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BEREZOWSKI'S BORDERLAW®

***** UPDATE *****

CBP Clamp Down on Canadian Intra-Company Transfers

To: Berezowski Business Immigration Law Clients
From: Nan Berezowski,
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Date: April 29, 2019

For as long as I have practiced immigration law, nearly 25 years, Canadians working and living in the United States as intra-company transferees (in 'L-1A' and 'L-1B' status) have been able to re-apply for L-1 status with relative ease, by applying in the same manner that they applied for their initial 'L' entry with U.S. Customs and Border Protection (CBP) at a border Port of Entry or airport Pre-Flight inspection. Unfortunately, CBP has unofficially put a stop to this practice. Canadians in L-1 status and their employers, need to be aware of this unannounced change - and plan accordingly.

The *North American Free Trade Agreement*, which came into effect in 1994, permits Canadians seeking L-1 status to petition, in-person, to CBP at a Port of Entry or at an airport with Pre-Flight inspection. Until recently, CBP would adjudicate the petition the same-day, usually within an hour. Processing 'on the spot' could be stressful but for most Canadians the benefit of quick and straightforward processing far outweighed any deterrent. While other nationals waited months for adjudication, Canadians were already settled into their new US jobs.

Now, CBP is refusing to process petitions that it considers 'renewals' or 'extensions'.

While law and logic support the traditional approach, that CBP has the authority to adjudicate L-1 renewal petitions for Canadians, earlier this year, amid intense anti-immigrant sentiment in the US, I heard reports that some Ports of Entry and Pre-Clearance locations had adopted a narrow interpretation of CBP's authority and were turning Canadians away.

To date CBP has made no official policy announcement yet reports of Canadians being turned away at the border now abound from Ports of Entry and Pre - Flight Inspection facilities across Canada. Recently, I learned that there is, indeed, an unpublished internal Directive guiding CBP Officers not to adjudicate certain L petitions.

What does this mean for a Canadian intra-company transferee and his or her employer?

Instead of sending an employee on a quick trip to the border and back for an L-1 petition renewal, employers must now file petition extensions at a USCIS Service Center in the US. This is a lengthy and involved process.

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The principal lawyer at Berezowski Business Immigration Law, I am an internationally recognized Canadian lawyer (Ontario) and a licensed US Attorney-at-Law (New York) who has been featured in Who's Who Corporate Immigration for over a decade.

Adjudication times currently range from six (6) weeks to four (4) and a half months. Employers do however have the option to expedite processing to 15 calendar days for an additional fee of US\$1,410.

I expect the policy change to result in a number of undesirable situations. Although an employee will remain in lawful status to live and work in the U.S. as long as her petition to extend or renew has been submitted to USCIS by her status expiry date, both employer and employee should expect logistical hurdles and adjudication. Below are some of the challenges I anticipate:

- A Canadian employee is in Canada when his status expires; he may be unable to re-enter the United States until his new petition is approved. Given the Service Center processing norms, this could be months;
- Similarly, a Canadian employee may not be able to travel abroad and re-enter the US in L-1 status if her extension petition has not been granted;
- By all accounts, "Requests for Evidence" (referred to as "RFE"s) are on the increase at Service Centers; RFEs tend to adversely impact both processing timelines and approval rates; and
- The validity of documents, such as drivers' licenses, are often linked to the L-1 status holder's status expiry date; it may be impossible to renew such documents until the employee's is granted her status extension.

There could also be a host of complications for companies that have Canadian employees who work in the U.S. intermittently or commute back and forth. CBP has informally indicated that the new policy does *not* apply to this cohort of L-1 status holders but it is too early to be confident in this. To date, the anecdotal evidence is that CBP is acting inconsistently with respect to these petitions, with individual Ports of Entry and Pre-Flight inspections taking different positions – some adjudicating and others turning Canadians away.

This policy change is a clear indication that the anti-immigration movement in the US has reached beyond asylum seekers at the country's southern borders and extends well into the corporate realm. Indeed, this policy adversely impacts companies and Canadians.

Nan Berezowski (BA. LL.B, LL.M) compiled this Update with the latest available information for the general information of Berezowski Business Immigration Law clients and other interested parties. This Update is not comprehensive and should not be relied upon without appropriate legal advice.