US plans to tighten norms for employee transfers

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Lubna Kably | TNN | Updated: Nov 22, 2019, 5:57 IST

Highlights

- Tech companies in India rely predominantly on the H-1B work visa, they also make use of L-1 visas for transferring employees to their US offices
- The fall agenda of the Trump government, released recently, states: “In order to improve the integrity of the L-1 programme, the department of homeland security (DHS) will propose to revise the definition of specialised knowledge"

Representative image
NEW DELHI: The Trump administration seems to have trained its guns on intra-company transfers of employees from overseas offices (say in India) to US offices.
While tech companies in India rely predominantly on the H-1B work visa, they also make use of L-1 visas for transferring employees to their US offices. An L-1A visa is granted to managers, whereas the L-1B visa is issued to professionals with specialised knowledge.
The fall agenda of the Trump government, released recently, states: “In order to improve the integrity of the L-1 programme, the department of homeland security (DHS) will propose to revise the definition of specialised knowledge; it will clarify the definition of employment and employer-employee relationship and ensure that employers pay appropriate wages to L-1 visa holders.” The target date for the proposed draft rules is September 2020.
“The revision could prove to be challenging for offsite placement of L-1 employees. It also aims to impose new wage obligations on L-1 employers, though the regulatory agenda does not specify the nature of these obligations. Unlike the H-1B programme, the L-1 programme is not currently subject to wage requirements,” says Mitchell Wexler, US-based partner at Fragomen, a global immigration law firm.
Rajiv Khanna, managing partner at Immigration.com told TOI, “For L-1B, under the statute,

the beneficiary (proposed visa holder) is deemed to have specialised knowledge if he or she has 'special' knowledge of the company's product and its application in international markets. An 'advanced' knowledge of the processes and procedures of the company also qualify."

"As the terms 'special' and 'advanced' are not defined, DHS could do so. However, the overall intent of the statute needs to be obeyed, else any new regulation could be subject to judicial challenge," explains Khanna.

The Department of Homeland Security continues to move forward with its plan to revise the definition of 'speciality occupation' to increase focus on obtaining the best and brightest foreign nationals via the H-1B programme. The definition of employment and employer-employee relationship is also proposed to be revised. DHS also proposes an additional requirement to ensure employers pay appropriate wages to H-1B workers. The earlier date set for the publication of the proposed draft rule was August 2019, the same is now likely to be issued next month.

Recent months have seen a spate of denials of H-1B applications on the ground that the job is not a speciality occupation. These include cases where the foreign national has been working in H-1B status either in the same job or in a similar job, that falls in the same occupational classification.

"We need to see whether a change in the definition of an employer-employee relationship will impact placement of our H-1B employees at third party client sites. Currently, we have to submit a plethora of information including the itinerary of the employee, who will be placed at client sites, when filing H-1B applications," says an immigration expert attached to a tech company.

The approval rates for both L-1 visas and H-1B visas have declined over the years. The approval rate for H-1B visa applications was as high as 95.7% in fiscal 2015 and dipped to 84.8% for fiscal 2019 (twelve-month period ended September). Similarly, in fiscal 2015, the approval rate for L-1 visa applications was 84%, which has declined to 72% in fiscal 2019.

Another proposal could eliminate policies that currently allow B-1 (business visa) visitors to engage in work in the US for short durations, in limited circumstances. This draft proposal is also slated for December 2019.

A long-deferred proposal to rescind a programme that permits certain category of spouses of H-1 workers (who are on H-4 visas) to apply for employment authorization (EAD) is now projected to be published in March 2020. "The details of the proposed rule, including whether currently valid EADs will hold good until their expiration, are not yet known," states Wexler.

Once the draft rules are issued, they go through a process of inviting public comments, and a set of reviews. Thus, it takes several months before the final rules come into effect.

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