 35,150 employees. Unlike years past when primarily upper-level executives were transferred abroad for a few years to gain an international perspective and broader knowledge of markets and business, today's transfers include professionals from all levels and operating units within the company. The goals for international assignments range from filling a skills gap to launching new endeavors, technology transfer and building management expertise. Many companies have made international experience a prerequisite to promotion within the organization and devote extensive resources to developing an international staff capable of functioning around the world. International assignments may last from less than six months to over three years. Depending upon the nature and duration of the assignment, the employee may be placed on either the home country or host country payroll. Expatriate compensation packages include benefits such as housing and education allowances, travel and expense reimbursement, tax equalization, language and cultural training, and spousal career assistance. The L visa and its equivalents in other countries play a critical role in facilitating global mobility.

Congress created the L visa category in 1970 in recognition of the need for international companies to have an avenue for temporarily transferring employees from abroad to the United States. The L-1 statutory provisions have been modified several times since then, to reflect evolving business practices, including more explicit definitions of qualifying capacities. The L visa plays a vital role in a company's ability to remain competitive in the global market, by allowing it to transfer employees with specific experience and skills from a company abroad to the same company, parent, affiliate or subsidiary within the United States. These employees must have been continuously employed by the company for one of the past three years, or for six months if the visa application is filed under an approved blanket petition. By their nature, L visa holders have experience with and knowledge of the company's operations, products and processes, and most are transferred only after many years of employment. This experience and expertise distinguishes them from other types of nonimmigrant workers who may be new hires from a competitor or recent college graduates. Even within the L category, however, important distinctions are drawn between the two types of L visas, the L-1A for executives and managers and the L-1B for employees with specialized knowledge.

L-1A *executives* direct the management of an organization or a major component or function of an organization. Similarly, L-1A *managers* have the primary duty of directing an organization, or area of an organization, and supervision or control of the work of others, or management of an essential function at a senior level in the organization's hierarchy. L-1A executives and managers tend to be transferred for longer-term assignments as their skills involve oversight, implementation and standardization of projects, processes and investments, integration of business units, and the opening of markets. Generally, their families are relocated with them at significant expense to the company. L-1A managers and executives are sometimes sponsored for legal permanent residency if it is in the company's and employee's best interest to have the employee remain in the United States. For example, a number of CEOs and other executives playing leading roles in U.S. companies initially transferred to the United States on L-1 visas.

L-1B employees have "*specialized knowledge* of the company, its product and its application in international markets, or have an advanced level of knowledge of processes and procedures of the company." L-1Bs are engineers, technicians, programmers, auditors and others with very specific skills. As companies have integrated their global operations, the mobility of these employees has increased. Tremendous gains in productivity can be realized by transferring international teams who already have the knowledge and experience to implement a project either in-house or for a client in a timely and cost-efficient manner. L-1B assignment duration tends to be shorter, often less than six months, and their families may or may not accompany them. A typical L-1B assignee may be an engineer who has overseen the installation of a manufacturing process or software system abroad that will be replicated in the United States. Most L-1B workers are not sponsored for

legal permanent residence as the goal for their assignment is to utilize their skills on a specific project and then send them on to their next assignment.

Congress has recognized the importance of the timely transfer of international assignees. The L was the first visa to mandate that the former Immigration and Naturalization Service (INS) process petitions in less than 30 days. While this deadline has not always been met, the Service rightly prioritizes these cases. In addition, Congress approved the "Blanket L" program. Under the blanket L option, a company is pre-certified to utilize the L visa program, either by meeting certain size and income requirements, or through a demonstrated track record of case approvals. In addition to managers and executives, only specialized knowledge workers regarded as professionals who hold a bachelor's degree may enter the United States through the use of a blanket petition. The blanket petition conserves the government's resources while maintaining compliance and security. The Bureau of Citizenship and Immigration Services (BCIS) undertakes an up-front review of the corporation and its qualifying entities, and this certification is reviewed after three years. The blanket L program eliminates the requirement that an individual application be submitted to BCIS. Instead, the transferring employee presents himself or herself to the U.S. Consulate abroad. A Department of State (DOS) Consular Official determines whether the employee meets the criteria for issuance of an L visa and performs a security check. If there are concerns about the employee's eligibility, Consular Officials frequently require the company to submit an individual application to BCIS. Consulates are tending to develop more specific guidelines to determine when managers, executives and specialized knowledge workers may utilize the classification without an approved BCIS petition. A broad range of ACIP member companies report more stringent reviews over the past year, particularly where the employee may be spending some of his or her time working off-site. We believe that such rigorous review by BCIS adjudicators and consular officers is appropriate when driven by clear, concrete guidance from Congress and/or the agency headquarters.

The majority of the employers who utilize the L visa program are large, global companies because of the legal requirements for the visa category. In Fiscal Year 2002, the Department of State issued 57,721 L-1 visas, according to the U.S. Department of State Visa Office, with a similar number issued to immediate family members (spouses and children) who accompany the principal visa holder. The Visa Office also has indicated that as of July 17, 44,565 L-1 visas have been issued for Fiscal Year 2003. It has been estimated that approximately half are L-1A and half are L-1B. Given that the current fiscal year ends on September 30, it appears that there will be no increase in demand for L-1 visas. Reports that over 300,000 L-1 workers enter the United States each year are highly misleading, as they reflect multiple entries by the same highly mobile L visa holders.

The L visa provides companies the flexibility necessary in a global market place to best utilize the skills available to integrate global research, development, sales and marketing initiatives as well as international mergers and acquisitions. As anticipated when the program was initiated in 1970, the cross-fertilization of ideas and the movement of personnel contribute significantly to international business operations. By definition, L-1 personnel entering the United States already have a proven track record with the business organization. Managers and executives typically are overseeing projects, essential functions or entire business units. They bring expertise to the United States and transmit corporate knowledge and culture to overseas operations. Specialized knowledge workers are coming to the United States because of their experience in working with a given process, tool or product that is integral to the particular company's way of doing business. Thus, the L-1 visa category permits global business organizations to build and invest in a global pool of talent, a major source of their strength. The level of international trade and investment inherent in today's economy would not be possible without this type of visa classification. Virtually every industrial country has a visa equivalent to the L-1 that allows for the exchange of personnel without a test for labor market impact.

The Difference Between L-1 and H-1B Visas

It is important to note that the L-1 visa category is distinct in its origins and usage from the H-1B visa and in its relationship to U.S. workers. Their differing legislative constructs make certain attestations and procedures

appropriate for H-1B visas inappropriate for L visas. The L-1A classification is clearly different from the H-1B visa, as it may only be utilized by managers and executives rather than all levels of professionals. The L-1B classification requires the employee to have specialized knowledge that has been obtained as a result of his or her unique pre-existing relationship with a company; in contrast, the H-1B professional typically possesses educational credentials and/or a skill set that was developed elsewhere and is present when the worker first seeks employment with the employer. In fact, most global companies use both types of visas depending upon the qualifications of the employee and the nature of the assignment. In most instances, H-1B employees are able to obtain employment because of the nature of their professional degree, often obtained at a U.S. university, or their experience with a competitor in the United States or abroad. L-1B employees, on the contrary, are transferred to the United States on the basis of proven records, resources and special or advanced knowledge that a company values and wishes to utilize in the United States as part of its effort to grow and remain competitive. L-1B stays are frequently of a shorter duration than the typical H-1B visitor, and they often remain on foreign payrolls, separate and apart from their U.S. colleagues. This is in contrast to a majority of H-1B workers who are sponsored for permanent residence. While many L-1 workers meet the statutory requirements for an H-1B visa, their criteria are distinct and narrowly drawn and serve different purposes for the company.

As H-1B workers might be drawn from the domestic or international marketplace, Congress in 1990 sought to assure that the employment of these foreign nationals did not adversely affect the wages and working conditions of U.S. workers. The labor condition attestation and related wage requirements were meant to create a level playing field for U.S. and foreign workers. Under this framework, H-1B workers are typically only hired when they either have superior skills, knowledge, expertise and/or accomplishments that are of great value to an employer, or alternatively, when U.S. workers are unavailable. In the L-1 category on the other hand, only a limited pool of workers are available for L-1 classification: members of a business organization's existing workforce. The L-1 category was enacted in 1970 and amended in 1990 with the expectation that it would be carefully monitored and regulated by the INS, now the BCIS. This expectation has largely been met, with adjudicators closely scrutinizing petitions, often questioning and sometimes denying cases that would appear approvable.

ACIP member companies are gravely concerned by legislative proposals that would attempt to superimpose the H-1B program on top of the L visa by establishing numerical quotas well below current usage, requiring a prevailing wage without taking into consideration global compensation packages, eliminating the blanket L visa program that facilitates the timely and efficient transfer of personnel, and imposing strict time limits on L visas that may not meet companies' assignment needs. The impact of these proposals on legitimate global business users of the L visa category would be dramatic and unacceptable. These changes would not address the concerns of displaced U.S. workers associated with offshoring, but would place the United States at a relative disadvantage to our trading partners who are increasingly using streamlined visa policies to attract trade and investment.

The New Offshoring Business Model and Its Impact on Visa Usage

A series of recent media articles, as well as congressional hearings, have focused on L visa usage in the context of the outsourcing of information technology and other white-collar services. A company may choose to outsource for a variety of reasons including where it wishes to reduce costs in order to maintain profitability, lacks the in-house expertise to complete the project, to limit in-house services to core competenencies in order to enhance quality, to obtain enhanced services from the outside firm, or simply because outsourcing is more efficient in terms of time and costs. Outsourcing is not a new business model and we acknowledge that it often comes with painful adjustments for U.S. workers. What has changed is that increasingly the outsourced work is going to offshore firms or offshore subsidiaries of U.S. firms as opposed to different companies also located in the United States.

Typically, there is not a one-for-one replacement of a U.S. employee by a foreign or outsourced worker. Rather, the companies that win the contracts utilize alternative business models. A company that wins a competitive bid to provide services will assign a team to the account. This team will be comprised of some combination of U.S. and foreign workers in the United States, as well as a team of employees operating at a center abroad. The U.S.-based workers typically collect information and coordinate activities with workers abroad. Examples of work contracted offshore include software development, back-office financial operations, and customer service call centers. The cost savings occur not in the United States, because L workers receive global compensation packages similar to U.S. workers, but overseas where the majority of the work is done.

Immigration laws, in particular the L-1B visa, certainly facilitate these business arrangements but they are a byproduct rather than an impetus of the offshoring model, as it has come to be called. Congress, and the nation, should appropriately consider what efforts must be made to ensure the United States is an attractive locale for investment, that the wages and working conditions of U.S. workers are not unfairly undercut, and that U.S. workers are prepared to meet the technological challenges and opportunities of this new economy. Proponents argue that while offshoring may cause some temporary dislocation in the U.S. workforce, particularly in today's sluggish economy, it will also keep industries competitive, provide investment in poorer nations, and eventually create new markets for U.S. goods and services that will spur future economic growth. Whether you agree with this assessment or not, the trend toward outsourcing and offshoring will not be halted by changes to our immigration laws.

We are concerned that proposals to prohibit placement of L employees at client or customer sites are overly broad and would restrict legitimate contractual arrangements and accepted business practices. There are many instances where the nature of a job requires the presence of an L visa holder at a customer site. For example, an auditor engaged in reviewing the client's worldwide operations may enter the United States on an L visa but work primarily at the client's site, as this is where the necessary information is located. Similarly, sales professionals spend most of their time visiting customers. BCIS and DOS regularly distinguish these legitimate uses from other, more questionable, outplacement arrangements and we applaud these efforts. This job could be made easier through revised definitions of specialized knowledge and enhanced use of precertification programs.

Recommendations

ACIP has attempted to explain the importance of L visas in the Twenty-first century global economy, to distinguish the L visa from the H-1B and to explain the larger economic forces surrounding offshoring and the displacement of U.S. workers. In our efforts to protect U.S. workers, we must not impose new burdens on global companies that make the United States an even less attractive locale for business operations and investment. ACIP would like to offer the following recommendations for consideration by Congress:

1. **Clarification of L-1B Specialized Knowledge.** ACIP notes that the business world has changed dramatically in the past 30 years and that it is not always easy to identify which corporate arrangements or positions qualify for the L visa, particularly the L-1B. The agencies' efforts to identify illegitimate uses of the program could be aided by legislative or regulatory clarification of some of the terms and definitions already in our laws. Better explanation of what experience and expertise qualify as "specialized knowledge" would be particularly effective. The allegations of abuse in the media have involved L-1B specialized knowledge visas, not L-1A visas for managers and executives. ACIP acknowledges that there has been ongoing disagreement about how the concept of "specialized knowledge" should be defined. Recently, BCIS and DOS offices have been taking a rather restrictive stance, at least in terms of how longstanding definitions of specialized knowledge are applied. More specificity in terms of the regulatory definition could lead to clearer standards that ultimately make it easier for companies to rely on continued utilization of this classification.

   ACIP strongly supports a joint review by Congress, the relevant agencies, and industry organizations to craft a meaningful, clear and appropriate definition of specialized knowledge. Input from all interested

parties will be vital to ensuring that today's complex business relationships are appropriately accommodated by our laws. ACIP firmly believes that with appropriate guidance BCIS and DOS are well equipped to make determinations regarding eligibility for and appropriate usage of L visas. It is not necessary to rewrite our L laws, add significant new regulatory burdens for all L visa employers or create a new regulatory scheme.

2. **Expansion of Precertification Programs to Identify Legitimate Users.** ACIP acknowledges that the L visa program is not without fraud and abuse, but we would posit that it involves a small percentage of cases. Nonetheless, the use of fraudulent credentials and bogus corporations are particularly troubling and cast a pall over all legitimate users. ACIP member companies have worked closely with Consulates, particularly in India and China, to identify and stop fraud. ACIP has previously testified before Congress about ways to reduce fraud and abuse. We would like to reiterate our support for the expansion of precertification programs today.

   The Blanket L program is one model for precertification. A detailed, initial review of qualifying business relationships by experienced BCIS officials produces more consistent and reliable results than the adjudication of tens of thousands of individual petitions. It allows for up-front clarification of complex issues, such as the company's relationship to the overseas entity, while still requiring Consular officials to review the bona fides of each particular employee. This streamlined process inherently conserves scarce government resources, while providing for even more thorough, consistent and fair adjudications. Many ACIP members have taken the blanket program a step further by establishing relationships with consular officials in countries where they have a significant presence. This allows the company to educate and give advance notice to consular officials about their global operations and intended plans for transferring personnel. We believe this type of government-private interaction and programs that identify legitimate users should be encouraged by formalizing mechanisms for companies to seek "pre-certification" at the consulates and establishing more direct lines of communication between the consulates and companies to resolve problem cases. These changes would benefit both the government and employers.

3. **Study on Competitiveness in the Twenty-first Century Global Economy.** Although today's hearing focuses on L visas, a wide variety of policies – trade, labor, investment, education and tax – must be considered in determining how to maintain U.S. competitiveness in the Twenty-first century. A strong economy will provide opportunities for those U.S. workers who have the education and training to meet the technological challenges of the new economy. ACIP member companies have supported legislation such as No Child Left Behind that benefits today's and tomorrow's workers. We will continue to work with our member companies on a variety of education and workforce issues to ensure we have access to the talent needed to compete in the Twenty-first century global economy.

   Demographic trends show that access to talent will be a vital issue for years to come. Over the course of this next century, ACIP believes that immigration policy will increasingly become a tool that countries employ to attract trade, investment and talented workers to their shores. We should not let short-term economic difficulties blind us to long-term economic opportunities. ACIP recommends that Congress commission a study, with the input of business experts, that examines emerging economic trends and examines the array of policies necessary to ensure future economic growth and opportunities for U.S. workers.

Conclusion

The L visa program, particularly the blanket L program, has been extremely important in facilitating global commerce for U.S. companies for over thirty years. It has been a model of success in an often-broken immigration system. Our challenge is to create a secure and efficient immigration system that protects U.S. workers while anticipating employers' needs for access to talent from around the world. ACIP stands ready to work with you to build such a system.

Thank you for your time and consideration. I have submitted a full statement for the record, and look forward to answering any questions that you might have.

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